STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2021 AP 000009-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JONATHAN LIEBZEIT,

Defendant- Respondent.

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM AN ORDER ENTERED ON NOVEMBER 25, 2020, IN THE CIRCUIT COURT OF OUTAGAMIE COUNTY
The Honorable John A. Des Jardins Presiding
Trial Court Case No. 1996 CF 576

Respectfully submitted:

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Overview

In 1997, the circuit court sentenced 19-year-old Jonathan Liebzeit to life in prison with no possibility of parole for a first-degree homicide he committed just days removed from his 19th birthday. At that time, the court reasoned the "adult" Liebzeit was irredeemable and could never again be safely allowed in the community. The only recourse was to lock Liebzeit up and throw away the key. It was pointless to let prison officials monitor his rehabilitation and decide whether he might ever be released because the "adult" Liebzeit was beyond rehabilitation.

Nearly 25 years later, and after attending a continuing education seminar presenting facts about the emerging adult brain, and having read a series of Supreme Court cases addressing harsh sentences for youthful offenders, the court invited the parties to address whether facts uncovered by new brain science might constitute a new factor. The State immediately tried to shut down the process, arguing the court lacked the authority to make such a request. In the end, however, the parties briefed the issues and Liebzeit presented an additional new factor: he had been diagnosed with brain damage as a minor due to chronic use of inhalants.

The circuit court methodically addressed the issues based on the parties' submissions. It first held a hearing and heard argument on the issue of whether new factors existed. It concluded they did and then conducted a separate hearing to determine whether the new factors warranted a modification of sentence. The court heard argument on that issue as well, and received input from the victim's family. At the conclusion of that hearing, the court determined a modification of sentence was appropriate and made Liebzeit eligible for parole on January 1, 2023, thereby leaving in the DOC's hands when, if ever, Liebzeit might be released. Since the modification was based on new factors, it was, by definition, *not* based on second thoughts or reflection alone.

State v. Harbor, 2011 WI 28, ¶36, 333 Wis.2d 53, 797 N.W.2d 828.

Now, with rather little regard for a sentencing court's ongoing, immutable and inherent authority and discretion to modify a sentence, *State v. Noll*, 2002 WI App. 273, ¶12, 258 Wis.2d 573, 653 N.W.2d 895, the State goes to great lengths to frame the sentencing court's decision as an abuse of discretion. This is a role reversal for the State, which routinely touts a sentencing court's vast discretion to uphold a denial of a defendant's request to modify his sentence. Here, however, the State endeavors to bridle that discretion because the court *granted* a modification. And to advance that objective, the State takes unfair liberties with the record.

For example, putting proof to the old adage that one ought to argue the facts when the law is not helpful, the State relies heavily on the heinous nature of the crime. And it was heinous. That, however, does nothing to inform the legal issues surrounding the existence of new factors. It is even less helpful given the Supreme Court's recognition that when it comes to youthful offenders, even those who commit the most heinous crimes are capable of change. *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016).

Another tactic is to ignore the full import of the new brain science, and reduce it to a solitary focus – impulsivity – never once addressing the primary cornerstone of the decision under review: the *possibility* of *rehabilitation*. Here, the sentencing court reasoned that when it first sentenced Liebzeit to die in prison it viewed him as a finished product incapable of rehabilitation. Now, based on new facts, the sentencing court reasoned Liebzeit was at least *capable* of rehabilitation, and that DOC officials were best positioned to make that determination. To read the State's brief is to believe the sentencing court became something of an apologist for Liebzeit, because he was an "impulsive" youth when he committed his crime. The State misses the point, but that is by design.

The State also denies science by claiming we know nothing more today about brain development and function than was known to the ancient Greeks. While just another example of how the narrow focus on "impulsivity" pervades and stunts the State's analysis, a larger problem is that this argument runs head-on into Supreme Court precedent. Numerous landmark Supreme Court decisions have recognized new brain science, and new social science, regarding the development of the adolescent brain. Arguing there is nothing new on this front has now become untenable.

Other diversionary tactics include dismissing Liebzeit's unknown, actual diagnosis of brain damage as "common knowledge." Knowledge of other facts are imputed to the sentencing judge despite his sober explanation that he was unaware of them. Most peculiar of all, the State claims the sentencing court would not have sentenced Liebzeit differently in 1997 had it possessed the information regarding the brain development of emerging adults and Liebzeit's brain damage, when that is exactly what the court has stated.

The important issues before this Court deserve better, as does Liebzeit, a real human being who admittedly committed a heinous crime 25 years ago. Both deserve a resolution based not on appeals to passion, or a purposeful, myopic analysis, or a denial of science, or efforts to recast the sentencing court's decision as something it was not. Analysis and resolution, instead, should be based on the law, a comprehensive analysis of the new facts embraced by the Supreme Court, and on what the sentencing court actually said. This brief will analyze the issues based on the law and how it interfaces with new facts now universally accepted, including by the highest court in the land.

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ISSUE PRESENTED

I. WHETHER IT WAS AN ERRONEOUS EXERCISE OF DISCRETION FOR A SENTENCING COURT TO MODIFY A "LIFE WITHOUT PAROLE" SENTENCE TO "LIFE WITH POSSIBLE PAROLE," UPON LATER LEARNING: (1) THE DEFENDANT WAS BRAIN DAMAGED WHEN HE COMMITTED HIS CRIME; AND (2) NEW BRAIN SCIENCE SPECIFIC TO A 19-YEAR-OLD ESTABLISHED, CONTRARY TO THE CORNERSTONE OF THE ORIGINAL SENTENCE, THAT THE DEFENDANT WAS *NOT* CATEGORICALLY BEYOND REHABILITATION.

The trial court answered: No.

STATEMENT ON PUBLICATION

The appellant believes that publication of the Court's opinion in this case will not be necessary as the issues presented can be resolved by mere application of existing law to undisputed facts of record.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as he believes the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issue presented.

Statement Of The Case And Facts

On October 30, 1996, the State charged Liebzeit, *inter alia*, with First-Degree Intentional Homicide. (R2). One week earlier, Liebzeit had just turned nineteen. The circumstances involved Liebzeit hitting Alex Schaffer with a baseball bat. Two co-defendants, James Thompson and Daniel Mischler, were also involved. Thompson also struck Schaffer in the head with the bat, and in his frenzy, struck Liebzeit's head. Thompson and Mischler then held Schaffer under water until he drowned. (R181-50-151; R184-2-67). A jury found Liebzeit guilty. (R188-4-5). On June 24, 1997, the court sentenced Liebzeit to life without possibility of parole. (R59).

In November 2019, the sentencing judge attended a continuing education seminar. (R192-25-26). A featured speaker was Dr. Leah Somerville, a professor of Harvard's Department of Psychology and Center for Brain Science. (R138). Professor Somerville presented her conclusions from a recently published article: *Searching for Signatures of Brain Maturity: What Are We Searching For?* Neuron (Oct. 2016). (R141). Those conclusions included that contrary to prior conventional thinking, the brain of a 19-year-old was *not* fully formed. As the Wisconsin supreme court presumably would have wanted, the judge applied what he learned at the seminar to cases he had handled, and decided it was worthwhile to revisit this case. (R192-25-26). He thus asked both parties to weigh in on whether the brain science might constitute a new factor that would warrant a sentence modification. (R138).

