STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2021 AP 000009-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Respondent,

v.

JONATHAN LIEBZEIT,

Defendant-Respondent-Petitioner.

PETITION FOR REVIEW AND APPENDIX

PETITION FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, DATED AUGUST 30, 2022

Respectfully Submitted:

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APPENDIX

ISSUES PRESENTED

I. WHETHER THIS COURT'S DECISION IN *STATE V. NINHAM*, 2011 WI 33, 333 WIS. 2D 335, 797 N.W.2D 451, WHICH HELD THAT THE BRAIN SCIENCE DISCUSSED IN SUPREME COURT CASES, WHEN APPLIED TO JUVENILE OFFENDERS, WAS NOT A NEW FACTOR, COMPELLED THE SAME OUTCOME IN A CASE INVOLVING A YOUNG ADULT, WHEN THE APPLICABILITY OF THAT BRAIN SCIENCE TO YOUNG ADULTS WAS NOT KNOWN AT THE TIME *NINHAM* WAS DECIDED.

The trial court answered: No.

The court of appeals answered: Yes.

II. WHETHER APPLICATION OF *NINHAM* TO REVERSE A SENTENCING COURT'S WELL-REASONED DECISION TO *GRANT* A SENTENCE MODIFICATION TO ALLOW FOR THE *POSSIBILITY* OF PAROLE, BASED ON ITS ORIGINAL ERRONEOUS BELIEF THAT A 19-YEAR-OLD COULD NEVER BE REHABILITATED, IMPERMISSIBLY INTERFERES WITH THE WIDE LATITUDE AND DISCRETION THAT SENTENCING COURTS ARE GRANTED IN THIS STATE.

The trial court answered: Yes.

The court of appeals answered: No.

III. WHETHER THE EXISTENCE OF A NEW FACTOR IS A QUESTION THAT SHOULD BE REVIEWED WITH *NO* DEFERENCE TO THE SENTENCING COURT, WHEN BY DEFINITION THE INQUIRY INCLUDES WHETHER THE NEW FACTOR WAS HIGHLY RELEVANT TO THE IMPOSITION OF THE ORIGINAL SENTENCE, AND WHETHER IT WAS KNOWN OR UNKNOWN AT THE TIME OF THE ORIGINAL SENTENCING, BOTH BEING INQUIRIES ON WHICH THE SENTENCING COURT IS IN A UNIQUE AND SUPERIOR POSITION TO OPINE.

The trial court: Did not address this issue.

The court of appeals answered: No.

IV. WHETHER A CATEGORICAL BAR ON A BRAND OF NEW FACTOR SHOULD BE ALLOWED WHERE THE NEW FACTOR EXISTED AT THE TIME OF THE ORIGINAL SENTENCING HEARING, AND WAS CENTRAL TO THE SENTENCE IMPOSED, BUT UNKNOWN TO THE SENTENCING COURT, AS OPPOSED TO A NEW FACTOR THAT DID NOT EXIST AT THE TIME OF THE ORIGINAL SENTENCING HEARING, BUT AROSE IN THE YEARS THEREAFTER.

The trial court: Did not specifically address this issue.

The court of appeals answered: No.

Statement Of The Case And Facts

On October 30, 1996, the State charged Liebzeit with First-Degree Intentional Homicide, just one week after he turned nineteen. (R2). The crime involved Liebzeit hitting Alex Schaffer in the head 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, accidentally struck Liebzeit's head, largely incapacitating Liebzeit. 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 the possibility of parole. (R59). The circuit court based the sentence almost entirely on the nature of the crime from which it viewed Liebzeit as beyond repair:

> As far as rehabilitation is concerned, I don't know how one would begin to rehabilitate a person that has, inside of himself, such rage and anger that over such trivial matters, that they would kill a friend. How do you begin to counsel and train somebody not to do that? . . . Rehabilitation, I think it would be very problematic to try to deal with such an antisocial personality as this.

