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Kate Kruse

Mitchell Hamline School of Law, kate.kruse@mitchellhamline.edu

Kim E. Patterson

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Abstract

In Wisconsin, trial courts have discretion to modify a defendant's criminal sentence if the defendant introduces a "new factor." Published Wisconsin case law gives little guidance on what constitutes a new factor. The Wisconsin Supreme Court has declined to find a new factor present in every case it has published since defining "new factor" in 1978. Because of ambiguous and conflicting rulings, the standards for both prongs of the new factor definition remain unclear. This Comment attempts to shed light on the new factor requirement for sentence modification by examining Wisconsin trial court decisions on a limited sample of sentence modification motions. This study reveals that trial courts modified sentences in a variety of cases to effect their intent in sentencing the defendant when it has been frustrated, to respond to a change in a defendant's health or family circumstances, or to reward a defendant for cooperating with the district attorney after sentencing. These grounds for sentence modification are offered in other states through statutory exceptions to the time limits governing sentence modification motions. This Comment concludes that Wisconsin's sentence modification law, though fraught with confusion at the appellate level, nonetheless provides defendants with a broader and more flexible form of post-conviction relief than that provided in states where statutes define the factors justifying a sentence modification.

Keywords

Sentences (Criminal procedure)

Disciplines

Criminal Law | Criminal Procedure | Law Enforcement and Corrections

COMMENT

WISCONSIN SENTENCE MODIFICATION: A VIEW FROM THE TRIAL COURT*

In Wisconsin, trial courts have discretion to modify a defendant's criminal sentence if the defendant introduces a "new factor." Published Wisconsin case law gives little guidance on what constitutes a new factor. The Wisconsin Supreme Court has declined to find a new factor present in every case it has published since defining "new factor" in 1978. Because of ambiguous and conflicting rulings, the standards for both prongs of the new factor definition remain unclear. This Comment attempts to shed light on the new factor requirement for sentence modification by examining Wisconsin trial court decisions on a limited sample of sentence modification motions. This study reveals that trial courts modified sentences in a variety of cases to effect their intent in sentencing the defendant when it has been frustrated, to respond to a change in a defendant's health or family circumstances, or to reward a defendant for cooperating with the district attorney after sentencing. These grounds for sentence modification are offered in other states through statutory exceptions to the time limits governing sentence modification motions. This Comment concludes that Wisconsin's sentence modification law, though fraught with confusion at the appellate level, nonetheless provides defendants with a broader and more flexible form of post-conviction relief than that provided in states where statutes define the factors justifying a sentence modification.

I. INTRODUCTION

Justice Louis Brandeis called it "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory" in implementing innovative laws or procedures.¹ For almost twenty years, Wisconsin has been such a laboratory in the area of criminal sentence modification. Wisconsin trial courts retain jurisdiction to modify sentences they have imposed if a defendant asserts a "new factor." In contrast, sixteen states follow the common law rule that a trial court loses jurisdiction to modify a criminal sentence when the sentence commences.² Twenty-eight states and the District of Co-

* In researching this Comment, the authors used the files and resources of the Legal Assistance to Institutionalized Persons (LAIP) program at the University of Wisconsin Law School. The staff of dedicated attorneys and office workers at LAIP were of great help in locating closed files and remembering old clients. They also provided input into drafts of this Comment and moral support for the topic of this Comment from the beginning. In particular, the authors wish to acknowledge the contributions of John Pray and Ken Lund.

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. *Rogers v. State*, 265 Ark. 945, 582 S.W.2d 7 (1979) (the trial court has power to modify a sentence only within the term of court and before executing the sentence); *People v. Getty*, 50 Cal. App. 3d 101, 123 Cal. Rptr. 704 (1975) (the trial court's jurisdiction ends when the sentence commences); *Kohlfuss v. Warden of Conn. State Prison*, 149 Conn. 692, 183 A.2d 626, *cert. denied*, 371 U.S. 928 (1962) (trial court has no power to modify a sentence after it com-

lumbia have amended the common law rule to give the sentencing court jurisdiction to modify sentences for a limited time after imposing them.³ Since these time limits are relatively short, sentence modification governed by time limits often cannot provide defendants with relief from hardships caused by changes in circumstances.

States have developed two ways of responding to hardships based on changes in circumstances. First, in Wisconsin and three other states, the courts define conditions under which defendants may bring sen-

ences); *People v. Wilson*, 111 Mich. App. 770, 315 N.W.2d 423 (1981) (trial court has no power to modify a sentence after it commences); *Harrigill v. State*, 403 So. 2d 867 (Miss. 1981) (trial court is powerless to alter or vacate sentence after the term of court ends); *State v. Burroughs*, 559 S.W.2d 42 (Mo. Ct. App. 1977) (trial court loses jurisdiction when the sentence commences); *State v. Porter*, 143 Mont. 528, 540, 391 P.2d 704, 711 (1964) (once a valid sentence is imposed, the court loses jurisdiction to vacate or modify it); *State v. Adamson*, 194 Neb. 592, 233 N.W.2d 925 (1975) (trial court loses the power to modify the sentence upon execution); *State v. Thomson*, 110 N.H. 190, 263 A.2d 675 (1970) (trial court loses jurisdiction when the sentence commences); *State v. Bonds*, 45 N.C. App. 62, 262 S.E.2d 340 (1980) (trial court loses jurisdiction at the end of the session); *State ex rel. Gladden v. Kelly*, 213 Or. 197, 324 P.2d 486 (1958) (trial court loses jurisdiction when the sentence commences); *State v. Patterson*, 272 S.C. 2, 249 S.E.2d 770 (1978) (trial court loses jurisdiction when the term of court expires); *Ex parte Reynolds*, 462 S.W.2d 605 (Tex. Crim. App. 1970) (trial court's jurisdiction expires when the sentence commences); *State v. Beck*, 584 P.2d 870 (Utah 1978) (court loses jurisdiction upon commencement of sentence); *State v. Wells*, 7 Wash. App. 553, 500 P.2d 1012 (1972) (court has no power to modify except for limited circumstances such as a clerical error or fraud). See also N.Y. CRIM. PROC. LAW § 430.10 (McKinney 1983) (sentence may not be changed once the term of the sentence has commenced); VA. CODE ANN. § 19.2-303 (Supp. 1988) (jurisdiction terminates when defendant is received by the Department of Corrections, however, the trial court retains jurisdiction over a defendant sentenced to jail until the expiration of the sentence).

3. ALASKA R. CRIM. P. 35(a) (trial court may modify a sentence within 60 days of its imposition); ARIZ. R. CRIM. P. 24.3 (60 days); COLO. R. CRIM. P. 35(b) (120 days); DEL. SUPER. CT. R. CRIM. P. 35(b) (60 days); D.C. SUPER. CT. R. CRIM. P. 35(b) (120 days); FLA. R. CRIM. P. 3.800(b) (60 days; the provision does not apply to the death sentence or certain other mandatory sentences); GA. CODE ANN. § 17-10-1(a) (Supp. 1988) (trial court may modify a sentence within the term of court or 60 days, whichever is greater); IDAHO R. CRIM. P. 35 (120 days); ILL. ANN. STAT. ch. 38, ¶ 1005-8-1(c) (Smith-Hurd 1982) (30 days; the Illinois statute specifies certain circumstances under which a court may modify a sentence after the time limit has expired. See *infra* note 5); IND. CODE ANN. § 35-38-1-17 (Burns Supp. 1988) (180 days; the statute allows a trial court to modify a sentence after 180 days if the district attorney agrees); IOWA CODE ANN. §§ 902.4, 903.2 (West Supp. 1988) (the time limit for felonies is 90 days, 30 days for misdemeanors; the statute does not apply to mandatory sentences); KAN. STAT. ANN. § 21-4603(3) (1981) (120 days); ME. R. CRIM. P. 35 (one year); MD. R.P. 4-345(b) (90 days; the statute allows modification at any time when the sentence is for desertion or non-support. See *infra* note 4); MASS. R. CRIM. P. 29(a) (60 days); N.J. CT. R. 3:21-10(a) (60 days; the statute also provides specific circumstances under which a court may modify a sentence after the time limit. See *infra* note 5); N.M. R. CRIM. P. 5-801 (30 days; the statute does not apply if the death penalty or a mandatory sentence is imposed); N.D. R. CRIM. P. 35(b) (120 days); OKLA. R. CRIM. P. ch. 16, § 982a(A) (120 days; the statute does not apply if the defendant is a convicted felon who has been in prison for a prior felony within the past 10 years); PA. R. CRIM. P. 1410 (10 days); R.I. SUPER. CT. R. CRIM. P. 35 (120 days); S.D. CODIFIED LAWS ANN. § 23A-31-1 (1988) (one year); TENN. R. CRIM. P. 35 (120 days); VT. R. CRIM. P. 35(b) (90 days); W.VA. R. CRIM. P. 35(b) (one year); WYO. R. CRIM. P. 36 (120 days). See also *Jones v. State*, 55 Ala. App. 466, 316 So. 2d 713 (Ala. Crim. App. 1975) (trial court loses jurisdiction after 30 days); *State v. Le Vasseur*, 1 Haw. App. 19, 613 P.2d 1328 (1980) (90 days); *Silverburg v. Commonwealth*, 587 S.W.2d 241 (Ky. 1979) (10 days).

