STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2011AP2821-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN M. LEHMAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDERS DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY, THE HONORABLE DENNIS R. CIMPL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the "Argument" portion of its brief.

ARGUMENT

LEHMAN'S DEFENSE COUNSEL WAS NOT INEFFECTIVE, AND THE CIRCUIT COURT DID NOT ERR IN DENYING LEHMAN'S VARIOUS MOTIONS FOR SENTENCE MODIFICATION.

I. APPLICABLE LEGAL PRINCIPLES AND STANDARDS OF REVIEW.

A. Regarding Ineffective Assistance Of Counsel.

To establish prejudice from counsel's performance in the case of a plea of guilty or no contest, the defendant must show that but for counsel's alleged deficiencies, the defendant would not have pleaded guilty or no contest and, instead, would have proceeded to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶18, 296 Wis. 2d 834, 723 N.W.2d 719.

To prove that his attorney's performance was deficient, the defendant must establish that counsel's representation fell below an objective standard of reasonableness. *Thiel*, 264 Wis. 2d 571, ¶19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986).

The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217. Whether a better defense could have been presented in retrospect is not the test for ineffectiveness. *State v. Robinson*, 177 Wis. 2d 46, 56, 501 N.W.2d 831 (Ct. App. 1993). The defendant's attorney does not have to present the best defense, but only a defense that was reasonable under the circumstances. *Robinson*, 177 Wis. 2d at 56; *State v. Felton*, 110 Wis. 2d 485, 501-02, 329 N.W.2d 161 (1983). Importantly, trial counsel's failure to make a meritless objection does not constitute deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. Finally, "[a] strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

The defendant must demonstrate that his attorney made serious mistakes that could not be justified under an objective standard of reasonable professional judgment. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). Further, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (citation omitted). In evaluating a deficiency claim, the court should not "second guess trial counsel's selection of trial tactics or strategies." *State v. Nielsen*, 2001 WI App 192, ¶26, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted).

Secondly, the defendant must "offer more than rank speculation to satisfy the prejudice prong." *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). The test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687; *Johnson*, 133 Wis. 2d at 222. The defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense." *State v. Koller*, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838. "The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome." *Id.*

As the *Lockhart* court observed:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. . . . As we explained in *Strickland v. Washington*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker."

Lockhart, 474 U.S. at 59-60 (citation omitted).

On appellate review, ineffective assistance of counsel cases present a mixed question of fact and law. The circuit court's factual findings will be upheld unless

clearly erroneous; whether counsel's performance was deficient and prejudicial to the defense is a question of law reviewed *de novo*. *State v. Mayo*, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115.

B. Regarding The Necessity Of A Postconviction Hearing.

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. *Allen*, 274 Wis. 2d 568, ¶9. First, an appellate court must "determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [an appellate court] review[s] *de novo*." *Id.* "If the motion raises such facts, the circuit court must hold an evidentiary hearing." *Id.* However, "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id.* In so deciding, the circuit court is required "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Allen*, 274 Wis. 2d 568, ¶9.

Appellate review of a circuit court's conclusion regarding the decision to hold a postconviction hearing is the "deferential erroneous exercise of discretion standard." *Id.* Further, a defendant must present facts that allow a reviewing court to "meaningfully assess a defendant's claim . . . those facts that are *material* to the issue presented to the court. A 'material fact' is: '[a] fact that is significant or essential to the issue or matter at hand.'" *Allen*, 274 Wis. 2d 568, ¶22 (citing *Black's Law Dictionary* 611 (7th ed. 1999)).

Indeed, "[n]ot all motions require evidentiary hearings." *Allen*, 274 Wis. 2d 568, ¶10 (citing 9 Wiseman, Chiarkas and Blinka, *Wisconsin Practice: Criminal Practice and Procedure* § 11.5 (1996)). Where an evidentiary hearing has been requested, one is not automatically granted, because the court "does not have to hold an evidentiary hearing on a motion just because a party asks for one." *Allen*, 274 Wis. 2d 568, ¶10 (quoting *State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999)).

Specifically, a defendant's claim of ineffective assistance of counsel may be denied without an evidentiary hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." *Allen*, 274 Wis. 2d 568, ¶9.