(*Id.* at pp. 60-61). The sentence the court gave Liebzeit in 1997 was understandable given the prevailing norms for young adults and the information available to it at that time.[1]

Twenty-two years later, in November of 2019, the sentencing judge attended a continuing education seminar which featured Dr. Leah Somerville, a professor of Harvard's Department of Psychology and Center for Brain Science. (R138; R192-25-26). 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 far from fully formed. (*Id.*). As this Court presumably would have wished, the judge applied what he learned at the seminar to cases he handled, and ultimately decided 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 parties therefore briefed the issues with Liebzeit noting there was another new factor: a diagnosis of brain damage Liebzeit received as a juvenile. (R140-2-4). On October 9, 2020, 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

[1] The State also argued, based on the nature of the crime, that Liebzeit was not the type of person who would respond to rehabilitative efforts. (*Id.* at 21). At age nineteen, Liebzeit could be said to be forever beyond redemption.

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). The sentencing court cogently explained:

> 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 that determination primarily on the nature of the homicide.

(R193-36-37). The sentence modification left to the sound discretion of the DOC the question of when, if ever, Liebzeit should be paroled. The sentencing court also relied on the fact that while it knew Liebzeit had an addiction problem with inhalants going back to age 14 or so, it did not know this use had actually resulted in diagnosed and documented *brain damage.* (*Id.* at 36).

The State appealed. (R162). On August 30, 2022, the court of appeals reversed. (Appendix A). The court of appeals explained it was compelled to reverse given this Court's decision in *State v. Ninham*, 2011 WI 33, 333 Wis.2d 335, 797 N.W.2d 451. (*Id.* at 21). Liebzeit now petitions this Court to review the court of appeals decision.

CRITERIA RELIED UPON FOR REVIEW

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH A LONG HISTORY OF STATE CASES RECOGNIZING THE PLENARY DISCRETION OF CIRCUIT COURTS IN MATTERS OF SENTENCING, AND ALSO MORE RECENT UNITED STATES SUPREME COURT DECISIONS ADDRESSING LIFE-WITHOUT-PAROLE SENTENCES FOR YOUTHFUL OFFENDERS, AND THE IMPORTANCE OF REVISITING SUCH SENTENCES ON COLLATERAL REVIEW.

Eleven years ago this Court decided *Ninham*, a case in which the minor defendant and other juveniles randomly attacked a 13-year-old riding his bike. Ninham and the others beat the victim and then followed him when he ran up a parking ramp to escape, caught him on the top floor and continued beating him before eventually throwing him off the parking ramp causing his death. ¶¶14-16. Ninham was convicted of first-degree intentional homicide and the court sentenced him to life without the possibility of parole.[2] *Id.* at ¶29.

In 2007, Ninham sought to modify his sentence so as to be eligible for parole. *Id.* at ¶35. Ninham argued, *inter alia*, that new scientific evidence relating to juvenile brain development

[2] Ninham was also charged with threatening the lives of his trial judge and three witnesses. *Id.* at ¶ 22. At trial, Ninham claimed he was not at the scene of the homicide, but if he was, he did not intend to drop the victim. *Id.* at ¶ 23. Unlike Liebzeit, Ninham maintained his complete innocence throughout the entire case, including his sentencing. *Id.* at ¶¶ 25, 28.

constituted a new factor relevant to the sentence imposed. *Id.* The circuit court denied the request noting it was well aware of the differences between juveniles and adult offenders at the time of the original sentencing hearing. *Id.* at ¶39. The circuit court also opined, and this Court agreed, that there were no significant distinctions between the "new" scientific evidence cited by Ninham, and the psychological evidence on minors discussed in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion), twelve years before Ninham was sentenced. *Id.* at ¶¶ 91-92.

A. The Court Of Appeals' Opinion In This Case Conflicts With The Wide Discretion Sentencing Courts Have In Wisconsin.

Wisconsin has a long history of granting sentencing courts great discretion in determining the appropriate sentence. Decisions affirming this discretion are too numerous for exhaustive review. *See, e.g.*, *Riley v. State*, 47 Wis. 2d 801, 803, 177 N.W.2d 838 (1970) (presumption court acted reasonably when reviewing sentencing decisions); *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 sentences based on case facts by identifying the most relevant factors and explaining how the sentence imposed furthers sentencing objectives").

