

STATE OF WISCONSIN  
IN SUPREME COURT  
Case No. 2008AP1139

**RECEIVED**

**12-03-2010**

**CLERK OF SUPREME COURT  
OF WISCONSIN**

---

STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

OMER NINHAM,  
Defendant-Appellant-Petitioner.

---

ON REVIEW OF A DECISION OF THE WISCONSIN  
COURT OF APPEALS, DISTRICT 3, AFFIRMING THE  
DENIAL OF POST-CONVICTION RELIEF ENTERED IN  
THE CIRCUIT COURT FOR BROWN COUNTY, THE  
HONORABLE J.D MCKAY PRESIDING.

---

**NON-PARTY BRIEF OF LEGAL ASSISTANCE TO  
INSTITUTIONALIZED PERSONS PROJECT (LAIP)  
OF THE FRANK J. REMINGTON CENTER,  
UNIVERSITY OF  
WISCONSIN LAW SCHOOL**

---

*Amicus Curiae*  
Legal Assistance to  
Institutionalized Persons  
Frank J. Remington Center  
University of Wisconsin Law School  
975 Bascom Mall  
Madison, WI 53706  
(608) 265-2741

Byron C. Lichstein  
Bar No. 1048483

Colleen M. Marion  
Law Student

**TABLE OF CONTENTS**

Table of Authorities .....ii

Argument..... 1

I. The legal standard for whether information qualifies as a “new factor” for sentence modification should be case-by-case depending on the specific sentencing rationale, and generally should not be subject to categorical rules..... 1

II. Depending on the sentencing rationale in a particular case, new adolescent brain science could constitute a “new factor” possibly warranting sentence modification.....5

III. A sentencing court’s reasoning process as to a defendant’s future risk to public protection is governed by the principles articulated in *Gallion*, and new adolescent brain science is relevant to that reasoning process.....8

    A. A sentencing court’s reasoning process as to a defendant’s future risk to public protection is governed by the principles articulated in *Gallion* ..8

    B. Adolescent brain science is relevant to sentencing predictions about a juvenile defendant’s future risk to the public ..... 9

Conclusion ..... 11

Certification as to Form and Length ..... 12

Certification of Compliance with Rule 809.19(12) ..... 12

## TABLE OF AUTHORITIES

### Cases

<i>Graham v. Florida</i> , 130 S.Ct. 2011 (2010) .....	6
<i>Hayes v. State</i> , 46 Wis. 2d 93, 175 N.W.2d 625 (1970) .....	4
<i>Kutchera v. State</i> , 69 Wis. 2d 534, 230 N.W.2d 750 (1975) .....	3
<i>Rosado v. State</i> , 70 Wis. 2d 280, 234 N.W.2d 69 (1975) .....	2
<i>State v. Allen</i> , 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433 .....	4
<i>State v. Bush</i> , 185 Wis. 2d 716, 519 N.W.2d 645 (Ct. App. 1994) .....	3
<i>State v. Champion</i> , 2002 WI App 267, 258 Wis. 2d 781, 654 N.W.2d 242 .....	4
<i>State v. Delaney</i> , 2006 WI App 37, 289 Wis. 2d 714, 712 N.W.2d 368 .....	3
<i>State v. Franklin</i> , 148 Wis. 2d 1, 434 N.W.2d 609 (1989) .....	2, 3
<i>State v. Gallion</i> , 270 Wis. 2d 535, 678 N.W.2d 197 (2004) .....	8-10
<i>State v. Hegwood</i> , 113 Wis. 2d 544, 335 N.W.2d 399 (1983) .....	4
<i>State v. Kluck</i> , 210 Wis. 2d 1, 563 N.W.2d 468 (1997) .....	4

*State v. Lechner*,  
217 Wis. 2d 392, 576 N.W.2d 912 (1998) ..... 3

*State v. McCleary*,  
49 Wis. 2d 263, 182 N.W.2d 512 (1971) ..... 4, 9

*State v. Michels*,  
150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989) ..... 2

*State v. Trujillo*,  
2005 WI 45, 279 Wis. 2d 712, 694 N.W.2d 933 ..... 4

**Other Authorities**

Council on Crime in America,  
“The State of Violent Crime in America: A First Report of the  
Council on Crime in America,” (1996)..... 5

