STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP001584 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRELL ANTWAIN KELLY,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Daniel L. Konkol Presiding, and from an Order Denying Postconviction Relief, the Honorable M. Joseph Donald presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Mr. Kelly deprived of his Sixth Amendment right to counsel?

   A. Did his first trial attorney provide constitutionally ineffective assistance when he recommended that Mr. Kelly forego an offer to plead to two domestic violence offenses and instead plead guilty to second degree child sexual assault, which carried more than twice the penalty exposure and entailed mandatory lifetime registration as a sex offender?

   B. Did his second trial attorney provide constitutionally ineffective assistance when he failed to advise Mr. Kelly that he could withdraw his plea prior to sentencing?

The circuit court ruled that neither counsel provided ineffective assistance.

2. Was Mr. Kelly's intellectual disability a new factor warranting sentence modification?

The circuit court ruled that the cognitive disability was not a new factor.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted as this case, which involves the application of the rule of ***Lafler v. Cooper***, 566 U.S. 156, 132 S. Ct. 1376 (2012), when counsel has given

constitutionally deficient advice to a defendant who is being asked to choose between two plea offers.

While undersigned counsel anticipates the parties' briefs will sufficiently address the issues raised, the opportunity to present oral argument is welcomed if this court would find it helpful.

STATEMENT OF FACTS

Mr. Kelly met L.J. at a gas station when he was 26 years old and she was 14 years old. She represented her age as 18. L.J.'s mother was present. (R. 26: 3). Mr. Kelly and L.J. started a dating relationship that lasted for nine years and resulted in three children. (R. 26: 3). Their first child was conceived when L.J. was 14 years old. Their third child was conceived when L.J. was an adult and was born in 2013. (R. 26: 3). L.J.'s mother was aware of and supported the relationship. (R. 26: 3; R. 95: 10). A child sexual assault charge was investigated while L.J. was pregnant with the couple's first child. However, no charge was issued. (R. 26: 2).

There were a number of domestic violence calls resulting from the relationship that did not result in convictions. (R. 95: 15-23). Then Mr. Kelly was charged in Case No. 13-CF-5072 with one count of Strangulation and Suffocation and one count of Battery. (R. 59: 18). The alleged victim was L.J. That case was dismissed when L.J. failed to appear. (R. 81: 1; App. 101). The identical Strangulation and Suffocation charge was reissued under Case No. 14-CF-1237 as Count 3. The Battery charge was reissued as a charge of Second Degree Recklessly Endangering Safety in Count 4. Count 1 of the new case charged Disorderly Conduct, and Count 2 charged Strangulation and Suffocation. In addition

to the charged counts, the criminal complaint alleged that Mr. Kelly had been referred for possible criminal charges involving domestic violence against L.J. "approximately 20 times since 2007." (R. 26: 11). The complaint recited a long list of specific uncharged domestic violence allegations involving Mr. Kelly and L.J. (R. 26: 11-12).

In Case No. 14-CF-1063, Mr. Kelly was charged with two counts of Second Degree Sexual Assault of a Child. The basis for the charges was sexual intercourse that occurred when L.J. was 14 years old. The offense was alleged to have occurred in 2006, eight years before the charges were issued. (R. 1).

Mr. Kelly was initially represented in the domestic violence cases by Attorney James Toran. (R. 81: 3, n. 3; App. 103). Subsequently, Attorney Scott Anderson took over representation of Mr. Kelly in both the domestic violence case and the sexual assault case. (R. R. 81: 3; App. 103). The State extended a written plea offer which provided that Mr. Kelly could elect to plead guilty to either: (1) one count of Strangulation and one Count of Second Degree Recklessly Endangering Safety in Case No. 14-CF-1237; or (2) one count of Second Degree Sexual Assault of a Child in Case No. 14-CF-1063. (R. 72).

The plea offer provided that in either case, the State would move to dismiss but read-in the other counts and would recommend 5-8 years initial confinement. (R. 72: 1).

Mr. Kelly entered a guilty plea to the charge of seconddegree child sexual assault. (R. 93). At the plea hearing, the circuit court inquired of Mr. Kelly as follows:

> Do you understand that because of this conviction, the second degree sexual assault, which is a felony, you will

> be required, I have no discretion, you will be required to register as a sex offender for life? If you live to be 102, you will still be registering as a sex offender with the State of Wisconsin; do you understand?

(R. 93: 8). Mr. Kelly said that he understood.

After the plea hearing, but before sentencing, Mr. Kelly fired Mr. Anderson and retained Attorney James Toran to represent him. The Court sentenced Mr. Kelly to ten years of initial confinement followed by eight years of extended supervision. (R. 82).

Attorney Toran filed a Notice of Intent to Pursue Postconviction Relief on behalf of Mr. Kelly. (R. 35). Undersigned counsel was appointed to represent him. Undersigned counsel became aware that Mr. Kelly has been diagnosed with an intellectual disability that qualified him for social security disability benefits. Counsel enlisted the aid of Justin Heim, M.A., a Client Services Specialist employed by the office of the State Public Defender to obtain records regarding Mr. Kelly's disability and gather information about the interplay between that disability and the facts of this case. Mr. Heim prepared a report. (R. 61).

Mr. Kelly filed a motion for postconviction relief asserting that Attorney Anderson provided ineffective assistance when he advised Mr. Kelly to plead guilty to the child sexual assault charge, which carried a maximum prison sentence of 40 years where the total prison exposure would have been only 16 years for the alternative offer the State had extended to Mr. Kelly. Further, the child sexual assault conviction entailed mandatory lifetime sex offender registration. (R. 59). Mr. Kelly's motion sought an order allowing him to withdraw his plea and accept the State's

alternative offer under ***Lafler v. Cooper***, 566 U.S. 156, 132 S. Ct. 1376 (2012). (R. 59: 5-8).

The postconviction motion further asserted that Attorney Toran provided ineffective assistance when he did not advise Mr. Kelly that he could move to withdraw his plea prior to sentencing for any fair and just reason. (R. 59: 9).

