STATE OF WISCONSIN

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

DISTRICT III

Case No. 2021AP9-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JONATHAN LIEBZEIT,

Defendant-Respondent.

APPEAL OF AN ORDER GRANTING A MOTION FOR SENTENCE MODIFICATION ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE JOHN A. DES JARDINS, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Twenty-four years after imposing a life-without-parole sentence on then-19-year-old Jonathan Liebzeit for the brutal, unprovoked "thrill-killing" of a childhood friend, the circuit court reflected on Liebzeit's sentence after a sentencing hearing for an 18-year-old offender reminded the court of Liebzeit's case. The court contacted Liebzeit's defense counsel and informed him that the court had attended a conference presenting information about ongoing development of the human brain during the ages of 18 to 22, and that it would entertain a motion for modification of Liebzeit's sentence based on that research if one were filed. The defense filed the motion and the court granted it over the State's objection, making Liebzeit eligible for parole on January 1, 2023.

Did the circuit court err in concluding that Liebzeit showed a new factor warranting sentence modification by providing the court with research on brain development in young adults and evidence that he damaged his brain by huffing inhalants at age 13?

This Court should reverse the circuit court. The record shows that this sentence modification was not based on a new factor; it was based on the court's reflection on the harshness of a life-without-parole sentence for a 19 year old. Liebzeit was an adult when he committed the crime which was particularly heinous in nature, and nothing about ongoing human brain maturation nor Liebzeit's huffing inhalants six years before the crime occurred is new, nor was it highly relevant to the imposition of Liebzeit's sentence in 1997.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The State does request publication, however, to dispel any further

question about whether *Graham v. Florida* and *Miller v. Alabama* overruled Wisconsin case law holding that research into the ongoing development of the human brain is not a new factor warranting sentence modification.

STATEMENT OF THE CASE AND THE FACTS

The Crime

Around midnight on October 27, 1996, 19-year-old Alex Schaefer received a call from his best friend he'd known since childhood, Jonathan Liebzeit. (R. 181:60–66.) Alex had just returned to Kaukauna from spending the summer in Texas with his sister. (R. 181:65; 108:103.)

Unbeknownst to Alex, Liebzeit was mad at him—for stealing a picture of Liebzeit's girlfriend in the eighth grade, stealing a hair tie from Liebzeit's former girlfriend a year previously, and for not repaying $15 Alex owed to a mutual friend, Daniel Mischler, who said he had forgiven the debt. (R. 182:71–73.) For these infractions, Liebzeit decided to kill Alex. (R. 182:76.) Liebzeit lured Alex to Liebzeit's father's house with an invitation to drink beer and smoke marijuana, but with the plan for Liebzeit and another friend, James Thompson, to take him to a park and beat him to death with a baseball bat. (R. 182:77–78; 183:76–80.) Mischler tried to talk the two out of this plan, but he failed. (R. 182:80–81.) Liebzeit got very excited when Alex agreed to come over. (R. 182:77; 183:81.)

Alex arrived and had a couple of beers with Liebzeit, Mischler, and Thompson. (R. 182:79.) Liebzeit then told Alex they were all going to go into the park to smoke some marijuana. (R. 182:83.) Liebzeit and Thompson secretly took a baseball bat wrapped in electrical tape along as the four left the house. (R. 182:83, 118.) Thompson led the group into some large sewer tunnels under a baseball diamond. (R. 182:84.) Suddenly, Liebzeit struck Alex with the baseball bat. (R.

182:86.) Alex cried out, "Jon, what are you doing?" (R. 182:86.) Liebzeit continued to beat Alex with the bat around his head and upper body. (R. 182:88.) Alex asked Liebzeit why he was beating him and saying "I'm sorry!" but Liebzeit kept beating him. (R. 182:88.) Alex finally offered "I got money," and pleaded with Liebzeit to stop, but the beating continued. (R. 182:88–89.) Alex escaped briefly and ran, but Mischler grabbed his shirt and Liebzeit and Thompson caught him. (R. 182:89–90.) Alex continued to plead with them to let him go. (R. 182:90–91.) Liebzeit swore at him and began beating him with the bat again. (R. 182:90–91.) He took a particularly vicious swing that connected with the back of Alex's head with a loud crack. (R. 182:92.)

Alex stumbled into the water in the tunnel and Thompson followed him. (R. 182:93–94.) Liebzeit told Mischler to go into the water and help Thompson. (R. 182:94.) Thompson and Mischler held Alex under the water until he stopped moving. (R. 182:97.) Liebzeit told Thompson to check Alex's pulse to make sure he was dead. (R. 182:98.) Alex had no pulse. (R. 182:98.)