The State responded by arguing the court did not have the authority to ask the parties to address the issue. (R139). The court would later explain why the State was wrong, and both parties submitted their positions. (R140; R143; R144; R154; R156). Liebzeit noted that in addition to the new brain science, there was a second new factor: Liebzeit had been diagnosed with brain damage as a juvenile. (R140-2-4). On October 9, 2021, the court conducted a hearing to address whether there were new factors. (R192).

After hearing argument, the sentencing court concluded two new factors existed: (1) new science regarding the emerging adult brain of a 19-year-old; and (2) documented brain damage Liebzeit suffered as a minor. (R192-32). The court scheduled another hearing to address whether these new factors justified a sentence modification. (*Id.* at 32-34). On November 3, 2020,after again hearing argument, and input from the victim's family, the court modified Liebzeit's sentence to make him merely *eligible* for parole on January 1, 2023. (R193-37-38). This appeal followed. (R162).

Argument

I. THE SENTENCING COURT PROPERLY EXERCISED ITS VAST DISCRETION IN SENTENCING MATTERS WHEN IT REASONED THAT NEW FACTS PERTAINING TO LIEBZEIT'S BRAIN WARRANTED A MODIFICATION TO ALLOW THE DOC TO DECIDE IF LIEBZEIT SHOULD EVER BE RELEASED FROM PRISON.

A. Applicable Legal Standards.

A circuit court always retains inherent authority and discretion to modify a sentence. *State v. Noll*, 2002 WI App. 273, ¶12, 258 Wis.2d 573, 653 N.W.2d 895. While that discretionary power is exercised within defined parameters, those parameters include the inherent authority to modify a sentence based upon the showing of a new factor. *State v. Crochiere*, 2004 WI 78, ¶12, 273 Wis.2d 57, 681 N.W.2d 524. A sentencing court's continuing jurisdiction over a sentence finds full expression in the fact there is no time limit for bringing a motion to modify sentence. *State v. Machner*, 101 Wis.2d 79, 82, 303 N.W.2d 633 (1981). Whether a sentence modification is warranted is left to the sound discretion of the circuit court. *State v. Trujillo*, 2005 WI 45, ¶11, 279 Wis.2d 712, 694 N.W.2d 933.

To warrant a sentence modification, a defendant must show the existence of a new factor, by clear and convincing

evidence, thought to justify the motion to modify sentence. *State v. Michels*, 150 Wis.2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the judge at the time of original sentencing, either because it was not then in existence, or because it was in existence, but overlooked by all the parties. *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis.2d 53, 797 N.W.2d 828.

Whether facts put forth by a defendant constitute a "new factor" is a question of law. *State v. Hegwood*, 113 Wis.2d 544, 547, 335 N.W.2d 399 (1983). When a modification is based on new factors, it cannot be said it was based on second thoughts or reflection alone. *Harbor*, 2011 WI 28, at ¶36. Whether a new factor justifies sentence modification is committed to the discretion of the circuit court, and this Court reviews such decisions for an erroneous exercise of discretion. *Id.* at ¶33. A proper exercise of discretion requires a trial court to rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision. *State v. Manuel*, 2005 WI 75, ¶24, 281 Wis.2d 554, 697 N.W.2d 811. The breadth of discretion afforded sentencing courts is such that if they fail to adequately enunciate their reasoning for their decisions, this Court will search the record for reasons to sustain the decision. *McCleary v. State*, 49 Wis.2d 263, 282, 182 N.W.2d 512 (1971).

The highly deferential review of sentencing court decisions, along with the strong public policy of not interfering with a sentencing court's discretion, have long been embedded in the very fabric of this state's sentencing laws. Decisions affirming this discretion are too numerous for an exhaustive review. *See, e.g.*, *Riley v. State*, 47 Wis.2d 801, 803, 177 N.W.2d 838 (1970) (in reviewing sentencing decisions there is a presumption the court acted reasonably); *McCleary*, *supra* ("the law gives the judge wide discretion in sentencing"); *State v. Schilz*, 50 Wis.2d 395, 400, 184 N.W.2d 134 (1971) ("strong policy against interference with the trial court's sentencing discretion"); *Ocanas v. State*, 70 Wis.2d 179, 183, 233 N.W.2d 457 (1975) ("review of the sentencing

court's discretion is highly deferential"); *State v. Paske*, 163 Wis.2d 52, 64, 471 N.W.2d 55 (1991) ("weight to be attributed to each factor is within discretion of sentencing judge"); *State v. Harris*, 2010 WI 79, ¶29, 326 Wis.2d 685, 786 N.W.2d 409 (in exercising discretion, sentencing courts individualize sentence to defendant based on case facts by identifying the most relevant factors and explaining how sentence imposed furthers sentencing objectives").

B. The Sentencing Court's Modification Decision Was Based On New Factors And Accordingly, Was *Not* Based On Second Thoughts Or Mere Reflection.

The State frames the court's decision as nothing more than the product of second thoughts about, or mere reflection on, the original sentence imposed. However, because the court based the modification on new factors, it was, by definition, ***not*** based on second thoughts or reflection alone. *Harbor*, 2011 WI 28, at ¶36. The sentencing court cogently rejected the State's efforts to spin its handling of this case into some kind of misfeasance:

> The seminar was sponsored by the Office of Judicial Education for the purpose of educating judges on . . . new research in order to assist them in exercising their duties. To go to a seminar and [then] totally disregard what Judicial Education is telling the judges would seem odd to this Court. The Court did not conduct independent research on this topic . . . I've used the information from that seminar on a number of occasions. . . . The Court raised the issue with the parties . . . . The Court's letter indicated . . . why the Court believed the issue was relevant and why it believed it was able to consider such evidence. The Court did not say it would grant a motion based on that evidence. . . . The Court did not demonstrate actual or apparent bias by doing that. And as I've said,

> I've listened to your arguments, I've reviewed your briefs.

(R192-25-26).

This effort to misconstrue the sentencing court's decision causes the State to advance contradictory positions. At one point, it argues the court erroneously modified Liebzeit's sentence because it deemed the "original sentence . . . unduly harsh or unconscionable." (State's Brief, p. 20), *citing State v. Grindemann*, 2002 WI App 106, ¶27, 255 Wis.2d 632, 648 N.W.2d 507. In the next breath, however, the State faults the circuit court for **not** assessing whether its original sentence was unduly harsh or unconscionable. (*Id.* at 22). Thereafter follows an inexplicable non-sequitur: the circuit court *did* consider the new factors at the original sentencing hearing and just did not think they mitigated the crime, (*id.*), despite the court's cogent explanation that it never considered those factors when first sentencing Liebzeit.

The truth is the circuit court addressed this very issue and rationally explained its approach:

> Because the data on juvenile brain development was not known at the time of when the Court sentenced Mr. Liebzeit, the Court cannot rely on it to find that its earlier determination that Mr. Liebzeit was not eligible for parole was unduly harsh or unconscionable under the Court's inherent sentencing power. The Court can only modify its parole eligibility determination if the new data on the brain development satisfied the new factor test for sentencing modification, *State v. Hegwood.* Just because the Court could not modify Mr. Liebzeit's sentence without the showing of a new factor does not mean the Court was unable to raise the issue on its own motion. The Court's action would only support a claim of judicial bias if the Court conducted itself in a

> manner that put the Court's impartiality in doubt or raised an apparent appearance of bias.

