STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

No. 2010AP002232-CR
(Milwaukee County Case No. 1990CF903680)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEMIAN HYDEN MCDERMOTT,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appeal from the Final Decision and Order
Entered in the Milwaukee County Circuit Court,
the Hon. Kevin E. Martens, Presiding

Robert R. Henak
State Bar No. 1016803

HENAK LAW OFFICE, S.C.
316 N. Milwaukee St., Ste. 535
Milwaukee, Wisconsin 53202
[414] 283-9300

Amelia L. Bizzaro
State Bar. No. 1045709

BIZZARO LAW LLC
2266 N. Prospect Ave., Ste. 310
Milwaukee, Wisconsin 53202
[414] 224-5326

Counsel for the Defendant-Appellant

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1. Whether the post-conviction court erroneously exercised its discretion by summarily adopting the state's partisan arguments as its decision denying McDermott's motion to modify his sentence.

The post-conviction court summarily adopted wholesale the arguments in the state's brief as its decision, declining to provide any independent analysis or acknowledgment of McDermott's arguments. R62, App. 1.

2. Whether the circuit court erroneously exercised its discretion when it denied McDermott's motion to modify his sentence despite McDermott's demonstration that new factors existed warranting modification.

The circuit court summarily adopted the state's arguments as its decision, making it unclear whether the court denied McDermott's motion because it believed he did not demonstrate a new factor or because it believed the new factors he presented did not warrant modification of his sentence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under WIS. STAT. (RULE) 809.22. Appellant's arguments are substantial and oral argument would enhance this Court's understanding of the complex issues raised here.

McDermott's entitlement to relief is clear under established authority and accordingly, publication is likely not justified. WIS. STAT. (RULE) 809.23.

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STATEMENT OF THE CASE

By criminal complaint filed on October 20, 1990, the state charged Demian McDermott with one count of first-degree intentional homicide, while armed as party to a crime, contrary to WIS. STAT. §§940.01(1), 939.05, and 939.63(1)(a)(2). McDermott was four days past his 18th birthday at the time. R2.

The charges arose from an incident in which McDermott, Phillip Torsrud and others arranged to buy half a pound of marijuana from Francisco Questell. R2. When Questell arrived with the marijuana, however, Torsrud shot and killed him. The state's theory at trial, which the jury apparently accepted, was that the homicide was a natural

consequence of a planned armed robbery. R41:6; *see also id*. at 11. Although the robbery/homicide involved a number of people, the state only charged three.

A jury convicted McDermott after a trial. R26. On November 19, 1991, the circuit court, the Hon. Jeffrey A. Wagner, presiding, sentenced McDermott to life imprisonment without the possibility of parole until 2025. R28.

In addressing the court at sentencing, McDermott explained how he had changed since being incarcerated prior to trial. "In the last thirteen months I learned many valuable lessons. First of all, I have learned that the life I was living was wrong, that dealing with drugs, the messing with drugs, the reckless attitude that I had – Just that I didn't have any respect." R41:19. McDermott also made a commitment to change.

> At this point I am not totally rehabilitated, but I am striving. I have got the attitude. I am going to better myself. I don't want to be the same Demian McDermott. I want to earn back my respect. I don't want people looking at me, saying he's a cold blooded murderer or he's a drug dealer, stay away. I don't want people to be uncomfortable around me.

Id. at 21.

In sentencing McDermott, the court considered the gravity of the offense, McDermott's character, and the need to protect the public. R41:22. The court acknowledged that Phillip Torsrud was the actual shooter, but found it inconceivable that the crime was anything but premeditated. R41:22-23. The court found that the rehabilitation McDermott sought would be available in prison. R41:23.

The court held that, based on the nature of the offense,

something more than a life sentence was necessary. It decided to set a parole eligibility date, finding that the only mitigating factor was McDermott's age. R41:24. But, the court acknowledged, in addition to punishment the sentence must also provide "some light at the end of the tunnel." R41:24. The court determined that "some light" meant life imprisonment without the possibility of parole until 2025. *Id*. The court based this determination, in part, on its observation that "I'd never feel comfortable around you knowing what I've read in this case." *Id*. The court also based its sentence, in part, on its belief that it is "necessary that a message be sent to the rest of your friends who are probably somewhat culpable..." *Id*. at 25.

On March 25, 2010, McDermott simultaneously filed a motion to modify his sentence based on new factors with supporting attachments and a motion for post-conviction relief pursuant to WIS. STAT. 974.06. R54, R55, R56, R57. Through Attorney June Simeth, the court informed McDermott that his motions would be rejected because their combined length exceeded 20 pages. R58. McDermott objected to the court's proposed action, but agreed to withdraw his WIS. STAT. §974.06 motion without prejudice and to re-file it later. R58.

After briefing, R60-R61, the circuit court, the Hon. Kevin Martens presiding, denied McDermott's motion on June 15, 2010 in a three-sentence order:

> On March 25, 2010, the defendant by his attorney filed a motion for sentence modification based on new factors. The court ordered a briefing schedule to which the parties responded. For all of the reasons set forth in the State's excellent brief, which the court adopts as its decision in this matter, the court denies the defendant's motion as well as the evidentiary hearing he requests.