They dragged Alex's body out of the water and further into the tunnel. (R. 182:99–100.) Thompson stole Alex's wallet and he, Mischler, and Liebzeit left the park. (R. 182:100–02.) Thompson and Liebzeit returned to Liebzeit's father's house where they changed clothes and laughed about the killing. (R. 2:2–3; 182:129; 183:89.) They joked about Alex having offered them money when they found only three dollars in the stolen wallet. (R. 183:90.) The next day, Thompson and Liebzeit said they did not feel any remorse about the murder and continued to joke about the murder being "funny." (R. 182:104, 129.) They made plans to go back to hide the body and hinder any identification of who it was. (R. 182:107–09.) They also gave Mischler some of Alex's clothing to dispose of and stripped the electrical tape from the bat. (R. 182:109–19.) Mischler told the

two he was disposing of the items but instead hid them in a barn at his house. (R. 182:114.)

By Tuesday, police had located Alex's body after someone who had been at Liebzeit's house that night tipped them off about the death. (R. 2:1–2; 183:100.) They arrested Mischler, who told them everything that happened that night and led them to Alex's belongings. (R. 182:115–29.)

The Trial

The State charged Liebzeit with one count of first-degree intentional homicide by use of a dangerous weapon and as a party to a crime, and one count of concealing a corpse as a party to a crime.[1] (R. 2:1.) At trial, Mischler related the above events and said it didn't make any sense why Liebzeit and Thompson wanted to hurt Alex, and that Mischler only went with them because he was scared they would do the same to him. (R. 182:92.) The witness who called police related Thompson's and Liebzeit's excited demeanor and activities before and after the murder, and recalled the two laughing about it. (R. 183:68–129.) The officer who interviewed Liebzeit also recalled Liebzeit telling him that he couldn't forgive Alex for stealing a picture of his girlfriend in the eighth grade and stealing the hair tie. (R. 195:17.) Liebzeit told the officer Mischler was not part of the discussion about killing Alex and did not want to go along. (R. 195:18, 35.) Liebzeit also admitted to the officer that he had beaten Alex with the baseball bat with no provocation but claimed killing him was accidental. (R. 195:21–30.)

[1] James Thompson and Edgar Liebzeit, Jonathan's father, were also charged with and convicted of crimes related to Alex's death. *See* Outagamie County Case Nos. 1996CF575, 1996CF602. Mischler was offered use immunity in exchange for his trial testimony. (R. 182:51.) He pled guilty to one count of second-degree intentional homicide in Outagamie County Case No. 1996CF574.

Liebzeit testified that the beating was planned and set into motion by Mischler and Thompson, that he had no knowledge of a plan for beating or killing Alex, and that he did not willingly participate in the beating. (R. 195:115–41; 186:14–118.) He claimed that Thompson pressed the bat on him and pressured him to hit Alex, and that the strike to Alex's head with the bat was an accident. (R. 195:139–41; 186:15–19.) The jury rejected Liebzeit's testimony and found him guilty of both charges.

Sentencing

The court said it carefully reviewed all of the submissions, arguments of counsel, and the testimony and statements made in court. (R. 190:50–51.) It stated that it "appears to the Court that Jonathan is an individual who has maximum needs." (R. 190:51.) His behavior pattern showed antisocial behavior escalating into ever more serious offenses over time. (R. 190:52.) Liebzeit had rejected all efforts at intervention for him and that he had "set his course and his path and is responsible as an adult individual needs to be held responsible." (R. 190:53.) The court recognized that Liebzeit's social worker indicated that Liebzeit tended to shirk blame for his behavior and in this particular case tried to cast the blame on Mischler. (R. 190:54.) The court noted the extreme brutality of the crime and that Liebzeit had conned, trapped, and betrayed a friend he had had since childhood and did so over something as trivial as a hair tie. (R. 190:55–61.) The court observed that "to betray a friend is a repulsive thing," noted that Liebzeit had an enormous amount of police contact since he was a juvenile—over 40 contacts—and that the behavior became increasingly violent as Liebzeit got older. (R. 56:5–7; 190:51–57)

The court also noted that Liebzeit had time to withdraw from this plan and to warn his friend, but never did. (R. 190:57.) Instead, as Alex pleaded for his life, his cries "fell on very cold, uncaring, vicious ears that had no use for a friend."

(R. 190:57.) The court determined that there was no amount of punishment that could truly meet the gravity of this offense and accordingly, the court sentenced Liebzeit to life without the possibility of parole. (R. 190:61–62.)

The Circuit Court's Request for a Motion for Sentence Modification

Twenty-four years after imposing Liebzeit's sentence, the circuit court, sua sponte, sent a letter to Liebzeit's new attorney. (R. 138.) It informed counsel that,

> This Court recently conducted a sentencing hearing involving an 18-year-old who committed several acts of destroying property. In preparing for that sentencing, the Court recalled that it had attended a seminar during November of 2019. The seminar dealt with the human brain. One of the presentations made at the seminar included a presentation about the adolescent brain. That presentation included a paper that detailed how the brain develops for many years beyond age 18, including the pre-frontal cortex of the brain. The presenter was Prof. Leah Somerville, PhD. In reviewing Dr. Somerville's paper, the Court recalled the *Liebzeit* case.

