STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2014AP2876-CR
(Sheboygan County Cir. Ct. Case No. 2012CF511)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO D. BARBEAU,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN SHEBOYGAN COUNTY CIRCUIT COURT, THE HON. TIMOTHY M. VAN AKKEREN PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN[1]

QUESTIONS PRESENTED

1. Did the circuit court properly exercise its discretion when the court denied defendant-appellant Antonio D. Barbeau's sentence-modification motion?

   - By its decision, the circuit court necessarily answered "Yes."
   - This court should answer "Yes."

[1] To facilitate online reading, the electronically filed version of this brief includes hyperlinked bookmarks.

2. Did Barbeau prove beyond a reasonable doubt the unconstitutionality of Wisconsin's Truth-in-Sentencing life-sentence statute as applied to juveniles convicted of Class A felonies?

   - The circuit court implicitly answered "No."
   - This court should answer "No."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED[2]

UNITED STATES CONSTITUTION AMENDMENT 8.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

WISCONSIN CONSTITUTION ARTICLE I, SECTION 6.

> Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted.

[2] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

WIS. STAT. § 940.01 FIRST-DEGREE INTENTIONAL HOMICIDE.

940.01 First-degree intentional homicide. (1) OFFENSES. (a) Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

(b) Except as provided in sub. (2), whoever causes the death of an unborn child with intent to kill that unborn child, kill the woman who is pregnant with that unborn child or kill another is guilty of a Class A felony.

(2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:

(a) *Adequate provocation.* Death was caused under the influence of adequate provocation as defined in s. 939.44.

(b) *Unnecessary defensive force.* Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

(c) *Prevention of felony.* Death was caused because the actor believed that the force used was necessary in the exercise of the privilege to prevent or terminate the commission of a felony, if that belief was unreasonable.

(d) *Coercion; necessity.* Death was caused in the exercise of a privilege under s. 939.45 (1).

(3) BURDEN OF PROOF. When the existence of an affirmative defense under sub. (2) has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt under sub. (1).

WIS. STAT. § 973.014 SENTENCE OF LIFE IMPRISONMENT; PAROLE ELIGIBILITY DETERMINATION; EXTENDED SUPERVISION ELIGIBILITY DETERMINATION.

973.014 Sentence of life imprisonment; parole eligibility determination; extended supervision eligibility determination. (1) Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after July 1, 1988, but before December 31, 1999, the court shall make a parole eligibility determination regarding the person and choose one of the following options:

(a) The person is eligible for parole under s. 304.06 (1).

(b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in s. 304.06 (1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06 (1).

(c) The person is not eligible for parole. This paragraph applies only if the court sentences a person for a crime committed on or after August 31, 1995, but before December 31, 1999.

(1g) (a) Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after December 31, 1999, the court shall make an extended supervision eligibility date determination regarding the person and choose one of the following options:

1. The person is eligible for release to extended supervision after serving 20 years.

2. The person is eligible for release to extended supervision on a date set by the court. Under this subdivision, the court may set any later date than that provided in subd. 1., but may not set a date that occurs before the earliest possible date under subd. 1.

3. The person is not eligible for release to extended supervision.

(b) When sentencing a person to life imprisonment under par. (a), the court shall inform the per-

son of the provisions of s. 302.114 (3) and the procedure for petitioning under s. 302.114 (5) for release to extended supervision.

(c) A person sentenced to life imprisonment under par. (a) is not eligible for release on parole.

(2) When a court sentences a person to life imprisonment under s. 939.62 (2m) (c), the court shall provide that the sentence is without the possibility of parole or extended supervision.

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.

STANDARDS OF REVIEW

A. Exercise Of Discretion.

When an appellate court reviews a circuit court's discretionary decision, the appellate court asks whether the circuit court exercised discretion, not whether another judge might have exercised discretion differently. ***State v. Prineas***, 2009 WI App 28, ¶ 34, 316 Wis. 2d 414, 766 N.W.2d 206.

> The term "discretion" contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards. The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.

State v. Delgado, 223 Wis. 2d 270, 280-81, 588 N.W.2d 1 (1999) (citations omitted).

> Under this standard, the circuit court's determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. . . . While the basis for an exercise of discretion should be set forth in the record, it will be upheld if the appellate court can find facts of record which would support the circuit court's decision.

Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (citations omitted).

B. Challenge To The Constitutionality Of A Statute.

> The constitutionality of a statutory scheme is a question of law that [an appellate court] review[s] de novo. Every legislative enactment is presumed constitutional. As such, [an appellate court] will "'indulge[ ] every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [an appellate court] must resolve that doubt in favor of constitutionality.'" Accordingly, the party challenging a statute's constitutionality faces a heavy burden. The challenger must demonstrate that the statute is unconstitutional beyond a reasonable doubt. In this case, [the defendant] faces the heavy burden of demonstrating that a punishment approved by the Wisconsin legislature, and thus presumably valid, is cruel and unusual in violation of the Eighth Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution.
>
> . . . .
>
> The Eighth Amendment's prohibition against "cruel and unusual punishments" flows from the basic "'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" According to the Supreme Court, the drafters of the Eighth Amendment did not attempt to define the contours of that proportionality, leaving to future generations of judges the task of "'discern[ing]

> how the framers' values, defined in the context of the world they knew, apply to the world we know.'" As such, the Supreme Court has determined that a punishment is "cruel and unusual" in violation of the Eighth Amendment if it falls within one of two categories: (1) "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" in 1791; or (2) punishment inconsistent with "'evolving standards of decency that mark the progress of a maturing society.'"