Conversely, before a defendant can prevail on a claim of ineffective assistance of counsel, counsel must have been given a chance to explain the challenged deficiency. *See State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Thus, if a defendant's claim of ineffective counsel cannot be resolved on any of the foregoing grounds for not holding a postconviction evidentiary hearing, the defendant's remedy is an evidentiary hearing, not a reversal of conviction. *See, e.g.*, *State v. Love*, 2005 WI 116, ¶2, 284 Wis. 2d 111, 700 N.W.2d 62.

C. Regarding A Circuit Court's Exercise Of Sentencing Discretion.

As this court recognized in *State v. Scherreiks*, 153 Wis. 2d 510, 451 N.W.2d 759 (Ct. App. 1989):

> Our review is limited. Sentencing is a discretionary act. The presumption is that the sentencing court acted reasonably. The defendant must show an unreasonable or unjustifiable basis in

> the record for the sentence complained of. A strong policy exists against interference with the discretion of the sentencing court. We will not interfere unless the court abused its discretion, and we will find no abuse of discretion if we find a reasonable basis for the court's determination.

Scherreiks, 153 Wis. 2d at 517 (citations omitted).

Indeed, with regard to allegedly harsh or excessive sentences, our supreme court has recognized:

> An abuse of this discretion will be found only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

Ocanas v. State, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (citation omitted).

In *State v. Hall*, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, this court further expounded upon the principles stated in *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971):

> In *McCleary*, the supreme court articulated the importance of creating a sentencing record that highlights the sentencing judge's logic in an explainable manner:
>
> > It is thus apparent that the legislature vested discretion in the sentencing judge, which must be exercised on a rational and explainable basis. It flies in the face of reason and logic, as well as the basic precepts of our American ideals, to conclude that the legislature vested unbridled authority in the judiciary when it so carefully spelled out the duties and obligations of the judges in all other aspects of criminal proceedings. . . .
> >
> > . . . .

> It is thus clear that sentencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed.
>
> [T]here must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.
>
> [T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth. . . .

Hall, 255 Wis. 2d 662, ¶10 (quoting *McCleary*, 49 Wis. 2d at 276-77) (internal citations omitted).

Specifically, a circuit court's determination of a defendant's eligibility for the Challenge Incarceration Program (CIP) is discretionary. *State v. Lehman*, 2004 WI App 59, 270 Wis. 2d 695, 677 N.W.2d 644. So too is a circuit court's determination of a defendant's eligibility for the Earned Release Program (ERP). *State v. White*, 2004 WI App 237, 277 Wis. 2d 580, 690 N.W.2d 880. A circuit court need not separately state its rationale in finding a defendant ineligible for CIP or ERP beyond the factors normally considered at sentencing. *State v. Owens*, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187 (ERP), *Lehman*, 270 Wis. 2d 695, ¶18 (CIP).

D. Regarding Circuit Court Review Of A Postconviction Motion To Modify Sentence.

A circuit court has the "inherent power" to modify a previously imposed sentence after the sentence has commenced, *State v. Wuensch*, 69 Wis. 2d 467, 472-73,

230 N.W.2d 665 (1975). However, it may not reduce a sentence merely upon "reflection" or second thoughts. *Wuensch*, 69 Wis. 2d at 480.

A court may do so, however, on the basis of "new factors," or when it concludes its original sentence was "unduly harsh or unconscionable":

> While the trial court may not revise a sentence merely upon "reflection," it may review its sentence for abuse of discretion based upon its conclusion that the sentence was unduly harsh or unconscionable. If the sentence is to be reduced upon those grounds, the trial court should set forth its reasons why it concludes the sentence originally imposed was unduly harsh or unconscionable.

Cresci v. State, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979) (citations omitted).

In *State v. Crochiere*, 2004 WI 78, 273 Wis. 2d 57, 681 N.W.2d 524, the Wisconsin Supreme Court summarized "new factor" jurisprudence as follows:

> In order to obtain sentence modification based on a new factor, an inmate must show that: (1) a new factor exists; and (2) the new factor warrants modification of his or her sentence. A new factor is not just any change in circumstances subsequent to sentencing. Rather, it 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.

> A new factor has been further defined as "an event or development which frustrates the purpose[1] of the original sentence." A defendant must prove a new factor by clear and convincing evidence.