tence modification motions.⁴ Second, several state legislatures have enacted statutory exceptions to the time limit controlling the trial court's jurisdiction to hear sentence modification motions. These statutory provisions allow the trial court to modify a sentence past the statutory or common law time limit under specified circumstances or if specified events occur.⁵

This Comment examines the Wisconsin common law sentence modification system at the trial court level. It analyzes a limited sample of "new factor" motions brought by defendants serving sentences in Wisconsin correctional institutions. These motions reveal that Wisconsin trial courts have developed sentence modification into a flexible postconviction remedy despite the failure of Wisconsin appellate courts to articulate a clear definition of a new factor. At the same time, trial courts respected and applied policy limitations articulated in appellate decisions. Interestingly, the statutes in other states creating exceptions to jurisdictional time limits collectively cover many of the grounds that Wisconsin trial courts have accepted as new factors. The statutory ex-

4. Louisiana and Maryland allow trial courts to exercise continuing jurisdiction over sentences, but limit the type of sentences that the courts have the authority to modify. *See* LA. CODE CRIM. PROC. ANN. art. 881 (West Supp. 1988) (allows trial courts to reduce the sentence of a misdemeanor or of a felon who has been sentenced to prison without hard labor); MD. R.P. 4-345(b) (allows modification at any time when the sentence is for desertion or non-support; otherwise, a 90-day limit applies. *See supra* note 3). Other than Wisconsin, Nevada is the only state where the trial court exercises wide discretion in sentence modification. In Nevada, a trial court may modify a sentence that was based on "materially untrue assumptions" which work to the "extreme detriment" of the defendant. *State v. District Court*, 100 Nev. 90, 97, 677 P.2d 1044, 1048-49 (1984).

5. ILL. ANN. STAT. ch. 38, ¶ 1005-8-1(f) (Smith-Hurd 1982) (defendant who must return to Illinois to serve an unexpired Illinois sentence after having served a term of imprisonment in another jurisdiction may apply to the Illinois trial court to have the Illinois sentence reduced; the defendant must apply for sentence reduction within 30 days of completing the other sentence); IND. CODE ANN. § 35-38-1-17 (Burns 1985) (trial court may modify a sentence after the 180-day statutory limit if the district attorney agrees); MINN. STAT. ANN. § 244.09 (11)(a) (West Supp. 1989) (trial court may modify a sentence if the mandatory sentencing guidelines for the crime change); N.J. CT. R. 3:21-10(b) (specifies several exceptions to the time limit; court may modify a sentence to allow a defendant to take advantage of a custodial or non-custodial drug or alcohol treatment program; court may modify a sentence to release a defendant because of the defendant's illness or infirmity; court may modify a sentence upon the joint application of the defendant and the prosecuting attorney); OHIO REV. CODE ANN. § 2929.51 (Anderson 1987) (trial court may suspend the sentence and place defendant on probation: any time before the defendant is delivered to the institution; between 30 and 90 days after the defendant has gone to prison; for a misdemeanor, at any time); S.C. CODE ANN. § 17-25-60 (Law. Co-op. 1985) (amends the common law rule by allowing a trial court to modify a sentence at any time in order to reflect a defendant's prior convictions which were not taken into consideration at sentencing).

Many states have statutes allowing trial courts to modify a sentence at any time to correct clerical errors in judgments, orders, or other parts of the record. ARIZ. R. CRIM. P. 24.4; COLO. R. CRIM. P. 36; DEL. SUPER. CT. R. CRIM. P. 36; D.C. SUPER. CT. R. CRIM. P. 36 (special provisions for correcting errors in the transcript); IDAHO R. CRIM. P. 36; IND. CODE ANN. § 35-38-1-15 (Burns 1985); ME. R. CRIM. P. 36; NEV. REV. STAT. § 176.565 (1987); N.D. R. CRIM. P. 36; R.I. SUPER. CT. R. CRIM. P. 36; VT. R. CRIM. P. 36; W. VA. R. CRIM. P. 36.

ceptions fail, however, to duplicate the flexibility of Wisconsin's common law remedy.

This Comment is based on a study of all sentence modification motions filed by the Legal Assistance to Institutionalized Persons (LAIP) program from 1978 through the summer of 1987.⁶ To collect the data upon which this Comment is based, the authors reviewed LAIP records on all files closed in that period. Where the "close-out" form⁷ indicated that a sentence modification motion had been filed, the authors collected data from the file.⁸ The study cannot predict the statistical probability of success of any particular new factor because it covers only a limited number of motions which were brought primarily by one organization.⁹ Because its resources are limited, LAIP represents an individual on a sentence modification only if there is a significant likelihood that the motion will be successful.¹⁰ Therefore, this study may reflect a success rate for particular grounds which is higher than the success rate for a random sample of sentence modification motions.

In addition to the new factor ground, a defendant may bring a sentence modification motion based on abuse of discretion.¹¹ Because

6. LAIP is a clinical program associated with the University of Wisconsin Law School. Its purpose is to provide an educational experience for law students and to assist indigent persons who are serving criminal sentences and mental health commitments in Wisconsin institutions. Each LAIP attorney manages the cases from one or more Wisconsin institutions. They are responsible for assigning cases to law students and supervising the law students' work on these cases. Interview with Ken Lund, LAIP Director, in Madison, Wis. (Apr. 7, 1988).

7. Students or staff attorneys complete close-out forms when the issues which LAIP is handling for a client are resolved. The close-out forms contain a brief description of the problems for which the client requested assistance and the action that LAIP took to resolve each issue.

8. This information included the crimes for which the defendant had originally been sentenced; the length of the original sentence; the name of the sentencing judge and the county in which the defendant was originally sentenced; the amount of time served when the sentence modification motion was filed; the grounds for the motion; the disposition of the motion; and any reasoning that the judge gave in support of his or her decision on the motion. The authors relied on file records including sentence modification motions, memoranda in support of motions, opposing memoranda, orders and written decisions on the motions, correspondence, records of telephone conversations, memoranda to the file, written communication between the student and the supervising attorney, sentencing orders and decisions, and prison records.

9. The authors examined over 100 sentence modification motions from circuit courts in 67 counties. Forty-two alleged new factors. Although most of the motions were brought by LAIP, the LAIP files sometimes contained information about other sentence modification motions filed by an LAIP client either pro se or with the assistance of another attorney. When there was enough data on these non-LAIP motions, they were also included in the study.

10. Interview with Ken Lund, LAIP Director, in Madison, Wis. (Apr. 7, 1988). In 1985, LAIP opened files for 145 inmates who requested help with a sentence modification, but it filed only 13 motions. In 1986, 12 motions were filed, out of 175 requests. LAIP does not open files for many requests. Requests for which LAIP did not open a file are not reflected in these numbers.

11. *State v. Wuensch*, 69 Wis. 2d 467, 480, 230 N.W.2d 665, 673 (1975) (trial court has jurisdiction to reduce a defendant's sentence for abuse of discretion if it finds the sentence unduly harsh or unconscionable, but it must state its reasons for the reduction on the record).

of the apparent time limit on motions based on abuse of discretion,¹² and their lack of utility as a unique post-conviction remedy,¹³ the remainder of this Comment will address only the new factor ground for sentence modification.

Part II of this Comment discusses the history of sentence modification in Wisconsin, tracing the development of the new factor ground, and giving a brief overview of appellate rulings on what constitutes a new factor. It also examines two major flaws in the Wisconsin new factor definition. Part III outlines a variety of grounds that defendants have asserted as new factors in sentence modification motions, analyzing the purposes that sentence modification has served and the policies that trial courts invoke in deciding sentence modification motions. In Part IV, the grounds accepted for sentence modification in Wisconsin's common law sentence modification system are briefly compared to statutory exceptions in other states. This Comment concludes that, despite confusing and conflicting case law, trial courts have developed Wisconsin's common law sentence modification into a post-conviction remedy which is more flexible than the statutory exceptions in other states.