State v. Ninham, 2011 WI 33, ¶¶ 44-46, 333 Wis. 2d 335, 797 N.W.2d 451 (citations omitted). "It is not sufficient for a party to demonstrate 'that the statute's constitutionality is doubtful or that the statute is probably unconstitutional.' Instead, the presumption can be overcome only if the party establishes 'that the statute is unconstitutional beyond a reasonable doubt.'" ***Wisconsin Med. Soc'y, Inc. v. Morgan***, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22 (citations omitted). *See also* ***id.*** ¶ 109. "This presumption and burden apply to as-applied constitutional challenges to statutes as well as to facial challenges." ***State v. McGuire***, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227. "[A] facial challenge to the constitutionality of a statute cannot prevail unless that statute cannot be enforced '"under any circumstances."'" ***State v. Padley***, 2014 WI App 65, ¶ 16, 354 Wis. 2d 545, 849 N.W.2d 867.

C. Review Of A Decision Granting Or Denying A Motion For Sentence Modification When A Defendant Invokes The Sentencing Court's Inherent Power To Modify A Sentence.

The power to modify a sentence is one of the judiciary's inherent powers. This power is exercised to prevent the continuation of unjust sentences.

However, a circuit court's inherent authority to modify a sentence is a discretionary power that is exercised within defined parameters. For example, . . . a court has the inherent authority to modify a sentence if a new factor is presented, or if the sentence is "unduly harsh or unconscionable." However, there must be some finality to the imposition of a sentence. Therefore, we have held that it would be an erroneous exercise of discretion to modify a sentence simply because upon reflection the court may have chosen a different one. Similarly, a court cannot set a harsh sentence to "shock" the defendant, while intending to reduce the sentence after the defendant has fully realized the loss of liberty he faces.

. . . .

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 defendant must prove a new factor by clear and convincing evidence.

State v. Crochiere, 2004 WI 78, ¶¶ 11-14, 273 Wis. 2d 57, 681 N.W.2d 524 (footnote omitted) (citations omitted) (withdrawn language omitted), *abrogated on other grounds by State v. Harbor*, 2011 WI 28, ¶¶ 46 n.11, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (withdrawing language).

> [A] decision on whether to modify a sentence is within the circuit court's discretion. 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.

Id. ¶ 24 (citations omitted). *See also* ***State v. Harbor,*** 2011 WI 28, ¶¶ 35-38, 333 Wis. 2d 53, 72, 797 N.W.2d 828; ***State v. Trujillo***, 2005 WI 45, ¶¶ 10-11, 279 Wis. 2d 712, 694 N.W.2d 933; ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989), *abrogated on other grounds by Harbor*, 333 Wis. 2d 53, ¶ 52.

"Whether a new factor exists is a question of law, which [an appellate court] review[s] *de novo*." ***Trujillo***, 279 Wis. 2d 712, ¶ 11. "The existence of a new factor does not, however, automatically entitle the defendant to relief. Whether the new factor warrants a modification of sentence rests within the trial court's discretion." ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). *See also* ***State v. Hauk***, 2002 WI App 226, ¶ 43, 257 Wis. 2d 579, 652 N.W.2d 393; ***Michels***, 150 Wis. 2d at 97. "In determining whether to exercise its discretion to modify a sentence on the basis of a new factor, the circuit court may, but is not required to, consider whether the new factor frustrates the purpose of the original sentence." ***Ninham***, 333 Wis. 2d 335, ¶ 89.

D. Statutory Interpretation.

"Interpretation of a statute is a question of law that [an appellate] court reviews de novo while benefitting from the analyses of the lower courts." ***State v. Buchanan***, 2013 WI 31, ¶ 12, 346 Wis. 2d 735, 828 N.W.2d 847. Statutory interpretation "'begins with the language of the statute.'" ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "'The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.'" ***State v. Ziegler***, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238 (quoted source omitted). An appellate court "must construe statutory language reasonably; an unreasonable interpretation is one that yields absurd results or one that contravenes the statute's manifest purpose." ***Buchanan***, 346 Wis. 2d 735, ¶ 23; *see also* ***Ziegler***, 342 Wis. 2d 256, ¶ 43.

ARGUMENT

I. REVIEW OF FACTS.

On Monday morning, September 17, 2012 (100:8), Barbeau, then a 13-year-old closing in on his fourteenth birthday (2:1; 93), told his co-defendant, Nathan J. Paape, that Barbara Olson, Barbeau's great-grandmother (100:7), "was somewhat rich and could be killed for money" (100:8; *see also* 100:38, 39). Later that day, Barbeau and Paape went to Olson's house. Barbeau brought a hatchet; Paape brought a hammer (100:8, 25, 26-27, 49). They entered the residence "through the garage door. Barbara Olson opened the garage door when they were in there and invited them in-

to the residence" (100:7). "Olson said she was going to call Antonio Barbeau's mother" (100:7). "[W]hen she went to do so," Barbeau struck her in the head with the hatchet (100:7, 36, 41, 50). Olson stumbled to the floor, and Barbeau "then struck her several more times" (100:9). Barbeau called for Paape to help, and Paape "struck her twice in the head with a hammer" (100:9; *see also* 100:28-29, 36, 41-42). Throughout, "Olson was saying to stop it" (100:9). After Olson died (100:42) of "[s]harp force trauma as well as blunt force trauma to the head" (100:61),[3] Barbeau and Paape stole some jewelry and money (100:44-45). Police later found the hammer, hatchet, and some blood-covered items in the trunk of Olson's automobile (100:59-60), which Barbeau and Paape had stolen and abandoned in a way to shift blame to someone else (100:12-15, 37, 44, 45).