There was no tension between *Ninham* and the highly deferential review of sentencing court decisions, because Ninham's sentencing court *denied* the sentence modification, and this Court affirmed. There is significant tension in this case, however, because Liebzeit's sentencing court *granted* the sentence modification, and despite doing so with a well-reasoned explanation, it has now been reversed. The judge who knows Liebzeit and his case best, and who has continuing jurisdiction over Liebzeit's sentence, along with the inherent authority and discretion to modify it, *State v. Noll*, 2002 WI App. 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895, has been told he cannot modify Liebzeit's sentence, despite a cogent explanation of why he did so.

The decision here is therefore at odds with the long-recognized authority and discretion of a sentencing court. As the sentencing court so rationally explained (and the record confirms), it initially made Liebzeit ineligible for parole because it viewed his rehabilitation as impossible. Twenty-two years later, and due to momentous advances in the understanding of the 19-year-old brain, it realized the cornerstone of its sentence was flawed. It realized it was at least *possible* Liebzeit might be rehabilitated, and that the DOC was therefore best suited to make that determination. This factor had been highly relevant to the imposition of the original sentence. And it frustrated the very purpose of its original sentence, *State v. Harbor*, 2011 WI 28, ¶52, 333 Wis.2d 53,

797 N.W.2d 828, which was to ensure that what it then viewed as an incorrigible 19-year-old was never given an opportunity for parole.[3]

B. *Miller v. Alabama* & *Montgomery v. Louisiana*

At the time this Court decided *Ninham*, the Supreme Court had decided, and this Court therefore considered, *Roper* v. *Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010). *Roper* had held it unconstitutional to impose capital punishment on any juvenile. *Graham* had held it unconstitutional to impose life-without-parole sentences for juveniles who had committed non-homicide offenses. Neither case implicated, as the Supreme Court had not yet opined on, the type of sentence in this case: life-without-parole for youthful offenders who *had* committed a homicide. Both *Roper* and *Graham* had, however, discussed the important differences between juvenile and adult offenders: (1) a lack of maturity and an underdeveloped sense of responsibility, qualities which often result in impulsive actions and decisions; (2) greater vulnerability or susceptibility to negative influences and peer pressure; and (3) characters that are not as well formed as adults.

The Supreme Court has now decided *Miller v. Alabama*, 567 U.S. 460 (2012), which addressed the exact sentence Liebzeit received - life-without-parole for a homicide case,

[3] Even if Liebzeit's sentencing court had not expressly placed rehabilitation at the center of its original sentence, Wisconsin courts have generally paid deference even to a sentencing court's *post* hoc explanation for why it imposed the original sentence in the first place. *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (deference will be paid to circuit court's *second* opportunity to explain its original sentence).

albeit for statutorily juvenile offenders. *Miller* held such sentences unconstitutional, though only when they are mandatory. Sentencing judges could still, in the exercise of their discretion, impose life-without-parole sentences for juveniles. However, the same observations about the differences between juveniles and adults that drove the decisions in *Roper* and *Graham* made it unconstitutional for state legislatures to take that discretion from judges, even when the offender had committed a homicide. *Miller* therefore affirmed the importance and necessity of allowing sentencing courts to consider the attributes of youthful offenders when deciding the question of eligibility for parole.

The Supreme Court has also now decided *Montgomery v. Louisiana*, 577 U.S. 190 (2016). *Montgomery* held that *Miller* announced a new substantive constitutional rule that was retroactive on state collateral review, thereby compelling states to go back and review such sentences. In other words, the Supreme Court's concern with life-without-parole sentences for youthful homicide offenders was so grave that it required state courts to go back and review such sentences. This is what Liebzeit's sentencing court has done in this case.

Even more in line with the case *sub judice* is *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016), another post-*Ninham* case. *McKinley* examined a *discretionary* and *de facto* life-without-parole sentence, and pointed out that sentencing courts must always consider a defendant's age when deciding what sentence, within statutory limits, to impose on a youthful offender:

> 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). Liebzeit's life-without-parole sentence was not *de facto*, it was *de jure*, and it was also *discretionary*.