II. HISTORY OF SENTENCE MODIFICATION IN WISCONSIN

A. Development of the New Factor Test

In 1970, the Wisconsin Supreme Court amended the common law rule that a trial court has no power to revise its sentence in a criminal case after the sentence has commenced.¹⁴ The court, in *Hayes v. State*, ruled that the ninety-day time limit for new trial motions should also control the time within which motions to modify sentences may be brought.¹⁵

12. Case law is not clear on whether trial courts have jurisdiction to hear sentence modification motions based on abuse of discretion after the time limit for new trial motions has expired. In 1975, the Wisconsin Supreme Court ruled that the 90-day time limit of *Hayes v. State*, 46 Wis. 2d 93, 175 N.W.2d 625 (1970), should control when abuse of discretion is alleged and no new factor is presented. *Jones (Hollis) v. State*, 70 Wis. 2d 62, 73, 233 N.W.2d 441, 447 (1975). In *Klimas v. State*, however, the supreme court asserted the regulatory nature of the time limit and held that the trial court had discretion to entertain a sentence modification motion based on abuse of discretion after the 90-day limit had expired. *Klimas v. State*, 75 Wis. 2d 244, 246, 249 N.W.2d 285, 286 (1976). The Wisconsin Supreme Court most recently addressed the issue in a footnote in *State v. Macemon*, 113 Wis. 2d 662, 335 N.W.2d 402 (1983). The court ruled that after the time limit only an appellate court may review a sentence for an abuse of discretion. *Id.* at 668 n.3, 335 N.W.2d at 406 n.3.

13. See Comment, *Sentence Modification by Wisconsin Trial Courts*, 1985 WIS. L. REV. 195, 231 (arguing that abuse of discretion motions in the trial court duplicate the appellate court function and appear to be a futile remedy).

14. *Hayes v. State*, 46 Wis. 2d 93, 101, 175 N.W.2d 625, 629 (1970). See *infra* note 24.

15. *Hayes*, 46 Wis. 2d at 106, 175 N.W.2d at 631. In 1984, the Wisconsin Court of Appeals ruled that a change in the time limit for bringing motions for new trial from 90 days to a

In subsequent cases, the Wisconsin Supreme Court extended a trial court's authority to modify a criminal sentence past the ninety-day limit set in *Hayes*. In *Lange v. State*,¹⁶ the Wisconsin Supreme Court ruled that the ninety-day limit was regulatory only and did not, therefore, affect the trial court's jurisdiction to hear sentence modification motions.¹⁷ As a result, trial courts gained authority to grant sentence modifications even after the time limit expires.

Trial courts do not, however, have unlimited discretion to modify sentences. For example, a sentencing court may not reduce a sentence on "reflection" alone or simply because it has thought the matter over and has second thoughts about the sentence it imposed. In *State v. Foellmi*,¹⁸ the supreme court adopted as Wisconsin law a portion of a draft of the American Bar Association's *Standards Relating to Sentencing Alternatives and Procedures* which said it may be appropriate for a sentencing court to make a change in an imposed sentence if a new factor is shown.¹⁹ Although the court adopted this standard as a guideline, it did not define the term "new factor."

In 1975, the Wisconsin Supreme Court defined "new factor" in *Rosado v. State*.²⁰ The court stated that 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.²¹

period of up to 165 days superseded the 90-day limit set forth in *Hayes* for sentence modification motions. *State v. Krueger*, 119 Wis. 2d 327, 332, 351 N.W.2d 738, 741 (Ct. App. 1984).

As previously noted, many jurisdictions have made similar amendments to the common law rule by allowing trial courts a limited number of days after imposing sentence during which it has discretion to modify a defendant's sentence. *See supra* note 3.

16. 54 Wis. 2d 569, 196 N.W.2d 680 (1972).

17. *Id.* at 573, 196 N.W.2d at 682-83.

18. 57 Wis. 2d 572, 582, 205 N.W.2d 144, 150 (1973).

19. The court adopted the following portion of Part VI, § 6.1(a) of the 1968 approved draft:

6.1 Authority to reduce: general.

(a) It may be appropriate to authorize the sentencing court to reduce or modify a sentence within a specified time after its imposition or the final resolution of an appeal if new factors bearing on the sentence are made known. . . .

Foellmi, 57 Wis. 2d at 581, 205 N.W.2d at 149.

20. 70 Wis. 2d 280, 234 N.W.2d 69 (1975).

21. *Id.* at 288, 234 N.W.2d at 73. In a 1989 case, the Wisconsin Supreme Court held that the existence of a new factor is a question of law which the defendant must show by clear and convincing evidence. *State v. Franklin*, 148 Wis. 2d 1, 9, 434 N.W.2d 609, 611 (1989).

In *Rosado*, however, the court held that the defendant had not shown a new factor which fit this definition.²² Since articulating the new factor definition in *Rosado*, the court has not ruled that any set of facts falls within the definition.

The Wisconsin Supreme Court found new factors in only three cases, all decided before *Rosado*.²³ In two cases, the Wisconsin Supreme Court affirmed trial court sentence reductions based on new information about a defendant's prior record.²⁴ In the third case, the trial court had misunderstood the effect that a new parole law would have on the defendant's parole eligibility.²⁵ The Wisconsin Supreme Court ruled that, in the circumstances of that case, correct information about the defendant's parole eligibility was a new factor.²⁶

22. In *Rosado*, the defendant pled guilty to one count of statutory rape brought against him because of his affair with a 15-year-old girl. *Id.* at 283-84, 234 N.W.2d at 70-71. Although the charge was based on the couple's activities in a Milwaukee hotel, the state introduced information about their five-month trip to Puerto Rico where the defendant apparently left the girl stranded. *Id.* at 284, 234 N.W.2d at 71. *Rosado* later moved for a sentence modification. He claimed that his version of the Puerto Rican incident, which was not elicited at sentencing, was a new factor. *Id.* at 288, 234 N.W.2d at 73. The trial court refused to hear testimony on this point. It held that *Rosado's* version of the incident was not a new factor because he had knowingly failed to testify to it at the sentencing hearing. The factor was not, therefore, "unknowingly overlooked by all of the parties." *Id.* at 288-89, 234 N.W.2d at 73.

23. *Kutchera v. State*, 69 Wis. 2d 534, 230 N.W.2d 750 (1975); *Mattice v. State*, 50 Wis. 2d 380, 184 N.W.2d 94 (1971); *Hayes v. State*, 46 Wis. 2d 93, 175 N.W.2d 625 (1970). *Kutchera* was decided under the *Foellmi* standard. See *supra* note 19. *Mattice* and *Hayes* were decided before any standard was articulated.

24. In *Hayes*, the trial court reduced the defendant's sentence sua sponte after learning that it had been misinformed as to the defendant's prior record. *Hayes*, 46 Wis. 2d at 106-07, 175 N.W.2d at 632. The court believed it had erred in imposing the maximum sentence on the defendant because the defendant's criminal record was less serious than the court had understood. The court assumed part of the responsibility for the misunderstanding because of the court's own failure to request a pre-sentence report. The state appealed, alleging abuse of discretion, but the Wisconsin Supreme Court affirmed, ruling that the trial court had sufficiently stated its reasons for the modification.

An almost identical case was presented in *Mattice*. There, the trial court was presented with evidence that the defendant had a more extensive criminal record than the court had believed. *Mattice*, 50 Wis. 2d at 382, 184 N.W.2d at 95. Upon hearing additional evidence, the court rescinded the defendant's probation and imposed the three-year stayed sentence. *Id.* The Wisconsin Supreme Court affirmed the trial court, stating that the trial court had clearly set out its reasons for the modification. *Id.*

25. *Kutchera v. State*, 69 Wis. 2d 534, 230 N.W.2d 750 (1975).

Comments by the prosecutor at sentencing about a defendant's parole eligibility alone do not give rise to a new factor. In a 1989 case, the Wisconsin Supreme Court held that a change in parole policy after sentencing was not a new factor. *State v. Franklin*, 148 Wis. 2d 1, 434 N.W.2d 609 (1989). The court distinguished *Kutchera* on the grounds that, in *Kutchera*, the trial court expressly discussed parole policy on the record when making its sentencing decision. *Id.* at 14-15, 434 N.W.2d at 614. The extent of this requirement that the factor appear on the record is unclear. In *Franklin*, the sentencing record may have had heightened importance because the sentencing judge had retired and the defendant brought the modification motion before a different judge. *Id.* at 6, 434 N.W.2d at 610.

26. *Id.* at 553, 230 N.W.2d at 760. In *Kutchera*, the defendant was convicted of seven burglaries in two trials and sentenced to a total of 17 years. At the time the defendant's sentences

Most of the published cases which discuss new factors have held that a fact or set of facts is not a new factor. The Wisconsin Supreme Court has explicitly ruled that disparity of sentences between co-defendants is not a new factor.²⁷ Disparity of sentence was also rejected as a new factor when argued on the basis of Wisconsin's felony sentencing guidelines.²⁸ The court has made it clear that a defendant's rehabilitative progress in a correctional institution may not be the basis of a sentence reduction.²⁹ Finally, the court rejected a reduction in the maximum penalty allowed by law for the defendant's crime as a basis for sentence modification motions.³⁰

were imposed, the district attorney stated that it was his understanding that unless the defendant were given consecutive sentences, he could be paroled "almost instantly" under a new parole law. *Id.* However, after Kutchera was sentenced, the supreme court ruled that concurrent as well as consecutive sentences each have a minimum parole eligibility date of one year. *Edelman v. State*, 62 Wis. 2d 613, 215 N.W.2d 386 (1974). After *Edelman* was decided, the trial court modified Kutchera's sentence, basing the modification on new information about the defendant's parole eligibility. *Kutchera*, 69 Wis. 2d at 553, 230 N.W.2d at 760.