R62, App. 1. McDermott timely filed a notice of appeal on September 8, 2010. R63. At McDermott's request, and without

opposition from the state, this Court stayed the briefing in this matter pending the Wisconsin Supreme Court's decision in ***State v. Ninham***, 2011 WI 33, __ Wis.2d __, 797 N.W.2d 451. *See* 11/16/10 Order. On June 2, 2011, this Court reinstated briefing and ordered McDermott to file his brief within 40 days. *See* 6/2/11 Order. Pursuant to that Order, this brief follows.

ARGUMENT

I. The Post-Conviction Court Erroneously Exercised its Discretion by its Wholesale Adoption of the State's Brief as its Decision

The circuit court erroneously exercised its discretion by adopting the state's brief wholesale as its decision denying McDermott's motion to modify his sentence. The court's actions denied McDermott an independent and neutral evaluation of his motion and in the process denied this Court an adequate record for appellate review.

A. The Post-Conviction Court Erroneously Exercised its Discretion

Rather than take the necessary time to explain, in its own words, why it denied McDermott's motion or why it rejected McDermott's explanation of why the state was wrong, *see* R61, the circuit court merely adopted the "excellent brief" of the state. R62, App. 1. Such a failure was error, as the Seventh Circuit has explained:

> A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and

> why it rejected contrary views.

DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990) (citations omitted). Such wholesale adoption of a party's brief "obscures the reasoning process of the judge,…deprives the court of the findings that facilitate intelligent review,….and causes the losing litigants to conclude that they did not receive a fair shake from the court." ***Walton v. United Consumers Club, Inc.,*** 786 F.2d 303, 313 (7th Cir. 1986). It presents the judge as "a mouthpiece for the winning party…rather than a disinterested evaluator of the several advocates' urgings." ***Id.***

> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

Bright v. Westmoreland County, 380 F.3d 729, 732 (3rd Cir. 2004).

Wisconsin authority is in accord. Although a court may adopt a party's arguments, it must "articulate the factors upon which it based its decision." ***Trieschmann v. Trieschmann,*** 178 Wis.2d 538, 542, 504 N.W.2d 433 (Ct. App. 1993). It must explain in non-conclusory terms *why* it found the party's position to be convincing. ***Id.*** at 542-44 (court misuses discretion by merely adopting party's position "without stating any reasons for doing so other than its believe that doing so was the 'only just solution'"). *Compare* ***In the Interest of Joy P.***, 200 Wis.2d 227, 241, 546 N.W.2d 494 (Ct. App. 1996) (no misuse of discretion where court discussed reasoning in adopting state's position).

Here, the circuit court gave no explanation for either its adoption of the state's brief as its decision or its implicit rejection of McDermott's explanation of why the state's arguments were invalid, thereby failing to "indicate the factors which it relied on in making its decision and state those on the record." ***Trieschmann***, 178 Wis.2d at 543; R62, App. 1. The circuit court's actions thus reflect not merely the erroneous exercise of discretion by failing to explain its wholesale adoption of the state's arguments, but an abdication of its judicial role. *See* ***Bright***, 380 F.3d at 731-32 (reversing and remanding in absence of evidence that fact-finding by adoption of party's arguments was product of judge's independent judgment). *See also* SCR Ch. 60, Code of Judicial Conduct, Preamble ("Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us…The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.") Here, the circuit court neither identified what specific arguments or facts in the state's brief it found compelling nor why, rendering appellate review impossible.

There can be no dispute that the state's brief, on its own, is an "argumentative, partisan submission[]." ***DiLeo***, 901 F.2d at 626. Indeed, the state's brief (and now the lower court's decision) makes its arguments in the alternative, arguing both that McDermott's proposed new factors do not meet the test for a new factor, but even if they did, they do not warrant sentenced modification. R60, App. 2-10. Thus, there is no way of know why the court denied McDermott's motion — because his proposed factors did not meet the test for a new factor, or because they did, but did not warrant modification.

The court has a responsibility to do more than merely declare a winner. Rather, the circuit court must explain the basis for its decision – what arguments were persuasive and

why. ***Trieschmann***, *supra.* It must articulate the standard of review it used to evaluate the case and apply the law to the specific facts. It did none of that. Indeed, even its decision relying on the state's "excellent brief" declines to explain *why* it was "excellent." R62, App. 1. The court's complete and total failure to do anything more than declare the state the victor is error that prevents adequate appellate review. Accordingly, this Court should remand this case to the circuit court for an actual, reviewable decision.

II. New Factors Justify Modification of McDermott's Sentence

The circuit court imposed life imprisonment without the possibility of parole until 2025, in part based on its observation that "I'd never feel comfortable around you knowing what I've read in this case." R41:24. Since his incarceration, McDermott has assisted in preventing crime through his participation in several programs. That, coupled with the fact that there is confirmation of his pre-sentencing transformation and new understanding of how adolescents make decisions, are new factors that warrant modification of McDermott's sentence. The circuit court erred by not so finding.

