STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2008AP1139

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OMER NINHAM,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Brown County, the Honorable J. D. McKay, Presiding

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ARGUMENT

THIS COURT SHOULD REPUDIATE THE COURT OF APPEALS' "FRUSTRATES THE PURPOSE" REQUIREMENT FOR SENTENCE MODIFICATION

The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), submits this non-party brief to address the applicable standards for evaluating requests for sentence modification based on the presence of a new factor. Specifically, WACDL asks this Court to repudiate the Court of Appeals' misplaced mandate that, in addition to meeting the requirements for modification established by this Court, the defendant *also* must show that existence of the new factor "frustrates the purpose" of the original sentence.

A. New Factors - Basic Analysis

While the trial court may not revise a sentence merely upon "reflection," ***Scott v. State***, 64 Wis.2d 54, 59, 218 N.W.2d 350 (1974), Wisconsin law grants the court discretion to modify a sentence upon a showing of a new factor. ***State v. Hegwood***, 113 Wis.2d 544, 546, 335 N.W.2d 399 (1983). The applicable standard

requires, first, that the defendant "demonstrate that there is a new factor justifying a motion to modify a sentence." ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609 (1989). Second, the Court must make the discretionary determination "whether the new factor justifies modification of the sentence." ***Id.***

Not all changes in circumstance after sentencing qualify as a new factor. *E.g.*, ***State v. Crochiere***, 2004 WI 78, ¶14, 273 Wis.2d 57, 681 N.W.2d 524. Rather, 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 the parties." ***Rosado v. State***, 70 Wis.2d 280, 289, 234 N.W.2d 69 (1975).

Whether a change in circumstance is a new factor is a question of law reviewed *de novo*. ***State v. Stafford***, 2003 WI App 138, ¶12, 265 Wis.2d. 886, 667 N.W.2d 370 (Ct. App. 2003). However, whether a new factor justifies sentence modification is an exercise of the circuit court's discretion and reviewed for erroneous exercise of discretion. ***Id.***

B. The Court of Appeals' "Frustrates the Purpose" Requirement

The Court of Appeals first introduced the requirement that a new factor "frustrate the purpose" of the original sentence in ***State v. Michels***, 150 Wis.2d 94, 441 N.W.2d 278 (1989). Michels filed a motion with the trial court, asserting that his deteriorating health constituted a new factor entitling him to sentence modification. ***Id.*** at 96. The trial court denied the motion, suggesting that health concerns ought be addressed by the custodial agency and the Department of Health and Social Services. ***Id.*** Michels appealed and the court of appeals affirmed. ***Id.*** at 96, 100.

Although Michels relied upon this Court's definition of "new factor" in ***Rosado***, *supra*, the Court of Appeals opined "that the case law since ***Rosado*** has limited the new factor standard to situations where the new factor frustrates the purpose of the original

sentencing." 150 Wis.2d at 97; *see* ***id.*** at 99:

> We conclude that a "new factor" must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing - something which strikes at the very purpose for the sentence selected by the trial court.

Concluding that health problems are more appropriately addressed by the prison system and the parole commission and that Michels' worsening health did not frustrate the sentencing court's original intent, the Court of Appeals affirmed denial of his sentence modification motion. ***Id.*** at 99-100.

C. Because the Court of Appeals' "Frustrates the Purpose" Requirement Conflicts with Prior Law and Makes No Sense, this Court Should Repudiate It

In imposing its new "frustrates the purpose" requirement, the ***Michels*** Court cited to four cases: ***Rosado***, *supra*; ***Hegwood***, *supra*; ***State v. Krueger***, 119 Wis.2d 327, 351 N.W.2d 738 (Ct. App. 1984); and ***State v. Sepulveda***, 119 Wis.2d 546, 350 N.W.2d 96 (1984). However, none supports its holding.

In ***Rosado***, the defendant sought modification based on a newfound willingness to tell his side of the story. 70 Wis.2d at 288. This Court defined "new factor," ***id.*** at 288-89; *see* Section A, *supra*, and denied his request, holding that his decision to remain silent at the sentencing hearing was not "unknowingly overlooked," but instead tactical. ***Id.*** at 288-89. The ***Rosado*** Court made no suggestion that the new factor must frustrate the purpose of the sentencing court.