27. *State v. Studler*, 61 Wis. 2d 537, 213 N.W.2d 24 (1973). In *Studler*, the defendant asserted that the trial court had abused its discretion by sentencing the defendant to 10 years for armed robbery when another judge had sentenced the co-defendant to five years. *Id.* at 541, 213 N.W.2d at 25-26. However, the Wisconsin Supreme Court ruled that a co-defendant's lesser sentence is not a new factor. *Id.* In so ruling, the court cited the legislature's intent that Wisconsin have a sentencing system where individuation rather than uniformity of sentences is the primary goal. *Id.* at 542, 213 N.W.2d at 26.

28. *State v. Macemon*, 113 Wis. 2d 662, 669, 335 N.W.2d 402, 406 (1983). The felony sentencing guidelines were developed by the Advisory Committee for the Wisconsin Felony Sentencing Guidelines Project in 1980. They were a compilation of average felony sentences in Wisconsin from 1977-1980. The guidelines for each crime used two matrices, accounting for various characteristics of the offense and of the offender, to show the range of sentences imposed and the percentage of cases where the offender was incarcerated.

Various counties implemented the guidelines on a voluntary basis in 1981 and 1982. In 1983, the Advisory Committee requested that the Wisconsin Supreme Court mandate the use of the guidelines and require a court which deviated from the guidelines to state its reasons for the departure. The court refused. It did, however, order that the statistical data on sentencing be collected and disseminated to all judges for its informational value. *In re Felony Sentencing Guidelines*, 113 Wis. 2d 689, 335 N.W.2d 868 (1983).

In 1984, the Wisconsin Supreme Court refused to promulgate its own felony sentencing guidelines after the legislature authorized it to do so. As a consequence, the power to promulgate sentencing rules passed to a sentencing commission. *In re Felony Sentencing Guidelines*, 120 Wis. 2d 198, 353 N.W.2d 793 (1984). Current law requires that a sentencing court take the guidelines established by the sentencing commission into consideration when imposing sentence and state its reasons for deviating from the guidelines on the record. Wis. STAT. § 973.012 (1987-1988). A defendant whose sentence does not fall within the guidelines, however, has no right to appeal the sentence. *Id.*

29. *State ex rel. Warren v. County Court*, 54 Wis. 2d 613, 620, 197 N.W.2d 1, 4-5 (1972) (rehabilitation goes not to excessiveness of a sentence but to the question of parole); *State v. Wuensch*, 69 Wis. 2d 467, 478, 230 N.W.2d 665, 671-72 (1975) (favorable consideration for the defendant's change in attitude and progress lies solely within the province of the Department of Health and Social Services); *Jones (Hollis) v. State*, 70 Wis. 2d 62, 72, 233 N.W.2d 441, 447 (1975) (defendant's progress in the rehabilitation system is a matter more properly considered by the Wisconsin Department of Health and Social Services).

30. See *infra* note 35 and text accompanying note 36.

B. Ambiguities in the New Factor Definition

1. INFORMATION "UNKNOWINGLY OVERLOOKED" AT SENTENCING

If a fact or set of facts existed at the time of sentencing, it must have been "unknowingly overlooked" by all of the parties to fit within the *Rosado* new factor definition.³¹ In *Rosado*, the court held that the defendant's explanation of a controversial incident was not unknowingly overlooked.³² Because the defendant could have given his explanation at the sentencing hearing and his counsel was fully aware that the trial court considered the incident relevant to sentencing, the supreme court interpreted the defendant's failure to testify as a "conscious tactical choice."³³ It is not clear how far the *Rosado* ruling should extend to cases where the defendant may know of the existence of certain facts but not realize their relevance at the time of sentencing.

A strict reading of the *Rosado* definition would conflict with earlier decisions affirming sentence modifications based on new information about the defendant's prior record.³⁴ It follows from the court's reasoning in *Rosado* that correct information about a defendant's prior record should not be a new factor. A defendant's prior record is in existence at the time of sentencing, is known to the defendant, and its relevance to sentencing is also presumably known to the defendant's counsel. The court in *Rosado* made no effort to harmonize its holding with the prior record decisions, suggesting that it did not intend to overrule them. Because of the conflict between the "unknowingly overlooked" prong of the *Rosado* definition and earlier case law, the extent to which information which is unknowingly overlooked by a defendant at sentencing may be used to argue that a new factor exists is not clear.

2. INFORMATION "HIGHLY RELEVANT" TO SENTENCING

In 1983, the Wisconsin Supreme Court decided two cases which construed the "highly relevant" prong of the *Rosado* new factor definition.³⁵ The majority in *State v. Hegwood* held that a reduction in the

31. See *supra* text accompanying note 21.

32. See *supra* note 22.

33. *State v. Rosado*, 70 Wis. 2d 280, 289, 234 N.W.2d 69, 73 (1975).

34. See *supra* note 24 and accompanying text.

35. *State v. Hegwood*, 113 Wis. 2d 544, 335 N.W.2d 399 (1983) (ruling that a statutory reduction in the maximum penalty for the crime for which the defendant had been convicted did not constitute a new factor); *State v. Macemon*, 113 Wis. 2d 662, 335 N.W.2d 402 (1983) (ruling that newly developed sentencing guidelines were not a new factor).

In *Hegwood*, the defendant was sentenced to 25 years for rape under a statute which prescribed a maximum penalty of 30 years for the crime. *Hegwood*, 113 Wis. 2d at 545, 334 N.W.2d at 400. Subsequently, the legislature passed a new sexual assault statute which carried a maximum sentence of 20 years. The defendant brought a sentence modification motion asserting that the

maximum penalty for the defendant's crime was not highly relevant to the defendant's sentence because the legislature did not remit criminal liability when it repealed the old law.³⁶ Some of the language in the *Hegwood* dissent and in the second case, *State v. Macemon*, suggests a restrictive interpretation of the majority's decision.³⁷ Under this interpretation, a reduction in the maximum penalty for a defendant's crime is not "highly relevant" because it does not mandate a reduction in the defendant's sentence.

Such a restrictive interpretation would, as a practical matter, eliminate the new factor ground for sentence modification. If a new factor mandates a sentence reduction by definition, the trial court has discretion to hear sentence modification motions only in cases where it has no discretion to deny a defendant's motion.³⁸ Although it is unlikely that the Wisconsin Supreme Court intended to make such a sweeping change in the law,³⁹ the implications of the *Hegwood* and *Macemon* decisions further confuse the status of the new factor ground for sentence modification.⁴⁰

statutory reduction in the maximum penalty was a new factor. The Wisconsin Supreme Court ruled that the reduction in the maximum penalty for sexual assault was not highly relevant to the imposition of sentence and, therefore, did not constitute a new factor.

In *Macemon*, the defendant was sentenced to 20 years for first-degree sexual assault. *Macemon*, 113 Wis. 2d at 663, 334 N.W.2d at 404. The defendant brought a sentence modification motion based on data from the Wisconsin felony sentencing guidelines (*see supra* note 28) which indicated that the majority of sentences for first-degree sexual assault in Wisconsin did not exceed ten years. *Id.* at 665-66, 335 N.W.2d at 405. The court held that deviation from the guidelines did not amount to a fact or set of facts which were highly relevant to the imposition of sentence.

See supra note 21 and accompanying text for the full *Rosado* new factor definition.

36. *Hegwood*, 113 Wis. 2d at 548, 335 N.W.2d at 402.

37. The dissent in *Hegwood* characterized the majority as ruling that a reduction in the maximum penalty for a crime is not a new factor "because the legislative reduction of the penalty is not automatically retroactive." *Id.* at 549, 335 N.W.2d at 402 (Abrahamson, J., dissenting). The *Hegwood* dissent reasoned that a reduction in the maximum penalty for a crime is highly relevant to sentencing because it indicates a change in the legislature's assessment of the gravity of the offense. *Id.*

The restrictive interpretation is also reflected in *Macemon*, a case decided the same day as *Hegwood*. *See supra* note 35. The court in *Macemon* did not fully reveal the reasoning in support of its holding that data from sentencing guidelines are not "highly relevant" to a defendant's sentence. The court noted only that the guidelines were "voluntary" and that *Hegwood* presented a "stronger case" for a new factor. *Macemon*, 113 Wis. 2d at 669, 335 N.W.2d at 406-07.