Crochiere, 273 Wis. 2d 57, ¶14 (citation omitted).

In addition, the *Crochiere* court noted:

> In order to succeed on a claim for sentence modification based on a new factor, an inmate must prevail in both steps of new factor analysis by proving the existence of a new factor and that it is one which should cause the circuit court to modify the original sentence. Accordingly, we point out that if a circuit court concludes that the facts shown are insufficient to constitute a new factor, as a matter of law, it need go no further in its analysis to decide the inmate's motion. Or, in the alternative, a circuit court may assume that a new factor does exist, without articulating the first step of new factor analysis, if the court concludes that in the exercise of its discretion, the alleged new factor is insufficient to warrant sentence modification.

Crochiere, 273 Wis. 2d 57, ¶24 (citation omitted).

Thus, a "new factor" is "more than a change in circumstances since the time of sentencing." *State v. Trujillo*, 2005 WI 45, ¶13, 279 Wis. 2d 712, 694 N.W.2d 933.

Whether a fact or set of facts constitutes a "new factor" is a question of law for independent review. *Trujillo*, 279 Wis. 2d 712, ¶11. If a "new factor" exists as a matter of law, the court must then, in the exercise of its discretion, determine whether the new factor justifies sentence modification. *Id.*

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[1]In *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, our supreme court clarified that "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." *Harbor*, 333 Wis. 2d 53, ¶48.

Sentencing discretion enjoys a strong presumption of reasonableness. *State v. Setagord*, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997). Thus, when a circuit court concludes that a "new factor" exists, but does not warrant sentence modification, the defendant must show some "unreasonable" or "unjustified" basis for the court's exercise of discretion. *Id.*

With respect to appellate review of the circuit court's exercise of discretion under the second prong of the "new factor" test, this court has explained:

> We review the trial court's discretionary determination of whether a new factor warrants sentence modification deferentially. We will sustain a discretionary determination if it is the product of a rational mental process and is "demonstrably . . . made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. . . . It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another . . . court may not reach, but it must be a decision which a reasonable . . . court could [reach]. . . . "

State v. Verstoppen, 185 Wis. 2d 728, 741, 519 N.W.2d 653 (Ct. App. 1994) (citation omitted).

II. APPLICATION OF PRINCIPLES AND STANDARDS TO FACTS OF THIS CASE.

A. Lehman's Defense Counsel Was Not Ineffective, And Nothing Presented To The Circuit Court Or This Court Conclusively Demonstrates Otherwise.

Lehman contends that his defense counsel was ineffective for failing to adequately investigate alleged "alibi" witnesses as to the August 28, 2008 and July 18, 2008 burglaries (counts 1 and 2) and a witness to whom

Lehman supposedly admitted stealing a bike which was outside the victim's home as to the July 18, 2008 (count 2) burglary (Lehman's Brief at 9-12).

Lehman submitted two postconviction motions regarding the above; one on February 25, 2010 (24), and another on July 11, 2011 (52, 53). The circuit court denied both motions, the first by written order dated March 1, 2010 (27), and the second by written order dated November 14, 2011 (57).

In the first postconviction motion, Lehman contended, without supporting affidavits or other proof from the individuals named or Lehman himself, that:

- Russell St. Jean, Lehman's roommate allegedly saw Lehman purchase the goods relating to the August 28, 2008 burglary;
- Amber Bossahart, Lehman's ex-girlfriend, was with Lehman on August 28, 2008, and thus Lehman had an alibi;
- Krista Smith, a friend to whom Lehman spoke regularly on the phone and who would vouch that Lehman said he stole a bike from outside the garage, not inside it, regarding the July 18, 2008 burglary.

(24:2-3, 9-13.)

In its March 1, 2010 decision denying postconviction relief, the circuit court concluded:

> It is completely unknown to the court what the above witnesses would actually have said had trial counsel performed an investigation. The motion is conclusory and self-serving, particularly with regard to witness Krista Smith, whose proposed testimony would have been predicated completely on hearsay—i.e. what the defendant told her. She could offer no personal knowledge of the situation because she was not present when the bicycle was taken. Failure to investigate Smith was neither deficient nor prejudicial.