(R. 138:1.) The court recognized that it had previously denied a request to resentence Liebzeit two years earlier (*see* R. 124), but it said it "believes the material presented by Dr. Somerville, if known by the court at the time of the sentencing, may constitute a new factor. The Court is open to argument on that issue." (R. 138:1.) The court therefore decided that "in the interest of justice, the Court will hold a hearing on the issue of a new factor involving 18-21 year olds' brain development as it impacts the *Liebzeit* case. Legal counsel is encouraged to make additional submissions regarding brain development studies as it relates to this case prior to the hearing." (R. 138:2.) It told counsel that the court would contact them to set a scheduling conference. (R. 138:2.)

The State objected, arguing that this sua sponte action by the court deprived the State of a fair tribunal and pointing

out that this Court had already held that research about the brain maturing through ages 18 to 21 was not a new factor as a matter of law in *State v. McDermott*, 2012 WI App 14, 339 Wis. 2d 316, 810 N.W.2d 237. (R. 139:1.)

The circuit court then provided the parties with Dr. Somerville's article titled "Searching for Signatures of Brain Maturity: What are we Searching for?" (R. 141:1.) It informed the parties that was the article it was referring to in its letter. (R. 141:1.) Liebzeit filed the motion based on Dr. Somerville's paper as the court had requested. (R. 143.)

The court held a hearing to address the State's repeated objections to the underlying motion and sua sponte hearing. (R. 192.) It acknowledged that *McDermott* and several other cases held that this research was not a new factor as a matter of law, but it determined that those cases could not be read "with the same force" after *Miller v. Alabama*, 567 U.S. 460 (2012). (R. 192:30.) It further determined that Liebzeit's having huffed inhalants at age 13 probably caused him brain damage and that could have affected his decision making. (R. 192:31–32.) It found that Liebzeit had "presented enough information to the Court to find that his brain development issues" constituted a new factor. (R. 192:32.)

At a second hearing the court reflected on the reasons it had imposed the initial sentence and stated that it now thought "[t]he Court's belief of the defendant's long-term dangerousness to society was likely misguided" and it had "based that determination primarily on the nature of the homicide." (R. 193:36–37.) But, given cases such as *Miller* and *Graham v. Florida*, 560 U.S. 48 (2010), and their discussions about adolescents' greater prospects for rehabilitation, it no longer believed Liebzeit could not be rehabilitated. (R. 193:36–37.) The court made Liebzeit eligible for parole in 2023. (R. 193:37–38.)

The State appeals.

STANDARD OF REVIEW

Whether the defendant has shown a new factor exists is a question of law reviewed by this Court de novo. *State v. Samsa*, 2015 WI App 6, ¶ 14, 359 Wis. 2d 580, 859 N.W.2d 149. Whether a new factor warrants sentence modification is reviewed for an erroneous exercise of discretion. *McDermott*, 339 Wis. 2d 316, ¶ 9.

ARGUMENT

Research into human brain development and Liebzeit's early substance abuse are not new factors warranting sentence modification; the circuit court's modification of Liebzeit's sentence was impermissibly based on reflection alone.

A. A new factor must be something that was not known to the parties and the circuit court at sentencing and must change something that was highly relevant to the imposition of the original sentence.

"A defendant can seek sentence modification in two ways." *State v. Noll*, 2002 WI App 273, ¶ 9, 258 Wis. 2d 573, 653 N.W.2d 895. First, a defendant may seek modification as a matter of right within the time limits prescribed by Wis. Stat. § 973.19 or Wis. Stat. § (Rule) 809.30. *Noll*, 258 Wis. 2d 573, ¶¶ 9–10 & n.3.

Second, when, as here, the time has long passed for a modification request under section 973.19 and Rule 809.30, the defendant may seek sentence modification by invoking the court's "inherent power." *Noll*, 258 Wis. 2d 573, ¶ 11. But a circuit court may not "reduce a sentence on 'reflection' alone or simply because it thought the matter over and has second thoughts." *Scott v. State*, 64 Wis. 2d 54, 59, 218 N.W.2d 350 (1974) (citation omitted). A circuit court may exercise its power to modify a sentence "only if a defendant demonstrates

the existence of a 'new factor' justifying sentence modification." *Noll*, 258 Wis. 2d 573, ¶ 11.