The circuit court commenced a ***Machner***[1] hearing on April 7, 2017. The hearing was continued to May 22nd and concluded on June 5th. (R. 96, 97, 98). The following testimony was presented at the hearing:

Attorney Scott Anderson:

Attorney Anderson testified that while he was representing Mr. Kelly in the two cases, the State extended a written plea offer that gave Mr. Kelly two options: (1) plead guilty to two domestic violence offenses against L.J. — one count of suffocation and strangulation and one count of recklessly endangering safety; or (2) plead guilty to one count of seconddegree sexual assault of a child. (R. 96: 7: App. 118). Attorney Anderson testified that the offer provided that under either plea option, the remaining counts would be read in, and the State would recommend five to eight years of initial confinement. (R. 96: 7: App. 118).

Attorney Anderson acknowledged that he recommended that Mr. Kelly plead guilty to the child sexual assault rather than accept the alternative offer. (R. 96: 8: App. 119). When asked to explain his rationale for that advice, Attorney Anderson explained:

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

> The rationale was that these were consensual, consensual acts of sex coming out of a long-term relationship. He already had children with her. This was a consensual relationship that by, I believe there is a big gap of time between the charged offense and the time he's coming up for a plea or sentencing. And that, that was the less serious charge in his -- I believe he would have got, my thinking, significantly less time taking that case than the strangulation and the RES case.

(R. 96: 8-9: App. 119-120). At another point in the hearing, Attorney Anderson expanded on this, saying:

> Because the sex act in my mind was a less serious offense than the domestic violence case. And just given the, given the age of it and the nature of the offense, and the relationship between Mr. Kelly and the young lady, the fact that the State was not going to prosecute that but for what was going on in the balance of the case. So it wasn't a major factor. The bottom line is I was certain that I could sell a much less sentence to the Court on that charge than I could on the other one.

(R. 96: 19-20: App. 130-31). The State asked Attorney Anderson whether this was his "strategy," and he answered in the affirmative. (R. 96: 20: App. 131). When asked if he recalled what he told Mr. Kelly about the difference in sentencing exposure between the two options, Attorney Anderson responded:

> I don't have specific recollections of the, of our discussions. He would have been aware of the maximum penalties, the terms of initial confinement, you know, between the two cases. All I know is that I, I highly recommended taking the 1063 case, seconddegree sexual assault pleading to that over the other one for those reasons I stated.

(R. 96: 9: App. 120). Attorney. Anderson did not recall advising Mr. Kelly about sex offender registration as a result of his plea, but said that it was his practice to do so, and he never deviated from that practice. (R. 96: 11, 17: App. 122, 128). Attorney Anderson did not recall Mr. Kelly telling him after he entered the plea that he wanted to withdraw it. He indicated that if that happened, he would have prepared a motion for plea withdrawal. (R. 96: 8-9: App. 119-20).

Attorney Anderson testified that he believed that the State was pursuing the sexual assault charge only because the State had been unable to successfully prosecute Mr. Kelly for domestic violence. It was evident to Attorney Anderson that the State was most concerned about the domestic violence allegations and that "they could care less that he was having sex with this young lady. It had been ignored." (R. 96: 14: App. 125).

On cross-examination, the State attempted to elicit testimony that one factor bearing on Mr. Kelly's decision was his willingness to admit guilt regarding some offenses, but not others, but Attorney Anderson disavowed that this was a factor in Mr. Kelly's decision. (R. 96: 18: App. 129). Attorney Anderson acknowledged that the strength of the evidence against a defendant is "a factor" in plea negotiations, saying:

> Whether we can win at trial, that's the number one concern. And when it's time to fold up then strength of the case comes into play

(R. 96: 19: App. 130). Attorney Anderson said that this could also be a factor in a plea decision. (R. 96: 19: App. 130). He testified that potential exposure is a factor bearing on a plea decision, but is not the sole factor. (R. 96: 19: App. 130).

Attorney Anderson testified that there were factors mitigating the seriousness of the sexual assault charge, including that L.J. lied about her age when Mr. Kelly met her, her mother was not cooperative in prosecuting Mr. Kelly, and years had passed since the offense occurred. (R. 96: 22: App. 133). Attorney Anderson agreed with the State that Mr. Kelly's plea to sexual assault did not require him to admit to any violence against L.J.. Attorney Anderson noted that the evidence against Mr. Kelly regarding the sexual assault (DNA testing of his and L.J.'s child) was strong. (R. 96: 8-9: App. 119-120). He testified that the strength of the evidence regarding the domestic violence allegations depended upon L.J.'s willingness to appear in court. (R. 96: 24: App. 135). Attorney Anderson believed that the case against Mr. Kelly on the sexual assault charge was stronger than the case against him on the domestic violence charges. Attorney Anderson endorsed the State's assertion that that "part of the calculation that can go into a defendant's decision whether to plead [is] the strength of the evidence on one charge versus the other." (R. 97: 9: App. 146).

Attorney Anderson also endorsed the State's assertion that if Mr. Kelly pled guilty to the domestic violence counts, which would have necessitated admitting violent conduct toward L.J., that would have "given more credence by his admission to the history of domestic violence that the State would be alleging at sentencing." (R. 97: 9: App. 146).

Attorney Anderson agreed that he believed that "the strategy to plead to the sexual assault was the best way to minimize the allegations of violence in this case." . (R. 97: 11-12: App. 148-49). He was most concerned about the allegations of violence and believed that the plea to the child sexual assault would "get him the least amount of time." (R. 97: 13: App. 150). Attorney Anderson was aware that the

judge would be permitted to consider the read-in charges for purposes of sentencing. (R. 97: 12; App. 149).

He acknowledged believing that the State was always much more interested in seeing Mr. Kelly punished for the domestic violence incidents than the sexual assault. (R. 97: 17: App. 154).

Attorney James Toran:

Attorney Toran took over representation of Mr. Kelly when Mr. Kelly called him and told him that he had fired Scott. Anderson and that he had entered a plea to a sexual assault offense and was not happy with that. Regarding his plea decision, Attorney Toran testified:

> He wasn't happy because, apparently, I -- I can't put my finger on it but some of the things he said that were told to him didn't make sense to me. I can't, you know, say for example what it was with any specificity -- specificity, but I told him it didn't make a whole lot of sense, but I don't know what exactly at this point in time. It's been about three, four years ago, at least.

(R. 98: 51-52: App. 160-61). When asked if he was aware of the two plea options that had been presented to Mr. Kelly, Attorney Toran testified:

> Not really. At that point, when I got the case, it was already a done deal. He had already entered his plea and I was more concerned about sentencing and getting the best outcome I could for him. In terms of the negotiations and what the offers were at that point, I wasn't privy to that.

