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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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Appeal No. 2023AP1755

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

ROBERT M. SCHUELLER,
Defendant-Appellant.

ON APPEAL FROM THE SEPTEMBER 6, 2023, ORDER DENYING SCHUELLER'S POSTCONVICTION MOTION TO MODIFY HIS SENTENCE, FILED IN THE WOOD COUNTY CIRCUIT COURT,
THE HONORABLE RICK SVEYKUS, PRESIDING.
WOOD COUNTY CASE NO. 2004CF271

DEFENDANT-APPELLANT'S BRIEF

Respectfully submitted by:

Matthew S. Pinix, SBN 1064368
Joseph S. Riepenhoff, SBN 1086537

PINIX LAW, LLC
1200 East Capitol Drive, Suite 360
Milwaukee, Wisconsin 53211
T: 414.963.6164 | F: 414.967.9169
matthew@pinixlaw.com
www.pinixlaw.com

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Other Authorities

Statement of the Issue

Background

Robert Schueller is a Vietnam veteran with PTSD. When he was sentenced for a shooting death nearly two decades ago, almost every person who spoke—the parties, the sentencing court, and even the victim's family—commented on Robert's PTSD. When assessing the danger that Robert posed to the public and the impact that would have on the duration of his sentence, the sentencing court expressly commented that Robert's incurable PTSD would forever make him a higher risk in the community.

What the sentencing court didn't know at the time was that treatment of PTSD would subsequently advance to the point where it can be cured. Nowadays, established PTSD treatments can diminish an afflicted person's symptomology and alleviate the diagnosis. Relying on an expert's opinion that he could benefit from such PTSD treatment, Robert filed a motion to modify his sentence.

The circuit court denied Robert's motion without a hearing. Although the court agreed that PTSD's treatability was not known at Robert's original sentencing, it concluded that PTSD was not a highly relevant factor at Robert's sentencing, and thus denied relief.

Issue presented

Whether the post-sentencing emergence of treatment options that can ameliorate Robert Schueller's PTSD is a new factor given that the sentencing court considered the incurability of Robert's PTSD as an aggravating factor impacting the need to protect the public?

This Court should answer yes and remand for the circuit court to discretionarily consider whether modification is warranted.

Statement on Oral Argument and Publication

Robert would welcome oral argument if it would assist the panel to understand the case's nuances. He thus requests it. He does not believe that publication is necessary as this case calls for a straightforward assessment of the facts under existing new factor jurisprudence.

Statement of the Case

Robert Schueller has PTSD. (R.1:7-8; A-Ap 13-14.) That fact was known when he was originally sentenced nearly twenty years ago. (*Id.*) What wasn't known—because it didn't then exist—was the fact that modern PTSD treatments can ameliorate the disorder's effects so that a person can be considered cured. (R.132:6-8.) The modern treatability of PTSD matters in Robert's case because his sentencing judge said this:

> Post Traumatic Stress Syndrome is a factor because the Court does have to look at the mental and emotional health problems of a defendant.
>
> It's a factor that really does slice both ways in terms of a Court's analysis. It mitigates his behavior in terms of why he may have acted the way he did that night, being paranoid, but it also I think aggravates the situation when you look at somebody in terms of their danger to the public.
>
> When you hear Doctor Nelson testify about Post Traumatic Stress, that these individuals tend to be explosive and quick to anger and have violent tempers, that's a concern.
>
> I understand that Post Traumatic Stress is something that Mr. Schueller will always have because of his service in Vietnam. And it's treatable to a certain degree, but it's not something he will ever be cured of.
>
> So it's something that the Court has concerns about when you look at the protection of the public.

(R.1:95-96; A-Ap 101-102.) When the court made those comments, Robert was being sentenced for having shot and killed a person in 2004. (*See* R.47.) And, as the court's comments suggest, his PTSD played a major role in his sentencing hearing. (*See, e.g.,* R.1:7-8, 28, 32-33, 61; A-Ap 13-14, 34, 38-39, 67.)

Robert had earlier pleaded no contest to second degree intentional homicide. (R.9:4.) Although Robert's plea accepted responsibility and avoided trial, it also resulted in the shooting's underlying facts not being fully vetted at a trial. In turn, this allowed for some disagreement on the facts at sentencing. (*Compare* R.1:67-69; A-Ap 73-75 *with id.*:76-79; A-Ap 82-83.) But, not everything was contested. First, everyone agreed that Robert shot and killed the victim outside a bar after an earlier altercation. (*Id.*) And second, it was also universally agreed that Robert had PTSD. (*Id.*:59, 79; A-Ap 65, 85.) Where the parties differed was on how the shooting had occurred and what let up to it.