(R192-21). The State's discussion of whether Liebzeit's sentence was unduly harsh, and how *this* Court would have rejected such an argument, (State's Brief, p. 20), is irrelevant to this appeal. It is a mere distraction.

The lower court also examined, at length, judicial bias, both actual and its appearance. (R192-21-25). The court acted properly at every step. To say it did something improper is tantamount to saying it was untruthful when it explained how the information came to its attention, or the process it thereafter followed.[1]

C. Liebzeit's Crime Was Admittedly Heinous, But Such Is Irrelevant To Whether There Are New Factors.

The State relies heavily on the heinous nature of Liebzeit's crime, with liberal references to such throughout the "argument" section of its brief. (State's Brief, pp. 17-19, 21-23). There is no doubt the crime Liebzeit committed was horrible. And yet, the seriousness of the crime is not relevant to the existence, *vel non*, of a new factor. Consequently, much of the State's brief constitutes *argumenta ad passiones*, rather than sober analyses of the actual issues on appeal.

This is particularly true given the Supreme Court's repeated observation that even those who commit the most depraved crimes may have, and might show, the capacity to change:

[1] Liebzeit's sentencing court is not the only court to believe revisiting a discretionary life-without-parole sentence is appropriate following *Miller* v. *Alabama*, 567 U.S. 460 (2012). The Supreme Court remanded three cases for precisely that purpose. *Blackwell v. California*, 568 U.S. 1081 (2013), *Mauricio v. California*, 568 U.S. 975 (2012), and *Guillen v. California*, 567 U.S. 950 (2012).

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition . . . **children who commit even heinous crimes are capable of change.**

Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) (emphasis added), *citing Miller, supra*.[2]

D. Both The Brain Science Regarding The Development Of The Emerging Adult Brain, And Liebzeit's Actual Brain Damage As A Juvenile, Constitute New Factors, As That Concept Is Defined By The Wisconsin Supreme Court.

As discussed more thoroughly below, the circuit court relied on two new factors in reaching its decision in this case: (1) new brain science regarding the 19-year-old brain; and (2) Liebzeit's documented brain damage as a child. In both instances, these are, undeniably, *facts*. Collectively, they are a set of facts. Accordingly, they fully meet the definition of "new factors" at the entry level.

They are also facts wholly absent from the original sentencing hearing. This Court can scour the record and not find a single reference to Liebzeit's organic brain damage during the original sentencing hearing. This fact existed, but was overlooked by all parties. Nor will this Court find any reference to brain science at all, much less brain science about the emerging adult. This is because these facts were not then

[2] In *Montgomery*, the defendant killed a deputy sheriff. In *Miller*, the defendant beat his neighbor into submission, then set fire to his trailer. In *Roper* v. *Simmons*, 543 U.S. 551 (2005), the defendant wrapped his victim's eyes and mouth with duct tape, tied her hands and feet with electrical wire, and threw her from a bridge.

in existence. While the State wishes to impute knowledge of the new brain science to the sentencing court, despite the court's pledge it was wholly unaware of such, it cannot impute knowledge of the applicability of the new brain science to *a 19-year-old*, as such is decidedly a recent innovation. This is especially true given the scholarly article authored by Dr. Somerville that resonated with the court.

Since these facts also pertain to Liebzeit's brain, they are, necessarily, highly relevant to the imposition of a sentence. It can fairly be said, and cannot reasonably be denied, that a person appearing before a court for sentencing is entirely defined by the person's brain. Nothing could be more relevant to the imposition of a sentence than a defendant's brain. This explains, for example, why it is unconstitutional to administer capital punishment to the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (mental retardation diminishes personal culpability even if offender can distinguish right from wrong).[3]

Facts elucidating a defendant's brain are highly relevant because sentencing courts are required to consider, *inter alia*, the defendant's character and prospects for rehabilitation. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis.2d 594, 712 N.W.2d 76. Correct and accurate background data is important because it significantly affects a defendant's chances for successful rehabilitation, his rehabilitative needs, and the likelihood he will reoffend. *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis.2d 535, 678 N.W.2d 197. This, in turn, alters the judicial calculus pertaining to protecting the public. *Id*. In short, nothing can be more relevant to sentencing than facts about a defendant's brain.

1. The brain science pertaining to a 19-year-old, on this record, is a new factor.

It is significant that Liebzeit had just turned 19 at the time he committed his offense, because much has been learned

[3] So relevant is brain development to a sentence that the Supreme Court has stated that a sentence failing to account for an offender's youth is *ipso facto* flawed. *Miller*, at 476.

about the 19-year-old brain in the nearly 25 years since he was sentenced. And what has been learned on this front has significantly impacted how courts now view sentences given youthful offenders. Over the last fifteen years, the Supreme Court has issued four landmark decisions significantly altering the treatment of young people in the criminal justice system. *Montgomery, supra; Miller, supra*; *Graham v. Florida*, 560 U.S. 48 (2010); *Roper, supra.* In this quartet of decisions, the Court looked to established scientific consensus regarding adolescent development and considered the unique attributes of youth when applying constitutional protections to youthful offenders.

These Supreme Court decisions rest "not only on common sense - on what 'any parent knows' - but on science and social science as well." *Miller*, at 471. Greater understanding in this area prompted *Miller* to hold mandatory life sentences for those who commit crimes as juveniles unconstitutionally cruel and unusual. *Id.* ("developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds - in parts of the brain involved in behavior control . . . transient rashness, proclivity for risk, and inability to assess consequences [which] lessen[] . . . moral culpability and enhance[] the prospect that, as the years go by and neurological development occurs . . . deficiencies will be reformed"). Because of greater prospects for reform, juveniles are less deserving of the most severe punishments, *id.*, such as the sentence Liebzeit received. *See also Roper*, at 569 ("[A]s the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.'").

To its credit, the State concedes the brain science in question *does* apply to Liebzeit. It does not argue that such is inapplicable to Liebzeit because he was not a juvenile, in the statutory sense, when he committed the offense in this case. It recognizes the adolescent brain does not magically transform on an individual's 17th or 18th birthday, as the brain science relied on by the Supreme Court affirms. Instead, the State

argues that what has been learned about the emerging adult brain is nothing new. Citing *State v. McDermott*, 2012 WI App 14, 339 Wis.2d 316, 810 N.W.2d 237, the State argues there is nothing about the adolescent brain that was not already known to the ancient Greeks.[4] (State's Brief, p. 11).

This argument, however, again depends on pretending the new brain science, and Supreme Court cases applying it, pertain only to impulsivity. More fatal still, it crumbles before the Supreme Court cases squarely relying on a *new* understanding of the young brain. *See*, *Graham*, at 68 (developments in psychology and brain science show fundamental differences between juvenile and adult minds); *Miller*, at 471 (Supreme Court's decisions rest on science and social science, *citing* Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). Had nothing new been learned about the adolescent mind, *Miller* would have had no reason to vacate the same life-without-parole sentence Miller and Liebzeit both received in 1997. The Supreme Court's reliance on developmental evidence represents a shift from prior decisions. Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 Psych. Pub. Pol'y & L. 410, 413 (2017).