38. *See Comment, supra* note 13, at 212-13 (arguing that there are few new facts which would have a mandatory effect on the original sentence, and those facts could be presented to the court as challenges to an illegal sentence under Wis. STAT. § 974.06 (1983-1984)).

In a recent case, the Wisconsin Supreme Court turned its focus from whether a fact mandates a sentence modification to what facts the trial court actually considered relevant to a defendant's sentence. *See the discussion of State v. Franklin at supra* note 26.

39. *See Comment, supra* note 13, at 212-13.

40. The *Hegwood* majority might also be interpreted as reasoning that a statutory reduction in the penalty for a crime is not a new factor because such a reduction is not relevant to a defendant's sentence at all. The court relied on Wis. STAT. § 990.04 (1981-1982), which provided that "the repeal of a statute . . . shall not remit, defeat or impair any civil or criminal liability for

III. WISCONSIN TRIAL COURT ACTION ON SENTENCE MODIFICATION MOTIONS

Despite confusing and conflicting case law, trial courts have used their discretion to develop sentence modification into a flexible post-conviction remedy which has served a variety of purposes. This study of LAIP motions reveals that trial courts modified sentences in a variety of cases where their intent in sentencing the defendant had been frustrated. Courts were reluctant, however, to grant sentence modifications where the defendant alleged that the court's intent that the defendant receive rehabilitative opportunities within the correctional system had been frustrated.

Trial courts were sometimes willing to modify defendants' sentences in response to events which occurred after sentencing, but they were reluctant to push the limits of unclear appellate rulings on the extent to which information "unknowingly overlooked" by a defendant at sentencing can be considered a new factor. Motions based on a change in a defendant's health or family circumstances were sometimes successful. One trial court used sentence modification to reward a defendant for cooperating with the district attorney after sentencing, but other courts refused to modify sentences in cases where inmates cooperated with prison authorities. Courts generally followed a policy of non-interference when the defendant's needs could be met through the administrative procedures of the Wisconsin Department of Health and Social Services.

A. Frustration of Sentencing Judge's Intent

In *Kutchera*,⁴¹ the Wisconsin Supreme Court ruled that new information about the defendant's parole eligibility qualified as a new factor when the trial court had relied on incorrect information in passing sentence.⁴² Trial courts went beyond this narrow ruling to correct

offenses committed . . . under such statute before the repeal thereof . . . unless specially and expressly remitted, abrogated or done away with by the repealing statute." *Hegwood*, 113 Wis. 2d at 547 n.3, 335 N.W.2d at 401 n.3. The court might have reasoned that a change in the maximum penalty cannot be "highly relevant" to the defendant's sentence because the remittance statute bars trial courts from abrogating the criminal liability of any defendant sentenced under the old law. Such an interpretation is consistent with language in the majority opinion that characterizes trial courts as "precluded" from retroactively reducing a defendant's sentence in the absence of legislative action. *Id.* at 548, 335 N.W.2d at 401. A less restrictive interpretation would prevent trial courts from reducing a defendant's sentence based on a later reduction in the maximum penalty allowed by law, but would not infringe on trial court discretion to grant sentence modifications on other grounds.

41. *Kutchera v. State*, 69 Wis. 2d 534, 230 N.W.2d 750 (1975).

42. See *supra* note 26 and accompanying text.

sentences in a variety of cases where the trial court's intent at sentencing had been frustrated.

First, trial courts modified defendants' sentences where, as in *Kutchera*, the trial judge misunderstood the effect of the defendant's original sentence. In one case, for example, the trial court erroneously believed that the sentence needed to be increased by eighty-one days to enable the defendant to serve the sentence in a state prison rather than a county jail.⁴³ When the error was brought to the judge's attention, he reduced the sentence to compensate for the misunderstanding. In another case, the court had been mistaken about the amount of time that a defendant would actually serve under a ten-year sentence running concurrent to a previously imposed sentence.⁴⁴ The court corrected its mistake by modifying the sentence to a one-year consecutive sentence, which reflected the amount of time the court intended that the defendant serve.

Second, trial courts used sentence modification to correct clerical or administrative errors which frustrated their sentencing intent.⁴⁵ In one case, for example, the judge granted a modification of thirty-eight days. The defendant was mistakenly taken to a county jail instead of state prison and, as a consequence, lost the opportunity to earn thirty-eight days of good time that he would have earned in prison.⁴⁶ Another judge granted a sentence modification motion to correct a clerical error at sentencing when he applied the wrong matrix from the Wisconsin Felony Sentencing Guidelines in determining the defendant's sentence.⁴⁷

43. *State v. O.*, No. 81-CR-288 (Portage County Cir. Ct. Apr. 5, 1982) (granted). A defendant sentenced to a term of imprisonment of more than one year must serve the term in state prison rather than in a county or municipal jail. WIS. STAT. § 973.02 (1987-1988). A defendant is entitled to credit on his or her sentence for time served in county jail prior to sentencing. WIS. STAT. § 973.155(1)(a) (1987-1988). In this case, the defendant had spent 80 days in jail prior to sentencing. The judge erroneously believed that the defendant needed to be sentenced to one year and 81 days in order to serve the time in the state prison rather than in the county jail.

44. *State v. W.*, No. J-1423 (Milwaukee County Cir. Ct. Apr. 18, 1979) (granted).

45. Many other states have statutes which allow trial courts to modify a criminal sentence to correct purely clerical errors. See *supra* note 5.

46. *State v. B.*, No. J-8473, J-9644, J-9847 (Milwaukee County Cir. Ct. Feb. 23, 1984).

A defendant convicted before 1984 is eligible to earn industrial good time which advances the defendant's mandatory release date (the date on which an inmate must be released on parole). WIS. STAT. § 53.11(1) (1987-1988); WIS. ADMIN. CODE § HSS 30.03(5) (Nov. 1987). Inmates subject to the pre-1984 regulations earned up to five days of good time per month. The defendant must maintain an assignment in a vocational or educational program within the correctional system and surpass the general average in diligence or study in order to earn good time. WIS. ADMIN. CODE § HSS 302.31(2) (Feb. 1987). Therefore, the opportunity to earn industrial good time was available only to defendants within the state correctional system.

47. *State v. G.*, No. K-1098 (Milwaukee County Cir. Ct. Dec. 4, 1981) (granted). See *supra* note 28 for more information on the Wisconsin Felony Sentencing Guidelines.

Third, a judge's intent may be frustrated when the sentence is based on a specialized correctional program which does not materialize. The Youthful Offenders Act was an example of this situation.⁴⁸ LAIP brought five sentence modification motions on behalf of persons sentenced under the Youthful Offenders Act.⁴⁹ Most motions asserted that the defendants serving time under the Youthful Offenders Act were not eligible to earn "good time" as were their adult counterparts.⁵⁰ One motion framed the lack of specialized programs as a new factor.⁵¹ In three cases, judges modified the defendants' sentences to compensate for the good time the defendants would have earned had they been sentenced as adult offenders.⁵²

Finally, a judge's intent may be frustrated by problems which arise in coordinating the defendant's Wisconsin sentence with sentences imposed in other jurisdictions. On one LAIP motion, for example, the trial court modified the defendant's Wisconsin judgment of conviction so that the defendant could serve the remainder of his Wisconsin sentence in Montana.⁵³ At sentencing, the court had expressed its intent that the defendant's Wisconsin sentence run concurrent to a previously imposed Montana sentence. Montana authorities subsequently issued a warrant which had the effect of tolling the defendant's Montana sentence until the defendant was returned to Montana. This made the Wisconsin sentence consecutive in effect.

48. The Youthful Offenders Act was intended to provide a specialized correctional program for offenders who were under age 21 and who, in the court's opinion, would benefit from the program. WIS. STAT. §§ 54.01(2), 54.03(1)(b) (1975-1976). In part, the program called for those sentenced under the Act to be segregated from adult inmates. WIS. STAT. § 54.17(6) (1975-1976) as amended by 1975 Wis. Laws ch. 224, § 63. There were problems with the Act from the start. The date by which youthful offenders were required to be segregated was delayed twice. Compare Act published June 22, 1976, ch. 224, § 63, 1975 Wis. Laws 744, 778 (segregation mandated by July 1, 1977) with Act published July 9, 1977, ch. 29, § 659m, 1977 Wis. Laws 35, 174 (segregation mandated by July 1, 1978). The Act was finally repealed, effective July 1, 1978. Act published June 26, 1978, ch. 418, §§ 377, 930(18)(b), 1977 Wis. Laws 1553, 1642, 1839.

49. *State v. F.*, No. 6000 (Outagamie County Cir. Ct. Aug. 9, 1977) (denied); *State v. G.*, No. I-9486 (Milwaukee County Cir. Ct. June 6, 1978) (granted); *State v. L.*, No. 5611, 5612, 5584, 5583, 5632 (Marinette County Cir. Ct. Mar. 23, 1979) (granted); *State v. Me.*, No. 3335 (Vernon County Cir. Ct. Aug. 1, 1978) (granted); *State v. Mo.*, No. I-8675 (Milwaukee County Cir. Ct. Mar. 30, 1978) (denied).