A. Standard of Review

The trial court, in exercising its discretion, may modify a sentence upon a showing of a new factor. ***State v. Hegwood***, 113 Wis.2d 544, 546, 335 N.W.2d 399, 401 (1983). The applicable standards are well settled. First, the court must determine whether a new factor exists. ***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***. The circuit court has the inherent power to modify its sentencing judgment after the execution of the sentence imposed has commenced. ***Hayes***

v. State, 46 Wis.2d 93, 101, 175 N.W.2d 625 (1970); ***State v. Krueger***, 119 Wis.2d 327, 351 N.W.2d 738, 741 (Ct. App. 1984).

Whether a fact or set of facts is a new factor is a question of law that this Court reviews *de novo.* ***State v. Stafford***, 2003 WI App 138, ¶12, 265 Wis.2d 886, 667 N.W.2d 340. However, whether a new factor justifies sentencing modification is an exercise of the circuit court's discretion and is reviewed under the erroneous exercise of discretion standard. ***Id.***

B. The Test for Determining the Existence of a New Factor

A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but which is 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." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 60 (1975).

Following ***Rosado***, this Court determined that a new factor must be an event or development that frustrated the purpose of the original sentence. ***State v. Johnson***, 210 Wis.2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997); *see also* ***State v. Michels***, 150 Wis.2d 94, 96-97, 441 N.W.2d 278 (Ct. App. 1989) ("[t]here must be some connection between the factor and the sentencing – something [that] strikes at the very purpose of the sentence selected by the trial court.")

As a result, over the years two lines of cases had emerged in new factor litigation, one stemming from the definition of a new factor in ***Rosado*** and one stemming from ***Michels***, which required frustration of the original sentence.

In ***State v. Harbor***, 2011 WI 28, __ Wis.2d __, __ N.W.2d __, the Wisconsin Supreme Court clarified which line of cases to follow. The ***Harbor*** Court concluded "frustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor." ***Id***. at ¶48. Thus, whether a proposed new factor frustrates the purpose of the original sentence is irrelevant for purposes of determining whether it meets the ***Rosado*** definition of a new factor. The court may, but is not required to, consider whether a proposed new factor frustrates the purpose of the original sentence, "[i]n determining whether to exercise its discretion to modify a sentence on the basis of a new factor[.]" ***Ninham*** at ¶89.

C. McDermott's Assistance in Preventing Crime, Confirmation of his Pre-Sentencing Transformation, and Enhanced Understanding of the Adolescent Brain are New Factors Justifying Modification of his Sentence

Contrary to the circuit court's apparent concession, the existence of three new factors warrants modification of McDermott's sentence. First, since his incarceration, McDermott has actively participated in programs designed to influence juveniles away from a life of crime. Not only are others comfortable around McDermott, but he has persuaded juveniles to make better decisions, demonstrating his ability to prevent crime in our communities. *See* ***State v. Doe***, 2005 WI App 68, 280 Wis.2d 731, 697 N.W.2d 101. Second, while post-sentencing rehabilitation is generally not a new factor, confirmation of a transformation begun before sentencing is. Finally, scientific testing now confirms that the portions of adolescent brains associated with impulse control, regulation of emotions, risk assessment and moral reasoning are not fully developed. Because McDermott's brain finished developing during his incarceration, the likelihood that he will commit a

new crime is severely decreased. He in fact is not the same person as when he committed these crimes. Each of these skew the Court's original assessment of the least amount of punishment consistent with the purposes of sentencing, constituting new factors that justify modification of McDermott's parole eligibility date.

1. McDermott's Assistance in Preventing Crime

Since entering the prison system, McDermott has participated in two programs whose goal was to influence juveniles seemingly destined for the court system to make better decisions. R57. The programs were voluntary and selective; only inmates who demonstrated a willingness to help young people change for the better were allowed to participate. The programs were hard work, requiring active participation and maintaining a standard of behavior for above the norm for those in prison.

McDermott first participated in the Blood-Related Inner City Kids (B.R.I.C.K) Program at Green Bay Correctional Institution from 1995 to 2000. R57:¶2. B.R.I.C.K. targeted teenage juveniles, with the average age being 17. The children were selected based on their problems with the law, at home or at school, and included children living in group homes. R57:¶4. McDermott and other inmate participants would spend every Monday from about 8 to 11 AM with the children. The inmates would share their life stories and relate stories of prison life. The purpose was to encourage a frank discussion regarding the children's lives and provide them with the tools for making better choices. R57:¶5.

Upon being transferred from Green Bay Correctional to Prairie Correctional in Minnesota on June 20, 2000, prison officials selected McDermott for *Project: Tomorrow*. *Project: Tomorrow's* goals were similar to that of the Green Bay

program; however, *Project: Tomorrow* was more regimented. R57:¶6. It was open to both girls and boys, and its participants included adults, families and sometimes teachers. Adults attending the program usually were there out of concern for a particular juvenile. R57:¶7.