The State ran through several different versions of the events that night before settling on the one set forth by the PSI writer, telling the court that "the agent's summary . . . sums it up." (R.1:68; A-Ap 74.) The PSI writer laid all the blame on Robert, lambasting him for everything from using drugs and alcohol to "cho[osing] to carry a weapon on his person." (R.119:11.) The PSI writer expressly noted that "[t]here is no dispute between the doctors that [Robert] has PTSD," but nonetheless opined that the shooting "was not as simple as PTSD combined with a self medicating war vet having a flashback." (*Id.*) To the agent—and thus the State by

way of adoption—the shooting was the result of "calculating behavior combined with chemical impairment and poor decision making and the end result was the [victim's] murder." (*Id.*) Consistent with the PSI writer's opinion on Robert's PTSD, the State tried to dissuade the sentencing court from viewing PTSD as a factor in the shooting. (R.1:59, 61; A-Ap 65, 67.)

For its part, the defense made PTSD and its impact on Robert's actions a central part of its sentencing argument. (*See id.*:79-84; A-Ap 85-90.) The "Doctor Nelson" to whom the sentencing court was referring in that earlier quotation was a psychologist who had evaluated Robert at the defense's request. (*Id.*:6-7; A-Ap 12-13.) Robert presented Dr. Nelson's testimony at sentencing, along with a report that he had prepared. (*Id.*; *see also* R.132:27-34.) Dr. Nelson's report explained Robert's PTSD as follows:

> While not all individuals with PTSD react to stress and perceived threat with anger and aggression, the Viet Nam veteran, because of the nature of the war itself, is predisposed to chronic distress, emotional isolation, and unresolved frustration. Such features appear to have developed because of the young age of the combatant (19.6 years), the uncertain ideological basis for the war, the solitary nature of the tour, the rapid return home to a hostile homeland, and the lack of adequate psychological care to support readjustment. Consequently, the Viet Nam veteran suffering PTRSD [*sic.*] is predisposed, more so than others suffering PTSD, to emotional and behavioral outburst. They are likely to over interpret threatening situations and react accordingly.
>
> Individuals suffering from Post Traumatic Stress Disorder tend to be anxious, fearful, and reactive. They appear to have lost their sense of security and are constantly vigilant and on guard against threat of perceived harm to self or others. Physiologic hyper arousal is common place. These individuals are tense and quick to react, especially when feeling threatened. Intense anxiety, nightmares, depression, and explosive aggressive behavior is characteristic of individuals with combat related PTSD. Substance abuse, while not a symptom of the disorder, is often a consequence of the disorder and an effort to reduce one's arousal and anxiety. Such abuse is particularly common in the combat veteran. Mr. Schueller's entire life history from early childhood abuse and belittlement, exposure to violence, and resolution of such through force, his military training and exposure to the terror and horrors of war, as well as his exposure to an unexpected, unprovoked, and life threatening attack during a routine daily activity, set the stage and almost ensured development of extreme insecurity, hyper vigilance, paranoia, and marked over reactivity to perceived threats - which are hallmark of combat based PTSD.

(R.132:32-33.)

To explain the shooting, the defense said that Robert had gotten into a brief fight with the victim at the bar after which Robert went home. (R.1:77-79; A-Ap 83-85.) At home, Robert obtained a gun, and then returned to the bar. (*Id.*) In the parking lot, Robert again encountered the victim and another struggle ensued. (*Id.*) Robert reported being pinned to the ground, sustaining hits to the head, thinking that he was going to die, and firing some warning shots to deter his attacker. (R.113:7; R.132:30-31.) After the victim was shot, Robert returned home and considered suicide, but ultimately turned himself in to police and confessed to what happened. (*Id.*)