(R. 98: 52: App. 161). When asked whether he discussed with Mr. Kelly the option of withdrawing his plea, Attorney Toran said:

> He wasn't happy, but in terms of withdrawing the plea, we didn't agree to that because if he had done so, I would have ordered a sentencing (sic) ranscript and filed a motion to withdraw the plea. I didn't do that, so, and I've done that on numerous occasions, so I know the procedure to withdraw the plea, and we didn't pursue that avenue, but I know he wasn't happy with his plea decision or -- or his counsel so-to-speak.

(R. 98: 52-53: App. 161-62). When asked if he recalled what advice he gave to Mr. Kelly, he said "we didn't decide to withdraw the plea, I mean, I said I would represent him at the sentencing and then we opted to proceed." (R. 98: 54: App. 163).

When asked how the decision was made to proceed to sentencing, Attorney Toran said:

> Yeah. I reviewed it, and you know, he said he wasn't happy with his attorney in terms of the advice and which case he pled to. Like I say, we didn't deal with that. I just dealt with the fact that he had pled guilty to the charge and represented him at sentencing, we didn't really go into detail about withdrawing the plea at all.

(R. 98: 53: App. 63).

Attorney Toran agreed that he was concerned about the number of violent acts the State would put before the court at sentencing. (R. 98: 56: App. 165). He did not endorse the State's view that if Mr. Kelly had admitted to one violent act, he would have been giving credence to the other allegations of violence. (R. 98: 56-57: App. 165-66). Attorney Toran asserted that if Mr. Kelly had told him about something that would be a legal basis for a plea withdrawal motion and if Mr. Kelly had wanted that, he would have filed it. (R. 98: 58-59: App. 167-68).

The State attempted to elicit from Attorney Toran that he was unaware of any basis for a plea withdrawal motion. Attorney Toran's response was as follows:

> Well, the long and short of it is, counsel, I was I was a bit concerned when he opted to go with another attorney after having represented him before, and I had met with him as well as a few other attorneys, I'm sure, and then he based his decision on Scott Anderson, and then after that, whatever transpired between them in conversations, you know, I was not privy to how they got to that cross in the road where he took that particular avenue where he pled to what he pled to. is it was a major breakdown between the time in which he accepted that plea for whatever reason that they -- that they had or whatever reason that they chose to do what they did, and basically, I was asked to come in to complete the sentencing, always indicated he wanted to plead whatever the sentence was though.

(R. 98: 60: App. 169).

Attorney Toran testified that the State's argument at sentencing focused on the domestic violence allegations and not the sexual assault. The State presented a slideshow that focused entirely on the domestic violence. Attorney Toran testified that it would have been impossible to position Mr. Kelly as a non-violent person at sentencing in this case. (R. 98: 65-66: App. 174-75).

Defendant Terrell Kelly:

Mr. Kelly testified that Attorney Anderson told him that he would get a lighter sentence if he pled guilty to the child sexual assault charge. (R. 98: 5). He testified that Attorney Anderson never told him that the maximum penalties he could get for the domestic violence offenses would be much less than the potential penalties for the sexual

assault or that if he pled guilty to the domestic violence offenses, the longest initial confinement he could get would be eight years. (R. 98: 6-7). Mr. Kelly asserted that Attorney Anderson had not discussed sex offender registration with him prior to his plea and that he did not know about it when he pled guilty. (R. 98: 6). He found out about this consequence later in a conversation with his aunt. Mr. Kelly testified that when the judge told him about sex offender registration during the plea hearing, he thought the judge was just warning him that the offense would be on his record for the rest of his life. (R. 98: 7).

Mr. Kelly testified that if he had known about the much higher penalty exposure for the child sexual assault charge and if he had known about sex offender registration, he would not have pled guilty to the sexual assault charge, but would have instead pled guilty to the domestic violence charges even though it meant admitting to them. (R. 98).

Mr. Kelly testified that after he fired Scott Anderson and hired Attorney Toran, he told Attorney Toran that he wanted to withdraw his plea. (R. 98: 10). Mr. Kelly testified that Attorney Toran told him that the plea deal was "messed up" and that Attorney Anderson "threw [him] under the bus." However, he testified that Attorney Toran told him it was too late to withdraw his plea.

On cross-examination, Mr. Kelly acknowledged that he received and reviewed the criminal complaints. (R. 98: 5). He acknowledged that he told the presentence writer that he felt the complaints had unfairly portrayed him as a violent person. (R. 98: 12). Mr. Kelly acknowledged his prior contacts with the criminal justice system, including prior cases in which he entered guilty pleas. (R. 98: 18-19:). There

was lengthy questioning about Mr. Kelly's contacts with L.J. during the pendency of the cases. (R. 98: 25-28).

Mr. Kelly acknowledged that at the plea hearing, the court advised him about the maximum penalty for the sexual assault charge to which he pled. (R. 98: 37).

Mr. Kelly denied that he chose to plead guilty to the sexual assault charge so that he wouldn't have to admit that he was a violent person. (R. 98: 42). He testified that he pled to the child sexual assault because his lawyer told him he would get a lighter sentence if he did. (R. 98: 42-43). He said he would not have pled guilty to child sexual assault if his lawyer had not advised him that he would get a lighter sentence by doing so. (R. 98: 44-45).

The circuit court's decision:

The circuit court directed the parties to file proposed findings of fact and conclusions of law. Counsel for Mr. Kelly did so. (R. 80). The State filed an eleven-page document entitled "Decision and Order Denying Motion for Postconviction Relief." (R.79).The Court announced its decision from the bench as follows:

> I have reviewed the submissions. I have heard the arguments. We have had a number of hearing dates where we, in my opinion, developed a very full and complete record in this matter. And based on the arguments and the submissions at this time, the Court finds that it will adopt the State's proposed Findings of Fact and Conclusions of Law in this matter and deny the defendant's motion with respect to vacating the conviction and deny his motion with respect to essentially resentencing the defendant.
>
> I do not find – I do find that Mr. Anderson was not deficient in this matter. He articulated what the strategy

> was. It is clear the defendant made a choice. In many respects, it was made through advice of counsel and the defendant. Mr. Toran came on with respect to, as successor counsel, and he indicated his focus primarily was one of trying to at least make an argument with respect to the sentencing of this defendant.
>
> The Court, therefore, having adopted the State's Proposed findings of Fact and Conclusions of Law, the Court at this time will deny the motion to vacate the conviction and withdraw the plea. I will sign the proposed order as it has been tendered to the Court.