Deciding a defendant's request for sentence modification based on a new factor is a two-step process. *State v. Harbor*, 2011 WI 28, ¶ 36, 333 Wis. 2d 53, 797 N.W.2d 828. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Harbor*, 333 Wis. 2d 53, ¶ 36. A new factor is "a fact or set of facts highly relevant to the imposition of sentence" that is not known to the sentencing court, "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." *Id.* ¶ 40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Second, the defendant must show the circuit court that the new factor actually justifies sentence modification. *Id.* ¶¶ 37–38.

B. Liebzeit did not establish that a new factor exists.

1. This Court has already held that research into human brain development is not a new factor as a matter of law, and the sentencing transcript shows it wasn't highly relevant to the imposition of Liebzeit's sentence.

a. Research into human brain development is not a new factor as a matter of law.

This Court in *McDermott* already considered, and rejected, the circuit court's precise holding here that neuroscience research showing that the human brain does not fully mature until a person's early 20s is a new factor. *McDermott*, 339 Wis. 2d 316, ¶¶ 17–22. Just like Liebzeit, McDermott committed a particularly vicious murder when he

was a young adult. *Id.* ¶¶ 3–6, 16. Also like Liebzeit, McDermott did not take responsibility for the murder and admitted that he had made some bad choices but said he was not the killer and did not deserve life in prison. *Id.* ¶ 5. The trial court considered the required sentencing factors and determined that since McDermott had no prior criminal behavior, "there should be some light at the end of the tunnel" for him, but that "was the only mitigating factor" it saw in the case. *Id.* ¶ 6. The court sentenced McDermott to life with the possibility of parole after 35 years. *Id.* ¶¶ 2, 6–7.

Also just like Liebzeit, McDermott filed a motion for sentence modification based on alleged new factors. He claimed that: (1) the circuit court erroneously evaluated his prospects for rehabilitation as proven by his conduct in prison; and (2) "recent research show[ing] that persons around the age of eighteen are not as mature as adults and, therefore, should not be held to the same degree of culpability as adults." *Id.* ¶ 8.

This Court unequivocally held that neither the defendant's maturation in prison nor research on human brain development in adolescents or 18 to 21-year-olds were new factors as a matter of law. *Id.* ¶¶ 15–22.

This Court acknowledged that recognizing a defendant's changed character after time as a new factor simply because the sentencing court was doubtful about the defendant's prospects for rehabilitation at sentencing "would wholly gut established law in Wisconsin that 'an inmates progress or rehabilitation while incarcerated' is not a 'new factor.'" *Id.* ¶ 15 (citation omitted).

This Court then rejected the contention that research into human brain development was a new factor, for two dispositive reasons.

First, the Wisconsin Supreme Court already held in *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d

451, that new scientific research into adolescent brain development was not a new factor. *McDermott*, 339 Wis. 2d 316, ¶¶ 18–19. There, the court recognized that while the studies on which Ninham relied themselves may not have been in existence when then-14-year-old Ninham was sentenced to life in prison without parole, "the conclusions reached by the studies were already in existence and well reported by the time Ninham was sentenced in 2000." *Id.* ¶ 18. It further referenced *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988), where the United States Supreme Court held that the death penalty was unconstitutional for a 15-year-old offender, to show that the impulsivity of young people was recognized as a "long-known reality" at least as far back as 1988. *McDermott*, 339 Wis. 2d 316, ¶ 19 (citation omitted).

Second, this Court recognized that the fact "that adolescents are generally more impulsive than adults has been known since humans were able to observe their environment," quoting Aristotle's observation in *Nicomachen Ethics* from 350 B.C.E. that "[y]oung people are in a condition like permanent intoxication," and Book 23 of Homer's *The Iliad* from roughly 750 B.C.E., stating, "[y]ou know how a young man can do foolish things. His mind works quickly, but his judgment's suspect." *McDermott*, 339 Wis. 2d 316, ¶ 20.

This Court held that the argument that a trial court "did not realize what recent scientific research has confirmed ignores reality, and, in essence, puts the old wine of human experience in the new bottles of recent research and labels the entire package as 'new.'" *Id.* ¶ 21. "As we have seen, *Ninham* rejected this false labeling," in which the Wisconsin Supreme Court noted that such research "only confirms the conclusions about juvenile offenders that the Supreme Court had 'already endorsed' as of 1988." *Id.* ¶ 21 (citation omitted).

b. The circuit court erroneously refused to follow this binding Wisconsin precedent that this type of research is not a new factor.

The circuit court here acknowledged that *Ninham* had already held that this research is not a new factor even when the defendant was a juvenile when they committed the offense, unlike the then-19-year-old Liebzeit when he murdered Alex. (R. 192:28.) It further recognized that *McDermott* similarly held that this research was not a new factor when applied to 18 to 21 year-olds, as well. (R. 192:28.) However, the circuit court determined that it was "not bound by *Ninham* and *McDermott* in this case" because, according to the circuit court, "both cases were decided prior to the U.S. Supreme Court's decisions finding that death sentences and life without parole violate the Eighth Amendment . . . when imposed on juvenile offenders due to the underdeveloped juvenile brain." (R. 192:28.) It then concluded that this case was distinguishable from *Ninham* and *McDermott* because "unlike in *Ninham* and *McDermott*, the data on brain development in juveniles was not available at the time Liebzeit was sentenced." (R. 192:29.) The circuit court erred in this reasoning in four respects.