The district attorney charged Barbeau with first-degree intentional homicide in violation of Wis. Stat. § 940.01(1)(a).[4]

Barbeau accepted an agreement to plead "no contest to the charge of party to the crime of first degree intentional homicide" (112:8; *see also* 93;

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[3] At sentencing, the prosecutor summarized testimony of the doctor who performed the autopsy: "We do know from Dr. Kelley's testimony of the autopsy that Mrs. Olson suffered 27 blows, 18 to her head alone of which 11 were sharp-edge instruments and seven were blunt" (113:88).

[4] "Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony." Wis. Stat. § 940.01(1)(a). Section

112:4).[5] At the change-of-plea hearing (112), Barbeau's counsel recited the plea agreement:

> Judge, we have reached a plea agreement with the state. I have filed a preliminary questionnaire and waiver of rights form. The long and short of it is my client has agreed to withdraw his NGI plea, and upon the court accepting my client's no contest plea to the charge without amendment the state has agreed to recommend a parole eligibility date of 35 years. My client is free to argue.

(112:2.) The prosecutor agreed with that summary, as did Barbeau personally (112:3). In accepting Barbeau's plea, the circuit court engaged in this colloquy with Barbeau:

> THE COURT: Then you understand that the court would not be bound by any recommendation and that you could face life imprisonment with the possibility of no parole?
>
> DEFENDANT BARBEAU: Yes, Judge.
>
> MR. LIMBECK: Judge --
>
> THE COURT: I'm sorry. Under the U.S. Supreme Court decision that there would have to be some determination of a parole date, that is true.
>
> MR. LIMBECK: That has been my advice to him as well, Judge.

(112:3.) The plea questionnaire included these declarations by Barbeau:

> I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: Life in Prison

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[5] At the suggestion of Barbeau's lawyer, the preliminary hearing (100) provided the factual basis for the plea (112:6). Barbeau personally agreed that the preliminary hearing could provide the factual basis (112:6-7).

> I understand that the judge must impose the mandatory minimum penalty, if any. The mandatory minimum penalty I face upon conviction is: 20 year parole eligibility date

(60:1.)

At sentencing on August 12, 2013 (113), written remarks from Barbeau's mother (113:59) stated that she understood that the court "will be deciding when Antonio can first ask the parole board to review his case. And at that time the parole board will either decide to keep Antonio longer, or they will decide to release him to life-long state supervision" (113:66-67). She wrote that Barbeau and Paape "will pay for their actions at the age of 13 for the rest of their lives whether they are paroled in 20 years or 35 years" (113:71). She "ask[ed] that [the court] grant my son, Antonio Barbeau, the ability to have a parole board review in 20 years" (113:71).

In his sentencing argument (113:85-99), the prosecutor said that "the purpose of us being here today is to have the court set a parole eligibility date. Antonio, by plea, has been convicted of party to the crime of first degree intentional homicide. That is life-time supervision, and the only question today is at what age would he be eligible for parole" (113:85). The prosecutor continued:

> Now, with that question is, is that simply being eligible for parole, doesn't necessarily mean he would get parole, but certainly that is what we are here today for. As this court well knows, the court cannot go less than 20 years by statute.
>
> As was revealed and discussed in the plea negotiations in the plea itself, the state is recommending that the court not set that parole eligibility date for Antonio until he has served 35 years in the system.

> In fashioning that recommendation in the discussions with Attorney Limbeck, which took place over some period of time, I believe, myself, that's a very reasonable recommendation.

(113:85-86.) The prosecutor noted "that the court is prohibited from the United States Supreme Court law, any court is prohibited from not setting a parole date" (113:94). He closed with the State's sentencing recommendation: "Judge, on behalf of the State of Wisconsin and on behalf of Barbara Olson I am recommending that you order Antonio Barbeau not to be eligible for parole until he has spent 35 years in confinement" (113:99).

During his sentencing argument (113:100-09), defense counsel told the court:

> How many felony sentencings, Judge, have you presided over that are covered by truth in sentencing? And your authority under truth in sentencing is, in reality, greater than it is for our most serious crime, which is first degree intentional homicide, especially with a juvenile and the U.S. Supreme Court rulings because in every other felony in the state you decide initial confinement and when they are going to be released on parole. This is the only crime that was exempted from truth in sentencing and they didn't even keep old law.

(113:101-02.) He added that "while this court can't deny a parole eligibility date, I am not aware of any court decision yet, I don't know if it's been challenged, but the Parole Review Committee has every right to continue to deny, continue to deny until someone, Antonio, dies in prison" (113:102-03). In addition, defense counsel said,

> Twenty years from now, Judge, the Parole Review Committee, which exists only for this crime, will be in a much better position than we are today to evaluate Antonio. . . .

> . . . You don't need to wait 25, 30, 35 years for the DOC to be in much better position to know what needs to be done. . . .

(113:106). Defense counsel closed with his sentencing recommendation:

> The public can be protected with 20 years. This is a child, it's not an adult. I think the deterrent argument is different when it's applied to a child than it is to an adult. And I think a 20-year parole eligibility date satisfies all the criteria and all the considerations this court needs to take into account, victim, community, and otherwise. Thank you.

