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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

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ARGUMENT

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

The state's reasoning is based on a faulty premise, and should be ignored. The state suggests that the circuit court's error is harmless because sufficiency of a post-conviction motion is a legal issue reviewed *de novo*. State's Brief at 4-5. Contrary to the state's apparent belief, appropriate circuit court evaluation of legal issues is not a meaningless gesture on the road to appellate review. *Cf.* ***State v. Balliette***, 2011 WI 79, ¶29, ___ Wis.2d ___, ___ N.W.2d ___ (ineffectiveness claims cannot be reviewed on appeal absent circuit court motion). Neither the parties nor this Court are well-served by encouraging circuit courts to merely rubber-stamp one party's

pleadings with the understanding that this Court will "sort it out" later.

Circuit courts are obliged to consider the submissions of the parties before it and issue a written decision reflecting its *independent* judgment. "We require the circuit court 'to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion.'" ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis2d 568, 682 N.W.2d 433 *quoting* ***Nelson v. State***, 54 Wis.2d 489, 497, 195 N.W.2d 629 (1972). Merely adopting a party's brief without explanation— whether it be the defendant's or the state's — is an abdication of that responsibility. Certainly, whether the circuit court must meet its obligations cannot be dependant on whether the issue is a matter of law or not, as the state argues.

There is no support for the state's position. The case overlooks two key differences between the cases it cited and this case: (1) this case does not involve proposed findings of facts and conclusions of law; and, more importantly, (2) the court here never explained why it was persuaded by one party's proposed findings of facts and conclusions of law. Those were the key differences in ***Interest of Joy P.***, 200 Wis.2d 227, 546 N.W.2d 494 (Ct. App. 1996). There, the Court permitted adoption of the state's brief, but acknowledged it was "not…a picture-perfect example of a statement of findings of facts and conclusions of law." ***Id.*** at 241. The key difference, however, between "adequate" (as in ***Joy P.***) and inadequate (as in here) is that at least in ***Joy P.***, the lower court explained *why* it was adopting the state's position. Here, as in ***Trieschmann v. Trieschmann***, 178 Wis.2d 538, 543, 504 N.W.2d 433 (Ct. App. 1993) no such explanation exists. Accordingly, ***Joy P.*** is distinguishable.

Kersten v. H.C. Prange Co., 186 Wis.2d 49, 60, 520 N.W.2d 99 (Ct. App. 1994) applies even less for the reason's it

explained: ***Kersten*** was "a contract dispute and consequential damages are to be determined by the fact finder, which happens to be the trial court. We therefore review the entire record, not just the trial court's explanation, in determining whether there is any credible evidence to support the factual finding." ***Id***. (citation omitted). Unlike here, the circuit court in ***Kersten*** made independent findings of fact, merely using one party's factual summary to guide its damage calculations. ***Id.*** at 60. Given the circuit court's failure to explain what it found or why, this case falls squarely within ***Trieschmann,*** not ***Kersten***.

Clear on its face is the fact that this is not a case in which the parties submitted proposed findings of fact and conclusions of law and then the circuit court chose among them. Had that happened, the state's citations to case law perhaps would have been relevant. ***Bright v. Westmoreland County***, 380 F.3d 729, 732 (3rd Cir. 2004), State's Brief at 5, makes the point for McDermott: "[j]udicial 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 at a specific decision."

II. New Factors Justify Modification of McDermott's Sentence

McDermott has long acknowledged that ***State v. Doe***, 2005 WI App 68, 280 Wis.2d 731, 697 N.W.2d 101 focused on a specific tip to law enforcement that lead to a particular arrest. But attempting to distinguish ***Doe*** on the specific facts of that case ignores the underlying principle that those who assist law enforcement in preventing crime are deserving of credit for doing so. ***Id.*** at ¶10.

The ***Doe*** Court looked to the federal sentencing guidelines, particularly §5K1.1, for guidance, not to create a specific test because "[r]emarkably, there are no published cases in Wisconsin touching on whether post-sentencing substantial assistance to law enforcement is a new factor." ***Doe*** at ¶8. The fact that McDermott may not meet the criteria for a §5K1.1 downward departure does not mean that he has not met the test for a new factor. As §5K1.1 points out itself the factors are just part of the court's assessment, but the court's analysis is in no way limited to those factors. ***Doe*** at ¶9 *quoting* U.S.S.G. §5K1.1 (policy statement). ***Doe*** specifically referred to the prevention of crime, which McDermott undoubtedly did. He has demonstrated a new factor. *See also* Brief at 10-14.

The programs that McDermott was involved in were highly selective, with strict criteria for admission. He played a specific role in these structured and regimented programs specifically designed to prevent children from getting involved with crime. *See* Brief at 10-12. It was not a program designed to rehabilitate an inmate, but rather to assist law enforcement in a way law enforcement officers cannot do themselves.