Jeffrey Kassel,  
“Sentence Modification by Wisconsin Trial Courts,” 1985  
Wis. L. Rev. 195 ..... 4

John Dilulio,  
“The Coming of the Super-Predators,” *The Weekly Standard*,  
(Nov. 27, 1995)..... 5

Wisconsin Council on Children & Families,  
“Rethinking the Juvenile in Juvenile Justice: Implications of  
Adolescent Brain Development on the Juvenile Justice  
System” (2006) ..... 6

## ARGUMENT

- I. The legal standard for whether information qualifies as a “new factor” for sentence modification should be case-by-case depending on the specific sentencing rationale, and generally should not be subject to categorical rules.**

There are two prongs for “new factor” sentence modification: 1) whether new information constitutes a “new factor,” and 2) if so, whether the “new factor” warrants sentence modification in the circuit court’s discretion. *State v. Crochiere*, 2004 WI 78, ¶10, 273 Wis. 2d 57, 681 N.W.2d 524. The first prong is a question of law, while the second prong calls for the circuit court’s exercise of discretion. *Id.*

The court of appeals’ opinion implicitly raises a significant question—whether the first prong of the “new factor” analysis should be subject to categorical rules for all cases. The opinion can be read to suggest that new adolescent brain science can never be a “new factor” in any case:

[T]he new research does not constitute a new factor. The court was aware of the differences between juveniles and adults. Continued medical and scientific research that provides a physiological explanation for the differences is not highly relevant to the sentence....[and] does not frustrate the purpose of the sentence.

Opinion of Court of Appeals at ¶ 9. Similarly, the State’s brief can be read to propose a categorical rule that, “as a matter of law,” “research regarding adolescent brain development does not meet the new factor standard” (State’s Brief at 30, 33).

This Court should make clear that, in general, the question of whether new information constitutes a “new factor” should

not be subject to categorical rules, but instead should be determined by analyzing whether the new information is “highly relevant” to the original sentencing rationale in the particular case. That view is supported by previous “new factor” cases.

Wisconsin’s foundational “new factor” cases focus on the relationship between the new information and the original sentencing rationale. In *Rosado*, this Court defined a new factor as “highly relevant to the imposition of sentence,” but “not known to the trial judge at the time of original sentencing.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Thus, the definition turns on the new information’s effect on the original sentencing rationale.<sup>1</sup>

Cases applying the standard reinforce that interpretation, by making clear that a particular kind of new information may be a “new factor” under one sentencing rationale, but not under a different rationale.

One example is this Court’s treatment of a change in parole eligibility as a potential “new factor.” In *Franklin*, this Court made clear that the determination is case-specific, depending on whether parole eligibility was highly relevant to the original sentence: “In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing.” *State v. Franklin*, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989). The Court found that Franklin failed to prove that a change in parole eligibility occurred, and determined that even if a change had occurred it would not be a new factor because “parole policy simply

---

<sup>1</sup> The frequently-cited *Michels* court of appeals decision added language to the *Rosado* standard—the new factor must “frustrate the purpose of the original sentence.” *State v. Michels*, 150 Wis.2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). Under *Michels* the focus is still on the relationship between the new information and the original sentencing rationale. In *Michels*, the “recent worsening” of Michels’ health did not “frustrate the sentencing judge’s original intent” because “at the time of sentencing, his health problems were known.” *Id.* at 96, 100.

was not relevant to the original sentence issued in this case.” *Id.* at 13.

The Court distinguished *Franklin* from *Kutchera*, in which a change in parole eligibility *did* occur, and the change *was* relevant to the original sentence. In *Kutchera*, at the time of sentencing the defendant was immediately eligible for parole, but later caselaw held that each inmate had a one-year minimum eligibility date. The Court held that this change constituted a “new factor” possibly warranting sentence modification. *Kutchera v. State*, 69 Wis. 2d 534, 553, 230 N.W.2d 750 (1975); *but see State v. Delaney*, 2006 WI App 37 ¶ 13, 289 Wis. 2d 714, 712 N.W.2d 368 (change in parole eligibility was not a “new factor” because the sentence was “carefully fashioned after an express consideration of the relevant factors, and Delaney's parole eligibility was not one of those factors”).