In addition to presenting Dr. Nelson's report and testimony regarding Robert's PTSD, defense counsel specifically argued that Robert's PTSD would have made him "more scared than a normal person" at the time of the shooting. (R.1:79; A-Ap 85.) Defense counsel also explained that Robert's PTSD wasn't "invented after the fact" but rather had been "diagnosed in the 1980s." (*Id.*) Robert's "personality was shaped by" his PTSD; it caused him to walk around with "an intense fear" even though he lived in a relatively safe place. (*Id.*:82-83; A-Ap 88-89.) And thus, in counsel's opinion, Robert "shot [the victim] not out of anger, not out of malice[,] but because he believed he was going to die or be seriously hurt." (*Id.*:84; A-Ap 90.) In other words, Robert's PTSD played a significant part in the shooting. (*See id.*)

In addition to the parties' arguments, four people spoke on behalf of the victim. (*Id.*:26-42; A-Ap 32-48.) Two of those people expressly noted Robert's PTSD diagnosis during their remarks. (*Id.*:28, 32-33; A-Ap 34, 38-39.) And while neither of them wanted much to be made of Robert's diagnosis, they certainly commented on it. (*See id.*)

The sentencing court started its remarks by referencing the *Gallion*[1] factors. (*Id.*:89; A-Ap 95.) The court then said that "protection of the community is important and has to be part of the sentence." (*Id.*:89-90; A-Ap 95-96.)

Assessing Robert's character, the court noted that Robert "ha[d] been prosocial all of his life" by which the court meant that he'd "functioned in our society despite suffering from [PTSD] for a number of years." (*Id.*:92-93; A-Ap 98-99.) The court recognized that Robert's PTSD was "not something that he made up after the fact,"

[1] *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197

but rather it had "been verified repeatedly in the records from the V.A. Hospital prior to this incident even occurring." (*Id.*:94; A-Ap 100.) It was at this point that the sentencing court called out Robert's PTSD as "a factor" that it had to consider because "the Court does have to look at the mental and emotional health problems of a defendant." (*Id.*:95; A-Ap 101.) Accordingly, the court said that Robert's PTSD was both mitigating and aggravating. (*Id.*) It was mitigating because it explained "why he may have acted the way that he did that night, being paranoid." (*Id.*) But it was aggravating because it made him "danger[ous] to the public" insofar as he was "explosive and quick to anger and ha[d] [a] violent temper[]." (*Id.*)

On the heels of recognizing the danger to the public built into Robert's PTSD, the sentencing court said two key things as far this appeal is concerned. (*See id.*:95-96; A-Ap 101-02.) First, it said that Robert would "always have" PTSD "because of his service in Vietnam." (*Id.*) Second, it said that Robert's PTSD was "not something he w[ould] ever be cured of." (*Id.*:96; A-Ap 102.) Taken together, those two things made Robert's PTSD "something that the Court ha[d] concerns about when [it] look[ed] at the protection of the public." (*Id.*)

The sentencing court went on to consider several other sentencing factors. It talked about: the circumstances of the offense; Robert's differing versions of events; the parties' dispute as to Robert's remorse; Robert's cooperation with law enforcement; Robert's choice to enter a plea; and the impact of the shooting on the community, including the victim's family. (*Id.*:97-103; A-Ap 103-09.)

Ultimately, the court sentenced Robert to a forty-year term of imprisonment, with twenty-five years of initial confinement and fifteen years of extended supervision. (*Id.*:105.) When explaining why it chose twenty-five years of confinement, the court explained, "I think that at that age"—Robert will be eighty years old—"the danger to the public is significantly mitigated." (*Id.*:105; A-Ap 111.) And then, the court explained that "supervision for the balance of [Robert's] life" was warranted "given this [PTSD] diagnosis." (*Id.*)

Nineteen years after the sentencing court told Robert that it was "concern[ed]" about his incurable PTSD on "protection of the public" grounds (*id.*:95-96; A-Ap 101-02), Robert filed a postconviction motion (R.131). In that motion, he averred the existence of modern PTSD treatments as a new factor warranting modification of his sentence. (*Id.*:1.)