Moreover, even were it true that nothing new has been learned about the *juvenile* brain over the past 25 years, what *has* since been learned, and what clearly *was* important to the court in this case, is that the brain science is now also understood to be applicable to a just-turned-19-year-old offender. Over the past ten years, additional advancements in neuroscience and brain imaging research have revealed the

[4] With all due respect, it is difficult to accept that over the course of nearly 3,000 years nothing new has been learned about the human brain. Notably, this is *not* a claim made by *State v. Ninham*, 2011 WI 33, 333 Wis.2d 335, 797 N.W.2d 451. In either event, Supreme Court decisions clearly repudiate that notion. Indeed, the Supreme Court repudiates the idea that nothing new has been learned since *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion), since its recent decisions acknowledge and discuss that case. *See, e.g.*, *Miller* at 481.

unique characteristics of youth identified in *Roper*, *Graham*, and *Miller* - immaturity, susceptibility, and changeability - persist beyond age eighteen. Scientists have now demonstrated these signature qualities of youth are marked in the very fibers of their brains. As the U.S. National Institutes of Mental Health has recognized these recent advances "have altered long held assumptions about the timing of brain maturation," revealing the brain does not become recognizably *adult* until after age 20. National Inst. of Mental Health, *The Teen Brain: Still Under Construction* 2 (2011), https://bit.ly/2N4ZoYU.

In other words, only recently has it been established that human brains continue to undergo profound changes throughout adolescence and young adulthood - a period sometimes referred to as "emerging adulthood" - in the areas and systems regarded as most involved in impulse control, planning, and self-regulation. Brain imaging and other novel neuroscience developments have made visible the differences between the developing brain and the adult brain as never before, effecting a paradigm shift in how behavior of emerging adults is understood in the scientific community. Well established, peer-reviewed research, and collective professional experience, demonstrate it is scientifically impossible to reliably predict the future dangerousness of an offender who commits a crime under the age of 21. And the very antitheses of that fact were the linchpin of the original sentence in this case.[5]

The sentencing court here also specifically noted the more recent (2016) article Dr. Leah Somerville of Harvard's

[5] Emerging adulthood has been defined as the period between adolescence and the mid-to-late-20s. Henin & Berman, *The Promise and Peril of Emerging Adulthood: Introduction to the Special Issue*, 23 Cognitive & Behav. Prac. 263, 263 (2016); *see also* Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 Wis. Law Rev. 669, 671 n.1, 681 ("[t]he 18-24 year old range used in this article finds support in the developmental science, and is frequently used in the legal and policy literature . . . The social meaning of emerging adulthood as a distinct status coupled with strong evidence showing that development continues until age 25 provides a solid foundation for policy reforms regarding young adults in the criminal justice system").

Department of Psychology and Center for Brain Science published. *See supra.* Dr. Somerville observed that:

> Longitudinal studies have been particularly informative in charting trajectories and points of asymptote in neurodevelopment. They show that reductions of cortical gray matter and increases in white matter **continue to actively change well into the twenties** and that a point of stability emerges earlier in some brain structures than others. Generally, regions of association cortex including the prefrontal cortex show particularly late structural development, whereas subcortical and occipital regions asymptote substantially earlier However, structural development continues to progress for a surprisingly long time. One especially large study showed that for several brain regions, structural growth curves had not plateaued even by the age of 30, the oldest age in their sample.

(R141-2) (Citations omitted). The court first learned this, and other related information, at a 2019 seminar.

Dr. Somerville noted the implications of brain science for societal institutions and the "recent surge of interest in the brain function of 'emerging adults,' individuals approximately 18–22 years old, who most societies treat as adults, but for whom neurobiological maturation is incomplete by almost any metric." (*Id.* at 3). This is the age range in which Liebzeit fell at the time of his offense.[6]

The State relies on *McDermott*, *supra* and *Ninham*, *supra*, for the proposition that the brain science is not a new

[6] There is growing harmony between the scientific community and federal law that age 22 is the age at which neurological development ends. *See, e.g.,* Intellectual Disability: Definition, Diagnosis, Classification, And Systems Of Supports (12th Ed. 2021) (human intellectual development ends at 22, not 18). *See also* 42 U.S.C. § 15002(8).

factor. (State's Brief, pp. 9-14). The circuit court, however, considered these cases and indeed, cited *Ninham* in its initial letter to the parties. (R138). Neither case addressed the new fact that the brain science applicable to statutory juveniles also extends to a 19-year-old.

McDermott was convicted of first-degree intentional homicide in 1991. He was eighteen when he killed his victim. McDermott was sentenced to life, but *was* made eligible for parole in 2025, an imperative factual distinction. When first sentenced, the court characterized McDermott's crime as "a pre-planned premeditated execution," noting the homicide had been discussed days before the act, graves had been prepared, and the weapon test-fired to see if anybody near the planned killing site would hear it. The court *denied* McDermott's motion to modify his sentence, yet another critical factual distinction (though *McDermott* never addressed the rationale by which it did so). In either event, *McDermott* deemed its decision compelled by *Ninham. McDermott* at ¶¶18-22. Thus, the proper focus here is *Ninham*.[7]

Before addressing *Ninham*, Liebzeit responds to the effort to position *McDermott* as dispositive: that brain science can *never* be a new factor *as a matter of law*, (State's Brief, p. 7). This is wrong. *McDermott* never said that, including at the State's pinpoint cite. (*Id.* at 10). And there is a colossal factual distinction between *McDermott* and this case: McDermott was given a parole eligibility date and thus, was never deemed irretrievably incorrigible. His possible rehabilitation was never an issue.

Here, by contrast, rehabilitation is *the* issue. The nature of the sentence (no possibility of parole) makes it so. And here, the lower court relied on the *possibility* of rehabilitation to modify the sentence. Only by ignoring the role of

[7] *McDermott* said to argue that "the trial court did not realize what scientific research has confirmed ignores reality." *Id.* at ¶21. Here, arguing the trial court *did* realize how the brain science applied to Liebzeit ignores reality, because the court expressly stated such was not the case.

rehabilitation in the decision *sub judice* has the State managed to position *McDermott* as dispositive.[8]

Fourteen-year-old Ninham and a group of juveniles randomly attacked a minor riding his bicycle. Ninham, especially, but also others, punched and beat the victim. When the victim ran up a parking ramp to escape, Ninham and the others pursued, caught him on the ramp's top floor, continued beating him, and Ninham and another person eventually threw him off the parking ramp. The victim fell 45 feet, landed on his back on the parking ramp's paved exit lane, and died of injuries sustained in the fall. *Id.* at ¶¶14-16.

Ninham was charged with first-degree intentional homicide. *Id.* at ¶21. Before trial, the State charged Ninham with additional counts including threatening his judge and three counts of witness intimidation. *Id.* at ¶22. The complaint alleged that while detained, Ninham threatened the life of his judge. It further alleged that upon learning of the other juveniles' cooperation with police, Ninham threatened to conduct a "drive by" of one witness's house, "rape and kill" another witness, and arrange for the killing of yet another witness's sister. *Id.* Ninham was found guilty following a trial at which his defense was he was not present at the scene of the homicide, but even if he was, he did not intend to drop the victim. *Id.* at ¶23. The court sentenced Ninham to life imprisonment without the possibility of parole. *Id.* at ¶29.