The *Project: Tomorrow* inmates met with children every Tuesday from 9 AM to about 2 PM. The program would begin with a mock strip search, to impress upon children the seriousness of the program and explain the rules for participating. These rules included making eye contact with the speakers, paying attention, and answering all questions honestly. Failure to respond with a correct answer would often result in the children doing some menial task (like push-ups, or cleaning the tables or chairs) that would serve as a punitive measure to get the point across that there are consequences for every action. R57:¶9. Next, the inmates introduced themselves and explained why they were in prison. After introductions, McDermott would usually ask children his name. The first couple usually would not know the answer, and the point about paying attention would quickly be made when those who answered incorrectly had to do push-ups. Next, each inmate would make a presentation on a different topic, from school and education to family to prison life to dealing with peer pressure. R:57¶10.

The inmates ate lunch with the children outside of the presence of the program facilitators and chaperones. Lunch was held in a large room, with the inmates and children at one table and the chaperones and facilitators at a table across the room. The groups would be further subdivided so that there would be one or two children to each inmate, providing the inmates with the opportunity to meet one-on-one with the children and tackle hard issues like peer pressure, drug use, abuse, and making good decisions. This was McDermott's favorite part of the day and allowed him to really impact the

children. R57:¶11. While in the program, McDermott and other program participants received numerous letters from children and chaperones describing the positive impact of the program. R57:¶13.

McDermott's participation in both of these programs was voluntary, and in fact, he could have been rejected from the programs despite his desire to participate. However, McDermott survived the strenuous selection process and not only was accepted into two different programs, but was one of the most active members of each one. R57:¶14.

McDermott's actions to prevent crime meet the definition of a new factor. *See* ***State v. Doe***, 2005 WI App 68, 280 Wis.2d 731, 697 N.W.2d 101 (assistance to law enforcement "that could prevent crimes or bring the guilty to justice" are new factors as a matter of law). First, it was not known at the time of sentencing, as McDermott only had the opportunity to become involved in the programs after he was sentenced. Second, McDermott's actions were highly relevant to the imposition of sentence.

Like providing assistance to law enforcement to solve crime, McDermott's actions to prevent crime meet the definition of a new factor. McDermott helped prevent crime by his participation in these programs just as if he had called law enforcement with a tip. Although McDermott's actions did not lead to specific arrests, his active participation helped prevent an untold number of crimes from being committed by juveniles who, without McDermott's intervention were identified as likely to have acted otherwise. Participation in B.R.I.C.K and *Project: Tomorrow* was specific, structured, and had the Department of Corrections been so inclined, measurable.

McDermott played a specific role and impacted participants in a particular way. A letter from a friend or family member certainly would not rise to the level of a new factor, and McDermott is not suggesting otherwise, despite the circuit court's adopted decision's suggestion. R60:3, App. 4. But participation in specific, regimented programs that have strict criteria for admission and, most importantly, are designed so the inmate helps prevent future crimes, does rise to the level of a new factor. McDermott's assistance in preventing future crime in this manner was unknown at the time of sentencing. He may not have worked directly with a law enforcement official or on a specific case, but his participation in both programs helped to prevent crimes, achieving the goal of ***Doe***.

A Wisconsin sentencing court has an overriding obligation to impose "the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***State v. Gallion***, 2004 WI 42, ¶¶23, 44, 270 Wis.2d 535, 678 N.W.2d 197, *quoting* ***McCleary v. State***, 49 Wis.2d 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). While the Court's purpose here was to comply with this obligation at the original sentencing, the identified new factor dramatically skews that sentencing calculus.

McDermott's participation in both crime prevention programs goes directly to both his character and the need to protect the public — key considerations at the time of sentencing. Originally, the circuit court found that consideration of the gravity of the offense, McDermott's character, and the need to protect the public combined to equal a sentence without parole eligibility until 2025.

The gravity of the offense will never change. Repeatedly calling the crime "horrific" as the state/circuit court did, does

not change that. R60:3, 5, 8, App. 4, 6, 9. But the gravity of the offense is not the only factor the court must consider at sentencing. As required by Wisconsin law, it also considered McDermott's character and the need to protect the public. Both of those considerations are mitigated by McDermott's assistance to law enforcement. Like Doe's efforts to help find and convict a particular criminal, McDermott's work to prevent crime thus alters the weight the circuit court applied to the three key sentencing factors and constitutes a new factor.

2. Confirmation of McDermott's Pre-Sentencing Transformation

Due, in part, to its uncertainty regarding the sincerity of McDermott's commitment to change, and its belief that it could never feel comfortable around McDermott, the court deemed life imprisonment with the possibility of parole only after 35 years to be the least amount of punishment consistent with the purposes of sentencing. *See* ***McCleary***, *supra*. However, McDermott's actions over the past 19 years remove that uncertainty upon which the original sentence was based, and frustrate the Court's intent to impose no more punishment than is necessary to satisfy the purposes of the sentence. ***Id***.

At sentencing, McDermott addressed the Court and noted that he had learned a lot in his 13 months of pre-trial incarceration. R41:19.

> At this point I am not totally rehabilitated, but I am striving. I have got the attitude. I am going to better myself. I don't want to be the same Demian McDermott. I want to earn back my respect. I don't want people looking at me, saying he's a cold blooded murderer or he's a drug dealer, stay away. I don't want people to be uncomfortable around me.

Id. at 21.

