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 L. LIEBZEIT,

Defendant-Respondent.

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

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The circuit court had no discretion to ignore this Court's decision in *McDermott* holding that this precise research into brain maturation in young adults is not a new factor as a matter of law, nor this Court's decision in *Barbeau* holding that *Ninham* does not conflict with the United States Supreme Court's decision in *Miller*.

Liebzeit has miscast the new-factor test as almost purely a decision left to the circuit court's discretion. (Liebzeit's Br. 16–17, 34 n.13.) But the cases on which he relies are decisions establishing a sentencing court's discretion when imposing the initial sentence. (Liebzeit's Br. 16–17.) That is the wrong analysis. The circuit court's discretion to *modify* a sentence is far more circumscribed, and it must be based on a new factor if more than 90 days has passed since sentencing. *State v. Harbor*, 2011 WI 28, ¶¶ 35–37, 333 Wis. 2d 53, 797 N.W.2d 828; Wis. Stat. § 973.19. The new-factor test is a two-part test that requires the defendant to first demonstrate that a new factor exists before the circuit court has any discretion to determine whether the sentence ought to be modified. *Harbor*, 333 Wis. 2d 53, ¶ 36. Whether something qualifies as a new factor is a question of law that this Court reviews de novo. *Id.*

In other words, the "highly deferential"[1] review of a circuit court's sentence modification based on a new factor applies only if the court first properly determined that a new factor exists as a matter of law. *Id.* ¶¶ 36–37. The proper interpretation of case law, including determining whether subsequent cases such as *Miller* have modified or undermined an earlier decision such as *Ninham*, is also a question of law. *State v. Starks*, 2013 WI 69, ¶ 28, 349 Wis. 2d 274, 833 N.W.2d 146, *abrogated on other grounds by State ex rel. Warren v.*

[1] (Liebzeit's Br. 29.)

Meisner, 2020 WI 55, 392 Wis. 2d 1, 944 N.W.2d 588. And the circuit courts are bound by the appellate courts' published decisions on questions of law. Wis. Stat. § 752.41.

This Court and the Wisconsin Supreme Court have held that new research about maturation of young peoples' brains is not a new factor under the first part of the sentence-modification test as a matter of law.[2] *State v. Ninham*, 2011 WI 33, ¶ 87, 333 Wis. 2d 335, 797 N.W.2d 451; *State v. McDermott*, 2012 WI App 14, ¶ 22, 339 Wis. 2d 316, 810 N.W.2d 237. And this Court has further held that *Miller v. Alabama*, 567 U.S. 460 (2012), where the United States Supreme Court discussed the role brain development plays in the constitutionality of imposing certain sentences on juveniles, did not alter that analysis. *State v. Barbeau*, 2016 WI App 51, ¶ 25, 370 Wis. 2d 736, 883 N.W.2d 520. Accordingly, *McDermott* and *Ninham* should have ended Liebzeit's motion for sentence modification without ever even reaching the discretionary part of the test.

The facts in *McDermott* were identical to those here: the 18-year-old adult defendant committed a brutal murder in 1991 and continually tried to blame someone else. *McDermott*, 339 Wis. 2d 316, ¶¶ 3–6. The court found that McDermott was a danger to the public and sentenced him to life, with parole eligibility after 35 years due solely to his lack of a criminal record. *Id.* ¶¶ 2, 6–7. McDermott moved for sentence modification, claiming the same new factor as Liebzeit: that "recent research shows 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.

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[2] The State did not argue that "brain science" generally can never be a new factor. (Liebzeit's Br. 25–26.) This particular research cannot be because the Wisconsin courts have held that it is not.

This Court disagreed and held this research is not "'a new factor' under the first aspect of *Harbor*'s two-part analysis." *Id.* ¶ 22. The supreme court in *Ninham* had rejected this same argument regarding brain development in adolescents, recognizing that while the articles may be new, their conclusions were certainly not. *Id.* ¶¶ 18–19. This Court further observed that the knowledge that young people are less mature "has been known since humans were able to observe their environment." *Id.* ¶ 20. This Court held that something universally known to humanity could not be a new factor as a matter of law. *Id.* ¶¶ 21–22.

