

**FILED**  
**03-06-2024**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

\_\_\_\_\_  
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 REPLY 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 .....	2
Argument.....	3
I. The State’s new factor argument misses the mark: Robert’s not arguing about his prison treatment or rehabilitation, and thus the State’s cited authority is inapt.....	3
II. The sentencing court specifically remarked on Robert’s incurable PTSD as making him dangerous, and even the State admits that protection of the public was one of the court’s express sentencing objectives. It’s thus obvious that the curability of Robert’s PTSD is highly relevant to the imposition of sentence.....	6
Conclusion.....	7
Rule 809.19(8g)(a) Certifications .....	8

---

### Table of Authorities

#### Cases

<i>Hayes v. State</i> , 46 Wis. 2d 93, 175 N.W.2d 625 (1970) .....	4
<i>Rosado v. State</i> , 70 Wis. 2d 280, 234 N.W.2d 69 (1975).....	3, 5, 7
<i>State v. Allen</i> , 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433.....	6
<i>State v. Kluck</i> , 210 Wis. 2d 1, 563 N.W.2d 468 (1997).....	4
<i>State v. Leitner</i> , 2001 WI App 172, 247 Wis. 2d 195, 633 N.W.2d 207 .....	6
<i>State v. Prince</i> , 147 Wis. 2d 134, 432 N.W.2d 646 (Ct. App. 1988) .....	4
<i>State v. Slogoski</i> , 2001 WI App 112, 244 Wis. 2d 49, 629 N.W.2d 50 .....	5

## Argument

When the sentencing court decided how much time Robert Schueller should spend in prison, it did so under the opinion that PTSD was an incurable mental health condition that would forever make Robert dangerous. (R.1:95-96; A-Ap 101-102.) But that opinion is now provably wrong. (R.132:6-8.) Since Robert's sentencing, advancements in mental health treatment have been developed that can cure a person of PTSD. (*See id.*)

It is those treatment options that Robert now adduces as a new factor. (*See* Robert's 1<sup>st</sup> Br. at 11-13.) And to prove that they are a new factor, he needs to show only two things: (1) the existence of those treatments was unknown at the time of sentencing and (2) had they been known, they would've been highly relevant to the sentence imposed. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). In its response brief, the State disputes Robert's ability to prove either element. (St.'s Br. at 10-15.) He explains below how the State's arguments do not defeat his claim for relief.

### **I. The State's new factor argument misses the mark: Robert's not arguing about his prison treatment or rehabilitation, and thus the State's cited authority is inapt.**

Before diving into the State's argument, Robert must briefly note here what both parties to this appeal have recognized: the postconviction 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 sentencing, because the advances had not yet occurred." (St.'s Br. at 9 (quoting R.143:3 (alteration in St.'s Br.)); *see also* Robert's 1<sup>st</sup> Br. at 10.) The State does not contest that finding on appeal. And so, all are agreed that the new treatments available to cure Robert's PTSD constitute "a fact . . . not known to the trial judge at the time of original sentencing . . . because it was not then in existence." *Rosado*, 70 Wis. 2d at 288, 234 N.W.2d 69. To Robert, that should be the end of any dispute over his ability to prove the first part of the new factor test. But the State disagrees.

Challenging Robert's ability to prove a new factor, the State complains that he "does not address the long history of cases that hold that response to treatment and rehabilitation are not new factors." (St.'s Br. at 12.) That is true: Robert did not

address those cases. But Robert fails to see how that is a meaningful challenge to his argument.

Robert will admit—as the State’s averred—that numerous cases have reiterated that a person’s successful rehabilitation in prison is not a new factor. *See, e.g., State v. Kluck*, 210 Wis. 2d 1, 7-8, 563 N.W.2d 468 (1997); (*see also* St.’s Br. at 12 (collecting cases)). But those cases have no force here because Robert’s not arguing about his carceral rehabilitation.