In support of his postconviction claim, Robert presented a report from Dr. Colin Mahoney. (R.132:2-10.) Dr. Mahoney has a doctoral degree in clinical psychology. Colin T. Mahoney, *Curriculum Vitae* at 1 (available at https://bit.ly/41wyej4) (last accessed Dec. 19, 2023); *see also Colin T. Mahoney, Ph.D.*, Univ. Colo. Colo. Springs, https://psychology.uccs.edu/colin-mahoney (last accessed Dec. 19, 2023.) He completed his postdoctoral research fellowship at the United States Department of Veterans Affairs' National Center for PTSD in the VA Boston Healthcare System and Boston University School of Medicine. Mahoney, *CV* at 1. He currently serves as an assistant professor of Trauma Psychology at the University of Colorado – Colorado Springs where he directs a research lab and teaches psychology courses at both the undergraduate and graduate level. *Id.* at 14-15, 17. Of particular relevance to Robert's case, Dr. Mahoney teaches graduate courses in trauma psychology and clinical psychology. *Id.* at 17. He has published numerous academic papers on PTSD, and his ongoing research investigates various trauma-related processes to inform, enhance, and develop evidence-based assessments and treatments for PTSD and comorbid substance use disorders. *Id.* at 3-6.

After meeting with and evaluating Robert, Dr. Mahoney opined that—as before—Robert qualifies for a PTSD diagnosis. (*See* R.132:4-6.) Dr. Mahoney's report also provided an overview of effective treatment options for PTSD, including the history and meta-analyses of Cognitive Processing Therapy ("CPT") and Prolonged Exposure therapy ("PE"). (R.132:6-8.) As Dr. Mahoney explained, by the end of one study concerning PTSD treatment, "92% of the participants who had variable length CPT no longer had a diagnosis of PTSD." (R.132:6.) Another study of CPT's effectiveness found that "participants who received [the treatment] demonstrated significantly more improvement in PTSD symptoms, depression, anxiety, guilt, and social adjustment. Forty percent of Veterans who received CPT no longer had PTSD by the end of treatment." (R.132:7.) Dr. Mahoney additionally noted that "research on CPT has demonstrated that military Veterans like Mr. Schueller can experience a significant reduction in PTSD symptom severity and potentially no longer meet diagnostic criteria for PTSD by the end of treatment." (*Id.*) As for PE, Dr. Mahoney explained that studies have shown that, "similar to CPT, research on PE has demonstrated that military Veterans like Mr. Schueller can experience a significant reduction in PTSD symptom severity and potentially no longer meet diagnostic criteria for PTSD by the end of treatment." (R.132:8.)

Relying on Dr. Mahoney's report, Robert argued postconviction that the existence of new PTSD treatment options constitutes a new factor because (1) those treatments were undoubtedly unknown at the time of sentencing and (2) the untreatability of PTSD was something on which the sentencing court had relied when fashioning Robert's sentence. Specifically, Robert argued that the sentencing court had relied on the incurability of Robert's PTSD to set a lengthy term of imprisonment, and thus its newfound treatability was a new factor.

Without holding a hearing, the circuit court denied his motion. (R.143.) As a threshold matter, the circuit court "ha[d] no problem finding that the advances in treating combat veterans for PTSD over the last 20 years were not known to the trial judge at the time of the original sentencing, because those advances had not yet occurred." (R.143:3; A-Ap 5.) However, the court concluded that those new PTSD treatments were not a new factor because Robert's PTSD was not "highly relevant" to the sentencing court. (*Id.*:3; A-Ap 5.) Additionally, the court reasoned that "there is no evidence that such treatment has occurred with the defendant as of today, or that he would be one of those individuals that could continue in life without a PTSD diagnosis." (*Id.*:4; A-Ap 6.) Having not found a new factor, the circuit court did not address whether or not modification was justified. (*Id.*)

Schueller appeals. (R.144.)

Argument

I. This is a sentence modification case; whether the existence of previously-unavailable treatments that can alleviate Robert's PTSD constitutes a new factor is reviewed *de novo*.

The power to modify a defendant's sentence derives from the "inherent power" of the judiciary. *Hayes v. State*, 46 Wis. 2d 93, 101, 175 N.W.2d 625 (1970). It is a discretionary power, *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983), purposed on "the correction of unjust sentences," *State v. Harbor*, 2011 WI 28, ¶ 51, 333 Wis. 2d 53, 797 N.W.2d 828. "The law appropriately recognizes that sentences may be based on what is unknowingly incomplete information, and, if they are, that there should be some mechanism to correct a resulting injustice." *State v. Ramuta*, 2003 WI App 80, ¶8, 261 Wis. 2d 784, 661 N.W.2d 483.

A defendant may be entitled to sentence modification if he or she can "demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." *Id.* ¶ 38. 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." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975). "[F]rustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor." *Harbor*, 2011 WI 28, ¶ 48.