> Without an affidavit from the other two potential witnesses, the defendant's claims are merely conclusory with any supporting factual data—and insufficient to obtain an evidentiary hearing.
>
> . . . .
>
> Because the defendant's claims with regard to the witnesses he maintains counsel should have investigated are based on mere supposition (not knowing what the witnesses actually would have said), the defendant has not raised an issue of fact which would render counsel's performance suspect or cause the court to hold an evidentiary hearing. Levesque v. State, 63 Wis. 2d 412, 421 (defendant may not stand on conclusory allegations hoping them to supplement them at a hearing).

(27:2-3.)

The circuit court's conclusion is correct: there is nothing concrete which would support a finding that Lehman's defense counsel was deficient, nor is there a likelihood that Lehman would have proceeded to trial because nothing presented to the circuit court (or this court for that matter) provides factual support for such a decision. Because Lehman's postconviction motion alleging ineffectiveness of his defense counsel presented only conclusory allegations, no postconviction hearing was required and the circuit court correctly concluded that defense counsel was not ineffective. *See Allen*, 274 Wis. 2d 568, ¶9.

In the second postconviction motion dated July 11, 2011, Lehman alleged that a witness, Adam Laux, would testify that he saw Lehman purchase some of the stolen goods (purse, credit cards) from the August 28, 2008 burglary from an unidentified man at Wendt's, a bar in Greenfield (52:4). Again, no affidavit or other proof from Laux or Lehman was submitted in support of the July 11, 2011 postconviction motion (*see* 53:5-6).

In its November 14, 2011 postconviction decision, the circuit court again concluded that Lehman's submission was insufficient to warrant a hearing or relief:

> No affidavit has been submitted from Adam Laux. Instead, Laux's testimony has been offered through an affidavit of postconviction counsel via an investigator for the public defender's office. Even assuming that Laux would testify as indicated by postconviction counsel, there has been no sufficient showing that trial counsel provided ineffective assistance for failing to investigate this witness. Trial counsel stated that he had no recollection of the defendant advising him about Laux. Even assuming the defendant had advised counsel about this witness, Laux's testimony does not provide the defendant with a "strong argument" for a lesser charge. Laux does not identify which night he was at Wendt's with the defendant. He did not witness the purchase of stolen goods because this transaction supposedly occurred between the defendant and an unknown man outside the bar. Moreover, Laux has not identified the purse and credit cards that the defendant stated that he purchased as belonging to the victim in the second charged burglary offense. There is no reason to believe that the defendant would have demanded a jury trial based upon the weak testimony offered by Adam Laux, particularly in light of the evidence of his confession. Consequently, the court finds no ineffective assistance of counsel with regard to this witness.

(57:1-2, footnote omitted.)

Because the second postconviction motion which included allegedly new information from witness Adam Laux presented only conclusory allegations, the circuit court correctly denied Lehman's motion without a hearing and concluded that defense counsel was not ineffective. *See Allen*, 274 Wis. 2d 568, ¶9.

Indeed, when pleading guilty, Lehman specifically averred that on July 18, 2008, he had gone into the garage, taken the items including the bike, and that the complaint could serve as a factual basis for Lehman's guilty plea

(34:6-7). Lehman also specifically admitted that he entered the Koehler's apartment on August 28, 2008, with intent to steal (34:6). Lehman has not concretely submitted anything in postconviction proceedings or on appeal which would challenge those conclusions.

Should this court disagree that Lehman's claim of ineffective counsel cannot be resolved on the foregoing ground for not holding a postconviction evidentiary hearing, Lehman's remedy is that evidentiary hearing at which defense counsel would be given the chance to explain the challenged deficiencies. *Curtis*, 218 Wis. 2d at 554-55, *Love*, 284 Wis. 2d 111, ¶2.

B. The Circuit Court's Decision That Lehman Is Ineligible For CIP And ERP Is Well Founded.

Lehman contends that the circuit court erred in determining that he was not eligible for either CIP or ERP because of his relative young age, purported alcohol abuse issues, and his defense counsel's contention that Lehman is at a "turning point" in his life (Lehman's Brief at 12-16).