(R. 102: 11-12; App. 178-79). The judge then signed the "decision and order" drafted by the State without changing a single word. (R. 79; R. 81; App. 101-111).

In the decision drafted by the State and signed by the judge, the court ruled that Attorney Anderson's performance was not deficient because his recommendation that Mr. Kelly plead guilty to the child sexual assault charge was "part of a reasonable strategy." (R. 81: 10: App. 110). The court further ruled that Attorney Toran's performance was not deficient because there were no grounds for Mr. Kelly to withdraw his plea prior to sentencing. Finally, the court ruled that Mr. Kelly had not shown prejudice because there was "no evidence that the State would have re-extended the same offer to Mr. Kelly in the event he succeeded in withdrawing his plea before sentencing." (R. 81: 10; App. 110).

Regarding Mr. Kelly's motion for sentence modification, the Court ruled from the bench, saying:

> Alright with respect to the modification of the sentence, the Court at this time is going to deny motion to modify the sentence in this matter. I do find that this, based on the arguments, this factor was essentially put forth before the Court at the time of sentencing. The

> only thing that is in my opinion that has changed is sort of the extended definition as to what was his disability. But clearly it was a factor that was argued before the original sentencing court. Therefore, this Court is going to deny the motion. I do not feel that it is a new factor.

(R. 102: 16; App. 183).

This appeal follows.

ARGUMENT

I. Mr. Kelly's Attorneys Provided Ineffective Assistance In Advising Him Regarding His Plea Options.

A. Standard of review.

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. This Court will uphold the circuit court's findings of fact, including the circumstances of the case and the counsel's conduct and strategy, unless they are clearly erroneous. Whether counsel's performance satisfies the standard for ineffective assistance of counsel is a question of law which this Court determines independently of the circuit court and court of appeals, benefiting from their analysis. ***State v. Jenkins***, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 196, 848 N.W.2d 786, 794.

Because the standard of review contemplates, that this Court will benefit from the analysis of the circuit court, it is important to note that there is no real circuit court analysis in this case. It is improper for a court to "simply accept[ ] a [party]'s position on all of the issues of fact and law without stating any reasons for doing so [.]") ***Trieschmann v. Trieschmann***, 178 Wis.2d 538, 541–542, 504 N.W.2d 433, 434 (Ct.App.1993). When a judge does this, it is impossible

to tell whether "the trial court's decision a product of the court's rational decision-making process," or that of the party's attorney. ***Id***. "Judges must not only make their independent analyses of issues presented to them for decision, but should also explain *their* rationale to the parties and to the public. ***State v. McDermott***, 2012 WI App 14, n. 2, 339 Wis. 2d 316, 323, 810 N.W.2d 237, 240. (emphasis in original).

This Court has repeatedly admonished circuit court judges against adopting the State's argument wholesale in criminal cases without explaining their own analyses and rationales. *See, **Id**. See, also*, ***State v. Farrell***, 2014AP330 (Nov. 25, 2014) (unpublished) ("Once again we caution circuit courts against adopting a party's submission *in toto*, as happened here.").

Here, the judge ordered the parties to submit proposed findings of fact and conclusions of law for its consideration. In response, the State submitted a dense, 11-page, single-spaced document entitled "Decision and Order Denying Motion to Vacate Conviction" with a signature block for the judge. (R. 80). This seemed presumptuous – until the judge signed it without making a single change. (R. 81; App. 101-111; R. 102: 11-12; App. 111-117). Any comments that might have shed light on the reasoning of the judge were limited to five sentences:

> I do not find – I do find that Mr. Anderson was not deficient in this matter. He articulated what the strategy was. It is clear the defendant made a choice. In many respects, it was made through advice of counsel and the defendant. Mr. Toran came on with respect to, as successor counsel, and he indicated his focus primarily was one of trying to at least make an argument with respect to the sentencing of this defendant.

(R. 102: 11-12; App. 178-79). The judge's comments shed no light on how his analysis led him to deny the motion. He declared that he found that Mr. Anderson was "not deficient" because he had "articulated what the strategy was," as if merely articulating any strategy were enough to defeat a claim of ineffective assistance. The judge did not explain why he found that strategy to be reasonable. The judge noted that Mr. Kelly "made a choice" and that "in many respects it was made through the advice of counsel and the defendant." This would seem to support Mr. Kelly's position that it was his attorney's advice that led to his choice. The judge did not explain why he concluded that the attorney's advice was constitutionally sound. The judge observed that Attorney Toran's focus was on the sentencing, which, as discussed below, supports Mr. Kelly's assertion that Attorney Toran believed he was hired to do a sentencing hearing and failed to discuss plea withdrawal with Mr. Kelly. The judge failed to offer any elucidation of his own analysis and how it led to the decision he made.

This Court has quoted the following admonitions of the United States Court of Appeals for the Seventh Circuit as a good reminder why judicial decisions at all levels must be explained by the judge or judges in their own words:

> From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own.... Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.

McDermott, 2012 WI App 14 at n. 2, 339 Wis. 2d at 323, 810 N.W.2d at 240, quoting ***DiLeo v. Ernst & Young***, 901 F.2d 624, 626 (7th Cir.1990).

When a judge signs a lengthy, detailed document produced by an advocate, the result is a decision that does not benefit from even-handed analysis. The result is likely to read like the work of an advocate, as is the case here. Further, the result of such abdication by the judge is likely to be a very flawed document. For example, as discussed below, the decision in this case incorrectly labels a legal conclusion a finding of fact and expressly credits "testimony" that appears nowhere in record. (R. 81: 8, 9; App. 108, 109).

There is no circuit court analysis from which this Court can benefit here. There is only the skewed and flawed analysis of an advocate. The decision drafted by the State and signed by the judge should be viewed by this Court with skepticism.

B. Mr. Kelly's first attorney provided ineffective assistance in advising him to choose the plea offer that resulted in a conviction to a more serious felony with a far greater prison exposure.