McDermott has made good on these promises, and his actions over the 19-plus years since sentencing negate the uncertainty that led the court to deny parole eligibility until he had served 35 years in prison. Providing this certainty regarding the sincerity of McDermott's transformation thus is a "fact highly relevant to the imposition of sentence" that was unknown because "it was not then in existence." ***Rosado v. State***, 70 Wis. 2d at 288.

In assessing the least amount of punishment consistent with the purposes of sentencing in this case, the sentencing court weighed the uncertainty of McDermott's transformation against his role in Francisco Questell's death. R41:22. Had the court known that McDermott's transformation in fact was sincere, the scales would have weighed differently, with his sincerity mitigating against the perceived need for such a lengthy period before parole consideration to protect the community or to address his character.

To be clear, McDermott is not arguing that his post-sentencing rehabilitation *per se* is a new factor, despite the circuit court/state's suggestion to the contrary. R60:5, App. 6. Because courts generally sentencing with the hope or expectation that prison will rehabilitate the defendant, fulfillment of that expectation alone is not a new factor. ***State v. Crochiere***, 2004 WI 78, 273 Wis2d 57, 681 N.W.2d 254.

McDermott's argument here is different. The sentencing court imposed a particular parole eligibility date based on its perception that McDermott could be rehabilitated as expressed in its belief that it would "never feel comfortable around you knowing what I've read in this case." R41:24. McDermott is arguing that the attainment of his goals and proving that he in fact could be rehabilitated, something the sentencing court was uncertain he could accomplish, is the

new factor. McDermott's conduct puts to rest any doubt the court had about his ability to change.

It is that confirmation, not the simply fact that he is rehabilitated, that is the new factor. Had the sentencing court known that McDermott would meet his goals — that people could in fact feel comfortable around him — the least amount of punishment necessary would have been less than what the sentencing court actually imposed.

3. Application of Adolescent Brain Research

Until recently, everything that was known about the adolescent brain was learned largely from autopsies, which shed little light on how the brain develops over time. MRI brain imaging, however, allows researchers to study how a live brain develops. Technological breakthroughs have not only allowed researchers to confirm what they already believed, but have provided new evidence that has revolutionized the way scientists understand the development of the brain from early childhood through adulthood. *See* Elizabeth R. Sowell, et al, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatial Regions*, 2 NATURE NEUROSCIENCE 859 (1999), R56:Attach. B.

Two such observations are that: (1) adolescents rely more strongly on the area of the brain associated with aggression, anger and fear, and (2) the regions of the brain associated with impulse control, risk assessment and moral reasoning develop last – after late adolescence.

Adolescence generally refers to the period of time encompassing the beginning of puberty through the assumption of adult roles. While technically, a person becomes an "adult" when he turns 18 years old, that is not always the practical truth. In neuroscience, for example, adolescence is not over until adult brain function is attached.

Although different from person to person, this generally does not occur until a person's early 20s. This puts McDermott squarely in the category of an adolescent at the time of his crime, despite the fact that he was five days over the age of 18 at the time of his crime.

Basic anatomy makes an adolescent strikingly different from an adult. Not surprisingly, adolescent brains are immature, especially in the areas that "govern control of impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable." National Institute of Mental Health "Teenage Brain: A Work in Progress," April 3, 2004, NIH PUBLICATION NO. 01-4929, R56:Attach. C. MRIs have captured such immaturity on film, revealing physiologically underdeveloped brains in the areas that control impulses, foresee consequences and temper emotions. While science cannot reveal the moral culpability of any adolescent, it can shed light on the adolescent-defendant's level of culpability in the areas long-considered by sentencing courts: character of the offender, need to protect the public, and gravity of the offense.

Adolescents are not just likely to make bad judgments; they are physiologically pre-destined to do so. Risk taking – in any arena, be it drugs, sex, alcohol or criminal activity – is so pervasive that "it is statistically aberrant to refrain from such behavior during adolescence." L. P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV.REV. 417, 421 (2000), R56:Attach. D.

The difference between the adult and the adolescent brain is not that an adolescent cannot determine right from wrong, but in how they think. Ask any adolescent in a driver's education class if it is wrong to drink and drive and he will answer yes. But that same adolescent, when surrounded by a

group of his peers, will likely climb into a car with his friends despite the fact that they all have been drinking. Adolescents tend to focus on the now – the opportunities for gain – rather than the later – the probability of loss. *See* Elizabeth S. Scott, et. al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 233 (1995), R56:Attach. E.

The U.S. Supreme Court recognized as much in holding that the death penalty does not apply to juveniles, citing three universal differences between adolescents and adults:

> First, lack of maturity and underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions...
>
> Second, juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure...
>
> Third, the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Roper v. Simmons, 543 U.S. 551, 569 (2005).

The adolescent brain is in a constant tug-of-war between its rational and emotional centers. The limbic system (the emotional epicenter of the brain) contains the amygdala. The amygdala controls aggressive and impulsive behavior. It is "a neural system that evolved to detect danger and produce rapid protective responses without conscious participation." Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND at 31 (2001). A person's fight or flight response stems from the amygdala. *Id*.