(113:109.)

In explaining its sentencing decision (113:111-21), the circuit court said that "if we would be looking at this with an adult, this is the type of case that would be called for life without any chance of parole" (113:113). The court closed by stating its sentencing decision:

> In looking at those circumstances that the court would again sentence the defendant to a life imprisonment with eligibility for parole, and I am not going to make it 35 years from that, it will be on essentially his 50th birthday. He will be eligible for parole on November 24, of 2048. That that determination also would indicate that he has 326 days credit for time served.

(113:118-19.)

On August 12, 2013, the court entered a judgment of conviction showing the sentence as "[l]ife with eligiblility of parole on 11-24-2048" (66).

On August 14, the Department of Corrections sought from the circuit court a clarification of the judgment of conviction (68). DOC wrote:

> Mr. Barbeau was convicted on case 12CF511 of 1st Degree Intentional Homicide (Party to a Crime). He was sentenced to a Life Sentence imprisonment with the "eligibility of parole on 11-24-2048". Since this is a truth in sentencing sentence, it is our understanding that he would need to be eligible for extended supervision, not parole.

(68:1.)

On August 22, the prosecutor moved the circuit court to hold a hearing "to correct the sentencing[ ] previously imposed" in Barbeau's case (70). The prosecutor based the motion on the DOC letter "rais[ing] the issue of the inapplicability of establishing parole eligibility status, pointing out that sec. 973.014(1g)(a), Stats., requires the Court to establish an Extended Supervision [E.S.] eligibility date" (70). The prosecutor requested a hearing because "the sentencing Court is required to issue certain warnings applicable to both the procedure to petition the Court for release once the E.S. eligibility is reached as well as DOC's authorization to extend the E.S. eligibility date for inmate behavior problems [secs. 973.014(1g) (b) and 302.114 (3)) and (5)]" (70).

In a letter dated August 24, Barbeau's defense counsel agreed to the correction: "May It Please the Court. The Department of Corrections' penchant for form over substance is once again apparent. The intent of the court is clear. I do not objection to changing 'parole' to 'extended supervision' per [DOC]'s August 14, 2013 correspondence" (71).

In the wake of the prosecutor's motion and defense counsel's letter, the circuit court proposed making the correction without holding a hearing unless "any of the attorneys have concerns about

simply making the correction on the record without the need of bringing the defendants back to court" (75). Defense counsel responded: "May it please the Court; I respectfully advise that I have no objection to the Court amending the Judgment of Conviction without a hearing" (76).

More than a year later — on October 24, 2014 — Barbeau filed a postconviction motion raising two claims of error:

> THE DEFENDANT, Antonio D. Barbeau . . . , moves the court for an order modifying the sentence imposed on August 13, 2013, to specify eligibility for extended supervision rather than parole and specifying eligibility after twenty years confinement. The defendant further moves the court for an order declaring Wisconsin's statutory scheme for sentencing Class A felonies unconstitutional as applied to minors and vacating the sentence imposed on August 13, 2013, and scheduling a further proceedings.
>
> The defendant brings this motion pursuant to Wis. Stat. § 809.30, Wis. Const. art. I, § 6, and U.S. Const. amends VI, VIII, and XIV.
>
> As grounds, the defendant asserts that the sentence with eligibility for parole was not authorized by law; that the current law constitutes a "new factor;" and that defense counsel was unconstitutionally ineffective for failing to know the current law regarding life sentences. *See Rosado v. State,* 70 Wis.2d 280, 288 N.W.2d 69 (1975); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).
>
> The defendant further maintains that Wisconsin's penalty scheme for children convicted of Class A felonies is amounts to an effective mandatory life sentence without release, prohibited by the Eighth Amendment under *Miller v. Alabama,* 567 U.S. __ ; 132 S. Ct. 2455 (2012), and *Graham v. Florida,* 560 U.S. 48 (2010). The defendant further asserts that the penalty scheme's mandatory minimum period of confinement is a cruel and unusual punishment

> when subjected to children. *See State v. Lyle,* No. 11-1339, slip op. (Iowa July 18, 2014).

(90:1.) Barbeau filed a supporting brief with the motion (91).

On November 12, the circuit court held a hearing on Barbeau's motion (114). Barbeau appeared in person and with his postconviction counsel (114:1). After hearing argument from postconviction counsel (114:2-5, 12-13) and the prosecutor (114:5-12), the court rejected Barbeau's constitutional challenge but granted in part the motion to correct the sentence:

> I'm satisfied then that the scheme for sentencing Class A Felonies in the State of Wisconsin is not unconstitutional as applied to minors. Therefore, the court would deny that motion. The court would, however, direct the clerk of court to prepare an amended judgment of conviction to indicate that instead of being paroled that it should be released to extended supervision. And I would have that done accordingly, and in that aspect the motion of the defendant is granted.

(114:17-18.)

II. BECAUSE BARBEAU RECEIVED THE HEARING HE REQUESTED FOR HIS SENTENCE-MODIFICATION MOTION AND BECAUSE HE DID NOT IDENTIFY A VALID NEW FACTOR, THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN THE COURT DENIED BARBEAU'S SENTENCE-MODIFICATION MOTION.

Barbeau contends that a new factor justifies sentence modification. Barbeau's Brief at 16-22. He argues that the circuit court erroneously applied sentencing statutes relating to parole rather

than extended supervision, *id.* at 16-18, and that "application of the wrong law at the time of his sentencing constitutes a new factor," *id.* at 19.