Despite acknowledging that ***State v. Harbor***, 2011 WI 28, __ Wis.2d __, __ N.W.2d __, eliminated the requirement that a new factor frustrate the purpose of the original sentence, the state opposes McDermott's proposed new factor based on confirmation of his pre-sentencing transformation on just those grounds. State's Brief at 20. Dressing the argument up as one of relevancy does not disguise from what it is — an argument based on the now-defunct opinion in ***State v. Michels,*** 150 Wis.2d 94, 441 N.W.2d 278 (Ct. App. 1989). McDermott need not demonstrate that confirmation of his pre-sentencing transformation frustrated the purpose of his original sentence. Rather, he need only show, as he has, that it was a fact highly relevant to the imposition of his sentence,

which was not known at the time of sentencing because it was not then in existence. ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 60 (1975). *See also* Brief at 14-16.

McDermott does not now claim, nor has he ever, claimed that rehabilitation alone is a new factor. In fact, he has acknowledged, from the beginning, that it is not. *See* Brief at 15. Rather, removing the uncertainty existing at the time of sentence regarding the sincerity of McDermott's commitment to change is a new factor. Not the fact that he is rehabilitated. Here, the difference is that the sentencing court expressed its doubt about whether McDermott's commitment to change was sincere, noting it would never feel comfortable around him. R41:24. But McDermott's actions over the last 20 years prove otherwise. This is not a person who tells an agent what he thinks the agent wants to hear in order to 'game' the system. Rather, McDermott's actions in the last *two decades* prove that transformation the Court doubted was in fact real. That confirmation — not McDermott's rehabilitation — is the new factor

State v. Ninham, 2011 WI 33, __ Wis.2d __, 797 N.W.2d 451, is not persuasive here. There, the circuit court knew and accounted for adolescent brain development. Here, it appears the sentencing court did not. Whether the court below knew about the impact of adolescent brain development (and if it knew, nonetheless overlooked it) is an unresolved question of fact. Here, the circuit court never expressed any knowledge of adolescent brain development at the time of McDermott's sentence.

The state attempts to rewrite history in opposing McDermott's new factor based on juvenile brain research. State's Brief at 23. That juveniles are different than adults was not universally known in the 1990s, when McDermott was sentenced. In fact, the opposite is true. The '90s saw a wave of

reforms that treated juveniles like adults more than ever before in response to a perceived increase in violent crime by adolescents. The legislature increased the minimum sentences for a variety of crimes, and waived juveniles into adult court with startling frequency.[1] Judges across the country seemed to forget what they knew as parents — that children are different from adults — and instead treated juveniles as short adults. Once waived into adult court, juvenile defendants received adult sentences. Gone were the goals of rehabilitation and the recognition that those committing crimes due to immaturity were less culpable, and in place were favorably looked upon longer sentences.

In line with this new atmosphere and following the trend of other states around the country, Wisconsin rewrote the juvenile justice code in 1995, removing it from the children's code and placing it next to the criminal code. As a result, the legislature created an entirely new set of laws for dealing with delinquent children. JUVENILE JUSTICE: A WISCONSIN BLUEPRINT FOR CHANGE, 1995, R61:13-56. It was also during the 1990 that Wisconsin statutorily excluded 17 year olds from the juvenile justice system and gave adult courts original jurisdiction over the most serious crimes allegedly committed by children 10 years and older. WIS. STAT. §938.183(1)(am) (1996). In the past decade, MRI research has provided the proof necessary to show how adolescents are in fact different and less culpable that adults, and to swing the pendulum back in favor of treating adolescents differently than adults. But at the time the circuit court sentenced

[1] According to the National Council on Crime and Delinquency's June 2006 Fact Sheet, R61:7-12 there was a 208 percent increase in the number of youth under 18 serving time in adult jails between 1990 and 2004. "The number of youth under age 18 in adult jails rose sharply through the 1990s to a high of almost 9,500 in 1999 and then leveled off to an average of just 7,200 since 2000." Fact Sheet at 3. R61:9.

McDermott, the pendulum had not yet begun to swing back toward middle ground. *See also* Brief at 16-29.

CONCLUSION

For these reasons and those stated in his brief, McDermott respectfully requests that this Court reverse the circuit court's order denying his post-conviction motion and remand for a hearing on his request to modify his sentence.

Dated at Milwaukee, Wisconsin, September 2, 2011.

Respectfully submitted,

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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 reply brief produced with a proportional serif font. The length of the brief is 2,010 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 2nd day of September 2011, I caused 10 copies of the Reply Brief 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.

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