In 2007, Ninham filed a motion to modify his sentence to make him eligible for parole. *Id.* at ¶35. Ninham raised several grounds, one of which was that new scientific evidence relating to juvenile brain development constituted a new factor relevant to the sentence imposed. *Id.* Ninham argued this new scientific research undermined his sentencing court's findings

[8] The State also ignores that Liebzeit's court did not rely on the *general* emergence of juvenile brain science, (*id.* at 12), but *specific* brain science *specifically* applicable to Liebzeit. The State also evaluates the *constitutionality* of Liebzeit's sentence, (*id.* at 12-13), which is not an issue here. And the argument that Supreme Court cases do not *compel* the result here also misses the mark, because while that argument was made in *McDermott* and *Ninham*, it is not made here.

regarding his culpability and recidivism. The court rejected all of Ninham's arguments, not perceiving any significant distinctions between the "new" scientific evidence cited by Ninham and the psychological evidence on adolescents cited in *Thompson, supra,* twelve years before Ninham was sentenced.[9] *Id.* at ¶37.

Inherent in the sentencing court's denial of Ninham's sentence modification was that it had already been aware of what Ninham tried to position as "new." This Court stated that when originally sentenced, the court was aware of the differences between juvenile and adult offenders, and a new physiological explanation for those differences was irrelevant to the sentence imposed. *Ninham,* at ¶39. This Court had further reasoned the court was within its province to conclude the new factor did not frustrate the purpose of the original sentence, an idea *Harbor* subsequently rejected as a *sine qua non* for a sentence modification. *Harbor,* at ¶52.

Ninham concluded Ninham had not demonstrated by clear and convincing evidence that a new factor existed. To explain, *Ninham* assumed, without deciding, the MRI studies had not existed when Ninham was sentenced. Nevertheless, *Ninham* agreed with the circuit court that the studies still did not constitute facts highly relevant to the imposition of sentence, but not known at the original sentencing, because the conclusions reached by the studies already existed and were well reported when Ninham was sentenced in 2000. Moreover, Ninham failed to show by clear and convincing evidence the studies' conclusions were "*highly relevant* to the imposition of [Ninham's] sentence." *Ninham,* at ¶93 (emphasis in original).

It is impossible to disentangle the import of *Ninham* from the reasoning of the circuit court decision it reviewed. The circuit court decided it had already considered, at Ninham's original sentencing, the information Ninham posited as new. Moreover, the circuit court concluded the information

[9] Ninham's sentence is back before this Court following the Supreme Court's decision in *Miller. State v. Ninham,* Appeal Number 2016AP002098.

was not highly relevant to the imposition of *its* sentence. To support this point, *Ninham* pointed to the circuit court's findings regarding Ninham's culpability and recidivism. *Id.* Among the many reasons the circuit court in *Ninham* denied a modification was its continuing view of Ninham's culpability, and the fact that even after being charged with first-degree intentional homicide, Ninham made serious threats against his judge and witnesses, including raping and killing them.[10] *Ninham*, at ¶22.

This case also stands in stark contrast to *Ninham* because the respective circuit courts' findings around the relevancy of the brain science were diametrically different. Here, the sentencing court expressly explained it was *not* aware of the new facts when it originally sentenced Liebzeit:

> In 1997 this Court was completely unaware of the defendant's brain damage and the brain development issues.

(R193-34). It later reiterated this point. (*Id.* at 36). This is poles apart from the sentencing court in *Ninham*, which noted it *was* aware of the issue in question during Ninham's original sentencing hearing.

It is also notable that Liebzeit's sentencing court, unlike Ninham's, found the new facts highly relevant to his sentence. And Liebzeit's sentencing court explained why:

> At the first sentencing the Court placed almost all of the weight on the monstruous nature of the homicide. This Court dismissed the potential for rehabilitation and indicated at that time that how does one rehabilitate a person that has inside himself such rage and anger over such trivial matters that he would have killed a

[10] Ninham also received conduct reports while awaiting trial, for sharpening a weapon and attempting to escape. *State v. Ninham*, 2009 WI App 64, ¶2, 316 Wis.2d 776, 767 N.W.2d 326. Liebzeit engaged in no negative conduct while awaiting trial or sentencing.

> friend. Rehabilitation would be problematic to deal with such an antisocial personality as []his.

(R193-36). Liebzeit's sentencing court then explained how the new information indicated that, in fact, Liebzeit's rehabilitation was at least possible.

Moreover, Liebzeit's sentencing court addressed *Ninham*, and explained why it was not controlling. Even if it could be said the brain science regarding juveniles was known in 1997, the fact it is applicable to a 19-year-old was decidedly not known at that time. Ninham's sentencing court could at least plausibly claim to have considered that information at sentencing, and indeed, it considered Ninham was a juvenile when originally sentencing him. *Ninham*, 2009 WI App 64, at ¶9.

No such consideration was ever given Liebzeit, however, because at age 19 in 1997, the sentencing court treated him as a final product in accordance with conventional thinking at that time:

> Here, Liebzeit is presenting new studies specifically addressing persons between the ages of 18 and 22 in addition to his own medical history. Thus, in this case, the brain development studies . . . do constitute a new factor. . . . Here, the Court is not considering brain development research generally, it is considering brain development research addressing Mr. Liebzeit's specific age group when he committed the offense . . . . The Court finds that Liebzeit has presented research that fits his individual history.

(R192-29-30).[11]

[11] Adding enhanced credibility to this rational is that when originally sentencing Liebzeit, the court noted that Liebzeit needed to be held responsible "as an **adult** individual." (R190-53) (emphasis added).

In other words, to the extent *Ninham* reasoned the adolescent brain science was not new since it had already been elaborated by *Thompson*, the sentencing court here would not have thought *Thompson*'s ruminations relevant to the 19-year-old Liebzeit in 1997. *Thompson*, after all, involved a 15-year-old. Thus, even were one to impute to Liebzeit's original sentencing court knowledge of *Thompson*'s analysis of the 15-year-old before it, what is undoubtedly "new," and *not* known in 1997, is that those adolescent brain principles also apply to a 19-year-old, like Liebzeit when originally sentenced.[12]

The sentencing court here also noted *Ninham* was decided "before" *Miller* later deemed unconstitutional sentences of life without parole imposed on offenders with underdeveloped brains. (R192-28). The relevance here is obvious. Indeed, not only did *Miller* address a factual situation more fully in line with Liebzeit's case, where *Roper* had not, but *Miller* went much further than *Roper* in establishing and explaining the relevance of the brain science to sentencing issues. And *Montgomery* later went further still.

Presumably to get around this problem, the State casts the sentencing court's decision in a false light:

> [C]ontrary 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

[12] The State argues the lower court overlooked *State v. Barbeau*, 2016 WI App 51, 370 Wis.2d 736, 883 N.W.2d 520. (State's Brief, p. 14). Neither party raised *Barbeau* below, likely because Barbeau's sentencing court *did* make him eligible for release, and also because the claimed new factor in *Barbeau* – the sentencing court mistakenly made him eligible for parole rather than extended supervision – was not relevant here. *Barbeau* is unhelpful, except to the extent it noted judges must be allowed to make individualized sentencing determinations, *id.* at ¶41, which, after all, is all the lower court did here.