For two reasons, this court should reject Barbeau's argument. First, Barbeau moved "for an order modifying the sentence imposed on August 13, 2013, to specify eligibility for extended supervision rather than parole and specifying eligibility after twenty years confinement" and requested a hearing (90:1). The court held a hearing (114) at which Barbeau's postconviction counsel made a brief argument on the sentence-modification issue:

> With regard to the new factor argument, the sentencing scheme really post-truth in sentencing the relief decision is very different from the parole decision. And I'm making the argument that, that is a new factor justifying lowering the eligibility date for extended supervision because that would be entirely within the court's discretion whether that is granted.

(114:3.) The court ordered the judgment of conviction amended to specify eligibility for extended supervision rather than parole (114:18). The court did not directly address the part of the motion requesting "eligibility after twenty years of confinement" but denied the motion in all respects other than the request to modify the sentence to specify extended supervision (114:18). The court's discussion of the seriousness of the crime (114:16-17), however, reflected the court's discussion of the crime's seriousness that underlay the original sentencing decision (113:112-13, 117-18).[6] The court

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[6] The same circuit judge presided over the sentencing hearing (113:1) and the postconviction-motion hearing (114:1).

did not change the eligibility date for extended supervision, in effect affirming the original eligibility date.

In short, Barbeau received a hearing on his sentence-modification motion. He had an opportunity to make any supporting argument he chose and, presumably, to testify personally in support (he attended the hearing (114:1)). In the end, the court properly exercised its discretion when the court granted part of Barbeau's motion and denied the rest. The State does not see any reason for this court to overturn that decision.

Second, Barbeau has not proved the existence of a "new factor." The Wisconsin Supreme Court has defined a "new factor" as

> 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.

Crochiere, 273 Wis. 2d 57, ¶14 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 Wis. 2d 69 (1975)).

In his brief supporting his postconviction motion, Barbeau argues that a "new factor" resides in the difference between (on one hand) the structure for deciding whether to release an inmate to parole supervision and (on the other hand) the structure for deciding whether to release an inmate to extended supervision (91:2-5). He continues that argument on appeal. *See* Barbeau's Brief at 12-16.

The sentencing transcript does not reveal anything suggesting the difference Barbeau highlights

had any influence on the sentencing court's decision. In explaining its sentencing decision (113:111-18), the court focused on the severity of the offense — *e.g.*, calling the crime "an extremely cruel act" and "extremely severe" (113:113). The difference therefore does not qualify as "a fact or set of facts highly relevant to the imposition of sentence."

In addition, the sentencing transcript discloses that the circuit court — despite sometimes referring to "eligibility for parole" — knew that extended supervision rather than parole applied to Barbeau's sentence:

> With respect to this particular case the court is also required to inform the defendant of the provisions under Statute 973.014[7] that under Section 302.114(3)[8] of the statutes if you violate any regula-

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7 "When sentencing a person to life imprisonment under par. (a), the court shall inform the person of the provisions of s. 302.114 (3) and the procedure for petitioning under s. 302.114 (5) for release to extended supervision." Wis. Stat. § 973.014(1g)(b).

8 Section 302.114(3) provides:

> (a) The warden or superintendent shall keep a record of the conduct of each inmate subject to this section, specifying each infraction of the rules. If any inmate subject to this section violates any regulation of the prison or refuses or neglects to perform required or assigned duties, the department may extend the extended supervision eligibility date set under s. 973.014 (1g) (a) 1. or 2., whichever is applicable, as follows:
>
> 1. Ten days for the first offense.
>
> 2. Twenty days for the 2nd offense.
>
> 3. Forty days for the 3rd or each subsequent offense.

(footnote continues on next page)

tion of prison or refuse or neglect to perform required or assigned duties the Department of Corrections may extend the date when you will become eligible for extended supervision by 10 days for the first offense, 20 days for the second offense, and 40 days for the third and each subsequent offense.

In addition, if you are placed in adjustment program or controlled segregation status the Department of Corrections may extend the extended supervision eligibility date by the number of days equal to 50 percent of the number of days spent in segregation status. If you file an action or special proceeding to which section 807.15 applies your extended su-

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(footnote continues from previous page)

(b) In addition to the sanctions under par. (a), if an inmate subject to this section is placed in adjustment, program or controlled segregation status, the department may extend the extended supervision eligibility date set under s. 973.014 (1g) (a) 1. or 2., whichever is applicable, by a number of days equal to 50% of the number of days spent in segregation status. In administering this paragraph, the department shall use the definition of adjustment, program or controlled segregation status under departmental rules in effect at the time an inmate is placed in that status.

(c) An inmate subject to this section who files an action or special proceeding, including a petition for a common law writ of certiorari, to which s. 807.15 applies shall have his or her extended supervision eligibility date set under s. 973.014 (1g) (a) 1. or 2., whichever is applicable, extended by the number of days specified in the court order prepared under s. 807.15 (3). Upon receiving a court order issued under s. 807.15, the department shall recalculate the date on which the inmate to whom the order applies will be entitled to petition for release to extended supervision and shall inform the inmate of that date.

> pervision eligibility date would be extended by the number of days specified in the order under Section 807.15(3) of the statutes. You may file a petition for release to extended supervision but not earlier than ninety days before your extended supervision eligibility date.