At the June 17, 2009 sentencing hearing, the circuit court found Lehman ineligible for either program ". . . given the continuing nature of these crimes. They are all the same crimes, and you, sir, are a career criminal" (34:21). The circuit court was referring to the prosecutor's recitation of Lehman's criminal history, which included multiple convictions for burglary, receiving stolen property, and theft (34:14). Further, the circuit court noted that Lehman had spent the "greater part" of the years between 1995 and 2002 incarcerated, which it took as an explanation for why no further incidents had been reported during that time (34:20). Thus, the circuit court determined that Lehman was in the "high risk" category (*id.*).

In its March 1, 2010, order denying sentencing modification on this issue, the circuit court reiterated:

> The court specifically indicated that it would not find him eligible due to his status as a career criminal (twelve felonies and four misdemeanors). Even though the defendant may be statutorily eligible for both programs, it is still within the sentencing court's discretion as to whether or not it will be (sic) make him eligible. The court indicated its reasons for denying eligibility, and it declines to alter its determination…

(27:4-5.)

As noted by the circuit court and above, a defendant's eligibility for CIP and ERP is a discretionary determination which does not require an explicit explanation beyond the normal factors considered by a circuit court in sentencing a defendant. *Owens*, 291 Wis. 2d 229, ¶9 (ERP), *Lehman*, 270 Wis. 2d 695, ¶18 (CIP).

Respectfully, the circuit court's rationale is plain on the record, and should be sustained on appeal. Lehman presented nothing new or different to the circuit court in its postconviction motion seeking eligibility for CIP and ERP, and similarly does not do so now on appeal.

C. RRS Is Not A New Factor.

Lehman contends that the creation of a Risk Reduction Sentence (RSS) constitutes a new factor which warranted resentencing (Lehman's Brief at 16-17). Lehman argues that the circuit court believed punishment was the only option and that no other form of rehabilitation was available when it sentenced Lehman (*id.*).

As an initial matter, Lehman has not presented clear and convincing evidence to show the existence of a "new factor" because there is nothing in the record which

would support an inference that the circuit court wished more treatment options were available when it imposed sentence. *See Crochiere*, 273 Wis. 2d 57 ¶14, "A defendant must prove a new factor by clear and convincing evidence." Indeed, based upon its comments above and conclusions regarding Lehman's eligibility for CIP and ERP, it thought otherwise (*see also* 34:21-22).

Furthermore, in its February 17, 2011 order denying relief on this basis, the circuit court correctly concluded that it had no authority to find Lehman eligible even if it had wanted to do so:

> Moreover, a court does not determine an offender's *eligibility* for a Risk Reduction Sentence under section 973.031; the statute authorizes the court to *order* the offender to serve a Risk Reduction Sentence at the time it imposes a bifurcated section under section 973.01, Stats. The court's authority to order an offender to serve a Risk Reduction Sentence extends to bifurcated sentences imposed on or after the effective date of section 973.031, or October 1, 2009. *See* 2009 Act 28 § 9411(2)(u). The defendant was sentenced prior to the effective date of the statute, and therefore, the court has no statutory authority to order a Risk Reduction Sentence in this case.

(44:1.)

Thus, because Lehman would not have been eligible for a RRS in the first place, the availability of RRS cannot be described as a new factor which could have warranted a modification of Lehman's sentence.

Indeed, as this court stated in *State v. Delaney*, 2006 WI App 37, 289 Wis. 2d 714, 712 N.W.2d 368:

> Delaney contends that Judge Flynn was aware of that parole policy and so must have sentenced him with that in mind-in essence, "oversentencing" him so that 25%, rather than the full term, actually represents the sentence that Judge Flynn intended.

> We decline to join Delaney's speculation as to Judge Flynn's thoughts. Instead, we limit our review to the judge's actual words.

Delaney, 289 Wis. 2d 714, ¶¶11-12; *see also Trujillo*, 279 Wis. 2d 712, ¶21; *State v. Longmire*, 2004 WI App 90, ¶45, 272 Wis. 2d 759, 681 N.W.2d 534; *State v. Franklin*, 148 Wis. 2d 1, 14, 434 N.W.2d 609 (1988) (post-sentencing changes in maximums, classification of crimes, parole policy not new factors).