It is true that neither *Miller* nor *Montgomery* conflict with *Ninham* in the sense that they compel the relief Liebzeit's sentencing court granted him. Liebzeit's original sentence was not mandatory, nor was he a juvenile, in the statutory sense. At the same time, it cannot be denied that those decisions, to an appreciable degree, reflect an extension of Supreme Court precedent to circumstances much more in line with this case than *Roper* or *Graham. Miller* speaks to the precise sentence Liebzeit received while *Montgomery* speaks to collateral review of such sentences. It is not difficult to understand why Liebzeit's sentencing court viewed them as relevant, and as having changed the landscape regarding how life-without-parole sentences for youthful offenders should be viewed, and the appropriateness of revisiting such sentences.

Miller and *Montgomery* also more directly repudiate the core reasoning of *Ninham*, because they *do* treat the brain science as something *new*, and not just the same old observations a mere plurality of the Supreme Court had made in *Thompson*:

> The evidence presented to us in these cases indicates that the **science and social science** supporting *Roper* 's and *Graham* 's conclusions **have become even stronger**. See, *e.g.*, Brief for American Psychological Association et al. as *Amici Curiae* 3 ("[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions"); *id.*, at 4 ("It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance"); Brief for J. Lawrence Aber et al. as *Amici Curiae* 26–27 ("Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency."

Miller, at 472, fn 5. The idea that the Supreme Court has not recognized, and relied on, significant advances in brain science during the 35 years since *Thompson* was decided is no longer a tenable position.

Ninham was also persuaded by the fact that a vast majority of states permitted juveniles to be sentenced to life without parole. *Ninham* at ¶55. The dissent in *Miller* also found such to be persuasive. *Miller* at 482. *Miller*, however, has now rejected that reasoning. Moreover, one case *Ninham* cited for that proposition - *Miller v. State*, 63 So. 3d 676 (Ala. Crim. App. 2010) – is the very case *Miller* reversed.

Finally, the undeniable fact that Liebzeit's crime was heinous in nature was a focal point of the State's arguments. It was also an important backdrop to the court of appeals' decision which meticulously revisited all the aggravating factors, (Appendix A, pp. 3-6), noted their centrality to the original sentencing decision, (*id.* at 6-7, 13-14), and used the gravity of the crime to undercut the sentence modification. (*Id.* at 14-15).

Miller, however, reasoned that new medical and social science has done away with the myth that youthful offenders can be accurately labeled as incorrigible, and *Montgomery* has noted such is true even where the crime was horrendous. The Supreme Court has now cautioned sentencing courts not to put undue weight on the particular facts of the case, or deem such proof of incorrigibility:

> 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, at 212 (emphasis added), *citing Miller, supra*. As Liebzeit's sentencing court explained, it did precisely what the Supreme Court is now cautioning courts not to do at Liebzeit's original sentencing hearing. It put undue weight on the facts due to the heinous nature of Liebzeit's crime, and deemed him forever incapable of rehabilitation.

II. THE APPELLATE COURT'S DECISION IS IN ACCORD WITH OPINIONS OF THE SUPREME COURT BUT DUE TO THE PASSAGE OF TIME OR CHANGING CIRCUMSTANCES, SUCH OPINIONS ARE RIPE FOR REEXAMINATION, BECAUSE THE FAILURE TO PAY *ANY* DEFERENCE TO THE SENTENCING COURT REGARDING THE EXISTENCE OF A NEW FACTOR MAKES NO SENSE WHEN THE CORE DEFINITION OF A NEW FACTOR IS WHETHER IT WAS HIGHLY RELEVANT TO THE SENTENCE IMPOSED, WHETHER THE COURT WAS AWARE OF IT, AND ALSO THE COURT'S APPRAISAL OF WHETHER IT FRUSTRATES THE PURPOSE OF THE ORIGINAL SENTENCE.

A. This Case Exposes A Flaw In The Standard Of Review For The Existence Of A New Factor.

This petition presents an opportunity for this Court to revisit whether it is proper for the standard of review for the existence of a "new factor" to be purely *de novo*. The definition of a new factor is:

> [A] fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Harbor at ¶40. Two important components of this definition – whether the new factor was highly relevant to the sentence and whether the sentencing court was aware of it – are both matters on which the sentencing court is in a unique and superior position to opine.