The front lobes, on the other hand, are the rational workhorses of the brain. The ability to regulate emotions, plan, and organize stem from the frontal lobes. Specifically, "the prefrontal cortex is associated with a variety of cognitive

abilities, including decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavior inhibition, impulse control, deception, responses to positive and negative feedback, and making moral judgment." ***Roper v. Simmons***, Brief of Amicus Curiae American Medical Association, et al., at 13-14 (footnotes omitted) (AMA Amicus Brief), R56:Attach. F.

The frontal lobe serves as a check on the amygdala. The more developed the frontal lobes, the more influence it has. As the frontal lobe develops, rationality, risk assessment, and judgment begin to reign over the impulsive behavior and emotions that stem from the amygdala. Ralph Adolphs, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125, 125-126 (1999), R56:Attach. G. *See also* Gargi Talukder, *Decision-Making is Still a Work in Progress for Teenagers*, Report dated July 2000, R56:Attach. H.

Conversely, until the frontal lobes of the brain are developed, there is no "check" on the impulsive behaviors and corresponding emotions that stem from the amygdala. *Id*. During this time period, the amygdala is more active than the frontal lobes. K. Rubia, et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCIENCE & BIOBEHAV. REV. 13, 18 (2000), R56:Attach. I. As the adolescent grows into adulthood, there is a shift from the amygdala-controlled impulsive behaviors to the more rational behavior of adults. *Id*. At this time, adolescence nears an end, and the risky behaviors associated with adolescence begin to disappear. However, this shift is the last to occur in the development of the brain. Emotion (amygdala) overrides reasoning (frontal lobes) well into late adolescence. Nitin Gogtay, et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD. SCI. 8174, 8177 (2004), R56:Attach. J.

The adolescent is further handicapped by his psychological immaturity. Adolescents "score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others, and they have more difficulty restraining their aggressive impulses." Elizabeth Caufmann and Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI & L. 741, 759 (2000), R56:Attach. K.

The immaturity of an adolescent's brain and the lack of social and emotional development make it difficult enough for adolescents to exercise good judgment, but it is virtually impossible when stress, emotions and peer pressure get added to the mix. While stress, emotions and peer pressure undoubtedly affect adult decision-making, they affect adolescents to a much greater degree.

Stress directly affects an adolescent's ability to weigh costs and benefits, and unlike adults, rational thought will not overcome impulses in an adolescent. L. P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417, 423 (2000). Emotions are magnified in an adolescent, in large part because adolescents are so emotionally volatile (which any parent can attest to). *Id*. at 429.

Perhaps the greatest impact on an adolescent's poor judgment is peer pressure. Adolescents also are more prone to peer pressure, which magnifies the likelihood of an already risk-prone and impulsive adolescent making bad judgments. Adolescents spend twice as much time with their peers as with parents or other adults, and they tend to gravitate towards peers who reinforce their own behaviors. *See* AMA Brief, *citing* Jeffrey Jensen Arnett, *Reckless Behavior in*

Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339, 354-55 (1992), R56:Attach. F.

Taken together — an immature brain, lack of social and emotional development, stress, emotions and peer pressure — all serve to increase the likelihood that an adolescent will engage in risky behavior and less likely that an adolescent will be able to control his impulses.

Although not known at the time of McDermott's original sentencing, these facts are critical to the assessment of the least amount of punishment consistent with the purposes of sentencing here. While they do not excuse his actions nor change the gravity of the offense, these scientific discoveries provide new insight into the adolescent mind that directly impact the assessment of both McDermott's character and his risk to the public. They demonstrate, as do the facts in this case, that an adolescent's conduct, character, or risk to the public some years after reaching maturity cannot accurately be predicted based on his or her actions as a youth.

The post-sentencing scientific discoveries also undermine the sentencing court's reliance upon general deterrence of similarly situated young people as justification for the lengthy time to parole eligibility. Because of the impulsive nature of adolescents' behavior, and their general inability to recognize consequences, sentencing a particular adolescent in the hopes of deterring others is an exercise in futility. Adolescents are incapable of looking past the moment into the future, not because they are ignoring future consequences, but because they are unable to see them at all. *See* ***Thompson v. Oklahoma***, 487 U.S. 815, 835 (1988) ("[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an

adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.") (footnote omitted); *see also* ***Roper*** at 1996 ("the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.")

Here, the Court explicitly relied on the principles of deterrence when it sentenced McDermott:

> Based on the fact that you didn't have any previous contacts with the system, but because of the horrendous nature of this act, regardless whether you've had previous contacts, the Court fe[e]ls it necessary that a message be sent to the rest of your friends who are probably somewhat culpable, but not to the extent you were.

R41:24-25.

The post-sentencing scientific discoveries regarding the adolescent brain thus undermine the purposes of the original sentence and constitute a new factor on this ground as well. Given that the extended time to parole eligibility was based on an inaccurate assessment of McDermott's character and the need to protect the public, and cannot have the intended deterrent effect, the Court's original assessment of the least punishment consistent with the purposes of sentencing is once again skewed.