Instead, in his postconviction motion, Robert specifically explained that the new treatment programs capable of curing his PTSD are accessible to him only “*in the community*.” (R.131:11-12 (emphasis added).) Indeed, he specifically wrote in his motion that “[t]he uniquely effective forms of treatment discussed [therein] are not available to [him] *while he remains in custody*.” (*Id.*:12 (emphasis added).) So, the State’s entire argument about prison treatment and rehabilitation not being new factors is completely off the mark. The bulk of authority on which the State relies simply has no merit in the discussion of Robert’s new factor.

One case to which the State cites does warrant specific discussion, and it is favorable to Robert’s position. (St.’s Br. at 12 (citing *State v. Prince*, 147 Wis. 2d 134, 136-37, 432 N.W.2d 646 (Ct. App. 1988)).) In *Prince*, the defendant sought to modify his sentence on the ground that he was responding to rehabilitative programming in prison. *Id.* at 135-36. This Court rejected that claim on the usual ground that “[c]hanges in attitude and prison rehabilitation are not new factors justifying sentence modification.” *Id.* at 136. Nonetheless, the Court remarked that the defendant’s “responsiveness to treatment as part of a rehabilitation program within an institution and his treatability as an outpatient *are two distinct issues*.” *Id.* (emphasis added). In other words, the Court recognized that a person’s ability to receive treatment outside the prison setting could be a new factor where “institutional treatment” offered as “part of the rehabilitation process” could not. *Id.* at 137-38.

Thus, the cases that the State cites are mostly inapt to the new factor that Robert presents. And at least one of them can be read to support Robert’s new factor claim.

Ultimately, sentence modification is purposed on “correct[ing] unjust sentences.” *Kluck*, 210 Wis. 2d at 8 (quoting *Hayes v. State*, 46 Wis. 2d 93, 105, 175 N.W.2d 625 (1970)). Robert’s case aims directly at that purpose: the correction of an

unjust sentence. His sentence has become unjust because it's based on the sentencing court's fundamental misunderstanding of PTSD's incurability and the attendant misbelief that Robert will be forever dangerous because of it.

Before moving on, Robert will briefly touch on the State's proposition that *State v. Slagoski*, 2001 WI App 112, 244 Wis. 2d 49, 629 N.W.2d 50, is somehow a barrier to relief. (St.'s Br. at 12.) The *Slagoski* defendant aimed to modify his sentence based on a mental health evaluation that was performed post-sentencing. 2001 WI App 112, ¶¶ 6, 10. This Court rejected the postconviction evaluation as a new factor for two reasons. *Id.* ¶ 11. First, the sentencing court had been provided with other mental health evaluations and the postconviction evaluation was nothing more than a variance of opinion between mental health professionals. *Id.* That's wholly unlike Robert's case because no one opined at his sentencing about the newly available PTSD treatments. Contrary to *Slagoski*, his case is not one of competing expert opinions. The second reason this Court rejected *Slagoski's* new factor is that the sentencing court had access to other records proffering similar opinions to the ones given postconviction. *Id.* In other words, there was nothing in the postconviction evaluation that was unknown at sentencing. *Id.* But that proposition cannot be advanced here: everyone agrees that the new PTSD treatments available to Robert were unknown to the sentencing court. *Slagoski* thus has no parallel to Robert's case.

Setting aside the State's cited cases, Robert wants to comment on the State's suggestion that "[t]he availability of treatment is only relevant if [Robert] was able to obtain that treatment and become rehabilitated." (St.'s Br. at 13.) That is not so. What is relevant is whether Robert has pointed to a fact or set of facts that was unknown to the sentencing court either because it was not in existence or it was unknowingly overlooked. *Rosado*, 70 Wis. 2d at 288, 234 N.W.2d 69. As Robert has explained and the postconviction court has found, the sentencing court did not know about the emergence of post-sentencing treatments that can cure PTSD. Nothing in the State's cited authority stops that fact from being recognized as a new factor. *Id.*

Finally, Robert wants to address the State's reliance on the postconviction court's conclusion that Robert hasn't "shown that he will be able to be part of the population that shows marked improvement based on the new treatment." (St.'s Br. at 13 (quoting R.143:4).) In case this Court may, at first blush, be inclined to find

that comment dispositive, Robert wants to remind the Court of the procedural posture of this case.