First, the Supreme Court has *not* held that life-without-parole sentences imposed on juvenile offenders violate the Eighth Amendment. To the contrary, in *Miller,* the Court refused to impose a categorical bar on life-without-parole sentences for juvenile killers. *Miller*, 567 U.S. at 479. It expressly held that life-without-parole sentences *can be* constitutionally imposed on juveniles who commit murder if the sentencing court has discretion to impose a lesser sentence if the circumstances warrant it. *Id.* at 479–80.

Second, even if the Supreme Court had found life-without-parole sentences categorically unconstitutional for

juvenile offenders due to their immature brains, that would be of no help to Liebzeit, who was aged 19 and an adult when he committed his crime. Indeed, when holding the death penalty unconstitutional for juveniles, the Supreme Court itself recognized that age 18 was the line to be drawn between its juvenile sentencing case law and sentencing for adults. *Roper v. Simmons*, 543 U.S. 551, 574 (2005). The Court observed,

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. . . . however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.

Id. Accordingly, the Supreme Court held that age 18 was "the age at which the line for death eligibility ought to rest." *Id.* If ongoing research into human brain development is insufficient to warrant sparing 18 to 21 year-olds from the death penalty, it is surely insufficient to warrant revisiting Liebzeit's 24-years-final life without parole sentence for the brutal, unprovoked thrill-killing of a childhood friend that Liebzeit committed as an adult over a stolen hair tie.

Third, contrary to what the circuit court believed, *Thompson* and *Roper* (both of which held the death penalty unconstitutional for juveniles due to their lack of maturity) along with *Graham* (where the Supreme Court held life-without-parole unconstitutional for juveniles who did not commit murder) did indeed predate both *McDermott* and *Ninham*. *Thompson* was decided in 1988. *Roper* was decided in 2005. *Graham* was decided in 2010. *Ninham* was decided in 2011, and *McDermott* in 2012. *Ninham* and *McDermott* expressly referenced these previous Supreme Court cases

dealing with juvenile brain development when reaching their conclusions. *See Ninham*, 333 Wis. 2d 335, ¶¶ 4, 34, 49–51, 60; *McDermott*, 339 Wis. 2d 316, ¶¶ 19–22.

Miller v. Alabama is the only case in this line of cases about juvenile brain development that did not exist when *Ninham* and *McDermott* were decided. However, the circuit court completely overlooked this Court's decision in *State v. Barbeau*, 2016 WI App 51, ¶ 25, 370 Wis. 2d 736, 883 N.W.2d 520, where this Court held that *Ninham* (and thus by extension *McDermott*, since *McDermott* did not involve a juvenile) was entirely consistent with the Supreme Court's decision in *Miller*. *Ninham* and *McDermott* are still good—and binding—law.

Finally, the circuit court erred in determining that this case was different from *Ninham* and *McDermott* on the ground that "the data on brain development in juveniles was not available at the time Liebzeit was sentenced." (R. 192:29.) Both the Wisconsin Supreme Court and this Court rejected the contention that repackaging knowledge as old as time about human behavior in the terms of a new research paper made this a "new factor" that was not known to the parties or the court. *Ninham*, 333 Wis. 2d 335, ¶ 92 ("[T]he 'new' scientific research regarding adolescent brain development to which Ninham refers only confirms the conclusions about juvenile offenders that the Supreme Court had 'already endorsed' as of 1988."); *McDermott*, 339 Wis. 2d 316, ¶ 21 ("To say, as McDermott argues, that the trial court did not realize what recent scientific research has confirmed ignores reality, and, in essence, puts the old wine of human experience in the new bottles of recent research and labels the entire package as 'new.'"). If this was known to all of humanity since at least 750 B.C.E.—and even at the very most generous, at least since the Supreme Court's *Thompson* decision in 1988—it was certainly known by the sentencing court in 1997. And in fact, the defense argued at sentencing that Liebzeit's young age

and poor upbringing led to this murder. (R. 190:47–48.) The circuit court had this information before it when it sentenced Liebzeit.