The right of a criminal defendant to the effective assistance of counsel extends to the plea bargaining process. ***Lafler v. Cooper***, 566 U.S. 156, 162, 132 S. Ct. 1376, 1384, (2012) (citing ***Missouri v. Frye***, 132 S.Ct. 1399 (2012); ***Padilla* v. *Kentucky***, 559 U.S. 356, 130 S.Ct. 1473, 1486 (2010); ***Hill v. Lockhart***, 474 U.S. 52, 57, 106 S.Ct. 366 (1985)). During plea negotiations defendants are "entitled to the effective assistance of competent counsel." ***McMann v. Richardson***, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970).

The two-part ***Strickland*** test applies to challenges to guilty pleas based on ineffective assistance of counsel. ***Hill***, 474 U.S. at 58. To prove ineffective assistance of counsel, Mr. Kelly must show that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

1. Deficient performance.

To show deficient performance, Mr. Kelly must show that counsel's performance fell below an objective standard of reasonableness. ***Id***, at 57 (quoting ***Strickland***, 466 U.S. at 688). Here, the State offered Mr. Kelly two plea options: (1) plead guilty to one count of strangulation and one count of seconddegree recklessly endangering safety in Case No. 14-CF-1237; or (2) plead guilty to one count of seconddegree sexual assault of a child in Case No. 14-CF-1063. (R. 72). Trial counsel performed deficiently in advising Mr. Kelly to reject the offer to plead guilty to the domestic violence offenses and to instead enter a plea to seconddegree sexual assault of a child, which was a more serious felony that carried a far greater prison exposure.

Mr. Kelly testified that Attorney Anderson never explained to him that the maximum penalties the court could impose for the domestic violence offenses would be far less than the potential penalties he could receive for the sexual assault or that if he pled guilty to the domestic violence offenses, the maximum initial confinement he could receive would be eight years. (R. 98: 6-7). Mr. Kelly testified that prior to his guilty plea, Attorney Anderson had not discussed sex offender registration with him and that he did not know about it when he pled guilty. (R. 98: 6). Attorney Anderson testified that he did not recall his discussions with Mr. Kelly but opined that, "He [Mr. Kelly] would have been aware of

the maximum penalties, the terms of initial confinement, you know, between the two cases." (R. 96: 9). Attorney Anderson did not recall advising Mr. Kelly about sex offender registration as a result of his plea, but testified that it was his practice to do so, and he never deviated from that practice. (R. 96: 11, 17).

In its decision the circuit court found that Attorney Anderson adequately explained to Mr. Kelly the terms of the offer letter, the two plea options offered by the State, his maximum exposure on both cases, and sex offender registration. (R. 81: 7; App. 107). Mr. Kelly does not argue on appeal that these factual findings were clearly erroneous.

The real issue here is whether Attorney Anderson's advice to Mr. Kelly that he should plead guilty to child sexual assault, rather than less serious offenses that carried lesser penalties, was reasonable. The facts in this regard were undisputed. Attorney Anderson stated clearly that he strongly recommended that Mr. Kelly plead guilty to seconddegree child sexual assault. (R. 96: 9; App. 120). His rationale for doing so was that the sexual assault charge was less serious than the domestic violence charges because the sexual relationship between Mr. Kelly and L.J. was consensual and there was a lengthy gap in time between the offense and the issuance of the charge. Attorney Anderson believed that he would get "significantly less time taking that case than the strangulation and RES [recklessly endangering safety] case." (R. 96: 8-9; R. 97: 6, 12; App. 143-49). He believed that Mr. Kelly would be in a more favorable position if he pled to the sexual assault charge, as it was not violent. (R. 97: 11; App. 148). Attorney Anderson testified that he was most concerned about the allegations of violence exposing Mr. Kelly to a longer sentence. (R. 97: 12; App. 149).

Accordingly, in its decision, the circuit court found that Attorney Anderson "recommended that Mr. Kelly plead guilty to the sexual assault cases (sic) and did this as a matter of trial counsel strategy to reduce the overall exposure to prison (on both cases) and to try and obtain a lesser period of initial confinement than requested by the State on the sexual assault case." (R. 81: 8; App. 108).

The circuit court also purported to make a factual finding that Attorney Anderson's "strategy of recommending the sexual assault plea was reasonable under all of the facts and circumstances." (R. 81: 8; App. 108). This was not a proper factual finding. While the court could make findings of fact about the circumstances of the case, and the court could find factually that Mr. Anderson *had* a particular strategy, whether or not that strategy was reasonable - *i.e*., whether or not counsel's performance was deficient - is a question of law. *See* ***State v. Jenkins***, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 848 N.W.2d 786. ("Whether counsel's performance satisfies the standard for ineffective assistance of counsel is a question of law which we determine independently of the circuit court and court of appeals, benefiting from their analysis.").

The circuit court ultimately concluded that Attorney Anderson's performance was not deficient as a matter of law. (R. 81: 10; App. 110). This legal conclusion was incorrect. It was not reasonable for Attorney Anderson to recommend a plea to child sexual assault in order to "try to obtain a lesser period of initial confinement." The plea offer was structured in such a way that pleading guilty to the child sexual assault would not result in the domestic violence charges being swept under the rug.

The alternative plea offers required either that Mr. Kelly plead guilty to the domestic violence charges, or alternatively, that they be dismissed and read-in upon his guilty plea to the child sexual assault offense. The facts available to the judge were identical either way. While the read in domestic violence offences would not increase the maximum possible sentence, reading the charges in made them fair game for the judge to consider in imposing the sentence**.** ***State v. Straszkowski***, 2008 WI 65, ¶ 93, 310 Wis. 2d 259, 304, 750 N.W.2d 835, 857.

In its decision, the court noted that Attorney Anderson testified that had Mr. Kelly pled to the domestic abuse charges, that would have given "more credence" to the domestic violence allegations. (R. 81: 4; App. 104). But Attorney Anderson knew from the outset that the State was focused on the domestic violence allegations in this prosecution. (R. 96: 14; R. 97: 17; App. 125, 154). In addition to the charged counts that were read in, the criminal complaint asserted that Mr. Kelly had been referred for domestic violence charges involving L.J. approximately 20 times since 2007 and recited a long list of specific domestic violence allegations. (R. 26: 11-12). Competent trial counsel would have been aware that the sentencing court was permitted to consider even uncharged, unproven conduct or pending charges in imposing a sentence. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559, 562 (1980).

Thus, it was foreseeable to Attorney Anderson that the State would focus almost exclusively at sentencing on the lengthy history of domestic violence between Mr. Kelly and L.J. (which it did, with a slideshow). (R. 95). Given the long domestic violence history, there was simply no reasonable possibility that the sentencing court would believe that Mr. Kelly was not guilty of violence against L.J.. Certainly, Mr.