Robert has not had an evidentiary hearing on his postconviction motion. Before a hearing, courts are to take as true the defendant's well-pleaded factual allegations. *See State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 682 N.W.2d 433. And thus, given the allegations in Robert's postconviction motion, it must be taken as true that—contrary to the postconviction court's finding—he is the sort of person who could be cured of PTSD by virtue of the new treatments he described. (*See, e.g.*, R.131:5 (“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”) (emphasis added).) If the postconviction court questioned the believability of that fact, it should have held a hearing. *Allen*, 2004 WI 106, ¶ 12 n.6, *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207 (stating that when credibility is an issue, it is best resolved by live testimony). Regardless, for purposes of this Court's analysis of whether Robert has presented a new factor, it must take as true that his PTSD can be cured by newly available treatments.

For all those reasons, Robert asks this Court to reject the State's suggestion that he's not proven a new factor.

**II. The sentencing court specifically remarked on Robert's incurable PTSD as making him dangerous, and even the State admits that protection of the public was one of the court's express sentencing objectives. It's thus obvious that the curability of Robert's PTSD is highly relevant to the imposition of sentence.**

The State writes in its brief that “the two most important factors” for the sentencing court were “[p]rotection of the community and punishment of the defendant.” (St.'s Br. at 14 (quoting R.1:89).) Robert won't disagree with that. In fact, the importance that the sentencing court ascribed to protecting the public played a significant role in Robert's appellate argument. (*See Robert's 1<sup>st</sup> Br.* at 13-14.)

Robert explained in his opening brief that the curability of his PTSD is highly relevant to the sentence imposed specifically because the sentencing court relied on the disorder's incurability to explain why the public needed to be protected from him. (R.1:95-96; A-Ap 102-03.) To the sentencing court, the dangerousness affiliated

with Robert's incurable PTSD necessitated his imprisonment until he was eighty because "at that age, danger to the public is significantly mitigated." (*Id.*:95-96, 105-06, A-Ap 102-03, 111-12.) Robert's incurable PTSD thus contributed to—as the State says—one of the most important sentencing factors: protecting the public.

The State offers little in response other than to say that "the perceived lack of treatability of [Robert's] PTSD was a small factor that went into the court's consideration of the protection of the public." (St.'s Br. at 14.) But the record belies that assertion. The sentencing court was very clear that Robert's PTSD "is something that [he] will always have" and never "be cured of," which caused the court to be "concern[ed] . . . when . . . look[ing] at the protection of the public." (R.1:95-96; A-Ap 101-02.) Importantly, the danger posed by Robert's incurable PTSD was not a one-off mention or an insignificance; the court spoke about it repeatedly throughout sentencing. Given (1) the State's agreement that protection of the public was one of the sentencing court's two most important considerations and (2) the sentencing court's express opinion that the incurability of Robert's PTSD would make him perpetually dangerous to the public, the curability of Robert's PTSD is obviously highly relevant to the sentence imposed. *See Rosado*, 70 Wis. 2d at 288, 234 N.W.2d 69.

Robert asks this Court to reach the same conclusion.

---

### **Conclusion**

For those reasons and the ones stated more fully in his opening brief, Robert asks this Court to conclude that he's presented a new factor and to remand the matter to the circuit court for it to decide as a matter of discretion whether modification is warranted.

Dated this 6<sup>th</sup> day of March, 2024.

PINIX LAW, LLC  
Attorneys for Robert M. Schueller

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

---

**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 1,915 words, as counted by the commercially available word processor Microsoft Word.

Dated this 6<sup>th</sup> day of March, 2024.

PINIX LAW, LLC  
Attorneys for Robert M. Schueller

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