This court should conclude that RRS is not a new factor, and, in any event, Lehman would not have been eligible for participation even if it were. Therefore, RRS cannot be said to be highly relevant to Lehman's sentence. *See Crochiere*, 273 Wis. 2d 57, ¶14.

D. Lehman's Sentence Was Appropriate Based Upon His Extensive Criminal History Which Largely Consists Of Acts Similar To Those In This Case.

Finally, Lehman argues that his sentence is "grossly disproportionate to the seriousness of these offenses" (Lehman's Brief at 18, 19).

Lehman was sentenced to five years of initial confinement followed by three years extended supervision for each offense, consecutively (16). Thus, Lehman faces a total of ten years of initial confinement and six years of extended supervision.

According to the complaint, Lehman was charged with two counts of burglary in violation of Wis. Stat. § 943.10(1m)(a). Violations of Wis. Stat. § 943.10(1m)(a) are a class F felony, which carry a maximum penalty of a fine not to exceed $25,000 or imprisonment not to exceed

twelve years and six months, or both. *See* Wis. Stat. § 943.10(1m), 935.50(3)(f).

Lehman pled guilty to both charges before proceeding to sentencing on June 17, 2009 (34:2-11). The prosecutor noted Lehman's extensive criminal history, noting similar charges involving theft or burglary which dated back to 1990 (34:14). The prosecutor recommended some form of imprisonment (34:15). Defense counsel recommended some term of initial confinement be imposed, but that it be imposed concurrent to the sentence Lehman was already serving (34:16).

After concluding that Lehman was not eligible for CIP or ERP, and before imposing sentence, the circuit court observed:

> [THE COURT:] And not to give you consecutive time on each one of these offenses would unduly depreciate the seriousness of the offense. I've read the victim impact statements about the emotional effects that you had here, the stress you've caused, the financial loss that you caused. Nicole Koehler writes it sounds like he's been doing this his whole life. His sentence should be increased. He has done nothing before and learned nothing. They all want restitution. Kelley Koehler, I don't ever want to see him again. I was shaking too much to turn on a light. That wasn't even the scariest part. I reached up for my phone which I had on the table a couple of feet away and it was gone. I suddenly realized that this awful person really had been in my sister's apartment and taken my only way to call for help, 'cause she doesn't have a land line and it was late, no one would be outside. Deciding what to do next was the worst time of my life. Should I jump off her second story balcony and run for it. Should I run for a knife. Should I look over the stairwell or would he be there waiting. It was awful. I finally decided to set my car alarm off until someone came for me and I yelled for them to call the police. I have nightmares. I feel sick to my stomach when I go back to her apartment. I hate this person so much for what he did. I mean this is powerful stuff and that's why you've got to get consecutive time for each one of these. Because if I didn't, I—and I saw

> these people, how could I say I didn't punish you. Because that's really all I have left is punishment. Rehabilitation hasn't worked, deterrence to you hasn't worked, so all I've got is punishment.

(34:21-22.)

These remarks from the victim reflect the simple fact that Lehman's crimes cannot be measured solely in dollars and cents, or the fact that no one was physically hurt when Lehman perpetrated them. Rather, the significant emotional and psychological harm of the victims is self-evident. Clearly, the circuit court was cognizant of this fact when it sentenced Lehman. It also made note that a concurrent sentence would unduly deprecate the seriousness of the crimes, and that it was doubtful anything but punishment was appropriate given Lehman's long and repeat criminal history.

Indeed, as the circuit court concluded in its March 1, 2010 order denying sentence modification:

> The defendant's criminal history is abominable. He was facing 25 years in prison for these offenses and received little over half that time. Based on his inability to curb his criminal tendencies and based on the need to protect the public, the sentences are not excessive or unduly harsh.

(27:4.)

As our supreme court has recognized:

> An abuse of [sentencing] discretion will be found only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

Ocanas, 70 Wis. 2d at 185 (citation omitted).

Lehman's sentence was appropriate given his history and the trauma inflicted upon his victims, and at

any rate, it is well within the maximum period of confinement of twenty five years. This court should sustain the sentence imposed.

CONCLUSION

For the foregoing reasons, this court should affirm Lehman's judgment of conviction and orders denying his motions for postconviction relief.

Dated this 24th day of April, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,456 words.

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Robert G. Probst
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of April, 2012.

_____
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