When a defendant asks for sentence modification based on a new factor, there are two parts to the analysis: the existence component and the justification component. *Id* ¶¶ 36-37. The existence component asks two things. First, is the purported new factor truly new, meaning was it not in existence or—alternatively—overlooked by the parties at sentencing? *Rosado*, 70 Wis. 2d at 288, 234 N.W.2d at 73. Second, was the purported new factor highly relevant to the imposition of sentence? *Rosado*, 70 Wis. 2d at 288, 234 N.W.2d at 73. The justification component has the court consider whether the new factor—if indeed one is recognized—warrants modification of the defendant's sentence. *Harbor*, 2011 WI 28, ¶ 37.

Only the first part of the analysis—the existence component—is relevant in Robert's case because the circuit court decided only that Robert had not proven a new factor. (R.143:4; A-Ap. 6.) The court expressly did not decide whether modification would be warranted. (*Id.*)

On review, the question of "[w]hether a fact or set of facts . . . constitutes a 'new factor' is a question of law" that appellate courts review "independently of the determinations rendered by the circuit court." *Id.* ¶ 33. And thus, this Court decides independently whether the treatability of Robert's PTSD is a new factor.

II. That effective PTSD treatments are now available to Robert is a new factor.

A. The sentencing court did not know of the contemporary treatments available to alleviate and even cure PTSD.

Robert was sentenced in 2005. Since that time, CPT and PE have developed to the point that they are now able to ameliorate PTSD in veterans. Dr. Mahoney's

report provides an overview of studies done after 2005 that have indicated the effectiveness of those treatment programs. (R.132:6-8.) In particular, Dr. Mahoney explains that

> CPT is one of the most studied treatments for PTSD. There have been over twenty randomized controlled trials (RCTs) of CPT with more in progress. Meta-analyses suggest that CPT produces large treatment effects in regard to PTSD symptom reduction and loss of diagnosis. Several studies have shown CPT to be effective for treating PTSD in Veterans and Service members. In the first RCT with U.S. Veterans, participants were randomized to either CPT or treatment as usual. Those participants who received CPT demonstrated significantly more improvement in PTSD symptoms, depression, anxiety, guilt, and social adjustment. Forty percent of Veterans who received CPT no longer had PTSD by the end of treatment. CPT has also been shown to be effective among Australian Veterans [. . .] A study with active duty military personnel found that PTSD symptoms improved more with individual than group CPT.

(*Id.*:7 (cited authorities omitted).) As for PE, Dr. Mahoney writes that it

> has been studied in over 20 RCTs with more in progress. Similar to CPT, meta-analyses suggest that PE produces large treatment effects in regard to PTSD symptom reduction and loss of diagnosis.
>
> Schnurr and colleagues conducted the first RCT in female Veterans and demonstrated PE to be more efficacious than Present-Centered Therapy. At follow-up, individuals who completed PE demonstrated a greater reduction of PTSD symptoms and were 1.8 times more likely to no longer meet diagnostic criteria for PTSD. A recent head-to-head RCT in post-9/11 Veterans compared sertraline plus enhanced medication management, PE plus placebo, and PE plus sertraline. Results revealed significant reductions in PTSD symptom severity in both PE plus placebo and PE plus sertraline. Additional RCTs demonstrated effectiveness for reducing PTSD symptoms in U.S. military personnel, U.S. Veterans, and Israeli Veterans.

(*Id.* at 8 (cited authorities omitted).)

The research summarized by Dr. Mahoney clearly establishes the efficacy of contemporary treatment options on alleviating and even ridding a person of PTSD. The existence of those contemporary treatment options and their ability to cure PTSD was certainly unknown to the court and the parties at the time of Robert's sentencing. Indeed, the sentencing court's remarks make plain its belief that Robert's PTSD was incurable. And that was a fair assessment at the time.

As Dr. Mahoney's report explains, advancements in CPT did not come about until 2012. (R.132:6.) And the efficacy of that change wasn't fully understood until

subsequent testing throughout the following decade. (*Id.*:7.) Likewise, the efficacy of PE in treating PTSD in veterans was not first studied until 2007. (*Id.*:8.) And, its ability to meaningfully reduce PTSD symptomology and diagnoses has continued to be evaluated and understood until recently. (*Id.*)

Thus, there is no way that the court or the parties could have been aware of today's PTSD treatments at the time of Robert's sentencing. Nor could the sentencing court have known that Robert's PTSD would one day be something that could be cured. Postconviction, the circuit court agreed. It "ha[d] no problem finding that the advances in treating combat veterans for PTSD over the last 20 years were not known to the trail judge" and that "those advances could be of use to [Robert]." (R.143:3; A-Ap 5.) Robert urges this Court to reach the same conclusion.