50. See *supra* note 46 for an explanation of good time.

51. *State v. L.*, No. 5611, 5612, 5584, 5583, 5632.

52. *State v. L.*, No. 5611, 5612, 5584, 5583, 5632; *State v. G.*, No. I-9486; *State v. Me.*, No. 3335.

53. *State v. J.*, No. K-8962 (Milwaukee County Cir. Ct. May 13, 1985). The defendant made a motion to modify his sentence and asked the court to modify the judgment of conviction as an alternative remedy. The court chose to modify the judgment of conviction to provide that the defendant's sentence could be served in the Montana correctional system and ordered that the defendant be made immediately available to the Montana authorities for transfer.

In another case, the defendant had escaped from a Wisconsin jail while awaiting trial on a burglary charge.⁵⁴ He was subsequently arrested, convicted and sentenced to three years in Illinois for breaking and entering. While incarcerated in Illinois, the defendant pled guilty to the Wisconsin charges and received a concurrent Wisconsin sentence.⁵⁵ Because of administrative policies, however, the defendant would have been paroled in Illinois five months before being released from his Wisconsin sentence.⁵⁶ The Wisconsin court modified the defendant's Wisconsin sentences for burglary and escape to time served in Illinois.

B. Defendant's Rehabilitation

On the other hand, motions which argued that the court's intent had been frustrated because the defendant was unable to participate in rehabilitative opportunities were generally unsuccessful.⁵⁷ A sentence reduction can have an indirect effect on an inmate's eligibility to transfer between institutions and participate in rehabilitative programs.⁵⁸

54. *State v. S.*, No. 81-CR-12, 81-CR-13 (Iron County Cir. Ct. Dec. 17, 1981).

55. The motion was accompanied by a letter from the district attorney confirming that it was the intent of the plea agreement that the defendant not serve any time in the Wisconsin system.

56. The motion asserted the defendant's ineligibility to earn industrial good time while incarcerated in Illinois as one of the reasons for the disparity in the mandatory release dates.

57. LAIP brought 11 motions based on grounds that a defendant's sentence structure was impeding his or her rehabilitation. One motion asserted that modification would allow the defendant to take advantage of employment opportunities. *State v. Wi.*, No. 84-CF-44 (Waupaca County Cir. Ct. July 11, 1985) (denied; defendant had received a one-year leave of absence from his job which was about to expire).

Four motions asked for modifications which would have allowed the defendant to take advantage of educational opportunities. *State v. A.*, No. 3-165-CR, 3-108-CR (Manitowoc County Cir. Ct. June 9, 1978) (denied; release date came more than one month too late to start at the state university at Oshkosh); *State v. Hn.*, No. 82-CR-134 (Rock County Cir. Ct. July 3, 1985) (denied; defendant wanted to transfer to a minimum security facility in order to obtain study release to complete bachelor's degree); *State v. L.*, No. 84-CR-623 (Brown County Cir. Ct. June 23, 1987) (denied; defendant wanted to transfer to an institution that would permit educational opportunities away from the institution); *State v. S.*, No. CR7720028 (Waupaca County Cir. Ct. Sept. 11, 1979) (denied; defendant wanted early release to attend the state university at Oshkosh where he had been accepted and would lose a financial aid award unless he could enroll).

Six motions asserted that modification would make the defendant eligible for rehabilitative programs within the correctional system. *State v. B.*, No. 42856 (Winnebago County Cir. Ct. Oct. 21, 1977) (denied; psychiatric care); *State v. D.*, No. 2-224024, 2-224025, 2-229711 (Milwaukee County Cir. Ct. June 6, 1980) (granted; substance abuse program); *State v. F.*, No. 65467 (Dunn County Cir. Ct. July 29, 1976) (denied; drug treatment program); *State v. Hy.*, No. 79-CR-124 (Green County Cir. Ct. Nov. 10, 1980) (denied; alcohol program); *State v. K.*, No. 5178 (Rusk County Cir. Ct. May 19, 1978) (denied; alcohol program); *State v. Wa.*, No. 2616 (Dodge County Cir. Ct. Jan. 8, 1979) (denied; alcohol program).

58. To be eligible for programs within the Wisconsin correctional system, an inmate must have a security classification which permits transfer to the institution where the program is offered. WIS. ADMIN. CODE § HSS 302.15(1) (Aug. 1979). One of the factors a prison director considers in assigning an inmate's security classification is the length of the inmate's sentence. WIS. ADMIN. CODE § HSS 302.14(3) (Aug. 1979). Therefore, although the Wisconsin Department of

Wisconsin appellate courts have not explicitly ruled on whether a defendant's ineligibility for rehabilitative programs is a new factor.⁵⁹

One explanation for the failure of these motions is a growing sentiment that rehabilitation offered in a coercive correctional setting does not work, or has not worked very well.⁶⁰ In practice, trial judges seemed to give the defendant's rehabilitative needs little weight at sentencing.⁶¹ Therefore, evidence that the Wisconsin Department of Health and Social Services' eligibility requirements limit a defendant's opportunities for rehabilitation may not carry much weight in changing the judge's original sentencing decision.

A second explanation for the difference in treatment is a general policy of not interfering with matters that lie within the province of the Wisconsin Department of Health and Social Services. The Wisconsin Supreme Court has clearly stated that a defendant's institutional prog-

Health and Social Services is responsible for determining program eligibility, a trial judge can affect the determination by reducing a defendant's sentence.

59. In *State v. Wuensch*, the Wisconsin Supreme Court was confronted with an appeal of a trial court decision to grant a motion which may have been based on the defendant's ineligibility for rehabilitative programs within the prison system. *State v. Wuensch*, 69 Wis. 2d 467, 230 N.W.2d 665 (1975). In *Wuensch*, the defendant testified at his sentence modification hearing that one of the reasons that he wanted a sentence reduction was to make him eligible for transfer from the Green Bay Reformatory (a maximum security facility) to Fox Lake (a medium security facility). Fox Lake offered opportunities to enroll in a welding course and technical school. *Id.* at 471, 230 N.W.2d at 668. The defendant also testified that he had been told that it was department policy not to allow prisoners with sentences longer than five years to be transferred to Fox Lake. *Id.* The defendant maintained on appeal that this departmental rule satisfied the new factor test.

Instead of reaching the question of whether the defendant had asserted a new factor, the court looked to the trial court's statement of reasons for granting the defendant's motion. The court noted that the trial court's only stated reason for granting the defendant's motion was the defendant's attitude and progress. The court then reversed the trial court on the grounds that institutional progress is not a new factor. *Id.* at 478, 230 N.W.2d at 671-72. See *supra* note 29 and accompanying text.

State v. Krueger, a court of appeals decision, suggests that inadequacy of rehabilitative programs may be a new factor. *State v. Krueger*, 119 Wis. 2d 327, 351 N.W.2d 738 (Ct. App. 1984). In denying a defendant's sentence modification motion, the court stated that the trial court was aware of the lack of such programs at sentencing. *Id.* at 333, 351 N.W.2d at 742. This leaves open the possibility that the lack of rehabilitative programs may qualify as a new factor if the court was not aware of the lack of programs for the defendant at the time of sentencing.

60. See generally F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981). The author sets forth several philosophical theories for why rehabilitation has fallen into disfavor, as well as practical reasons why rehabilitation has failed.

61. In each of two LAIP motions brought on grounds of the defendant's eligibility for rehabilitative programs, the court denied the motion because it had been aware at sentencing that the sentence would have an adverse effect on the defendant's rehabilitative opportunities. See *State v. Wi*, No. 84-CF-44; *State v. L.*, No. 84-CR-623.

In a third case, the defendant asked for a reduction in sentence which would have facilitated his transfer to a medium security facility. *State v. F.*, No. 65467. The defendant was incarcerated in a maximum security facility which did not have a drug treatment program. The court held that there was no new factor. The court went on to say that even if it had jurisdiction to rule on the merits of the motion, it would not have reduced the sentence because the nature of the offense and the protection of the public outweighed the defendant's rehabilitative needs.

ress is an issue for the parole board and, therefore, "lies solely within the province of the department of health and social services."⁶² For this reason, the Wisconsin Supreme Court has consistently held that a defendant's institutional progress or rehabilitation does not constitute a new factor.⁶³ Thus far, the Wisconsin Supreme Court has not extended this policy to defeat motions brought on grounds of a defendant's ineligibility for rehabilitative programs. At the trial court level, however, a non-interference policy seemed to predominate in considering sentence modification motions based on these grounds.⁶⁴

C. Information Known to the Defendant at Sentencing

Trial courts were also reluctant to extend the limits of the "unknowingly overlooked at sentencing" prong of the *Rosado* new factor definition.⁶⁵ LAIP motions brought on facts known to the defendant at sentencing, for the most part, did not persuade trial courts to reduce the sentence.⁶⁶ In one case, the defendant revealed after sentencing that her male co-defendant had beaten her and caused her to do things she would otherwise not have done.⁶⁷ In another case, the defendant conceded that he was "legally guilty" of burglary, but alleged that he had believed at the time that he was retrieving property in payment of a debt owed him by the owner.⁶⁸ Both motions were denied.