Kelly's decision not to plead to the two domestic violence charges, while agreeing to them as read-ins for sentencing purposes, would not cause the court to discount the domestic violence. Attorney Toran had the right of it when he testified at the ***Machner*** hearing that presenting Mr. Kelly as non-violent was "impossible." (R. 98:66; App. 175).

Any notion that Attorney Anderson had that Mr. Kelly's guilty plea to child sexual assault rather than the two domestic violence offenses would result in a lesser sentence was baseless. There was no actual benefit to pleading to the child sexual assault, and there were multiple serious drawbacks — greater exposure, sex offender registration for life, and the stigma resulting from sex offender status.

There is another layer of unreasonableness in Attorney Anderson's advice to Mr. Kelly that was not addressed at all by the circuit court in the decision it signed onto. Not only did Attorney Anderson indicate that he believed that there was a fair chance that Mr. Kelly would get "significantly less time" if he pled to the child sexual assault, he in fact testified that he was "certain" of it. (R. 96: 10, 21; App. 121, 122). And, he conveyed this certainty to Mr. Kelly, who testified that Attorney Anderson told him that by pleading to the child sexual assault, he *would* — not *could* — get a lighter sentence. (R. 98: 6, 36, 44). Even if there had been any basis for Attorney Anderson's belief that pleading to the sexual assault would better position Mr. Kelly for sentencing, it was unreasonable for Mr. Anderson to believe he could be *certain* of a more favorable result, much less convey that to Mr. Kelly. Every competent lawyer knows that there is no such thing as certainty in sentencing. Thus, Attorney Anderson performed deficiently when he led Mr. Kelly to believe that less time was a certain outcome of choosing the plea option that was otherwise much less attractive.

There was no reasonable strategic basis for advising Mr. Kelly to forego the more favorable offer and plead guilty to child sexual assault. Because his performance fell below an objective standard of reasonableness, counsel performed deficiently.

2. Prejudice.

To establish prejudice under ***Strickland***, Mr. Kelly must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In the context of plea negotiations, a defendant must show that "the outcome of the plea process would have been different with competent advice." ***Lafler,*** 566 U.S. at 163.

To show prejudice from ineffective advice that leads to rejection of a plea offer, Mr. Kelly must make a further showing:

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 163. The circuit court's decision did not address prejudice as it related to Attorney Anderson's deficient performance. (R. 81; App. 101-111).

Mr. Kelly testified that he chose to plead guilty to the sexual assault rather than the domestic violence charges

because Attorney Anderson told him that choosing that option would result in a lighter sentence. (R. 98: 43-44). He testified that absent this advice from his attorney, he would not have chosen to plead guilty to the child sexual assault charge. (R. 98: 44-45).

Further, there is no reason to suppose that the alternative plea would not have been presented to the Court. The alternative plea offer was made in writing, and Mr. Kelly committed no new offenses or violations of his bond that would have led the State to rescind the offer. Whether the sentence would have been less severe is an unknown. Certainly the convictions would have been less severe (a Class G and a Class H felony instead of a Class C felony). In addition, the alternative plea offer would not have subjected Mr. Kelly to sex offender registration and the other negative consequences that flow from the sex offender status.

Thus, Mr. Kelly was prejudiced by counsel's deficient performance. The appropriate remedy is for this Court to vacate Mr. Kelly's conviction and require the State to reoffer the original plea proposal so that Mr. Kelly can choose the more favorable option. ***Id.***, at 1389.

C. Mr. Kelly's second attorney provided ineffective assistance when he failed to advise Mr. Kelly that he could withdraw his plea prior to sentencing for any fair and just reason.

1. Deficient performance.

When Attorney Toran became aware that Mr. Kelly had been given bad advice about the plea offers and was unhappy with his decision, his failure to discuss the option of plea withdrawal prior to sentencing constituted deficient performance. Attorney Toran should have advised Mr. Kelly

that he could withdraw his plea prior to sentencing for any fair and just reason.

The rule distinguishing between plea withdrawal before and after sentencing — and providing that the former should be liberally allowed — is well-settled. Withdrawal of a plea may occur either before or after sentencing. When a defendant moves to withdraw a plea before sentencing, "a circuit court should 'freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.'" ***State v. Jenkins***, 2007 WI 96, ¶ 2, 303 Wis.2d 157, 736 N.W.2d 24 (quoting ***State v. Bollig***, 2000 WI 6, ¶ 28, 232 Wis.2d 561, 605 N.W.2d 199); *see id*., ¶ 29 ("[T]he court has consistently articulated a liberal rule for plea withdrawal before sentencing...."). However, this rule should not be confused "with the rule for post-sentence withdrawal where the defendant must show the withdrawal is necessary to correct a manifest injustice." ***Id***., ¶ 2 n. 2 (citing ***Dudrey v. State***, 74 Wis.2d 480, 483, 247 N.W.2d 105 (1976) (citing ***State v. Reppin***, 35 Wis.2d 377, 151 N.W.2d 9 (1967))).

"Fair and just reason" means some other adequate reason besides the defendant simply changing his mind. ***State v. Rhodes***, 2008 WI App 32, 307 Wis. 2d 350, 355, 746 N.W.2d 599, 601, citing ***State v. Canedy***, 161 Wis.2d 565, 583, 469 N.W.2d 163 (1991). Confusion about the consequences of a plea is a fair and just reason for plea withdrawal. *See* ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111, 117.

The circuit court's decision contained the following factual finding:

> Regarding the plea withdrawal discussions in this case, it is possible that, as Mr. Kelly says, Attorney Toran told

> Mr. Kelly that "it was too late" to withdraw his plea but likely that any such statements –if they occurred - were practical, not legal, advice. There is nothing ot (sic) corroborate the statement other than Attorney Toran agreeing there was some conversation about the plea. Attorney Toran did demonstrate a practical understanding of the law governing plea withdrawal post-plea but pre-sentencing, however, as well as an appreciation for how filing a motion of questionable merits may undermine the goal of seeking the best outcome for a client. The bottom line is that it is not shown by clear and convincing evidence that Attorney Toran gave this legal advice and more likely that Mr. Kelly is taking a fragment of a conversation out of context.

(R. 81: 9; App. 109).