What is highly relevant to the imposition of a sentence is peculiarly within a sentencing court's province, given its "wide discretion to determine what factors are relevant, and what weight to give each factor," *State v. Williams*, 2018 WI 59, ¶47, 381 Wis. 2d 661, 912 N.W.2d 373. Depriving the sentencing court of any voice on this issue is also inconsistent with prior decisions of Wisconsin courts. *Ninham* is illustrative of this truism. The sentencing court in *Ninham* explained that it *was* aware, at the time of the original sentencing, of the factor Ninham tried to position as new. This Court accepted and relied on that explanation when affirming the denial of a sentencing modification. In other words, *Ninham* was faithful to the sentencing court's discretion. The appellate court's decision in this case is not.

Here, the sentencing court explained it was *not* aware and *never* considered the brain science at issue. It further explained the original sentence it imposed was premised on its belief that it was impossible for Liebzeit to *ever* be rehabilitated, and that he would *always* pose a danger to the public. The sentencing court then explained that the new brain science was highly relevant to the sentence it had imposed because it undercut the idea that Liebzeit would forever be beyond rehabilitation. Inherent in the modification of Liebzeit's sentence is the idea that the new factor *did* frustrate the purpose of the original sentence, which was to ensure that

Liebzeit was *never* released from prison, a purpose which, in light of the new factor, no longer made sense to the court.

Sentencing courts are uniquely positioned to know whether a new factor frustrates the very purpose of original sentences. *Harbor*, at ¶52. *Harbor* held that the frustration of the purpose of an original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor. *Id.* at ¶48. It also held, however, such a consideration permissible when deciding the issue, while noting that any fact that frustrates the purpose of the original sentence would generally be a new factor highly relevant to the imposition of sentence. *Id.* Whether a new factor exists in the first place is also affected by whether it frustrates the purpose of the original sentence, an inquiry the sentencing court knows best.

B. New Medical And Social Science Has Established A Scientific Consensus That The 19-Year-Old Brain Is Not Fully Formed.

Scientific advances since this Court decided *Ninham* have changed the way we understand the development of the juvenile brain into the adult brain. More specifically, the sentencing court here relied on a 2016 article published by Dr. Leah Somerville of Harvard's Department of Psychology and Center for Brain Science, wherein she 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).

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. And 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). This change in circumstances since *Ninham* was

decided makes the application of *Ninham* to a case such as this one ripe for reexamination.

III. A DECISION BY THIS COURT WILL HELP DEVELOP, CLARIFY AND HARMONIZE THE LAW ON NOVEL ISSUES, THE RESOLUTION OF WHICH WILL HAVE STATEWIDE IMPACT.

A. There Should Not Be A Categorical Bar On A New Factor Which Arises From A Fact That Existed And Was True At The Time Of The Original Sentencing, But Was Overlooked Because Scientific Advances Did Not Discover It And Develop It Into A Scientific Consensus, Until Years Later.

On rare occasion, this Court has categorically ruled that certain circumstances can never be a new factor. The court of appeals has done so as well. These decisions involve post-sentencing changes of circumstances. *State v. Kluck*, 210 Wis. 2d 1, 563 N.W.2d 468 (1997) (rehabilitation); *State v. Scaccio*, 2000 WI App 265, 240 Wis. 2d 95, 622 N.W.2d 449 (post-sentencing conduct); *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 354 (change in the classification of a crime under revisions to sentencing laws); *State v. Carroll*, 2012 WI App 83, 343 Wis. 2d 509, 819 N.W.2d 343 (repeal of sentence reduction program); *State v. Hegwood*, 113 Wis. 2d 544, 335 N.W.2d 399 (1983) (legislative reduction in maximum penalty for offense); *State v. Iglesias*, 185 Wis. 2d 117, 128, 517 N.W.2d 175 (1994) (citing *State v. Michels*, 150 Wis.2d 94, 99–100, 441 N.W.2d 278 (Ct. App. 1989) (change in defendant's health)). In each

case, the putative new factor involved a fact that became true post-sentencing, and which the original sentencing court could not have foreseen. Categorical bars have largely, if not entirely, been limited to situations where the putative new factor did not then exist. Categorical bars have not been employed where the new factor *was* in existence, but overlooked by the parties.