In ***Hegwood***, the defendant sought modification of his sentence based on the legislature's subsequent reduction of the maximum penalty for the crime for which he was convicted. 113 Wis.2d at 545-46. This Court concluded that the reduction of the maximum penalty was not "highly relevant to the imposition of sentence" because the reduced maximum penalty could not be

retroactively applied. ***Id.*** at 547-48. Once again, the Court did not suggest that a new factor must frustrate the purpose of the sentencing.

In ***Krueger***, the defendant sought modification of his sentence for two reasons. First—similar to the request in ***Michels***—the defendant cited the need to receive specialized treatment unavailable where he was incarcerated. Second, the defendant cited to his post-conviction conduct as indicative of his remorse and positive change. 119 Wis.2d at 333. The Court of Appeals held that the sentencing judge was aware of the shortcomings of the custodial agency in addressing treatment needs and anticipated his rehabilitation, so confirmation of those facts were not new. ***Id.*** at 333-35. The Court also held that signs of post-conviction change ought be addressed by the custodial agency, not the sentencing court. ***Id.*** Yet again, therefore, the Court denied relief because the factors were not new, not because they failed to frustrate the sentencing court's purposes.

Although the decision in ***Sepulveda*** used the term "frustrates the purpose," it likewise does not support the Court of Appeals' engrafting of that language as a requirement for sentence modification. In ***Sepulveda***, the defendant was convicted of abduction and personating a peace officer and the court read in two counts of lewd and lascivious behavior. 199 Wis.2d at 548. The sentencing court adopted the presentence recommendation that Sepulveda be placed on probation, but with the condition that he voluntarily admit himself for inpatient treatment at Mendota Mental Health Institute, and stayed a six-year period of incarceration. ***Id.*** at 548-49.

After Mendota denied Sepulveda admission, the probation department unsuccessfully sought to revoke his probation, and the state then asked the trial court to reconsider the grant of probation. The court held a hearing and then vacated the original sentence and instead sentenced Sepulveda to three years imprisonment on the abduction charge and concurrent time on the impersonation count. The court explained that the defendant's denial of responsibility for

his actions, which led to his rejection from Mendota constituted a "new factor" under ***Rosado*** permitting the imposition of the new sentence. ***Id.*** at 549-50.

This Court affirmed, holding that "the trial judge possessed the authority to modify probation to include incarceration when the primary condition becomes unachievable, thereby circumventing the intent behind the grant of probation." ***Id.*** at 556. The Court's basic rationale was that, because Sepulvada's admission to Mendota was, in effect, a precondition or prerequisite to probation, the failure of that precondition rendered the probation a nullity, authorizing the sentencing court to effectuate its original intent. ***Id.*** at 555-56; *see* ***id.*** at 569-70 (Abrahamson, J., concurring). The Court noted, however, that the sentencing court's authority to vacate probation without revocation is limited and should be used "only . . . where the judge's intent behind the grant of probation is completely frustrated due to the failure of a primary condition." ***Id.*** at 557.

Although the Court based its holding on the statutory authority to modify the terms and conditions of probation under Wis. Stat. §973.09(3)(a), 119 Wis.2d at 557, 560, it went on to analogize to other circumstances in which the courts are authorized to consider new evidence, such as when a prior sentence is vacated on the defendant's motion or where modification is sought on "new factors" grounds. ***Id.*** at 557-62. In upholding the trial court's exercise of discretion, the Court noted that "[t]he untreatable nature of the defendant's personality disorder is clearly *similar to* a "new factor" in resentencing and justifies the inclusion of incarceration in the court's power to modify the terms of probation under section 973.09(3)(a)." 119 Wis.2d at 560 (emphasis added).

While noting that the particular new factor here "entirely frustrated the judge's intent and circumvented the dual purposes of probation," ***id.*** at 560-61, the Court neither held nor suggested that frustrating the sentencing court's intent was necessary, as opposed to sufficient, to establish a new factor for purposes of sentence modification as opposed to in the specific circumstances of

Sepulveda. Yes, the Court held that frustration of the sentencing court's purpose in imposing probation must have been "completely frustrated due to the failure of a primary condition" for the court to exercise its power *under §973.09(3)(a)* to substitute incarceration for probation. 119 Wis.2d at 557. However, nothing about the Court's analysis in applying that requirement in the specific circumstances of ***Sepulveda*** rationally applies to "new factors" analysis under ***Rosado***.