> 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.

(State's Brief, pp. 13-14) (citations omitted). Here, the State attacks the lower court's decision by claiming it erred in its analysis of *Ninham* because it wrongly believed *Thompson, Graham* and *Roper* were all decided *after Ninham.*

The State is wrong. In addressing *Ninham,* the court only cited *Miller* as having been decided after *Ninham*. (R192-28). It did not even reference *Thompson*, much less claim it was decided after *Ninham.* Nor did it reference *Roper* during its analysis of *Ninham.* And when it did reference *Graham,* such was at a different hearing than that where it distinguished Liebzeit's case from *Ninham.* (R193-36). Claiming the lower court erroneously believed *Thompson, Roper and Graham* were decided *after Ninham* mischaracterizes the decision.

To the extent the sentencing court reasoned a Supreme Court decision was relevant to its analysis of *Ninham,* the record reveals that decision was *Miller,* a case indisputably decided after *Ninham.* The lower court explained:

> [I]n *Miller v. Alabama*, which did not overrule *Ninham* or *McDermott*, it does support reading those cases with more sympathy for young adult offenders. Dicta in *McDermott* in particular you cannot read *Ninham* and *McDermott* with the same force after the *Miller* decision which supports finding that the particularized brain development research could be a new factor.

(R192-30).

This is notable because in reasoning Ninham had not presented a new factor, and the facts in question had not been overlooked by the parties, *Ninham* referenced section

III.A.2.b.i. of its opinion. *Ninham* at ¶93. That section, in turn, distinguished *Roper* and *Graham* because neither involved a life sentence without parole:

> *Roper* does not, however, stand for the proposition that the diminished culpability of juvenile offenders renders them categorically less deserving of the second most severe penalty, life imprisonment without parole. Indeed, the *Roper* Court affirmed the Missouri Supreme Court's decision to modify the 17–year–old defendant's death sentence to life imprisonment without eligibility for parole.

Ninham, at ¶75.

Here we find another reason why *Ninham* is not controlling. A pillar of its rationale has been superseded by *Miller*, which issued the precise ruling *Ninham* reasoned had never been issued. And this Court has since certified Ninham's case to the Wisconsin supreme court on the question of whether *Miller* and *Montgomery* may have fatally undermined the holding in *Ninham*. *State v. Ninham*, Appeal No. 2016AP002098.

The Seventh Circuit has also since weighed in on the new factors relevant to the adolescent brain, vis-a-vis a proper sentence. *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016), examined a *discretionary* life-without-parole sentence, and pointed out sentencing courts must always consider a defendant's age when deciding what sentence, within statutory limits, to impose on a juvenile. *McKinley* went on:

> But the "children are different" passage that we quoted earlier from *Miller v. Alabama* cannot logically be limited to de jure life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life. **The relevance to sentencing of "children are different" also cannot in logic depend on whether the**

> **legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors.**

Id. (Emphasis added; citations omitted). *McKinley* noted its defendant was entitled to have *Miller* applied retroactively because it changed "substantive" law, *id.* at 913, a ruling subsequently ratified by *Montgomery*. [13]

Finally, this Court has recognized that scientific advances can render *convictions* infirm, and there is no reason the same cannot be said of *sentences*, particularly where the sentencing court has made that exact determination. In *State v. Edmunds*, 2008 WI App 33, ¶12, 308 Wis.2d 374, 746 N.W.2d 590, this Court recognized that a shift in the medical community around shaken baby syndrome entitled the defendant to a new trial on the charge of first-degree reckless homicide. And this Court reached that conclusion even though the shift resulted only in "competing medical opinions" as to how the victim's injuries arose, and where the new evidence did not completely dispel the old evidence. *Id.* at ¶23. The scientific advances were sufficiently "new," and although the defendant had already litigated the issue, this Court held he was not barred from relitigating the same issue. *Id.* at ¶12.

[13] Since both *McDermott* and *Ninham* addressed the question of whether a court erroneously exercised its discretion in *denying* a motion to modify sentence, they are not, *ab initio*, a good fit for a case examining whether a court erroneously exercised its discretion in *granting* such a motion, especially where such flowed from a rational explanation of how new information highly relevant to the imposition of the original sentence warranted such. It is also respectfully submitted that the standard of review for whether a new factor exists cannot reasonably be purely *de novo*, given the definition of a new factor. Part and parcel of the definition of a new factor is the new facts must be "highly relevant" to the imposition of a particular sentence. *Harbor* at ¶40. What is highly relevant to the imposition of a sentence, however, is peculiarly within a sentencing court's province, given its "wide discretion in determining what factors are relevant, and what weight to give to each factor." *State v. Williams*, 2018 WI 59, ¶47, 381 Wis.2d 661, 912 N.W.2d 373, *citing Gallion*, *supra* at ¶68. Whether this standard of review should be reexamined, of course, is an argument for another day, and in another court.

2. The Libertas Report of organic brain damage existed, but was overlooked by all the parties.

During the original sentencing hearing information was presented to the court regarding Liebzeit's use of controlled substances, including inhalants. (R190-52). There was also a single, isolated reference by the State to Libertas as a place where Liebzeit rejected treatment. (*Id.*). No treatment reports, however, were submitted, despite the fact such existed. Most importantly, the sentencing court was never informed that at age thirteen, Liebzeit had been diagnosed as suffering from brain damage, even though such had been documented by Libertas.

This was not a casual observation. In a discharge summary signed by both William Reynders, M.D. and Patricia Wisnecki, CADC, Liebzeit's brain damage was repeatedly referenced as the primary problem:

> Throughout the course of treatment it was apparent that Jon's brain damage as a result of his long term inhalant abuse was playing a part in his ability to fully participate in the assignments. . . . Again, as a result of the long-term inhalant abuse Jon has suffered some permanent brain damage and this was determined after more extensive intelligent testing was done. . . . It is not understood whether or not this lack of participation is directly related to his self-worth issues or the brain damage.

(R144-3-4).

It cannot be disputed this was, and is, a fact. Nor can it be disputed it was unknown to the sentencing judge when Liebzeit was originally sentenced. Nor can it reasonably be claimed a defendant's brain damage is not highly relevant to

the imposition of a sentence. Indeed, the sentence modification judge in this case thought it highly relevant, and such was squarely within its protected purview to decide what facts are relevant and should be given weight. *Williams*, *supra.*

The State, however, endeavors to sweep this revelation under the rug by arguing it was common knowledge that human brains are damaged by substance abuse. (State's Brief, p. 16). This merits several responses. First, it is more accurate to say it was common knowledge that human brains *can* be damaged by substance abuse. Second, there was no reference to brain damage during Liebzeit's sentencing hearing. Neither the original sentencing court nor defense counsel mentioned that Liebzeit probably had brain damage. Third, even had it been mentioned, there is a chasm between what *might* be true and what was *actually diagnosed and documented* for the specific defendant. Finally, Liebzeit's brain damage was not some amorphous observation. It was determined that it was specifically interfering with his cognition and ability to successfully treat his issues, and may have prevented his successful participation in treatment.