This case presents identical facts. Liebzeit committed an unspeakably heinous murder when he was age 19 and has uniformly tried to pin it on Thompson and Mischler, despite all the evidence showing that Liebzeit orchestrated the killing. (*Compare* R. 2:2; 182:70–140, 150–51; 183:50–51, 76–96 *with* 149; 195:116–19, 122–41; 187:1–12, 14–18.) Liebzeit's motive was too trivial to comprehend and he showed no remorse. (R. 182:72–73, 104–05; 183:79–80; 195:16–17.) Unlike McDermott, however, Liebzeit had an unbelievably long criminal and antisocial background. (R. 190:51–54.) The circuit court sentenced him to life without parole due to the "monstrous" nature of the crime and Liebzeit's poor character. (R. 190:59–62; 193:36.)

The circuit court reflected on that sentence 24 years later, invited the defense to file a motion based on the research rejected in *McDermott*, and granted the motion because it now felt life-without-parole was too severe a sentence. (R. 138; 193:35–39.) But Liebzeit presented only "the old wine of human experience in the new bottles of recent research and label[ed] the entire package as 'new.'" *McDermott*, 339 Wis. 2d 316, ¶ 21. This Court and the supreme court, though, "rejected this false labeling." *Id.* The circuit court was thus required to reject it, also.

Liebzeit's attempts to distinguish *McDermott* fail. (Liebzeit's Br. 25–26.) Liebzeit first claims that the circuit court properly applied *McDermott* and *Ninham* because it "considered" these cases when granting the sentence modification motion. (Liebzeit's Br. 25–26.) The fact that the circuit court "considered" *Ninham* and *McDermott* means nothing. The record shows that the court reached the erroneous conclusion that it was not bound by either *Ninham* or *McDermott* because it believed *Ninham* had been modified by *Miller*—despite this Court's unequivocal holding that it was not. (R. 192:28–29); *Barbeau*, 370 Wis. 2d 736, ¶ 25. Neither *Miller* nor any other case has abrogated or modified *Ninham* or *McDermott*. The circuit court was bound by these cases.

Liebzeit then claims that while there may not have been any advancement in *juvenile* brain research in the past 25 years, the research showing that people age 18 to 22 are still maturing is new. (Liebzeit's Br. 23.) But that is the same argument this Court rejected in *McDermott*—that research showing brain maturation "generally does not occur until a person's early 20's" was new. *McDermott*, 339 Wis. 2d 316, ¶ 16. This Court held that it was not. *Id.* ¶ 22.

Liebzeit's final attempt to distinguish *McDermott* relies on the inapposite fact that the defendant in *McDermott* was given a parole eligibility date, so unlike Liebzeit, McDermott "was never deemed irretrievably incorrigible." (Liebzeit's Br. 26.) He claims this research shows that he may be capable of rehabilitation even though the circuit court did not think he was then, and it is therefore a new factor. (Liebzeit's Br. 13.) That argument ignores the reality that to get beyond the first prong of the new factor test, the defendant has to identify something that is actually *new*. *Harbor*, 333 Wis. 2d 53, ¶ 57. There is nothing new about the conclusions reached by this research; this Court, the Wisconsin Supreme Court, and the Supreme Court of the United States have all recognized them

as basic common knowledge as old as history about human development. *See, e.g., McDermott*, 339 Wis. 2d 316, ¶¶ 19–22; *Ninham*, 333 Wis. 2d 335, ¶ 87; *Miller*, 567 U.S. at 472. Nor is there anything new about the fact that people are capable of rehabilitating in prison, which is not a new factor, either. *See McDermott*, 339 Wis. 2d 316, ¶ 22 ("That McDermott may now rue what he did does not change things."); *State v. Crochiere*, 2004 WI 78, ¶¶ 14–15, 273 Wis. 2d 57, 681 N.W.2d 524 (post-sentencing rehabilitation is not a new factor).

Liebzeit's argument boils down to an averment that the court erroneously assessed his character at sentencing. That is an issue that must be brought on direct appeal or within 90 days of sentencing. *See* Wis. Stat. § 973.19.

Perhaps realizing that *McDermott* dictates the outcome of this case, Liebzeit attempts to do an end-run around *McDermott* by noting that *McDermott* relied on *Ninham*, and therefore spending much effort trying to distinguish *Ninham* instead. (Liebzeit's Br. 26–34.) This attempt also fails. To find in Liebzeit's favor, this Court would have to overrule *Barbeau*'s holding that *Ninham* is in line with *Miller*, and overrule *Ninham*'s holding that this research about young people generally does not prove anything about a specific offender, and is thus not a new factor as a matter of law. *Barbeau*, 370 Wis. 2d 736, ¶ 25; *Ninham*, 333 Wis. 2d 335, ¶¶ 87–93. But this Court cannot overrule or modify precedent. *Cook v. Cook*, 208 Wis. 2d 166, 189–91, 560 N.W.2d 246 (1997).