The context of ***Sepulveda*** is critical. The Court there was construing the circuit court's power to *increase* punishment, with all its attendant Constitutional considerations, not its authority to modify a sentence by reducing it on "new factors" grounds. Moreover, the Court did not state that the sentence modification standards of ***Rosado*** applied to the unique situation in ***Sepulveda***; rather, it analogized to those standards in addressing the court's authority to modify the terms of probation *under §973.09(3)(a)*. ***Id.*** at 557, 560-61 (evidence "similar to a 'new factor' in resentencing").

The ***Michels*** Court's conclusion that these cases "limited the 'new factor' standard to situations where the new factor frustrates the purpose of the original sentencing," 150 Wis.2d at 97, accordingly is just wrong. By seeking to impose limitations on the authority to modify sentences granted by this Court, moreover, the Court of Appeals exceeded its authority. ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246 (1997) (Supreme Court is the only court with authority to overrule, modify, or withdraw language from a prior appellate case).

The "frustrates the purpose" requirement also simply makes no sense. This Court established the "new factors" test in ***Hayes v. State***, 46 Wis.2d 93, 175 N.W.2d 625 (1970), holding that a sentencing court properly reduced Hayes' sentence upon learning that its view of Hayes' prior record at the original sentencing was incorrect. ***Id.*** at 106-07. The Court rejected prior authority allowing modification or even an increase in sentence during the same term of court. ***Id.*** at 99-106. The unanimous Court dismissed concerns for finality in favor of fairness:

> 'We are aware there are counter arguments to the modification of our present rule, i.e., that the sentencing process must at some point come to an end and there are other ameliorative devices such as appellate review of sentencing or the pardoning power to provide relief. Within reasonable limits we think an unjust sentence should be corrected by the trial court. It is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably.

Id. at 105.

The traditional, ***Rosado*** standards grant the sentencing court the ability to correct an unjust sentence when presented with new factors that, if known to the court at the time of the original sentencing, would have caused it to impose a different sentence. Those standards simultaneously prevent modification based on "mere reflection." At the same time, the requirements that the court identify new factors, as defined in ***Rosado***, and exercise "sound sentencing discretion" when modifying a sentence, ***Hayes***, 46 Wis.2d at 106, distinguish valid modification from impermissible reductions based on "mere reflection" or for "shock treatment." *See, e.g.*, ***State v. Wuensch***, 69 Wis.2d 467, 472-75, 479, 230 N.W.2d 665 (1975). The requirement that defendants prove existence of the new factor by clear and convincing evidence, ***Franklin***, 148 Wis.2d at 8-10, further protects against baseless sentence modifications.

Unlike the situation in ***Sepulveda***, where the "frustrates the purpose" requirement protected the defendant from an unwarranted *increase* in punishment, ***Michels'*** application of that requirement to sentence modification based on new factors does nothing to enhance correction of unjust sentences. Indeed, as generally misapplied by the lower courts, that requirement perpetuates unjust sentences by preventing sentencing courts from exercising their discretion when presented with evidence meeting the ***Rosado*** standards that, if known at the original sentencing, would have caused them to impose lesser sentences, but which does not "frustrate the purpose" of the original sentence.

At the same time, ***Michels'*** application of that standard to sentence modifications adds nothing to the ***Rosado*** standard in terms of preventing the unjustified modification of sentences based on mere reflection. Rather, the *only* effect of the "frustrates the purpose" requirement in sentence modification cases is to leave in place unjust sentences that would be modified under the traditional ***Rosado*** standards.

This result is especially odd given that sentence modification under ***Hayes*** and ***Rosado*** rests in the court's sound exercise of discretion and is not based on a finding of blameworthiness. Compare, for instance, sentencing challenges based on error by one of the participants. If the failure to provide information to the sentencing court is due to counsel's ineffectiveness, the defendant need only show a reasonable probability of a different result, ***Williams v. Taylor***, 529 U.S. 362 (2000), not that the error frustrated the sentencing court's purpose. Likewise, when the court relies on inaccurate information in violation of due process, the question is not whether correcting the false information frustrates the sentencing court's purpose, but whether the error is harmless beyond a reasonable doubt. ***State v. Tiepelman***, 2006 WI 66, ¶3, 291 Wis.2d 179, 717 N.W.2d 1. In either circumstance, resentencing is mandatory without meeting ***Michels'*** frustration requirement. Yet, when correction of an unjust sentence for which no one is to blame is delegated to the sound discretion of the sentencing court, ***Michels*** mandates a higher burden. That makes no sense.