Hence, parole eligibility has sometimes—but sometimes not—been found to be a “new factor” for sentence modification.

Another example of this case-by-case approach is the caselaw concerning a PSI's inaccurate treatment of prior convictions. When “inaccurate information” is presented at sentencing, that information can constitute a “new factor”, but only if it was highly relevant to the original sentence. *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). In *Lechner*, the PSI's inaccurate listing of prior convictions was not a new factor because the court based its sentence not on the prior convictions, but on the defendant's substance abuse. *Id.* at 422. By contrast, in *Bush*, the PSI's inaccurate account of the defendant's prior sex offender treatment was a new factor because the court expressly relied on the inaccuracy. *State v. Bush*, 185 Wis. 2d 716, 721, 519 N.W.2d 645 (Ct. App. 1994).

A case-by-case approach furthers the original goal of sentence modification—to correct individual unjust sentences. *Hayes v. State*, 46 Wis. 2d 93, 105, 175 N.W.2d 625 (1970). This is consistent with Wisconsin’s foundational sentencing cases, which state that each defendant should “be sentenced according to the needs of the particular case.” *State v. McCleary*, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971).

It is true that there are exceptions to this case-by-case approach; in rare cases this Court has suggested a categorical approach to new factors. This Court has ruled that post-sentencing “rehabilitation”<sup>2</sup> and post-sentencing changes in law—where the legislature has chosen not to make the law retroactive<sup>3</sup>—are never new factors. But these rare examples reflect a policy of deference to other institutional actors. Jeffrey Kassel, “Sentence Modification by Wisconsin Trial Courts,” 1985 Wis. L. Rev. 195, 207, 214. As to changes in law, this Court deferred to the legislature’s judgment that a new law should not apply retroactively. As to rehabilitation, this Court deferred to the parole board and, later, to legislative intent behind “Truth in Sentencing.”<sup>4</sup>

A case-by-case approach does not significantly harm judicial economy, because circuit courts maintain discretion under the second prong of the new factor test to deny meritless sentence modifications without a hearing. *See State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. A case-by-case approach merely avoids artificial categorical rules, and allows a circuit court to exercise its discretion in appropriate cases where new information is highly relevant to the sentence.

---

<sup>2</sup> *State v. Kluck*, 210 Wis. 2d 1, 563 N.W.2d 468 (1997); *State v. Champion*, 2002 WI App 267, 258 Wis. 2d 781, 654 N.W.2d 242.

<sup>3</sup> *State v. Hegwood*, 113 Wis. 2d 544, 335 N.W.2d 399 (1983); *State v. Trujillo*, 2005 WI 45, 279 Wis. 2d 712, 694 N.W.2d 933.

<sup>4</sup> These rare categorical rules also likely reflect a desire to discourage prisoner litigation. Kassel at 215. That concern is addressed in the next sub-section.



**II. Depending on the sentencing rationale in a particular case, new adolescent brain science could constitute a “new factor” for sentence modification.**

Consistent with the above discussion, new adolescent brain science could constitute a “new factor” in some cases, because it could be new and highly relevant, and could frustrate the purpose of a sentence.

Many very long juvenile sentences were imposed during the 1990’s, when courts and commentators feared a rising number of juvenile “super-predators,” juveniles whose serious crimes supposedly demonstrated irredeemable character flaws and a permanent risk to public safety. John Dilulio, “The Coming of the Super-Predators,” *The Weekly Standard*, 23 (Nov. 27, 1995) (“By the year 2010, there will be approximately 270,000 more juvenile super-predators on the streets than there were in 1990”); Council on Crime in America, “The State of Violent Crime in America: A First Report of the Council on Crime in America,” (1996) (noting the “coming storm of juvenile violence”).

Data has proven that those fears were unfounded. Franklin Zimring, “American Juvenile Justice,” Oxford University Press, 122 (2005) (“[T]here is simply no foundation for any prediction of future danger in the first nine years of the period after 1993, the era that was supposed to lead the bad new days of juvenile violence”).

New adolescent brain science may, in some cases, provide the factual basis for modifying sentences imposed under the “super-predator” myth or other similar outdated notions about juvenile crime. Thus, the new brain science may satisfy the “new factor” standard.