And while the state courts must follow the decisions of the Supreme Court on matters of federal constitutional law even if the Wisconsin law conflicts with it,[3] whether

[3] *State v. Jennings*, 2002 WI 44, ¶ 3, 252 Wis. 2d 228, 647 N.W.2d 142.

something constitutes a new factor for sentence modification is a state-law issue. At any rate, the Supreme Court itself recently disavowed the notion that *Roper v. Simmons*,[4] *Graham v. Florida*,[5] *Miller* or *Montgomery v. Louisiana*[6] imposed substantive requirements on how sentencing courts must weigh "the unique attributes of youth" at sentencing. (Liebzeit's Br. 22.) *Jones v. Mississippi*, 141 S.Ct. 1307 (2021).

In *Jones*, the Court held that *Miller* only required state statutes to *allow* courts to impose sentences less than life without parole on juvenile homicide offenders. *Id.* at 1311. It further held that *Montgomery* only made *Miller* retroactive, and flatly stated that neither case imposed "a formal factfinding requirement" about a youthful offender's incorrigibility. *Id.* And, of course, Liebzeit entirely ignores the fact that the Supreme Court held that people 18 and over, regardless of their developing brains, are nevertheless eligible for the death penalty and mandatory life without parole sentences. *Roper v. Simmons*, 543 U.S. 551, 574 (2005); *cf. Miller*, 567 U.S. at 474 ("[I]mposition of a State's most severe penalties *on juveniles* cannot proceed as though they were *not children*." (emphasis added).). Liebzeit's implied argument that these cases dictated that a court cannot sentence a young person over 18 to life without parole without finding them permanently incorrigible, or that they somehow affected Wisconsin's case law on whether these types of studies on adolescent brain development are new factors, is meritless.[7] (*See* Liebzeit's Br. 23–34.)

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[4] 543 U.S. 551 (2005).

[5] 560 U.S. 48 (2010).

[6] 577 U.S. 190 (2016).

[7] Liebzeit also erroneously implies that the Supreme Court vacated Miller's life without parole sentence because the sentencing court didn't have these types of studies to consider at sentencing, making

Accordingly, Liebzeit's argument that this research can be a new factor for him further crumbles in light of *Ninham*. The 14-year-old defendant in *Ninham*, too, received a life-without-parole sentence. *Ninham*, 333 Wis. 2d 335, ¶ 29. Just like Liebzeit, Ninham argued that these studies showed he should be considered less culpable than adult offenders and had greater prospects for rehabilitation, and were therefore a new factor. *Id.* ¶¶ 87–93. The Wisconsin Supreme Court held that studies showing that young people generally are more amenable to rehabilitation and less culpable than adults for their poor choices "are insufficient to support a determination about the culpability of a particular" young offender; "[l]ikewise, the studies' conclusion that adolescents 'almost universally'" outgrow their poor behavior "tells us virtually nothing about" any specific individual's likelihood to recidivate. *Id.* ¶ 93. Accordingly, such studies could not be "a new factor for the purposes of modifying Ninham's particular sentence." *Id.*

Despite Liebzeit's lengthy attack on *Ninham*, he cannot escape its holding because it is directly on point here. *Liebzeit*, like *Ninham*, relies only on studies talking about characteristics of young adults in general. (*See* Liebzeit's Br.

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them new knowledge about juveniles. (Liebzeit's Br. 23 ("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.") That is a fundamental misreading of *Miller*.

Miller's sentence was vacated because it was *mandatory* for his crime. *Miller v. Alabama*, 567 U.S. 460, 489 (2012). The Supreme Court in *Miller* held that due to the *well-known* attributes of juveniles, states could not mandate they serve life without parole and sentencing courts had to have the freedom to impose something lesser. *Id.* at 472. It simply noted that this "common sense" about children was also supported by science. *Id.* at 471. The Court in no way suggested that nothing about human brain development was known until 2012 and therefore Miller must receive a new sentence because of this "new" research, as Liebzeit implies.