In sum, the circuit court was simply wrong when it held that *Roper*, *Graham*, and *Miller* substantively changed the law since *Ninham* and *McDermott* and that it could thus ignore *Ninham* and *McDermott*. *McDermott* controls this case. The defendant there relied on the exact contention that Liebzeit relied on here: that ongoing development of the human brain beyond adolescence and early into adulthood is a new factor that mitigated his responsibility for an unspeakably callous murder he committed as a young adult. *McDermott*, 339 Wis. 2d 316, ¶ 16. This Court unequivocally held, relying on the Supreme Court and Wisconsin cases discussing ongoing brain development in adolescents and human experience throughout recorded history, that it is not a new factor as a matter of law. *Id.* ¶ 22. *Miller* did not affect that holding. The circuit court was bound by *McDermott* and *Ninham*, and it erred in granting Liebzeit's motion on this basis.

2. The sentencing transcript shows that the court was aware that Liebzeit had abused multiple substances, including inhalants, from a young age at the time of sentencing.

The circuit court also found that brain damage Liebzeit purportedly suffered from huffing inhalants at age 13 was a new factor warranting modification. (R. 144; 192:31–32.) But Liebzeit's long history of substance abuse, and in particular his addiction to inhalants, was well known to the circuit court at sentencing. The State and the defense expressly discussed Liebzeit's drug use and alcohol, marijuana, and inhalant dependence at the sentencing hearing. (R. 190:19, 39, 45.) The Presentence Investigation report also informed the court that Liebzeit had been using inhalants and every other substance

other than barbiturates since age 11. (R. 56:11.) It further stated that this substance abuse from a very young age was "a significant factor in his poor adjustment." (R. 56:12.) And when imposing Liebzeit's sentence, the court expressly noted that he "has used nearly every controlled substance that is available" and that he "had a major problem with inhalants," but that he had rejected all efforts at treatment and intervention. (R. 190:52.) The circuit court was aware of and thus duly considered the effect of Liebzeit's substance abuse and dependence when sentencing Liebzeit to life without parole.

Moreover, the report Liebzeit presented to the court to support his argument that he suffered from brain damage was from a Libertas Treatment Program assessment of Liebzeit in 1990. (R. 144:3.) This report was certainly known to Liebzeit at the time of sentencing—indeed, he told the PSI writer about his experiences at Libertas—and he simply failed to present the court with this report then. (R. 56:9.) Information that the defense knew about and did not offer at sentencing is not a new factor. *See State v. Crockett*, 2001 WI App 235, ¶ 14, 248 Wis. 2d 120, 635 N.W.2d 673.

And, much like the rashness of youth, the fact that human brains are damaged by substance abuse is common knowledge, particularly if the substance abuse occurs when the person is a child. *See, e.g.,* Stephen A. Dinwiddie, Abuse of Inhalants: a review, *Addiction* 1994; Vol. 89, Issue 8 at 925–39[2]; *This is Your Brain On Drugs*, 80's Partnership for A Drug-Free America.[3]

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[2] *available at https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1360-0443.1994.tb03348.x.*

[3] *available at https://www.youtube.com/watch?v=GOnENVylxPI.*

Something that is common knowledge and that the court is expressly made aware of at sentencing is not transformed into a new factor simply because the defendant later presents his medical record bolstering it to the court, as Liebzeit did here. *Harbor*, 333 Wis. 2d 53, ¶¶ 54–63. Indeed, that was the situation that was presented in *Harbor*, as well, and the supreme court held that the defendant's struggles with mental illness and substance addiction could not be new factors because they were known to the court at sentencing, even though the court did not have the defendant's medical reports about them then. *Id.* A circuit court's "altered view of certain evidence presented at [the] original sentencing hearing is not a 'new factor.'" *State v. Grindemann*, 2002 WI App 106, ¶ 2, 255 Wis. 2d 632, 648 N.W.2d 507. So, Liebzeit's alleged brain damage due to huffing inhalants and its effects on his decision making cannot be a new factor because it isn't "new." It was known to the court and the parties at sentencing.

3. Liebzeit's brain development and young adults' tendency to make rash decisions were not highly relevant to the imposition of initial sentence.

This research into human brain development and any brain damage Liebzeit suffered from huffing inhalants are not new factors for another reason: the reason for Liebzeit's purported impulsivity and poor decision-making was not highly relevant to imposition of his original sentence. *See Harbor*, 333 Wis. 2d 74, ¶ 40.

To the contrary, one of the reasons the court imposed life without parole here was precisely because this horrific, unprovoked murder was *not* the result of rashness or impulsivity. The court recognized that "there are a wide variety of murders, and that's why courts have discretion in determining parole dates." (R. 190:54–55.) And it observed that here, "there was a significant amount of planning and

premeditation that went into this homicide," which was an aggravating factor. (R. 190:55.) There was evidence that Liebzeit had been planning the murder for "as much as nine months or so before the actual crime occurred," while Alex was not even in Wisconsin. (R. 190:55.) Alex "[s]hould have been totally out of the mind of Jonathan Liebzeit." (R. 190:55.) However, unbeknownst to Alex, Liebzeit was angry because "since the eighth grade . . . Alex had done irritating things, such as taking girlfriend's [hair] ties, taking pictures of them, sneaking into his girlfriend's room. . . . And that ultimately, [Liebzeit] planned to kill him." (R. 190:56.) When a peer asked him if that was "really a reason to kill somebody," Liebzeit "returned that with a smile, and said yes." (R. 190:56.) The court found "[t]here was thought; there was contemplation; there was planning" that went into this murder. (R. 190:56.)