First, adolescent brain science may be “new” in some cases. As the U.S. Supreme Court recognized in its recent decision

altering the constitutional standard for sentencing juveniles, scientists have only recently developed the technology to reveal substantial physical differences between adolescent and adult brains. See *Graham v. Florida*, 130 S.Ct. 2011, 2026-27 (2010). In some cases the science is new because it did not exist at sentencing. In other cases, the science may have existed, but was unknowingly overlooked.

Although adolescent brain science is undeniably recent, the State suggests that it is not new in a legally relevant way. The State asserts: “Ninham did not even establish that the information...was new in any meaningful sense” because “it has long been said that...adolescents are less mature and responsible, more vulnerable, more impulsive...than adults” (State’s Brief at 30). That may hold true in some cases, but in others it does not. Some sentencing courts use the heinousness or apparent sophistication of a particular crime to conclude that the juvenile is adult like, and *not* immature and impulsive. Further, it is one thing to believe that juveniles are generally immature, but it is quite another to recognize that they have an underdeveloped physical capacity for judgment and impulse control. That physical underdevelopment lessens the blameworthiness of criminal behavior.

Finally, even if it has long been known that juveniles are impulsive, it has not been known that all juveniles—even those who commit very serious and violent crimes when they are young—will develop increased physical capacity for judgment and impulse control over time. Adolescents’ ability to control their behaviors “only fully develops late in adolescence (ages 18-22).” Wisconsin Council on Children & Families, “Rethinking the Juvenile in Juvenile Justice: Implications of Adolescent Brain Development on the Juvenile Justice System,” [http://www.wccf.org/pdf/rethinking\\_juv\\_jjsrpt.pdf](http://www.wccf.org/pdf/rethinking_juv_jjsrpt.pdf), 11 (2006). Thus, adolescent brain science is “new” in a legally significant way.

The science may also qualify as highly relevant, and may

frustrate the purpose of a sentence. Depending on the particular sentencing rationale, the science may be highly relevant to punishment, public protection, or rehabilitation. If a sentencing court concluded that a juvenile offender, despite his age, had an adult's capacity for decision-making, and therefore was just as blameworthy, the science could counter that conclusion and require reassessment of the necessary punishment. By contrast, in some cases, even without the benefit of recent science, the sentencing court will have expressed beliefs about adolescent development that are consistent with new scientific findings. In such cases, the science would be cumulative, not highly relevant.

For the same reasons, the new science could frustrate the purpose of a sentence where the sentencing rationale is tied to unsubstantiated beliefs about the blameworthiness or incorrigibility of a juvenile. By contrast, the science might not frustrate the purpose of a sentence that was imposed primarily for punishment. In such a case, the sentencing judge might have reasoned that—although juveniles have capacity for change and are less blameworthy—the seriousness of the crime demands a punitive sentence.

Thus, adolescent brain science could be a “new factor” in some cases, and should not be subject to a categorical prohibition. Neither policy goal served by previous categorical rules are present with adolescent brain science. No other institution is better-positioned than the sentencing judge to assess the significance of adolescent brain science. Courts need not defer to any other institution such that a categorical rule is necessary. Further, it is worth noting that allowing sentencing courts to consider adolescent brain science will not create a high volume of prisoner litigation. The universe of cases in which the science could be a new factor is limited, because the science will not be new forever, and because it will usually apply only to defendants who were sentenced to very long terms when they were very young.

**III. A sentencing court's reasoning process as to a defendant's future risk to public protection is governed by the principles articulated in *Gallion*, and new adolescent brain science is relevant to that reasoning process.**

**A. A sentencing court's reasoning process as to a defendant's future risk to public protection is governed by the principles articulated in *Gallion*.**

Apart from its bearing on sentence modification, this case also has implications for sentencing in the first instance.

Sentencing courts often attempt to predict what future risk a defendant will pose if released. Such predictions are difficult, but necessary to decide how much confinement (if any) is needed for public protection.

This Court should make clear that predictions about a defendant's future risk to the public are governed by the same explicit reasoning process that governs other aspects of sentencing, pursuant to *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. That decision stated that sentencing courts must demonstrate their reasoning—explicitly, on the record—relying on relevant facts to reach rational conclusions about the sentencing factors. Additionally, they must explain, on the record, how their conclusions as to the different factors justify the particular sentence. This explicit reasoning process provides legitimacy to sentencing decisions and encourages courts to closely examine their reasoning to arrive at the most effective sentence.