(113:119-20 (footnotes added).) A "new factor" consists of "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." ***Crochiere***, 273 Wis. 2d 57, ¶14. The court's explicit references to "extended supervision" and the court's compliance in part with an obligation applicable only to a Truth-in-Sentencing sentence[9] show that the trial court in fact knew "at the time of original sentencing" that extended supervision rather than parole applied to Barbeau's sentence.

In his postconviction motion and in his brief in support of the postconviction motion, Barbeau asserts that his trial counsel provided ineffective assistance by failing to know current law relating to sentencing (90:1; 91:1, 7-8). He makes the same claim in this court. *See* Barbeau's Brief at 20-22.

Barbeau did not pursue his ineffective-assistance claim in the postconviction-motion hearing (114). He did not ask the circuit court to conduct a

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[9] Section 973.014(1g)(b) also required the court to explain "the procedure for petitioning under s. 302.114 (5) for release to extended supervision." The sentencing transcript does not show the court providing that explanation, although the court, as required by section 973.014(1g)(c), "inform[ed] the [defendant] of the provisions of s. 302.114 (3)."

Machner[10] hearing and did not make any reference to an ineffective-assistance claim during the postconviction-motion hearing. Barbeau did not subpoena trial counsel for a hearing at which he would shoulder his obligation to "preserve the testimony of trial counsel." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Consequently, the State regards this claim as abandoned and does not see any need to address the claim in this court.

III. BARBEAU DID NOT PROVE BEYOND A REASONABLE DOUBT THE UNCONSTITUTIONALITY OF WISCONSIN'S TRUTH-IN-SENTENCING LIFE-SENTENCE STATUTE AS APPLIED TO JUVENILES CONVICTED OF CLASS A FELONIES.

In his postconviction motion (90), Barbeau challenged the constitutionality of "Wisconsin's penalty scheme for children convicted of Class A felonies" (90:1). He asserted that Wisconsin's penalty scheme

> amounts to an effective mandatory life sentence without release, prohibited by the Eighth Amendment under *Miller v. Alabama,* 567 U.S. __ ; 132 S. Ct. 2455 (2012), and *Graham v. Florida,* 560 U.S. 48 (2010). The defendant further asserts that the penalty scheme's mandatory minimum period of confinement is a cruel and unusual punishment when subjected to children. *See State v. Lyle,* No. 11-1339, slip op. (Iowa July 18, 2014).

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[10] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

(90:1.) *See also* 91:8-14 (supporting brief). He continues with this claim in this court. *See* Barbeau's Brief at 22-32.

A. Standard Of Review For A Constitutional Challenge To A Sentence As A Violation Of The Eighth Amendment To The United States Constitution And Of Article I, Section 6 Of The Wisconsin Constitution.

Wisconsin's sentencing regime does not offend either the United States or Wisconsin constitution. *See* U.S. Const. amend. 8; Wis. Const. art. I, § 6. The Wisconsin Supreme Court has explained the standards for reviewing a claim like Barbeau's:

> The constitutionality of a statutory scheme is a question of law that we review de novo. *State v. Radke,* 2003 WI 7, ¶ 11, 259 Wis. 2d 13, 657 N.W.2d 66. Every legislative enactment is presumed constitutional. *Id.* As such, we will "'indulge[ ] every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, we must resolve that doubt in favor of constitutionality.'" *State v. Cole,* 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328 (quoting *Aicher v. Wis. Patients Comp. Fund,* 2000 WI 98, ¶ 18, 237 Wis. 2d 99, 613 N.W.2d 849). Accordingly, the party challenging a statute's constitutionality faces a heavy burden. *Id.* The challenger must demonstrate that the statute is unconstitutional beyond a reasonable doubt. *State v. McGuire,* 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227. In this case, [the defendant] faces the heavy burden of demonstrating that a punishment approved by the Wisconsin legislature, and thus presumably valid, is cruel and unusual in violation of the Eighth Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution. *See Gregg v. Georgia,* 428 U.S. 153, 175 (1976) ("[I]n assessing a punishment selected by a

> democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.").
>
> The Eighth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, guarantees individuals protection against excessive sanctions: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII; *see also Roper,* 543 U.S. at 560; *Atkins v. Virginia,* 536 U.S. 304, 311 (2002); *Thompson,* 487 U.S. at 818-19 & n.1. Article I, Section 6 of the Wisconsin Constitution contains substantively identical language: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted." Generally, we interpret provisions of the Wisconsin Constitution consistent with the Supreme Court's interpretation of parallel provisions of the federal constitution. *State v. Arias,* 2008 WI 84, ¶ 19, 311 Wis. 2d 358, 752 N.W.2d 748. That is particularly true where, as here, the text of the provision in our state constitution is virtually identical to its federal counterpart, and no intended difference can be discerned. *See State v. Jennings,* 2002 WI 44, ¶ 39, 252 Wis. 2d 228, 647 N.W.2d 142 (citing *State v. Agnello,* 226 Wis. 2d 164, 180-81, 593 N.W.2d 427 (1999)). Thus, our analysis in this case is largely guided by the Supreme Court's Eighth Amendment jurisprudence and in particular, the cases concerning juvenile offenders.

Ninham, 333 Wis. 2d 335, ¶¶ 44-45 (footnote omitted).

The circuit court correctly rejected the challenge. This court should affirm the circuit court's decision.

B. Wisconsin's Sentencing Regime For Juveniles Convicted Of Class A Felonies Does Not Violate Either The United States Constitution Or The Wisconsin Constitution.