That is the opposite of the type of impulsive action, poor decision-making skills, and lack of control over their environment the Supreme Court said may mitigate the circumstances in which some juveniles commit homicide. *See Miller*, 567 U.S. at 477–78.

Moreover, Alex "had been [Liebzeit's] friend since fifth grade, had been in Cub Scouts, Boy Scouts together, they had done a lot of things together." (R. 190:55.) When Liebzeit called, "Alex Schaffer trusted his friend, and Alex went over." (R. 190:56.) Liebzeit conned Alex by inviting him over and being friendly until they were in the park and trapped him in order to kill him. (R. 190:56.)

The court observed at sentencing that "[t]o betray a friend is a repulsive thing, and the betrayal they did, as a result of that betrayal, Jonathan Liebzeit became a traitor to his friend, to the Schaffer family, to his own family, and to himself." (R. 190:57.) Liebzeit had opportunities to withdraw and time to reflect on the plan, but nevertheless carried out the murder "in a brutal, vengeful, and cold fashion, began striking his friend who called out for assistance. Why are you

doing this? They continued on . . . [t]hose pleas fell on very cold, uncaring, vicious ears that had no use for a friend." (R. 190:57.)

The sentencing court said that "[t]his type of planning, cold calculation, and betrayal of a friend ranks" with the most serious of crimes. (R. 190:59–60.) It also determined that the community had to be protected from Liebzeit whose history showed an antisocial personality, and it said it couldn't fathom "how one would begin to rehabilitate a person that has, inside of himself, such rage and anger that over such trivial matters, that they would kill a friend." (R. 190:60.) The court further found that there was no amount of punishment that could truly "appropriately punish a person for the type of crime that occurred here." (R. 190:60–61.)

So, the court imposed this sentence because Liebzeit had showed cold calculation in planning and executing Alex's murder. He harbored unwarranted resentment of Alex for a very long time over trivialities, planned this murder when Alex was not even around, and then led his friend unwittingly to his death. It was not an impulsive decision. Nothing in the sentencing transcript suggests that the court would have viewed Liebzeit's behavior differently in 1997 if only it had been presented with the universally known information that young people have bad impulse control and decision-making skills or that huffing inhalants can damage one's brain. The circuit court erred in determining that these things were new factors because nothing about Liebzeit's crime could be attributed to rashness or poor impulse control caused by youth or inhalant abuse. These were not highly relevant to anything the sentencing court considered when imposing Liebzeit's life-without-parole sentence. They therefore cannot be new factors.

C. Even if this research were a new factor, the circuit court erroneously exercised its discretion in finding that it justifies modification of Liebzeit's sentence for this brutal, unprovoked murder he committed as an adult and that he found "funny" after the fact.

The record shows this modification was granted purely on the sentencing court's reflection and second thoughts about Liebzeit's sentence. Accordingly, it erroneously exercised its discretion in granting the modification. *See Harbor*, 333 Wis. 2d 74, ¶ 35 ("A court cannot base a sentence modification on reflection and second thoughts alone.").

The circuit court said that it contacted the defense and urged them to file their new factor motion based on this brain research "under its inherent power to consider whether a sentence is unduly harsh or unconscionable." (R. 192:26.) But that is a proper basis for a sentence modification only if "a determination that the court's original sentence was unduly harsh or unconscionable would be sustainable on appeal." *Grindemann*, 255 Wis. 2d 632, ¶ 29. In other words, only if this Court would have held the original sentence unduly harsh or unconscionable can an order modifying a sentence on that ground be sustained. *Id.* And here, there is no question that this Court would have held that Liebzeit's life-without-parole sentence was not unduly harsh or unconscionable.

A sentence can be found unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Grindemann*, 255 Wis. 2d 632, ¶ 31 (citation omitted). Life without parole is undoubtedly a severe sentence—it is the most severe sentence that one can receive in Wisconsin. However, Liebzeit also committed the most

severe crime one can commit: he intentionally took a human life. And the circumstances of this murder and Liebzeit's character show that "the judgment of reasonable people concerning what is right and proper" support a life-without-parole sentence here. *Id.*

This was a particularly cruel, cold, and calculated murder. The State described it as "one of the most brutal, merciless killings the county had ever seen." (R. 190:21; 193:5.) The victim was entirely innocent. Alex had no idea that Liebzeit was angry with him. And indeed, Liebzeit had no reason to be angry with him: at worst, Alex stole a picture of Liebzeit's girlfriend in the *eighth grade* and a hair tie from Liebzeit's girlfriend a year earlier. Alex lost his life over something that one can purchase a 32-pack of at Walgreens for a few dollars. Further, Liebzeit tricked Alex into coming over by pretending to be friendly with him and then sprung a trap on him. And Liebzeit carried this killing out in a horrific, brutal manner, beating Alex to death with a baseball bat. It was a long, terrifying, painful death and Liebzeit never even gave Alex a reason for it.