This entire body of research, as it applies to McDermott, thus is a new factor, because by significantly skewing the Court's assessment of the least amount of punishment consistent with the purposes of sentencing, it is highly relevant to the imposition of sentence and was unknown at the time of the original sentencing because it was not then in existence. ***Rosado***, 70 Wis.2d at 288. The portion of the research that confirmed what was already known about the

adolescent brain is also a new factor, as it was overlooked by all of the parties, despite its existence. ***Id***.

a. *State v. Ninham*

In ***Ninham***, the Supreme Court addressed whether research about adolescent brain development was a new factor. ***Ninham*** at ¶¶87-93. The Court found that Ninham did not demonstrate that a new factor existed on the facts of his case. ***Id.*** at ¶91. That decision does not stand for the proposition that advancements in adolescent brain development research may never ben a new factor, simply that Ninham did not prove it was a new factor "for purposes of modifying Ninham's particular sentence." ***Id.*** at ¶93. The Court left unanswered the question of whether the new research would constitute a new factor when the full effects of adolescent brain development were in fact unknown to the circuit court in a given case or, if previously known, overlooked.

Here, the circuit court/state assumed a level of understanding that simply did not exist in 1991. It assumed that, because the sentencing court acknowledged McDermott's age at the time of sentencing, it knew everything that subsequent research shows that to entail — that "adolescents and young adults are subject to impulsivity, recklessness, peer pressure, and poor decision making sills which, for the vast majority of persons, subside with the passage of time due to physical, mental and emotional maturation." R60:7, App. 8. Calling such knowledge "part of the universal, categorical wisdom of mankind" is taking it a little far. R60:6, App. 7. While generally, people may have understood there was a difference between adolescents and adults, the science did not specifically explain the reasons for that difference until recently. The scientific explanation and its specific impact on the defendant's culpability and rehabilitative potential is the new factor — not the general

sense that a 14-year-old might act differently than a 45-year-old. *See also* ***Graham v. Florida***, 130 S.Ct. 2011 (2010) *citing* AMA Brief ("…developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.")

Unlike in ***Ninham***, there is nothing to show there that the sentencing court knew or understood the actual impact of McDermott's youth on his culpability and rehabilitative potential. The circuit court/state *assumed* a level of understanding not revealed in the sentencing transcript. While the sentencing court considered McDermott's culpability and character, it did not weigh the impact of his physical, mental, and emotional maturation on those factors.

D. The Existence of Such New Factors Warrants Modification of McDermott's Sentence

Because McDermott has demonstrated the existence of new factors, this Court must next evaluate whether the circuit court's refusal to modify McDermott's sentence was an erroneous exercise of discretion. ***State v. Stafford***, 2003 WI App 138, ¶12, 265 Wis.2d 886, 667 N.W.2d 340.

"[T]he exercise of discretion is not the equivalent of unfettered decision-making." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981). A discretionary act "must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." ***Id.*** Moreover, "a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Id.***

When the circuit court relies on the relevant facts in the record and applies the correct legal standard to reach a reasonable decision, it has properly exercised its discretion. ***State v. LaCount***, 2008 WI 59, ¶76, 310 Wis. 2d 85, 750 N.W.2d 780. However, an erroneous exercise of discretion occurs when the court's factual findings are unsupported by the evidence or when it applies an erroneous view of the law. ***State v. Martinez***, 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989). A decision based on an error of law is not entitled to deference on review. ***State v. Giwosky***, 109 Wis. 2d 446, 452, 326 N.W.2d 232 (1982).

For the reasons stated in Section I, *supra*, the post-conviction court's adoption of the state's brief of its brief was itself an erroneous exercise of discretion. But more than that, the contents of state's brief/court decision further demonstrated an erroneous exercise of discretion.

The circuit court/state refused to acknowledge the existence of any new factors, despite McDermott's demonstration that new factors exist. As a result, the circuit court/state never analyzed whether modification was appropriate based on those new factors and the facts of this case. Such a refusal to apply the law to the facts was an erroneous exercise of discretion. As demonstrated herein, amply reasons justify modification of McDermott's sentence.

There is no dispute regarding the gravity of this offense. As the sentencing court acknowledged at McDermott's sentencing, however, the sentence here must not only serve to punish the offender, but also must provide "some light at the end of the tunnel." R41:24. In the instant case, modification is warranted because McDermott's work with at-risk children, confirmation of his transformation, and application of adolescent brain research go to the very heart of the factors this Court considered at sentencing.

Since incarcerated, McDermott's brain, like all adolescents, has matured, eliminating the likelihood that he will act impulsively, or will act without an understanding of the consequences. The majority of adolescents who commit violent crimes grow out of it by the time they reach adulthood, as demonstrated in arrest statistics. Arrests among teenagers 15 to 19 outpace arrests of any other age group, but there is a sharp decrease after age 19. *See Rethinking the Juvenile in Juvenile Justice: Implications of Adolescent Brain Development on the Juvenile Justice System*, WISCONSIN COUNCIL ON CHILDREN AND FAMILIES (March 2006) at 9, *citing* arrest data from the Office of Justice Assistance, and census estimates from the Department of Health and Family Services, R56:Attach. L. McDermott is no exception.