Even when new information involved the defendant's prior record, which the supreme court has affirmed as a basis for sentence modifica-

62. *Wuensch*, 69 Wis. 2d at 478, 230 N.W.2d at 671-72.

63. *See supra* note 29.

64. In denying LAIP motions, several trial courts expressed an unwillingness to interfere with the Department of Health and Social Services' decisions. *State v. A.*, No. 3-165-CR, 3-108-CR (Manitowoc County Cir. Ct. June 9, 1978); *State v. B.*, No. 42856 (Winnebago County Cir. Ct. Oct. 21, 1977); *State v. S.*, No. CR7720028 (Waupaca County Cir. Ct. Sept. 11, 1979); *State v. Wa.*, No. 2616 (Dodge County Cir. Ct. Jan. 8, 1979). In one case, the court stated that it felt "constrained by the law." That court was sympathetic to the motion, however, and made favorable comments on the record for the parole board's consideration. *State v. Mn.*, No. 82-CR-134 (Rock County Cir. Ct. July 3, 1985). In another case, the defendant requested that his probation be reinstated because of a lack of adequate psychological treatment in the maximum security institution. The court stated that if the Department of Health and Social Services decided that the defendant needed additional psychiatric care, it could transfer the defendant to a different institution where such care would be available. *State v. B.*, No. 42856.

65. *See supra* notes 31-34 and accompanying text.

66. Of six LAIP motions asserting grounds based on facts known to the defendant at sentencing, five were denied. *State v. E.*, No. 6006 (Green County Cir. Ct. Mar. 22, 1977) (denied); *State v. F.*, No. 4870 (Dodge County Cir. Ct. Aug. 24, 1978) (granted); *State v. H.*, No. I-5844 (Milwaukee County Cir. Ct. June 7, 1984) (denied); *State v. Kl.*, No. 81-CF-232 (Kenosha County Cir. Ct. June 7, 1984) (denied); *State v. Kn.*, No. I-286 (Milwaukee County Cir. Ct. Nov. 29, 1977) (denied); *State v. T.*, No. 6902 (Douglas County Cir. Ct. Feb. 23, 1979) (denied).

67. *State v. Kl.*, No. 81-CF-232.

68. *State v. T.*, No. 6902.

tion,⁶⁹ trial courts did not always grant sentence modifications.⁷⁰ Whether an error as to a particular aspect of the defendant's prior record was "highly relevant" may depend on the extent of the rest of the defendant's criminal record.⁷¹ In the only successful LAIP motion based on the defendant's prior record, the defendant sought to have a one-year sentence for escape modified.⁷² A court in the county where he was incarcerated imposed the escape sentence. The defendant brought to the court's attention that his original conviction for burglary had recently been vacated in the county of conviction. The trial court modified the defendant's escape sentence to time served.

Trial courts' reluctance to grant motions based on facts known to the defendant at sentencing may rest on conflicting policy considerations. Allowing a judge to consider the most accurate information whenever it is revealed promotes the goal of accurate fact finding. On the other hand, allowing a defendant to raise such information might encourage defendants to withhold information to gain another appearance before the judge.

D. Defendant's Deteriorated Health

Although a defendant's health is not one of the primary factors considered at sentencing,⁷³ a change in a defendant's health may have an impact on the factors a trial court considers at sentencing. If an illness is sufficiently life-threatening, the court's original sentence may have increased in severity and become a "life" sentence.⁷⁴ If a defendant's health problem is so debilitating that the defendant will be physically unable to commit further crimes, the defendant's health would be relevant to the need to protect society against him or her. Wisconsin case law is silent, however, on whether a defendant's deteriorated health meets the new factor definition.

69. See *supra* note 24.

70. *State v. F.*, No. 4870, *State v. Kn.*, and *State v. H.*, No. I-5844, No. I-286, involved mistakes about the defendant's prior record.

71. In one case, the court responded to the assertion that it had been misinformed regarding the defendant's successful completion of a prior probation period by detailing the defendant's three other criminal convictions. *State v. H.*, No. I-5844.

72. *State v. F.*, No. 4870.

73. The three major factors to be considered at sentencing are the gravity of the offense, the character (or rehabilitative needs) of the defendant, and the need to protect the public. *Klimas v. State*, 75 Wis. 2d 244, 247, 249 N.W.2d 285, 287 (1976).

74. LAIP was successful in obtaining the modification of a defendant's eight-year armed robbery sentence where the defendant had acquired immune deficiency syndrome (AIDS). Attached to the motion was a physician's report that estimated that the defendant's life expectancy was four to eight months. The defendant's family had made arrangements for him to live with them after release. *State v. T.*, No. K-9501 (Milwaukee County Cir. Ct. Feb. 25, 1987).

LAIP had limited success with motions based on the defendant's deteriorated health, but trial judges generally did not favor motions brought on these grounds.⁷⁵ Trial courts articulated two reasons for denying LAIP motions based on health. First, where one trial court was aware of the defendant's condition at sentencing, the trial judge found that the defendant had failed to assert a new factor.⁷⁶ Second, trial courts sometimes articulated a policy of non-interference with matters that lie within the province of the Wisconsin Department of Health and Social Services.⁷⁷

E. Change in Family Circumstances

A defendant's circumstances may also change when the defendant's family meets with hardship. The effect on the family and society may distinguish this ground from the health ground, which affects primarily the defendant alone. Two LAIP motions which asserted the defendant's family hardship as a new factor were granted.⁷⁸ In both cases, the defendant was a woman, her crime was non-violent, she had a short sentence and she was the only one available to help the family.⁷⁹

75. Only two out of nine LAIP motions brought on the grounds of the defendant's deteriorated health were successful. *State v. T.*, No. K-9501 (granted; defendant had AIDS); *State v. B.*, No. L-2866 (Milwaukee County Cir. Ct. Apr. 25, 1986) (denied; motion based on defendant's mental retardation); *State v. H.*, No. I-704, I-1932 (Milwaukee County Cir. Ct. Oct. 17, 1978) (denied; motion based on recent diagnosis that defendant had muscular dystrophy); *State v. L.*, No. 264-399, 264-392 (Dane County Cir. Ct. Aug. 31, 1979) (granted; defendant had surgery to remove a brain tumor and was partially paralyzed as a result); *State v. R.*, No. H-5544, H-9114 (Milwaukee County Cir. Ct. May 4, 1979) (denied; motion based on defendant's hypertension and coronary bypass surgery); *State v. S.*, No. E-9861, E-9863 (Milwaukee County Cir. Ct. Mar. 30, 1981) (denied; defendant underwent coronary bypass surgery); *State v. V.*, No. 4893, 4894, 4869 (La Crosse County Cir. Ct. June 23, 1987) (denied; motion based on defendant's diabetic condition); *State v. Wa.*, No. 80-CR-210 (Lincoln County Cir. Ct. Aug. 4, 1982) (denied; motion based on diagnosis of defendant's skin rash as pustular psoriasis); *State v. Wi.*, No. 562 (Clark County Cir. Ct. July 11, 1985) (denied; motion based on defendant's pancreatitis and varicose veins in the stomach which necessitated an operation to remove defendant's spleen).

76. For example, a trial judge denied one motion, stating, "I had the benefit of a thorough presentence investigation. I had considered the facts [sic] that he had mental retardation. . . . I don't believe this is really a new factor or new information other than there is a more thorough examination of him." Transcript of Proceedings on Sentence Modification Motion at 9, *State v. B.*, No. L-2866. (Milwaukee County Cir. Ct. July 24, 1986).

77. In denying the motion, one trial court stated that a defendant's bypass surgery and hypertension were matters that the parole board should consider. *State v. R.*, No. H-5544, H-0114. In denying another motion, a court stated that "whatever changes in the defendant's position have been brought about by the physical malady to which the petitioner has become subject are within the control of the State Department of Health and Social Services and any change in his future status should be left to that agency." Transcript of Proceedings at 3, *State v. H.*, No. I-704, I-1932 (Oct. 16, 1978).

78. *State v. S.*, No. 4962 (La Crosse County Cir. Ct. Nov. 29, 1979); *State v. G.*, No. I-8317 (Milwaukee County Cir. Ct. Sept. 21, 1979).

79. Both defendants were serving two-year sentences: one for theft (*State v. S.*, No. 4962) and one for party to the crime of robbery (*State v. G.*, No. I-8317).