And afterward Liebzeit laughed about it. (R. 182:104, 129; 183:90.) The next day, Thompson and Liebzeit said they did not feel any remorse about the murder and continued to joke about the murder being "funny." (R. 182:104, 129.) Liebzeit has never taken any real responsibility for the murder and has continually tried to blame the killing on Mischler despite overwhelming evidence that the whole thing was orchestrated and carried out by Liebzeit. (R. 190:49–50.) Moreover, Liebzeit had done nothing with his life at the tie of sentencing other than get into trouble, and his behavior was escalating in severity. (R. 190:51–52.) Multiple interventions had been tried with him, and Liebzeit rejected them all. (R. 190:52–54.) Liebzeit was a high risk to the community.

The circuit court acknowledged all of this at sentencing. It carefully explained how there are different types of

murders, and some of them warrant more severe punishment than others. (R. 190:59.) It agreed with the State that this was "a most serious type of murder." (R. 190:59.) It was not carried out in the heat of passion, or accidentally; rather, "[t]his type of planning, cold calculation, and betrayal of a friend ranks with the sexual predators of this world, with the coldness and calculation that went into this crime." (R. 190:59–60.) Furthermore, Liebzeit's social worker and the sheriff's office had both opined that Liebzeit had a proclivity for violence and neither were surprised that he committed this crime, which the sentencing court also considered. (R. 190:54, 60.) Liebzeit's life-without-parole sentence was justified here and did not shock the public conscience as to what is right and proper under the circumstances.

The circuit court did not assess whether its original sentence was unduly harsh or unconscionable under that standard. (R. 193:33–38.) Instead, it simply observed that "emerging adults, including 19-years-olds, are more likely to take risks than 25-year-olds. Older adults have increased executive functioning and the ability to plan ahead to make executive plans and control impulses." (R. 193:35.) But the court recognized that "[a]t the first sentencing the Court placed almost all of the weight on the monstrous nature of the homicide." (R. 193:36.) Nothing about the development of brains in young adults changes the monstrous nature of this homicide.

And the court failed to explain what about Liebzeit's crime was influenced by "brain development and brain damage" or "peer pressures and his home environment." (R. 193:36.) The court simply stated that it "failed to properly consider" them when imposing the life-without-parole sentence. (R. 193:36.) But the sentencing transcript shows that the court did consider these things at the original sentencing hearing. (R. 190:51–54.) It just did not think they mitigated the severity of the crime then. (R. 190:54–60.)

In short, the circuit court granted this motion for sentence modification based purely on the circuit court's second thoughts about the harshness of a life-without-parole sentence. There is nothing substantiating its determination that it would have sentenced Liebzeit differently in 1997 if it had been presented with this information about ongoing brain development in young adults.

Indeed, allowing Liebzeit to be considered for parole because he was 19 at the time of this murder shocks the public conscience, not the other way around. He has still never taken true responsibility for this killing. Liebzeit's letter of apology to Alex's family did not even materialize until 23 years after the crime. (R. 152.) And in that letter, Liebzeit still refused to admit that he was the person who planned the murder and that he invited Alex over for the express purpose of killing him. (R. 152:2–3.) There was nothing about Liebzeit's development or home life that suggested he committed this crime due to impulsivity or his circumstances. The circuit court granted this motion simply because Liebzeit, like every other 19 year old on earth, had not fully matured when he committed this horrible crime. (R. 193:36.) That is not an appropriate ground for sentence modification. Granting this motion was an erroneous exercise of discretion on behalf of the circuit court.

However, this Court need not reach this issue. As shown, the circuit court erred in its conclusion that Liebzeit had shown a new factor at the outset. Neither Liebzeit's maturity level nor the effects that substances had on his brain were new, and they were not highly relevant to the imposition of the original sentence. This Court should reverse the circuit court's order modifying Liebzeit's sentence.

CONCLUSION

This Court should reverse the order of the circuit court.

Dated this 12th day of April 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,790 words.

Dated this 12th day of April 2021.

Electronically signed by:

s/ Lisa E.F. Kumfer
LISA E.F. KUMFER

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

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s/ Lisa E.F. Kumfer
LISA E.F. KUMFER

Index to the Appendix
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APPENDIX CERTIFICATION

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 Wis. Stat. § 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.

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.

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