McDermott's lack of impulsive behavior and his ability to understand the consequences of his actions since his sentencing is not merely a product of his environment. Admittedly, a secure setting such as a prison limits an inmate's ability to act out. However, McDermott's conduct in prison has demonstrated that, like his brain, he has matured. If he had not, his prison records would be littered with conduct reports demonstrating his inability to conform to prison rules. *See* McDermott's Inmate Classification Report revealing no conduct reports, R56:Attach. A.

Because of his age, McDermott was also more likely to be rehabilitated than an older offender sentenced for a similar crime. The ***Roper*** Court recognized this:

> Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of

> irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

543 U.S. at 570 (citations omitted).

Evidence of McDermott's inability to understand the consequences of his actions at the time of his crime is evident in his comments to the court at sentencing. "When I was out there, I thought about money. I had all the friends. I had all the girls. I had all the good times, and its gotten me into trouble." R41:19. It was not until McDermott was in jail that he recognized the serious consequences of his actions. Once he recognized the seriousness of the consequences, he also seemed to recognize his need to continue to grow up. As he explained at sentencing:

> At this point I am not totally rehabilitated, but I am striving. I have got the attitude. I am going to better myself. I don't want to be the same Demian McDermott. I want to earn back my respect. I don't want people looking at me, saying he's a cold-blooded murderer or he's a drug dealer, stay away. I don't want people to be uncomfortable around me.

R41:21.

Today, McDermott is totally rehabilitated. As described *infra*, he has participated in two programs whose goal was to influence juveniles seemingly destined for the court system to make better decisions. *See* R57. The programs were voluntary — McDermott was not required to participate. The programs were selective — only those who demonstrated a willingness to help young people change for the better were allowed to participate. The programs were hard work, requiring active participation and maintaining a standard of behavior for above the norm for those in prison.

His participation in these programs is further evidence that his brain is fully matured. As a result, he is unlikely to reoffend, and as a result is not a danger to he community. The sentencing court's reliance on its impression that McDermott would always be a danger to the community is thus unfounded. The research presented herein demonstrates that the court's perception of the least amount of custody necessary to meet the goals of sentencing was skewed.

McDermott's efforts to curtail crime must be rewarded by a modification of his sentence or, as the ***Doe*** Court noted, the lack of reward will act as a disincentive for prisoners to work with law enforcement to prevent or reduce crime. *See* ***Doe***, 2005 WI App 68, ¶10. Since his incarceration, McDermott has lived an exemplary life. Not just an exemplary prison life, but an exemplary life. He has not stopped with bettering only himself; he has worked to pass the lessons he has learned onto at-risk children. These are characteristics that would serve the community rather than harm it.

Reducing the time before McDermott is eligible for parole would not unduly depreciate the gravity of the offense. Although mandating a life sentence for offenses such as this, the legislature recognized that not everyone convicted of first-degree intentional homicide deserves imprisonment for life, allowing instead for parole eligibility after as little as 13 1/3 years. Even with a reduction in time to parole eligibility, McDermott will still be serving a life sentence and will not be released until and unless the Parole/Earned Release Review Commission, based on current and accurate information, determines under all the circumstances that he can be released safely.

The new factors shown by McDermott here demonstrate that the court's original assessment of the least amount of punishment consistent with the purposes of

sentencing was skewed. The fact that McDermott had not yet assisted the state in trying to reduce or prevent crime, the court's unawareness of adolescent brain development research, and its uncertainty at sentencing regarding the sincerity of McDermott's transformation elevated concerns over McDermott's character and, consequently, the court's view of his risk to the public. The new factors provide the court an accurate perception of McDermott's character and risk to the public, calling for a reduced time before parole eligibility to meet the Court's obligations under ***McCleary***.

CONCLUSION

McDermott has met both prongs of the test for modification of his sentence. He has demonstrated both the existence of new factors and that such existence warrants modification. For these reasons, McDermott respectfully asks that this Court reverse the circuit court's order denying his motion to modify his sentence and remand for resentencing.

McDermott has further demonstrated that the circuit court erred when it adopted the state's brief as its decision, thereby abdicating its role. Accordingly, reversal is warranted at the very least for a remand to the circuit court for a full decision that this Court may review.

Dated at Milwaukee, Wisconsin, July 12, 2011.

Respectfully submitted,

BIZZARO LAW LLC
Counsel for CLIENTNAME,
Defendant-Appellant

Amelia L. Bizzaro
State Bar No. 1045709
2266 N. Prospect Ave, Suite 310
Milwaukee, Wisconsin 53202
[414] 224-5326 [phone]
[414] 255-3484 [fax]
abizzaro@bizzarolaw.com

Robert R. Henak
State Bar No. 1016803
Henak Law Office, S.C.
316 N. Milwaukee St., Ste 535
Milwaukee, Wisconsin 53202
[414] 283-9300 [phone]
[414] 283-9400 [fax]
henaklaw@sbcglobal.net

FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 8,456 words.

Amelia L. Bizzaro

ELECTRONIC FILING 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, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

Amelia L. Bizzaro

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the 12th day of July, 2011, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Demian Hyden McDermott to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin, 53701-1688.

Amelia L. Bizzaro