None of the federal cases[11] on which Barbeau relies supports his argument. In ***Roper v. Simmons,*** 543 U.S. 551 (2005), the Court held unequivocally that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." ***Id.*** at 578. Because Wisconsin does not allow a court to impose the death penalty for any crime, ***Roper*** does not support Barbeau's claim of unconstitutionality. ***Ninham***, 333 Wis. 2d 335, ¶ 75 ("*Roper* does not, however, stand for the proposition that the diminished culpability of juvenile offenders renders them categorically less deserving of the second most severe penalty, life imprisonment without parole. Indeed, the *Roper* Court affirmed the Missouri Supreme Court's decision to modify the 17-year-old defendant's death sentence to life imprisonment without eligibility for parole." (citation omitted)).

In ***Graham v. Florida***, 560 U.S. 48 (2010), the Court declared that

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[11] ***Miller v. Alabama***, 567 U.S.___, 132 S. Ct. 2455 (2012); ***Graham v. Florida***, 560 U.S. 48 (2010); ***Roper v. Simmons,*** 543 U.S. 551 (2005).

> [t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

Id. at 82. *See also* ***id.*** at 75 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. . . . [W]hile the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.").

Graham does not support Barbeau's argument because (1) ***Graham*** concerns juveniles convicted of nonhomicide crimes, a category of juveniles that does not include Barbeau, and (2) Barbeau's sentence did not provide for life imprisonment without the possibility of release before the end of that term. In addition, unlike the Florida sentencing statute at issue in ***Graham***, *see* ***Graham***, 560 U.S. at 58, Wisconsin's sentencing statute allows a sentencing court to impose a sentence of life imprisonment with a possibility of release before the end of the term.

Most recently, in ***Miller v. Alabama***, 567 U.S.___, 132 S. Ct. 2455 (2012), which arose from homicide convictions of two 14-year-old offenders, the Court declared "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" ***Id.*** at 2460. *See* ***id.*** at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). Thus, as to juveniles, the Court extended the prohibition on mandatory life-without-parole sentences to reach homicide convictions as well as convictions for nonhomicide crimes. The Court did not hold that a sentence must guarantee supervised release before the conclusion of a life sentence: the Court quoted (without rejecting or otherwise criticizing) ***Graham***'s reminder that "'[a] State is not required to guarantee eventual freedom.'" ***Id.***

Miller does not help Barbeau. Barbeau's sentence did not provide for life imprisonment without the possibility of release before the end of that term. In addition, unlike the sentencing statutes at issue in ***Miller***, *see* ***id.*** at 2461 (Arkansas), 2463 (Alabama), Wisconsin's sentencing statute allows a sentencing court to impose a sentence of life imprisonment with a possibility of release before the end of the term.

As applied to Barbeau, Wisconsin's sentencing statutes do not offend any of the standards set out in ***Graham*** and ***Miller***. Section 973.014(1g)(a) provides a sentencing court with three sentencing options:

> 1. The person is eligible for release to extended supervision after serving 20 years.
>
> 2. The person is eligible for release to extended supervision on a date set by the court. Under this subdivision, the court may set any later date than that provided in subd. 1., but may not set a date that occurs before the earliest possible date under subd. 1.
>
> 3. The person is not eligible for release to extended supervision.

For Barbeau, ***Graham*** and ***Miller*** foreclosed the sentencing court from invoking the third option. But neither case, either explicitly or implicitly, prohibited the sentencing court from invoking either of the two remaining options. The court chose the second option: "a date set by the court" — here, Barbeau's fiftieth birthday (113:118). Neither ***Graham*** nor ***Miller*** suggests that the date set by Barbeau's sentencing court violates the Eighth Amendment. And because Wisconsin courts "interpret provisions of the Wisconsin Constitution consistent with the Supreme Court's interpretation of parallel provisions of the federal constitution," especially "where, as here, the text of the provision in our state constitution is virtually identical to its federal counterpart, and no intended difference can be discerned," ***Ninham***, 333 Wis. 2d 335, ¶ 45, the date set by the sentencing court does not violate Wisconsin's constitution.

C. Wisconsin's Mandatory-Minimum Sentence Of Twenty Years For A Life Sentence Under Wis. Stat. § 973.014(1g) Does Not Violate Either The United States Constitution Or The Wisconsin Constitution. In Addition, The State Doubts That Barbeau Has Standing To Challenge The Statutory Mandatory-Minimum Sentence.

Barbeau seeks to circumvent the lack of support his argument receives from ***Graham*** and ***Miller*** by making a facial challenge to the twenty-year mandatory minimum period of initial confinement in section 973.014(1g)(a)1. and section 973.014(1g)(a)2. *See* Barbeau's Brief at 28-32. He relies principally on ***State v. Lyle***, 854 N.W.2d 378 (Iowa 2014), and on the exclusion of juveniles from some mandatory minimum sentences applicable in Wisconsin to child sex offenses.