The circuit court also found:

> Because both Attorney Anderson and Attorney Toran said they would have filed a plea withdrawal motion if Mr. Kelly directed as much, the Court finds that Mr. Kelly articulate (sic) to the attorneys a basis for such a motion and did not direct his attorneys to do so. Thus, the Court credits Attorneys Toran's testimony that "we decided not to file."

(R. 81: 9; App. 109).

While the circuit court found that Attorney Toran had demonstrated an understanding of the law, the court did not find that Attorney Toran had ever *explained* his understanding to Mr. Kelly. While the court found that Mr. Kelly did not *direct* either attorney to file a motion for plea withdrawal, the court did not find that either lawyer ever told Mr. Kelly that given the advice he received from Attorney Anderson, he would have grounds to withdraw his plea if he

chose to do so. Nor is there any testimony in the record to indicate that Attorney Toran ever gave Mr. Kelly such advice.

The court specifically credited Attorney Toran's "testimony" that "we decided not to file." (R. 81: 9; App. 109). This quotation appears in the decision without a citation to the record. The problem is that this testimony does not appear anywhere in the record. Attorney Toran never said that. An error of this kind is one potential consequence when the court uncritically adopts the filing of an advocate as its decision. To the extent that the court found that Attorney Toran testified that he and Mr. Kelly together made a decision not to withdraw the plea, that factual finding is unsupported by the record and is clearly erroneous. ***State v. Esser***, 166 Wis. 2d 897, 903, 480 N.W.2d 541, 543 (Ct. App. 1992).

What the record does establish is that, when asked whether he discussed plea withdrawal with Mr. Kelly, Attorney Toran indicated that he knew Mr. Kelly was not happy with his plea decision or his counsel but that they "didn't agree to that [plea withdrawal] because if he had done so, I would have ordered a sentencing (sic) transcript and filed a motion to withdraw the plea." (R. 98: 52; App. 161). When asked whether he specifically recalled what advice he gave Mr. Kelly, he responded "We didn't decide to withdraw the plea, I mean, I said I would represent him at the sentencing and then we opted to proceed." (R. 98: 53; App. 162).

When pressed to explain, Attorney Toran said: "Yeah, I reviewed it, and you know, he said he wasn't happy with his attorney in terms of the advice and which case he pled to. Like I say, we didn't deal with that. I just dealt with the fact that he had pled guilty to the charge and represented him at sentencing. *We didn't really go into detail about withdrawing*

the plea at all." (R. 98: 53; App. 162). He clarified on redirect that whatever conversations he had with Mr. Kelly and whatever advice he gave him regarding plea withdrawal, he did not remember it. (R. 98: 63; App. 173).

The only thing that is clear from this testimony is that it was Attorney Toran's view that his role was just to "represent him at sentencing," and therefore, he was not concerned with the plea and consequently did not discuss plea withdrawal with Mr. Kelly in any detail. He did not recall at all what discussions they had about plea withdrawal. He could only say that he knew Mr. Kelly was unhappy with the advice he received and "which case he pled to" and that ultimately no plea withdrawal motion was filed.

The totality of Attorney Toran's testimony indicated that he believed the plea to be "a done deal" and that he "didn't deal with that," [i.e., plea withdrawal], in his discussions with Mr. Kelly and "didn't really go into detail about withdrawing the plea at all." Given Attorney Toran's testimony, it is easy to see how Mr. Kelly came away with the impression that Attorney Toran was telling him it was too late. Attorney Toran did not have a detailed discussion with Mr. Kelly about his plea decision and his options related to plea withdrawal. Failure to do so, given Mr. Kelly's expressed unhappiness with his plea decision, and given the two-tiered offer and the questionable plea decision, was deficient performance.

2. Prejudice.

Attorney Toran's deficient performance in failing to "deal with" the plea withdrawal option in his discussions with Mr. Kelly resulted in prejudice. If Attorney Toran had advised Mr. Kelly that plea withdrawal was an option, Mr. Kelly would have pursued that option. Had Mr. Kelly moved

the court to allow him to withdraw his plea to the child sexual assault and to accept the State's offer to allow him to plead to the domestic violence offenses instead, the motion would surely have been granted.

In its decision, the circuit court concluded "Mr. Kelly cannot show prejudice because there is no evidence that the State would have re-extended the same offer to Mr. Kelly in the event he succeeded in withdrawing his plea before sentencing." (R. 81: 11; App. 111). But under ***Lafler***, the question is not whether the State would have been inclined to extend the same offer *after* a plea withdrawal. The question is whether at the time the original plea was entered, there were any intervening circumstances that would have caused the State to withdraw its original offer. ***Lafler***, 566 U.S. at 163, 132 S. Ct. at 1385. There is no hint of any such circumstance in this record.

Again, the appropriate remedy is for this Court to vacate Mr. Kelly's conviction and require the State to reoffer the original plea proposal so that Mr. Kelly can choose the more favorable option. ***Id.***, at 1389.

II. Mr. Kelly's Cognitive Disability is a New Factor Warranting Sentence Modification.

Wisconsin circuit courts have inherent authority to modify criminal sentences. ***State v. Hegwood***, 113 Wis.2d 544, 546, 335 N.W.2d 399 (1983). This authority is not unlimited. A court cannot modify a sentence based on reflection and second thoughts alone. ***State v. Wuensch***, 69 Wis.2d 467, 474, 480, 230 N.W.2d 665 (1975). However, it may base a sentence modification upon the defendant's showing of a "new factor." ***Hegwood***, 113 Wis.2d at 546, 335 N.W.2d 399.

Deciding a motion for sentence modification is a two-step process. First, the defendant must demonstrate the existence of a new factor. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶ 40, 333 Wis. 2d 53, 74, 797 N.W.2d 828 (citation omitted).

Erroneous or inaccurate information used at sentencing may constitute a "new factor" if it was highly relevant to the imposed sentence and was relied upon by the trial court. ***State v. Norton***, 2001 WI App 245, ¶ 9, 248 Wis. 2d 162, 168, 635 N.W.2d 656, 659. Once the defendant has established the existence of a new factor, he must satisfy the court that the new factor warrants a modification of the sentence. ***Id***. at ¶ 36, 333 Wis. 2d at 72, 797 N.W.2d at 838.