The decision in this case, however, imposes a new brand of categorical bar because it encompasses factors that *existed at the time of the original sentence* (the incomplete maturation of Liebzeit's brain and his brain damage), but unknown to the sentencing court. Moreover, it involves a factor on which the sentencing court was heavily reliant when fashioning the original sentence. That the new factor resulted from significant advances in medical and social science should not be a deterrent. Wisconsin courts have 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. *State v. Edmunds*, 2008 WI App 33, ¶12, ¶23, 308 Wis.2d 374, 746 N.W.2d 590 (shift in medical community around shaken baby syndrome entitled defendant to a new trial, even where shift resulted only in "competing medical opinions").

A categorical bar prohibiting the recognition of advances in medical and social science as a potential new factor should be of concern to this Court. Such advances are important to the development of the law. Indeed, they are often the subject of continuing judicial education seminars, as they were in this case. After being educated about these new developments and the scientific consensus, Liebzeit's sentencing judge now presumably approaches life-without-

parole sentences with greater caution and thought. And because of the great discretion afforded sentencing judges, this Court would find nothing wrong with him doing so. To fully respect his right to incorporate the new scientific developments into his prospective sentences, while completely barring him from applying these new scientific developments to address prior sentences he realized were flawed, is a defective dichotomy. It is also contrary to *Montgomery's* belief that courts should go back and revisit life-without-parole sentences for youthful offenders.

B. *Ninham* Cannot Rightfully Be Extended To A Case Where The Brain Science Principles Known To Be Applicable To Minors Were Wrongfully Considered Inapplicable To An Emerging 19-Year-Old Adult.

Using *Ninham* to deny Liebzeit relief was wrong because unlike Ninham, Liebzeit was not a minor. While the importance of this distinction might appear, at first blush, to be counterintuitive, it is not. *Ninham* deserved no traction here because that decision was predicated on the idea that the brain science, as applied to minors, was not new. Ninham's sentencing court *had* been conscious of those principles, and *had* taken them into consideration, when originally sentencing Ninham.

The same, however, cannot be said in this case. Twenty-five years ago 19-year-olds were viewed as fully formed products, and thus were denied any consideration of the scientific principles then reserved exclusively for statutory minors. In other words, what may have been intuitive to courts

when sentencing *juveniles* in the 1990s did not cross the minds of courts sentencing young emerging adults during that time frame.

A side-by-side comparison of Ninham's sentencing rationale and Liebzeit's sentencing rationale proves this point. Unlike Ninham's sentencing court, which *did* acknowledge his status as a youthful offender, the original sentencing court in this case blindly gave Liebzeit no such consideration, simply because he was a chronological adult when he committed his offense. There was no discussion devoted to his young age. *McKinley, supra* (age always a consideration). The following passage from the sentencing court captures this distinction while explaining why *Ninham* is not dispositive:

> Now, the State is correct that courts have previously found that research on brain development generally did not constitute a new factor. I just indicated that. And the State is *incorrect* that the evidence in this case is the same as those in those cases. **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 and his history of abusing inhalants.** The Court finds that Liebzeit has presented research that fits his individual history.

(R192-29-30) (emphasis added).

In summary, what is truly "new" in this case, as Liebzeit's sentencing court explained, is the knowledge,

nonexistent 25 years ago, that the principles enunciated by *Miller* do not magically evaporate when an offender reaches the chronological age of eighteen. On the contrary, they persist through age 19 (read, "Liebzeit") and well beyond. This is not an issue *Ninham* ever addressed, and *Ninham* should therefore not have controlled the outcome in this case.

Argument

I. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT *NINHAM* IS DISPOSITIVE OF THIS CASE.

As noted, the new brain science, and the Supreme Court cases applying it, does not pertain exclusively to impulsivity. The Supreme Court cases enunciate a more fulsome 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).