9–11; R. 143:5–20; 155.) These studies say nothing about his particular characteristics, criminal background, likelihood to recidivate, or degree of culpability for Alex's murder—all of which the circuit court considered at sentencing. Consequently, they cannot be a new factor even if they *were* unknown to the sentencing court in 1997. *Ninham*, 333 Wis. 2d 335, ¶ 93.

Otherwise, Liebzeit simply makes the same unavailing argument made in *McDermott*: that "only recently has it been established that human brains continue to undergo profound changes throughout adolescence and young adulthood." (Liebzeit's Br. 24.) So, he essentially asks this Court to ignore *Ninham* and *McDermott*'s holdings that these conclusions about brain development in juveniles and young adults are not new and therefore research about the maturing brain cannot be a new factor. (Liebzeit's Br. 21–34.) Again, this Court cannot do so.

In short, the circuit court had no legal basis to grant Liebzeit's motion. It improperly cast aside binding precedent that this type of research is not a new factor under the first prong of the new-factor test. *Ninham*, 333 Wis. 2d 335, ¶¶ 87–93; *McDermott*, 339 Wis. 2d 316, ¶ 22. Liebzeit's motion never should have reached the discretionary stage of the analysis. The circuit court's decision must be reversed.

II. Even if the circuit court could have ignored these cases—which it could not—its decision to modify Liebzeit's sentence was improperly based on second thoughts and reflection.

The State will not rehash its brief-in-chief showing that the circuit court's granting Liebzeit's sentence modification was based on reflection and second thoughts alone. The circuit court was reminded of this case 24 years later when sentencing another young man, advised the defense to file a motion and on what grounds, and granted it despite the case

law holding that this research cannot be a new factor and the fact that Liebzeit's immaturity was not highly relevant to the original sentence.

The State wishes to clarify, though, why it discussed the unduly-harsh-and-unconscionable standard under *State v. Grindemann*, 2002 WI App 106, ¶ 27, 255 Wis. 2d 632, 648 N.W.2d 507, as Liebzeit has misunderstood the State's argument. (Liebzeit's Br. 18, 31; State's Br. 25.) The State recognizes that sentence modification on that ground is permissible only if made within 90 days of sentencing. *State v. Macemon*, 113 Wis. 2d 662, 668 n.3, 335 N.W.2d 402 (1983). The State was merely illustrating that the *circuit court* erroneously stated that it had the inherent authority to modify Liebzeit's sentence on this ground at any time. (State's Br. 25; R. 192:26.)

The State then explained that even if the court had truly applied that standard it should have denied the motion, because its original sentence indisputably was *not* unduly harsh or unconscionable. (State's Br. 28–28.) The point of the State's argument was to show that the circuit court granted this motion solely because it reflected on the harshness of Liebzeit's sentence.

The State was not conflating the standards nor making a constitutional argument; it was showing that even under the circuit court's supplied rationale, there were no grounds to grant this motion. "A trial court may not reduce a sentence on 'reflection' alone or simply because it has thought the matter over and has second thoughts." *Scott v. State*, 64 Wis. 2d 54, 59, 218 N.W.2d 350 (1974) (citation omitted). And this modification was based on reflection alone.

III. Liebzeit's substance abuse was known to the court at sentencing and cannot be a new factor.

Again, the State will not rehash all the arguments in its brief-in-chief showing why Liebzeit's brain damage from

inhalant abuse could not be a new factor. Something known to the parties or the court at sentencing cannot be a new factor. *See, e.g., Harbor*, 333 Wis. 2d 53, ¶¶ 57–58. This was referenced in the PSI and discussed by the court and the parties; it was known at sentencing. (R. 56:9–12; 190:52.) It is not a new factor, nor is the universally known fact that substance abuse causes brain damage.

But even if the Libertas report itself was unknowingly overlooked, it is not a new factor. Liebzeit and the circuit court failed to explain how young peoples' and the brain damaged's trouble "mak[ing] executive plans and control[ling] impulses" (R. 193:35) was relevant to the initial sentence or the severity of the crime, which the court found was coldly and calculatedly planned and not the result of impulse at all. (R. 190:54–60.) Nothing Liebzeit presented was a new factor because it was not highly relevant to the initial sentence.

CONCLUSION

This Court should vacate the order granting Liebzeit's sentence modification.

Dated this 15th day of July 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 15th day of July 2021.

Electronically signed by:

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

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of July 2021.

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