The State, however, takes this argument to a rather disingenuous level, arguing:

> 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.

(State's Brief, p. 17), *citing Harbor*, 333 Wis.2d 53, ¶¶54–63. It was *not* common knowledge, however, that Liebzeit had brain damage. That fact was unknown. Moreover, this argument relies on something "the court is expressly made aware of." Again, the record reveals Liebzeit's original sentencing court was never made aware of his brain damage.

The State, however, argues that information the defense knew about and did not offer at sentencing is not a new factor.

(*Id.* at 16), *citing State v. Crockett*, 2001 WI App 235, ¶14, 248 Wis.2d 120, 635 N.W.2d 673. The State argues Liebzeit told his PSI writer about his "experiences" at Libertas and simply failed to present the court with the report. In fact, it was Liebzeit's mother, not Liebzeit, who mentioned to the PSI writer that Liebzeit had been at Libertas, but nothing indicates such included "his experiences." (R56-10). And even if it had, there was no mention of a diagnosis.

This case cannot be properly analogized to *Crockett.* Crockett alleged the following new factors: (1) no consensus among defendants that he did most of the shooting; and (2) his co-defendant was the only person claiming Crockett pressured him to reload the pistol. *Crockett* reasoned that even if the original sentencing court overlooked these facts, Crockett, as a participant in his own crime, could not maintain he did not know the facts of his own case. *Id.* at ¶14.

E. The Decision By The Lower Court Relied On Facts Of Record, The Applicable Law, And Used A Demonstrable Rational Process To Reach A Reasonable Decision.

A proper exercise of discretion requires circuit courts to rely on facts of record, the applicable law, and, using a demonstrable rational process, reach reasonable decisions. *Manuel*, 2005 WI at ¶24. If a trial court fails to adequately set forth its reasoning, this Court will search the record for reasons to sustain a discretionary decision. *McCleary*, 49 Wis.2d at 282. This Court need not do so here, however, because the circuit court's decision-making process constitutes an exemplary exercise of discretion.

The circuit court here undeniably relied on the facts of record. It revisited the facts surrounding the crime itself, commenting on its egregious nature. It also reviewed the facts relevant to its original sentencing decision. It also examined the facts comprising the new factors. It considered input from the victim's family. All were facts of record. It also made abundantly clear, on several occasions, that it would not, and

therefore did not, consider the facts surrounding Liebzeit's considerable rehabilitation efforts.[14] (R192-36; R193-32-33).

The circuit court also relied on the applicable law. It applied the correct definition of a new factor. (R192-26-27). It applied the proper burden of proof. (*Id.* at 27). It addressed *Ninham* and *McDermott.* (*Id.* at 28-31). It addressed the relatively recent and relevant Supreme Court decisions. (*Id.* at 28-30; R193-34-36). It considered the nature of the crime, the character of the defendant, and the need to protect the public. (R193-32-37). *State v. Frey*, 2012 WI 99, ¶46, 343 Wis.2d 358, 817 N.W.2d 436. The State fails to identify any applicable law the circuit court did *not* consider and apply.

The circuit court then applied the facts of record to the applicable law and set forth a demonstrable rationale process culminating in a reasonable decision. Here is one such portion:

> At the first sentencing the Court placed almost all of the weight on the monstrous nature of the homicide. This Court dismissed the potential for rehabilitation and indicated at that time that how does one rehabilitate a person that has inside himself such rage and anger over such trivial matters that they would have killed a friend. Rehabilitation would be problematic to deal with such an antisocial personality as this. . . . In *Graham* the Supreme Court said that in deciding that a juvenile offender forever will be a danger to society would require making a judgment that the child is incorrigible. Thus, this Court did not understand the emerging adult brain development and rejected the possibility of rehabilitation. . . . The Court's belief of the defendant's long-term dangerousness to society was likely misguided. Again, the Court based

[14] Liebzeit submitted proof of an excellent prison record, not as a new factor, but rather, to corroborate the applicability of the emerging adult brain science to him. (R144). The circuit court, however, scrupulously ignored this, noting it did not review those records, deeming them not relevant to the issues before it. (R192-18).

> that determination primarily on the nature of the homicide.

(R193-36-37). This reasoning is in full accord with *Montgomery*'s observation that "[t]he need for incapacitation is lessened because ordinary adolescent development diminishes the likelihood a juvenile offender forever will be a danger to society," and that "life without parole foreswears altogether the rehabilitative ideal." *Montgomery*, at 207-08.

The State, however, as previously noted, simply ignores the importance and relevance of the new factors to the issue of rehabilitation. Its solitary reference to "rehabilitation" pertains only to the original sentencing:

> Multiple interventions had been tried with him, and Liebzeit rejected them all. Liebzeit was a high risk to the community.

(State's Brief, p. 21) (record citations omitted). This, the State continues, justified the original sentence given Liebzeit. (*Id.* at 21-22). While true, the State completely ignores how the *possibility* of rehabilitation was rationally explained as important to the sentence modification court, and the weight it decided should be placed on that recognized sentencing factor, given the new information. *State v. Kennedy*, 190 Wis.2d 252, 257, 528 N.W.2d 9 (Ct. App. 1994).

This is not to say, however, that the possibility of "rehabilitation" is the *only* facet of brain science relevant to this case. The brain science is multi-dimensional, in spite of the State's effort to artificially make it unidimensional (i.e., only impulsivity), followed by its observation that Liebzeit's crime was premeditated, and thus cannot be viewed as impulsive. The State ignores all other aspects of the brain science, such as the reduced ability to balance long-term consequences with more immediate effects. And consider that in *Roper* the defendant planned to murder someone randomly, and discussed his plans in "chilling, callous terms." *Roper*, at 556. *Roper* involved premeditation at a level far exceeding what can be attributed to Liebzeit. And still, *Roper* stated:

> A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. It has been noted that adolescents are overrepresented statistically in virtually every category of reckless behavior. In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Roper, at 569–70. (Citations and quotations omitted). Since the Supreme Court found these observations relevant to someone who premeditatedly and randomly selected his victim, then tied her up and threw her from a bridge, the State is wrong to argue the Supreme Court jurisprudence means

nothing for Liebzeit simply because his crime cannot be deemed, in the purest sense, impulsive.[15]

Moreover, the State's observation that Liebzeit resisted rehabilitation as a juvenile only gives greater expression to the relevance of the new factors. At the original sentencing hearing, the State presented Liebzeit's opposition to treatment as an immutable character flaw, (R190-20-21), and the original sentencing court agreed. (*Id.* at 60-61). Both new factors now cast that perceived "fact" in a rather different light. What was once viewed as impossible has now been determined to be possible. And this is not based only on the brain science applicable to a 19-year-old, but also Liebzeit's brain damage.