However, even were it true that nothing new has been learned about the *juvenile* brain over the past 25 years, what *has* more recently been learned, and what clearly *was* important to Liebzeit's sentencing court, is that the brain science is now understood to also be applicable to a just-turned-19-year-old offender. Since 1997, additional advancements in neuroscience and brain imaging research

have revealed the unique characteristics of youth identified in *Roper*, *Graham*, and *Miller*, to include 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.

This is not an issue *Ninham* ever addressed, because Ninham was only 14-years-old at the time of his offense. Consequently, Ninham's sentencing court was credibly able to say it was well aware of, and took into consideration, the undeveloped nature of Ninham's brain at the time of his original sentencing. The sentencing court in this case, however, extended no such consideration to Liebzeit because he was 19-years-old at the time of his offense and therefore deemed a final product. It did not know that 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.

This is not amorphous conjecture. On the contrary, this linchpin of the sentence modification comes directly from the mouth of the sentencing court. (R193-34) ("[i]n 1997 this Court was completely unaware of the defendant's brain damage and the brain development issues"). Consequently, the entire rationale for its original life-without-parole sentence was

the very antitheses of this new fact. *Ninham* does not control the outcome of this case.[4]

To address this problem, the appellate court turned to its decision in *State v. McDermott*, 2012 WI App 14, 339 Wis.2d 316, 810 N.W.2d 237, which cavalierly extended this Court's holding in *Ninham* to an 18-year-old who, unlike Liebzeit, *was* made eligible for parole. The sentencing court in *McDermott* therefore did not "foreswear altogether the rehabilitative ideal." *Montgomery*, at 207-08. It did, however, deny the motion to modify McDermott's sentence which sought an earlier parole eligibility date.

Although *McDermott* did not elaborate on the rationale by which the sentencing court refused to modify his sentence, it did say that to argue that "the trial court did not realize what scientific research has confirmed ignores reality." *Id.* at ¶21. Here, by contrast, arguing that Liebzeit's trial court *did* realize how the brain science applied to Liebzeit ignores reality, because the court expressly stated it did not. Once again, this contrast draws into sharp focus the problem when zero deference is paid to a sentencing court's explication of what it knew, and what it did not know, at the time of the original sentencing hearing.

Moreover, demonstrating that reasonable minds can disagree on the issue presented, and that clarification from this

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

Court would be helpful, is the dissenting opinion in *McDermott*.

> I part from the Majority, however, on the question of whether scientific research confirming that portions of the adolescent brain are not fully developed is a new factor highly relevant to the sentence imposed here. The Majority, like the State, observes that we all know from experience that adolescents often demonstrate amazingly poor judgment, and therefore concludes that no new facts are being offered here. I disagree. What is offered here is the assertion - supported at this time only by documents discussing such facts - that scientists can now physically measure the degree to which various portions of the brain have developed at various ages and can relate that development to specific brain functions. Because McDermott's judgment at the time of his crime, when he had recently passed his eighteenth birthday, was not merely poor but could be described as abysmal, the trial court was rightly concerned with whether it would ever be safe to even consider releasing him into society. However, the technology now available, which allows measurement of brain segment development, and scientific explanations of behavioral changes based on brain development, are relevant to both the protection of the community and the defendant's character and rehabilitation needs. Had this information been available to the trial court, it is reasonably probable that the trial court

> would have considered such information in setting a date for parole eligibility.

McDermott, at ¶¶ 28-29.

II. THE COURT OF APPEALS IMPROPERLY INVADED THE PROVINCE OF THE SENTENCING COURT BY REJECTING ITS EXPLANATION FOR THE SENTENCE IT ORIGINALLY IMPOSED, AND DILUTING ITS EXPRESS RELIANCE ON THE IMPOSSIBILITY OF REHABILITATION.

Liebzeit's sentencing judge stated unequivocally that he based Liebzeit's original sentence almost entirely on his belief that it was impossible for Liebzeit to be rehabilitated. He was not making it up. Such language appears prominently in the transcript of the original sentencing hearing. And rehabilitation of a defendant is a principal objective of a sentence. *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis.2d 535, 678 N.W.2d 197.