In ***Lyle***, the Iowa Supreme Court declared "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause in article I, section 17 of our constitution." ***Id.*** at 400. ***Lyle*** does not satisfy Barbeau's obligation to prove unconstitutionality beyond a reasonable doubt. The Iowa court reached its decision under the Iowa Constitution, not the United States Constitution. Barbeau does not offer any evidence that the Wisconsin Supreme Court would find the twenty-year mandatory minimum unconstitutional *per se* as applied to juveniles under either the United

States Constitution or the Wisconsin Constitution.[12]

The exclusion of juveniles from minimum sentences for some child sex crimes but not for other crimes merely reinforces the point: the legislature itself carved out a small exception for juveniles in one category of offenses, not an across-the-board exception for juveniles for all categories of offenses. Certainly nothing in Wisconsin case law or in the Truth-in-Sentencing statutes suggests that the legislature intended to exempt juveniles from mandatory-minimum sentences applicable to the

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[12] The Connecticut Supreme Court rejected a juvenile's constitutional challenge asserting

> that the ten and five year mandatory minimum sentences for first degree sexual assault and risk of injury to a child, respectively, when applied to a juvenile offender, violate the eighth amendment right to an individualized, proportionate sentence because the sentencing court is unable to consider and give effect to relevant mitigating evidence of the offender's youth and immaturity.

State v. Taylor G., 315 Conn. 734, 739, 110 A.3d 338, 343 (2015). The court wrote:

> The defendant's sentences not only were far less severe than the sentences at issue in *Roper, Graham* and *Miller,* but were consistent with the principle of proportionality at the heart of the eighth amendment protection because the mandatory minimum requirements, while limiting the trial court's discretion to some degree, still left the court with broad discretion to fashion an appropriate sentence that accounted for the defendant's youth and immaturity when he committed the crimes.

Id. at 346.

class of serious crimes subject to a life-imprisonment penalty.

Moreover, the State doubts that Barbeau can properly mount a challenge to the twenty-year mandatory-minimum sentence in section 973.014(1g)(a). If the sentencing court had indicated somehow that but for the statutory requirement, the court would have set Barbeau's eligibility for extended supervision at some point less than twenty years, Barbeau might have a colorable claim that, under ***Graham*** and ***Miller***, the statutory mandatory-minimum sentence precluded the court from imposing a constitutionally proportionate sentence on him as a juvenile.

But the sentencing court imposed a date beyond the statutory twenty-year mandatory minimum. Sentences beyond a statutory minimum do not operate additively: sentencing courts do not say, in effect, "There's a statutory minimum of twenty years. I think you deserve ten years. Twenty plus ten equals thirty. Therefore, the court sentences you to thirty years." Rather, a sentencing court would say something like "I think you deserve ten years, but the statute requires me to impose a minimum term of twenty years. Therefore, the court sentences you to twenty years."

Here, in its assessment of factors appropriate to setting eligibility for release to extended supervision (113:113-18), the sentencing court made clear that Barbeau deserved a sentence beyond the twenty-year mandatory minimum. In fact, the sentencing judge made clear that it "frankly had in mind a later eligibility date than what I am going to be ordering here today" (113:118). Conse-

quently, the statutory mandatory-minimum sentence did not play any role in Barbeau's sentence. At the postconviction-motion hearing, the court reiterated its views:

> [W]e are talking about circumstances that occurred in this instance where there were multiple blows done by hatchet, by hammer, done on that point. It's not an issue here of an individual standing maybe 50 feet away with a firearm and discharging that firearm at someone and not having the real understanding that, Woe, this could be the end of it. This was a matter that required that someone become involved immediately at the point of that individual as that person is making pleas for her life. It's an instance as well where it's not just that these things were picked up on the scene. These were items brought to the scene. Again, as we look at the matters here, it is not so much a failure to understand what is going on. This is a case where there was just a complete and utter lack of empathy and a matter of going through these actions which were just horrendous.

(114:16-17.)

In the State's view, Barbeau lacks proper standing to challenge the statutory mandatory-minimum sentence. Wisconsin courts employ "a two-step analysis for a challenge to standing: '(1) Does the challenged action cause the petitioner injury in fact? and (2) is the interest allegedly injured arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?'" ***Coyne v. Walker***, 2015 WI App 21, ¶ 7, 361 Wis. 2d 225, 862 N.W.2d 606 (quoting *Wisconsin's Envtl. Decade, Inc., v. PSC,* 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975)), *rev. granted,* 2015 WI 78, 865 N.W.2d 502 (table). Barbeau fails at the first step: in terms of the statutory mandatory-minimum sentence, the

court's sentencing decision did not cause him injury in fact.

D. Summary.

In summary, Barbeau failed to prove beyond a reasonable doubt that the statute that authorized the circuit court's sentence violates either the United States Constitution or the Wisconsin Constitution. The circuit court therefore correctly denied Barbeau's challenge. This court should affirm the circuit court's decision.

CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's decision denying Barbeau's postconviction motion and should affirm the judgment of conviction. The circuit court properly exercised discretion when it denied Barbeau's sentence-modification motion. Barbeau failed to prove beyond a reasonable doubt the unconstitutionality of Wisconsin's sentencing regime for juveniles convicted of Class A felonies as adults. In addition, the State doubts Barbeau's standing to challenge the constitutionality of the twenty-year mandatory-minimum sentence applicable to a life sentence under Wisconsin's Truth-in-Sentencing statutes.

Date: October 28, 2015.

Respectfully submitted,

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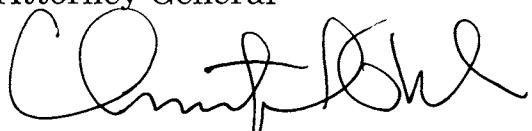

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 8,562 words.

CHRISTOPHER G. WREN

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In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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

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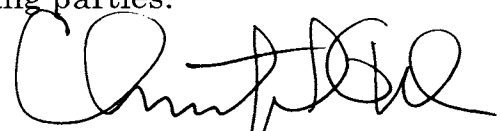

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