The present availability of treatment and the ability to cure Robert of PTSD was thus unknown at the time of his sentencing. The remaining question for new factor purposes is whether Robert's incurable PTSD was highly relevant to the sentence imposed.

B. Robert's PTSD—and the court's opinion that it was incurable—was highly relevant to the imposition of sentence.

There should be no dispute that Robert's PTSD featured prominently at sentencing. The defense presented testimony and a report from a psychological expert about Robert's PTSD and its impact on the shooting. And then, in argument, defense counsel opined that Robert's actions were influenced and mitigated by his PTSD. The State did not disagree that Robert had PTSD, but rather contested its mitigating impact. Two of the victim's family members expressly remarked on Robert's PTSD, joining the State's attempt to diminish its mitigating impact. So, nearly every party to the sentencing proceeding had something to say about Robert's PTSD.

When it was the court's turn to speak, it repeatedly remarked on Robert's PTSD. (R.1:93-96, 106; A-Ap 99-102, 112.) The court indisputably considered Robert's PTSD as "a factor" that it "d[id] have to look at" because, as the court said, it was part of Robert's "mental and emotional health problems." (*Id.*:95; A-Ap 101.) The court expressly remarked that Robert's PTSD was, in some ways, mitigating. (*Id.*) But it was also aggravating, said the court, because it made Robert a "danger to the public."

(*Id.*) Robert's PTSD was "something that the Court ha[d] concerns about when [it] look[ed] at the protection of the public." (*Id.*:96; A-Ap 102.)

Relevantly, early in the sentencing court's remarks it said that "[p]rotection of the community" was a "significant" sentencing objective. (R.1:89; A-Ap 95.) So, when the court later stated that it was concerned about Robert's incurable PTSD for protection of the public grounds, it was tying that PTSD to what it had earlier referred to as a significant sentencing objective. That same recognition of the importance of protecting the public came again later in sentencing shortly before the court articulated the duration of Robert's sentence: "There are . . . the Court's concerns about protection of the public . . .." (R.1:105; A-Ap 111.) Then, after the court gave Robert twenty-five years of initial confinement, it opined that so doing would make Robert eighty-years-old on release. (*Id.*) "And," said the court, "at that age, danger to the public is significantly mitigated." (*Id.*:105-06, A-Ap 111-12.) So, very obviously, the sentencing court was making protection of the public a cornerstone of Robert's sentence.

Importantly, Robert's incurable PTSD was one specific thing that the court recognized earlier in sentencing as making Robert dangerous to the public. (*Id.*:96; A-Ap 102.) What is more, the court brought up Robert's PTSD *again* when explaining why eighty-year-old Robert would eventually need a lifetime of supervision: "The Court does believe that [Robert] would need to be on supervision for the balance of his life given this [PTSD] diagnosis." (*Id.*:106; A-Ap 112.) In other words, Robert's incurable PTSD would make him dangerous even as an octogenarian. (*See id.*)

In addition to the record, extant authority supports the proposition that Robert's PTSD was highly relevant at sentencing. Our supreme court has listed protection of the public among the factors most relevant to sentencing. *See State v. Gallion*, 2004 WI 42, ¶¶40, 43-44 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. Whereas the sentencing court recognized Robert's incurable PTSD as contributory to the need to protect the public, it was highly relevant to the sentence imposed. *See id.* Furthermore, Robert's PTSD is both part of his character and constitutes applicable mitigating information. Sentencing courts are required by law to consider both the character of the defendant, *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409, and any applicable mitigating information, *Gallion*, 2004 WI 42, ¶43; *see also* Wis. Stat. § 973.017(2)(b) (codification of principle). Finally, the sentencing

court's express recognition of Robert's incurable PTSD when explaining his sentence demonstrates its high relevance. *Cf. State v. Franklin*, 148 Wis.2d 1, 15, 434 N.W.2d 609 (1989) ("Because it was not expressly considered by the court in sentencing, parole policy was not relevant to the imposition of this sentence.")