It is too easy to ignore *Gallion's* principles when it comes to predictions about a defendant's future dangerousness, instead relying on unstated assumptions about how a defendant's current crime predicts his future behavior. On one hand, it is easy for a sentencing court to assume that a non-violent, petty

offender does not pose a risk of violence in the future. By the same token, it is easy to assume that a person who commits a serious crime is irredeemable and will likely commit additional serious crimes if allowed back into the community. Such assumptions may often be correct, but are sometimes incorrect, and often go unexamined and unstated.

This Court should make clear that, when a sentence is based on public protection, a sentencing court must explain on the record what conclusions it is reaching about a defendant's future risk to the public, and what facts support those conclusions. Reaffirming those requirements will help ensure that sentences are well thought-out, and neither too long nor too short to ensure public protection. For many sentencing courts, this will be nothing more than a reaffirmation of current practice. For others it will serve as a necessary reminder and correction to sentencing practices that sometimes fall short. *State v. Gallion*, ¶2 (“Yet, sentencing courts have strayed from [*McCleary*]...for some, merely uttering the facts, invoking sentencing factors, and pronouncing a sentence is deemed sufficient”).

**B. Adolescent brain science is relevant to sentencing predictions about a juvenile defendant's future risk to public protection.**

As previously stated, new adolescent brain science establishes that the adolescent brain is physically underdeveloped when it comes to judgment and impulse control. More importantly, the science establishes that this physical underdevelopment subsides in all juveniles around ages 18-22, meaning that all juveniles—regardless of the severity of their crimes—will develop increased physical structures for judgment and impulse control.

This information should be deemed relevant to predictions about a juvenile defendant's future dangerousness. (As pointed out at length in Ninham's brief-in-chief and in recent

U.S. Supreme Court cases, the research also reduces a juvenile's culpability, and thus affects how much punishment is warranted.) A sentencing court considering the likelihood that a juvenile will reoffend should recognize that the juvenile's brain will develop increased physical capacity for judgment and decision-making. A sentencing court inclined to assume that an adolescent's crime reveals a character flaw—one that could continue into adulthood and cause future crimes—should consider that assumption in light of adolescent brain science.

This does not mean that a sentencing court must give any particular juvenile a lenient sentence, or that adolescent brain science must trump all other sentencing considerations. A sentencing court might be aware of the science—and thus the likelihood that a particular juvenile will grow out of the risk he poses to the public—but nonetheless impose a lengthy sentence out of consideration for another sentencing purpose, such as punishment. A sentencing court might conclude that even though the juvenile defendant will likely mature soon, the crime is so heinous that punishment justifies a sentence that is longer than the period needed for the juvenile's brain to develop. But a sentencing court reaching that decision should be explicit that the sentence is driven by punishment (despite the reduced culpability caused by a juvenile's age), not by public protection.

Thus, the point is not that the new science necessarily requires shorter sentences, but rather that the research has significant bearing on sentencing. Both punishment and public protection are informed by the research. How a sentencing court weighs these considerations is still well within the court's discretion, but consistent with *Gallion* that discretion must be exercised based on facts of record and a demonstrated reasoning process, both of which should take account of the new science.

## CONCLUSION

For the reasons stated, this Court should issue an opinion consistent with principles described above.

Respectfully submitted this \_\_\_\_\_ day of December, 2010.

---

Byron C. Lichstein  
Bar No. 1048483

---

Colleen M. Marion  
Law Student

Legal Assistance to Institutionalized Persons  
Frank J. Remington Center  
University of Wisconsin Law School  
975 Bascom Mall  
Madison, WI 53706  
(608) 265-2741  
*Amicus Curiae*

Cc: Sally Wellman, Criminal Appeals Unit, Wisconsin Dept.  
of Justice  
Frank Tuerkheimer, Godfrey & Kahn  
Bryan Stevenson, Equal Justice Initiative  
Rob Henak, Henak Law Office

**CERTIFICATION AS TO FORM AND LENGTH**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2968 words.

---

Byron C. Lichstein

**CERTIFICATION OF COMPLIANCE WITH RULE  
809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

---

Byron C. Lichstein