The trial courts modified both sentences in ways that brought about the defendants' immediate release.⁸⁰

F. Cooperation with Authorities

A trial court may modify a sentence where the defendant cooperated with the state after sentencing and where the district attorney supported the motion. Wisconsin case law is silent on whether such cooperation qualifies as a new factor. LAIP motions that asserted cooperation with authorities fell into two categories. One motion asserted that the defendant had cooperated with the district attorney in another prosecution.⁸¹ Other motions were based on the defendant's cooperation with prison authorities regarding incidents within the prison.⁸²

Where the defendant cooperated with the district attorney after sentencing, one court was willing to modify the defendant's sentence.⁸³ Receptiveness to sentence modification in such a case may reflect a recognition that after a defendant is sentenced, the district attorney has no power to reward an inmate for cooperation. Inmate testimony may be important to the interests of the justice system if such testimony is needed to help convict guilty parties. Before a cooperating defendant is convicted, a district attorney may offer concessions in exchange for testimony. Once the cooperating defendant has been sentenced, the most a district attorney can offer is support for a defendant's sentence modification motion or support at a defendant's parole hearing.

One trial court was willing to modify a sentence where the defendant cooperated with prison authorities. A desire to encourage disclosure of potentially dangerous situations within a prison is a defensible basis upon which to grant sentence modification motions. In one case, the court granted such a motion.⁸⁴ Another court, however, invoked a

80. In one case, the court granted a motion to modify the sentence to one year, nine months and 27 days. This allowed the defendant to be released immediately to return to Illinois to support her father who was in poor health and her mother who was about to lose her job. *State v. G.*, No. I-8317.

In the other motion the court modified the sentence to 10 months. The defendant was pregnant when she was sentenced, although no one was aware of that fact at sentencing. The defendant's family was unable to care for the child and it would have had to be placed in a foster home until the defendant's release. *State v. S.*, No. 4962.

81. *State v. B.*, No. G-6215, G-6216 (Milwaukee County Cir. Ct. Sept. 15, 1983) (granted).

82. *State v. M.*, No. 83-CF-44 (Waupaca County Cir. Ct. May 7, 1984) (granted, then vacated, *see infra* note 84); *State v. S.*, No. 113115 (Kenosha County Cir. Ct. May 7, 1982) (denied).

83. The district attorney agreed to support the motion in return for the inmate's cooperation in a Wisconsin Department of Justice investigation. *State v. B.*, No. G-6215, G-6216.

84. One LAIP motion cited as new factors the defendant's report of an assault, subsequent cooperation with the investigation, and the danger to which the defendant was exposed as a

non-interference policy that trial courts employ when matters are under the Wisconsin Department of Health and Social Services' jurisdiction.⁸⁵ The Department has the power to reward an inmate for disclosure of a dangerous situation.⁸⁶ It is also the Department's job to protect inmates if they are in danger as a result of the cooperation. Therefore, it seems legitimate for a court to invoke the non-interference policy in these situations.

IV. COMPARISON OF COMMON LAW AND STATUTORY SYSTEMS

As this study shows, trial courts have used Wisconsin's common law sentence modification system for a wide variety of purposes. Statutory exceptions from other states address some of the grounds that Wisconsin trial courts have accepted as new factors. For example, a New Jersey statute provides an exception to the sixty-day limit usually applicable to sentence modification to permit a defendant's release because of the defendant's illness or infirmity.⁸⁷ Indiana and New Jersey have statutory exceptions allowing a trial court to modify a sentence if the district attorney supports the defendant's motion.⁸⁸ A South Carolina statute allows a trial court to modify a defendant's sentence where the defendant's prior criminal record was not taken into account at sentencing, a situation similar to that addressed in Wisconsin appellate rulings.⁸⁹

An explicit statutory mandate may broaden a trial court's perceived authority to modify sentences. For example, Wisconsin trial courts were left to weigh the conflicting policy considerations involved in modifying sentences based on information known to the defendant but not brought out at sentencing. In contrast, Nevada law gives trial courts a broad mandate to modify a defendant's sentence where the sentence was based on "materially untrue assumptions" and where the

result of that cooperation. The trial court granted the motion. However, the district attorney moved the court to reconsider the reduction. When the court realized that the sentence reduction would result in the inmate's release in two months, it vacated the sentence modification, stating that the defendant should not yet be released. *State v. M.*, No. 83-CF-44 (Waupaca County Cir. Ct. June 25, 1984).

85. One LAIP motion included a letter from the Department of Health and Social Services commending the defendant for his cooperation and stating that he was probably in danger because of his cooperation. Nonetheless, the court stated that it was the department's job to protect the inmate and that cooperation was for the parole board to consider. *State v. S.*, No. 113115.

86. The Department of Health and Social Services can grant the inmate a parole hearing. WIS. ADMIN. CODE § HSS 30.04 (Sept. 1984). It can also transfer the inmate to another institution.

87. *See supra* note 5.

88. *Id.*

89. *Id.* The scope of the South Carolina law may be narrower than the Wisconsin ruling because the South Carolina statute does not, on its face, allow courts to reduce a sentence if the defendant's record is less serious than the court initially believed.

defendant suffers extreme detriment as a result.⁹⁰ Similarly, most trial courts have chosen to employ a policy of non-interference into the province of the Wisconsin Department of Health and Social Services and have refused to modify defendants' sentences to allow them to take advantage of rehabilitation opportunities.⁹¹ The New Jersey legislature has expressly given trial courts the power to modify a sentence to allow a defendant to participate in a custodial or non-custodial drug or alcohol rehabilitation program.⁹² Because the legislature presumably weighed the conflicting policies, the trial courts may feel freer to modify sentences on these grounds.⁹³

No one state is able, however, through narrowly drawn statutory exceptions, to provide the range of relief that Wisconsin trial courts are able to offer. The Wisconsin common law system is especially well-suited to develop sentence modification as a remedy to correct the effects of misinformation or error on a defendant's sentence. Although many state statutes allow trial judges to correct clerical errors in a sentence,⁹⁴ the cases in this study demonstrate that a judge's sentencing intent can be frustrated in ways that go beyond clerical errors. Wisconsin trial courts were able to respond to administrative errors, changes in institutional programs, or the actions of other sentencing jurisdictions. It is unlikely that a statute could capture this variety of circumstances.

V. CONCLUSION

Judged by published case law alone, Wisconsin's common law system has failed to articulate a clear "new factor" definition. The *Rosado* definition leaves unclear the extent to which information known to a defendant at sentencing will be considered to have been "unknowingly overlooked." The Wisconsin Supreme Court has added to the confusion with rulings that may be interpreted as saying that only facts that mandate a sentence reduction meet the "highly relevant" prong of the *Rosado* definition. The court has found new factors in only three cases, all decided prior to the court's articulation of the new factor definition.

The view of sentence modification at the trial court level presented in this Comment paints a different picture. Trial courts went beyond the narrow *Kutchera* ruling and used sentence modification to effect their sentencing intent when it was frustrated by a misunderstanding about

90. See *supra* note 4.

91. See *supra* notes 57-64 and accompanying text.

92. See *supra* note 5.

93. A court that has the discretion to modify may, however, choose not to exercise that discretion in some cases. For example, see *supra* text accompanying notes 69-72 for a discussion of some Wisconsin trial courts' reluctance to modify a defendant's sentence based on an error in his or her prior criminal record.

94. See *supra* note 5.

the effect of the sentence or by administrative or clerical errors. Trial courts also modified sentences when specialized correctional programs failed to materialize and to coordinate a defendant's Wisconsin sentence with sentences in other jurisdictions. Trial courts sometimes reduced sentences based on a defendant's failing health or family hardship. One trial court was willing to use sentence modification to reward a defendant for cooperating with the district attorney after being sentenced.

Nonetheless, trial courts used sentence modification conservatively and followed general policies set out in case law. Trial courts applied the general policy against interference with the functions of the Wisconsin Department of Health and Social Services in deciding motions based on a defendant's health, cooperation with prison authorities, and rehabilitative needs. They were reluctant to modify sentences to allow a defendant access to rehabilitative programs. They were similarly reluctant to test the limits of the new factor definition on the extent to which information known to the defendant at sentencing may be considered a new factor. Even in the face of clear appellate rulings allowing sentence reduction based on information about the defendant's prior record, trial courts did not always grant sentence reductions.

Viewed as a whole, Wisconsin's common law sentence modification system has proven to be a successful experiment in state post-conviction criminal procedure. State statutory exceptions to a trial court's lack of jurisdiction provide more explicit guidance to trial courts in deciding whether to modify a defendant's sentence in some cases. Statutory exceptions allowing trial courts to modify sentences in narrowly specified circumstances do not, however, allow trial courts the flexibility to modify sentences that trial courts have enjoyed under the Wisconsin common law system.

KATHERINE R. KRUSE AND KIM E. PATTERSON