On review, whether a fact or set of facts presented by the defendant constitutes a "new factor" is a question of law. ***State v. Hegwood***, 113 Wis.2d 544, 547, 335 N.W.2d 399 (1983). This Court reviews questions of law independently of the determinations rendered by the circuit court and the court of appeals. ***Id.*** The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court, and is reviewed for erroneous exercise of discretion. ***Id.*** at 546.

At sentencing, the circuit court was told that Mr. Kelly had a "learning disability." (R. 26: 12; R. 95: 54). However, the court was unaware that Mr. Kelly actually has an *intellectual* disability that has qualified him for Social Security Disability payments. Mr. Kelly attached to his

postconviction motion social security records and a detailed report that explained the significance of the difference between a learning disability and an intellectual disability. (R. 59: 20; R. 61).[2]

Unlike a learning disability, an intellectual disability (formerly called mental retardation), significantly reduces an individual's cognitive ability. (R. 59: 21). This information was unknown to the judge at the time of Mr. Kelly's sentencing and seems to have been unknowingly overlooked by the parties. ***Harbor***, at ¶ 40.

When Mr. Kelly applied for social security benefits, he was tested and found to have an IQ of 63, which placed him in the mildly mentally retarded range. (R. 59: 22). Mr. Kelly displayed "significantly subaverage general intellectual functioning with deficits in adaptive functioning" as well as "rather limited problem solving approaches." (R. 59: 22). Mr. Kelly was found to be disabled and eligible for benefits, and his mother was named his payee. (R. 59: 23).

Mr. Kelly's intellectual disability was highly relevant to sentencing, as it would have shed additional light on both his sexual relationship with L.J. and his domestic violence offenses.

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[2] Testimony regarding these records was not presented at the postconviction motion hearings. As Mr. Kelly represented in his proposed findings of fact and conclusions of law, the State agreed in a hallway discussion prior to the commencement of the ***Machner*** hearing that it would not be necessary for Mr. Kelly to present testimony to authenticate the records. If this Court finds the factual record to be incomplete (and if the Court denies Mr. Kelly's motion to withdraw his plea), a remand may be appropriate.

Regarding the sexual relationship, Mr. Kelly's intellectual disability likely contributed to his engaging in impulsive, immature and inappropriate behavior. (R. 59: 25); Phenix, A. and Sreenivasan, S. (2009), *A Practical Guide for the Evaluation of Sexual Recidivism Risk in Mentally Retarded Sex Offenders*, J. Am Acad Psychiatry Law 37:509-24. This suggests that Mr. Kelly's involvement with a much younger girl may have been a result of his intellectual disability with its attendant impulsiveness, immaturity and diminished social skills, and not due to any deviance or sexual paraphilia. (R. 59: 25). This would suggest a diminished need for sex offender treatment and a diminished risk of recidivism. This is consistent with the Wisconsin Department of Corrections psychologist who assessed Mr. Kelly's treatment needs and reported the following:

> Mr. Kelly has no past sex crimes, convictions, or suggestions on his record. He was not in the Junior High parking lot, seeking his next 14-year-old victim, he was not on Myspace with a fake profile scoping out young teens. He was with her when she was 14, believing she was 18, and with full support from her mother. He remained upon learning she was pregnant and her real age, and stayed in her life to the extent they had two more children. Contents of his record indicate a concerning dynamic of domestic violence that must be addressed. However, this is a unique case, as Mr. Kelly stuck with her unlike men who pursue young teens repeatedly given an attraction to this age group. History does not show Mr. Kelly is one of these men . . .It is hard to believe he got ten years. With the nature and dynamics of the offense, since they have been together close to nine years, had three children, he still has support from the victim and her mother, and this is his only sex crime that occurred 8 years ago, with hesitation, this writer, DCI Psychological Services recommends short-term (SO-2).

(R. 61: 9).

With regard to the domestic violence aspect of these cases (and the record of police contacts), intellectual disabilities such as Mr. Kelly's, and the impulse-control problems they entail, can lead to poor frustration tolerance and aggressive behavior. (R. 59: 24). This information does not excuse Mr. Kelly's conduct, but it makes it more understandable. This would indicate that Mr. Kelly would benefit from sustained counseling and training in aggression management.

The circuit court orally ruled that the new information was not a new factor, and therefore did not reach the question whether this information would have warranted sentence modification. The court reasoned as follows:

> I do find that this, based on the arguments, this factor was essentially put forth before the Court at the time of sentencing. The only thing that is in my opinion that has changed is sort of the extended definition as to what was his disability. But clearly it was a factor that was argued before the original sentencing court. Therefore, this Court is going to deny the motion. I do not feel that it is a new factor.

(R. 102: 16; App. 182-83). However, contrary to the court's conclusion, it did not in fact learn at sentencing the actual nature of Mr. Kelly's disability. Rather, the court heard only that Mr. Kelly had a "learning disability." (R. 26: 12; R. 95: 54). The new information presented that explained the nature of Mr. Kelly's disability, and the fact that he was found eligible for social security benefits based on it, is not just an "extended definition" of a learning disability, as the court held. To the contrary, an intellectual disability is an entirely different condition with a markedly different impact on Mr. Kelly's emotional capability.

A learning disability would have had very little relationship to Mr. Kelly's offenses and practically no bearing on the sentencing decision. An intellectual disability, on the other hand, would have been a significant new piece of information about Mr. Kelly's character and the obstacles he has faced. That information could be directly related to his offenses and would have been highly relevant to the sentencing decision. ***State v. Harbor***, 2011 WI 28, ¶ 40, 333 Wis. 2d 53, 74, 797 N.W.2d 828 (citation omitted). Thus, the circuit court's conclusion that the intellectual disability was not a new factor was erroneous as a matter of law.

Should this Court deny Mr. Kelly relief in the form of plea withdrawal as argued above, he requests that this Court find that the new information regarding his intellectual disability constitutes a new factor, and remand to the circuit court for a determination of whether this new factor warrants a modification of his sentence.

CONCLUSION

Mr. Kelly requests that this Court enter an order vacating his conviction and allowing him to accept the State's original offer to dismiss the other charges in exchange for his plea of guilty to one count of suffocation and strangulation and one count of seconddegree reckless injury. Resentencing will then be required. In the event that request is denied, Mr. Kelly requests remand to the circuit court for a decision as to whether the new factor of his intellectual disability warrants a modification of his sentence.

Dated this 12th day of January, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,894 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 12th day of January, 2018.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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