What first presented as imperviousness to rehabilitation can now be understood as a reflection of a damaged brain. The Libertas report links Liebzeit's brain damage to his inability to successfully participate in treatment. And a study by the National Institute for Health (NIH) observes that inhalant use can impair cognition due to degradation of brain cells.[16] Another NIH study observes that such activity can lead to

[15] Moreover, that youths are more susceptible to peer pressure and do things in groups they would not do alone is also relevant, as the record reveals Liebzeit's crime, and any planning, was done jointly with his co-defendant, James Thompson, one year Liebzeit's senior, and who was also convicted of first-degree intentional homicide. *State v. Thompson*, Case No. 1996CF000575. *See also* (R182; R184) (Mischler testimony). And as previously noted, Thompson and Mischler held Shaffer under water until he drowned. (Id.). *Miller*, at 490 (adolescent lack of maturity and underdeveloped sense of responsibility make them more susceptible to negative influences and outside pressures, including peer pressure). One behavioral study reports that 18-22-year-olds take more risks in the presence of same-age peers than when alone or *in the presence of slightly older young adults*. Gardner & Steinberg, Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 Developmental Psychol. 625, 626-634 (2005).

[16] Inhalant Use and Inhalant Use Disorders in the United States, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3188822

increased levels of aggression.[17] And it is now also widely accepted that the plasticity of the brain allows for the possibility that it can repair itself. An NIH article[18] notes, regarding brain damage, that "structural changes occur in the brain throughout life, including the generation of new neurons and other brain cells, and connections between and among neurons." In short, structural plasticity provides a mechanism for the brain to repair itself. *Id.* The State does not dispute this either. It simply continues to claim, contrary to the record, that the sentencing court *was* aware of Liebzeit's brain damage. (State's Brief, p. 22).

Also relevant is the PSI's observation that Liebzeit did not present as someone who grasped the gravity of what he had done or his situation. (R56-12). It is noteworthy that a professional experienced in dealing with criminal defendants saw something in Liebzeit that stood out. This is relevant because the inability to understand and accept responsibility for one's actions and blame-shifting, also noted by the court during the original sentencing hearing, (R190-53-54), are hallmarks of the emerging adolescent brain. *Graham*, 560 U.S. at 68 ("underdeveloped sense of responsibility"). This apparently carefree attitude toward his crime also appeared to be forever embedded in Liebzeit.

Inexplicably, the State also claims the court *did* consider brain development at the original sentencing hearing, but just did not think it mitigated the severity of the crime. (State's Brief, p. 22), citing (R190-54-60). A review of the sentencing hearing transcript, however, does not support this claim. The original sentencing court never uttered the word "brain," much less broached the subject of brain development. The repeated attribution to the sentencing court of a rationale it

[17] Impact of gasoline inhalation on some neurobehavioural characteristics of male rats
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2788517

[18] Structural Plasticity of the Adult Brain
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3181802

never articulated betrays the State's recognition that it cannot prevail on the actual record.[19]

[19] The State argues Liebzeit has never taken responsibility for his crime. (State's Brief, p. 23). This claim cannot stand on a record where Liebzeit participated in a Restorative Justice program, (R144-10), wrote a letter of apology to the victim's family once he became aware of a program allowing it, (R152), and took ownership of the death before the circuit court modified his sentence. (R193-27-31) ("I know I'm responsible for Alex's death and that my actions were wrong"). This Court, however, will likely deem Liebzeit's post-conviction actions to be irrelevant to the issues *sub judice*, just as the sentencing court assiduously avoided those facts. Nevetheless, should this Court deem this argument relevant, or conclude the State has opened the door for consideration of who Liebzeit is today, then it must also consider the many ways Liebzeit has breathed life into the central tenets of *Montgomery*, *Miller*, *Graham* and *Roper*: (1) his **low** COMPAS scores in all recidivism areas except sentence structure; (2) his voluntary completion of a substance abuse program; (3) his single conduct report (minor in 2004) from reception at DCI through 2019; (4) his steady completion of "re-entry portfolios" for PRC hearings despite no prospects for release; and (5) his myriad of educational (e.g., GED) and vocational accomplishments over the past 24 years. (R144-5-17).

When sentencing Liebzeit in 1997, and given the then prevailing view of the 18-19-year-old mind, the circuit court noted that "as an adult individual [Liebzeit] need[ed] to be held responsible," and further noted he had not reacted positively to the system's attempts to help him, and that he had rejected help. (R190-50-53). The sentencing court also noted Liebzeit presented "as a high risk to others" and, based on a report from his social worker, did not take responsibility for his actions. (*Id.* at 53-54).

The circuit court understood that what has been learned about the 19-year-old brain since 1997 cuts across all sentencing factors:

> *Roper* and *Graham* emphasized the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because [t]he heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults - their immaturity, recklessness, and impetuosity - make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence in *Graham:* Deciding that a juvenile offender forever will be a danger to society would require mak[ing] a judgment that [he] is incorrigible - but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation could not justify that sentence. **Life without parole forswears altogether the rehabilitative ideal.** It reflects an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change.

Miller, at 472-73. (Emphasis added; citations and quotations omitted).

It is also understandable that in exercising its discretion, the sentence modification court would note that in 1997, it had relied on Liebzeit's apparent antisocial personality. (*Compare* R193-25 *and* R190-51-52). New and extensive research (i.e., since Liebzeit was sentenced) now warns against using antisocial behavior as a basis for making long-term predictions of an emerging adult's violent behavior because such predictions will mistake the hallmark features of youth for permanent defects, and dramatically overpredict the number of young people who will be violent in the future. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 Developmental Psychol. 1654, 1655 (2009); *see also* Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 Behav. Sci. & L. 53, 59 (2001) (collecting evidence that psychopathy assessments may "tap construct - irrelevant variance associated with relatively *normative* and *temporary* characteristics of adolescence rather than deviant and stable personality features"). *Montgomery* further noted that given what the Supreme Court had said in *Roper*, *Graham*, and *Miller* about the constitutional differences between adolescents and adults vis-à-vis culpability, prisoners serving life without parole must be given an opportunity to show their crime did not reflect irreparable corruption; and, if not, their hope for some years of life outside prison must be restored. *Id.* at 736-37.

The sentencing court here was well within its discretion to review, in light of new factors, the harshest of sentences it first imposed on the teenage Liebzeit. As the Supreme Court observed:

> And this lengthiest possible incarceration is an especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender. The penalty when imposed on a teenager, as compared with an older person, is therefore the same . . . in name only.

Miller, at 475 (citations and quotations omitted).

Conclusion and Relief Requested

Liebzeit anticipates that in reply, the State may float a "floodgates" argument. If so, this Court should not take the bait. This case should be decided on its unique facts, and no broad pronouncements need be made. Nor is it likely that circuit courts are lining up to modify sentences of this nature. Moreover, the outcome of such cases turns, in the end, on an exercise of discretion, based on the unique facts of each case. For the very same reasons Liebzeit would not have a prayer, had the circuit court denied his motion and he now needed to convince this Court such was an erroneous exercise of discretion, this Court should affirm the lower court's well-reasoned and well-supported decision.

For all the foregoing reasons, Liebzeit respectfully asks this Court to affirm the lower court's sentence modification.

Dated this 11th day of June, 2021.

Electronically signed by: /s/ Rex Anderegg
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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief, including the "Overview," is 10,992 words, as counted by Microsoft Office 365.

Dated this 11th day of June, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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.

Dated this 11th day of June, 2021.

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