The ***Michels*** requirement also is unworkable. *See, e.g.*, ***Scott***, 64 Wis.2d at 59-60 (rejecting suggestion sentencing court could modify sentence in absence of new factors to comply with original intent). Rarely, if ever, does the sentencing court have a single purpose for the sentence imposed. Often, those purposes are in conflict. Would a changed circumstance that frustrated one purpose while enhancing another meet the ***Michels*** standard?

Finally, even if ***Michels'*** frustration requirement could somehow be deemed reasonable, a rational application of that

standard renders it meaningless. A Wisconsin sentencing court is required to impose a sentence that is sufficient, but no more punitive than necessary, consistent with the gravity of the offense, the character of the defendant, and protection of the public. ***McCleary v. State***, 49 Wis.2d 263, 182 N.W.2d 512 (1971); *see* ***State v. Gallion***, 2004 WI 42, ¶¶23, 44, 270 Wis.2d 535, 678 N.W.2d 197. A central purpose of every sentence imposed in this state is to comply with this legal obligation. As such, *any* new fact or circumstance that meets the ***Rosado*** definition and which the sentencing court indicates would have caused it to impose a lesser sentence if it had known it at the time would frustrate that court's purpose of imposing the least punishment consistent with the purposes of sentencing. The only practical effect of ***Michels***, therefore, is to mislead or confuse lower courts into believing that the "frustrates the purpose" requirement *restricts* the court's ability, otherwise permissible under ***Rosado*** to correct unjust sentences.

D. This Court's Application of the "Frustrates the Purpose" Requirement

This Court has applied ***Michels'*** "frustrates the purpose" standard in only one case. In ***State v. Crochiere***, 2004 WI 78, 273 Wis.2d 57, 681 N.W.2d 524, the defendant argued that traditional sentence modification law should be changed in light of Truth-in-Sentencing to reflect the absence of parole to account for many factors the courts previously deemed insufficient for sentence modification. ***Id.*** ¶1.

In rejecting that argument, the Court relied in part on ***Michels***, noting that the alleged new factors did not frustrate the purpose of the sentence imposed. ***Id.*** ¶¶21-22. However, Crochiere had not challenged the validity of ***Michels'*** restrictions on sentence modification and the Court merely took them as a given without critical analysis. The Court's result, moreover, would not have changed without them. The circuit court had concluded that evidence of the defendant's child support obligations would not have made a difference in the original sentence, ***id.*** ¶21, so that evidence would not have been "highly relevant to the imposition of sentence."

Rosado, 70 Wis.2d at 288. Likewise, the defendant's rehabilitation in prison would not constitute a "new factor," regardless of ***Michels'*** frustration requirement because, as this Court noted, "it is likely that circuit courts sentence with the hope that rehabilitation will occur." ***Crochiere***, ¶22. As such, at least where the sentencing court does not state otherwise, post-sentencing rehabilitation is not new and modifying the sentence on this ground accordingly would demonstrate "mere reflection" rather than application of a new factor under ***Rosado***.

* * *

Michels' frustration standard thus was and is wrong as a matter of law and policy and undermines the purpose of sentence modification to correct unjust sentences. Also, because that standard furthers no legitimate state interest, its repudiation implicates no reliance interests. *Stare decisis* accordingly does not prevent this Court from doing so. ***Johnson Controls v. Employers Ins. of Wausau***, 2003 WI 108, ¶¶98-99, 264 Wis.2d 60, 665 N.W.2d 257. *See* ***id.*** ¶99 (better to admit error and overturn erroneous decision than to perpetuate injustice).

CONCLUSION

For these reasons, WACDL asks that the Court repudiate ***Michels'*** unnecessary "frustrates the purpose" requirement for sentence modification based on new factors.

Dated at Milwaukee, Wisconsin, December 7, 2010.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,991 words.

____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 7th day of December, 2010, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

____
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