According to the sentencing court, Schueller's PTSD "aggravate[d] the situation when you look at somebody in terms of their danger to the public." (*Id.*) To explain what it considered the aggravating nature of Schuller's PTSD, the court reasoned "that Post Traumatic Stress is something that Mr. Schueller will always have because of his service in Vietnam. And it's treatable to a certain degree, but it's not something he will ever be cured of. So it's something that the Court has concerns about when you look at the protection of the public." (R.1:95-96; A-Ap 101-02.) Robert's incurable PTSD made him "explosive and quick to anger" and caused him to "have [a] violent temper[.]" (*Id.*:95; A-Ap 101.) Those attributes made him dangerous to the public because, according to the sentencing court, he would always be saddled with PTSD.

Given that the sentencing court made protection of the public a significant sentencing objective and specifically called out Robert's incurable PTSD as a factor relevant to that objective, Robert's PTSD and its incurability were highly relevant at sentencing.

But now, Robert can show that his PTSD is not an incurable condition or one that will persist throughout his life. Instead, there are contemporary treatments available to cure him. Whereas the incurability of Robert's PTSD was highly relevant at sentencing, so too is the now-known fact that it can, in truth, be cured. For those reasons, the fact that Robert's PTSD is no longer incurable and instead can be ameliorated by modern treatment options is a new factor.

III. The circuit court did not decide whether modification was warranted; if this Court concludes that Robert has proven a new factor, it should remand so that the circuit court can make that discretionary decision.

If this Court decides that Robert has proven a new factor, then it should remand to the circuit court to decide whether modification is warranted. The question of modification is a matter of circuit court discretion. *Harbor*, 2011 WI 28, ¶33. However, in Robert's case, the circuit court did not decide that question. (See R.143:4; A-Ap 6.) Instead, the circuit court denied Robert's motion because, in its

opinion, he had not established a new factor. (*Id.*) "The function of [the appellate] court is not to exercise discretion in the first instance but to review the exercise of discretion by the trial court." *Priske v. Gen. Motors Corp.*, 89 Wis. 2d 642, 663, 279 N.W.2d 227 (1979). Whereas the circuit court in Robert's case chose not to exercise its discretion, remand is the appropriate result "[b]ecause [this Court] may not exercise discretion for the trial court." *Mach v. Allison*, 2003 WI App 11, ¶29, 259 Wis. 2d 686, 656 N.W.2d 766.

Thus, if this Court decides that Robert has proven a new factor, it should send his case back to the circuit court so that it may decide, as a matter of discretion, whether modification of his sentence is warranted. *See id.*; *Harbor*, 2011 WI 28, ¶33.

Conclusion

Robert was sentenced to a lengthy term of imprisonment because, in the sentencing court's opinion, his incurable PTSD made him dangerous to the public. The sentencing court expressly called out that incurable PTSD when explaining the sentence it imposed. Nineteen years later, there are viable treatment options that Robert can utilize to finally address and alleviate the PTSD with which he has struggled his entire adult life. Given that the court sentenced Robert believing that he would forever be dangerous because of his PTSD, the existence of new PTSD treatments and their ability to cure Robert of his PTSD is thus a new factor.

Robert asks this Court to find that the treatability of his PTSD is a new factor and remand his case to the circuit court so that it can, as a matter of discretion, decide whether modification is warranted.

Dated this 19th day of December, 2023.

PINIX LAW, LLC
Attorneys for Robert M. Schueller

Electronically signed by Matthew S. Pinix
By: Matthew S. Pinix, SBN 1064368
Joseph S. Riepenhoff, SBN 1086537

Rule 809.19(8g)(a) Certifications

I certify that this brief conforms to the rules contained in Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 4,836 words, as counted by the commercially available word processor Microsoft Word.

I hereby certify that filed with this brief is an appendix that complies with Section 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 s. 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 including 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.

Dated this 19th day of December, 2023.

PINIX LAW, LLC
Attorneys for Robert M. Schueller

Electronically signed by Matthew S. Pinix
By: Matthew S. Pinix, SBN 1064368
Joseph S. Riepenhoff, SBN 1088091

Rule 809.19(8g)(b) Certification of Appendix Content

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 Section 809.19(2)(a) and that

contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

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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 first names and last initials instead of full names of persons, specifically including 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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