Here, however, the appellate court presumes to know the mind of the sentencing judge better than he does:

> While it might be true that "the impact that [brain] damage may have had on impulse control is relevant to whether [Liebzeit] is someone likely to be successfully rehabilitated," the court's sentencing explanation at that time reveals that Liebzeit's alleged issues with impulse control and **rehabilitation** were **not highly relevant to the imposition of its original sentence.** In other words, the court found at the

> 1997 sentencing that Liebzeit could not be rehabilitated—not because of his impulsive decision making—but because of the planning and brutality of the killing. **Thus, the focus was on punishment and protection of society.**

(Appendix A, pp. 14-15) (emphasis added). The appellate court forecasted this intention to supplant the sentencing court's rationale with its own at the outset of its opinion. (App. A, p. 2) ("the court's understanding that Liebzeit may have an increased potential for rehabilitation, [was] not highly relevant to his 1997 sentence").

Altering a sentencing judge's explanation for the sentence he imposed and telling him what he *really* was thinking is offensive to the deference afforded sentencing judges. This is particularly true where the sentencing judge's explanation is fully supported by the words he used during the original sentencing hearing. Blurring the lines between rehabilitation and punishment and protection of society is also offensive where "rehabilitation" is the key determinant between the possibility of parole and the impossibility of parole. Punishment and protection of society find expression in the *life* sentence which means the defendant may die in prison, regardless of parole eligibility. The possibility of rehabilitation finds expression in whether the defendant will ever be eligible for parole. Blending and equating these distinct objectives of a sentence, *Gallion* at *id.,* was wrong.

III. THE COURT OF APPEALS DIVIDED AND CONQUERED THE TWO NEW FACTORS EVEN THOUGH BOTH PERTAINED TO LIEBZEIT'S BRAIN AND WERE THEREFORE INTIMATELY RELATED.

The appellate court rejected the sentencing court's reliance on Liebzeit's previously unknown but diagnosed brain damage as a new factor. In so doing, it artificially reduced the relevancy of Liebzeit's brain damage to impulsivity alone, from which it then found it facile to discard its relevance altogether, because his attack on his victim was not impulsive, but instead, premeditated. (App. A, pp. 12-14). In a passage offensive to *Montgomery*'s admonition that even the most "heinous" crime should not be viewed as absolute proof of future dangerousness, the appellate court stated:

> Even if the Libertas Report provided evidence as to whether Liebzeit's brain damage impacted his impulsivity, impulsivity had no bearing on the circuit court's decision at the 1997 sentencing. To the contrary, as the court explained at that sentencing, the killing was not impulsive—"[t]here was thought; there was contemplation; there was planning." The court also reasoned that Liebzeit "had opportunities to withdraw, to warn his friend.… but he did not." According to the court, the killing was "cruel, cold, calculated, and vengeful … [in] which [Liebzeit] played a most significant role." The court further described the homicide as the "most serious type of murder," as opposed to those "in the heat of passion" or where "intent is formed

> instantaneously," such as during the course of a robbery or high-speed chase. Because the court in 1997 did not find that the killing was in any way the result of Liebzeit's impulsivity, the fact that his brain damage due to inhalant use may have caused him to otherwise act impulsively was not highly relevant to the 1997 sentence. Therefore, Liebzeit's brain damage, as it relates to the nature of the killing, cannot constitute a new factor.

Id. at 14. (Citations omitted). Missing from the analysis is the sentencing court's observation that Liebzeit's damaged brain, of which it was not aware, "could repair itself." (R193-34).

More conspicuous by its absence is any discussion of how Liebzeit's brain damage would have stunted the full maturation of his brain, thereby rendering him, from a developmental perspective, even younger than his chronological 19-year-old age. It is difficult to comprehend how a defendant's brain damage, unknown to the original sentencing court, cannot constitute a new factor. And yet, the appellate court breathes life into this counterintuitive conclusion by substituting *its* sentencing rationale for that expressly articulated by the sentencing court.[5]

The relevance of the brain damage was not limited to impulsivity. It further exposed and exacerbated the flaw in the original sentencing court's belief that Liebzeit could not be rehabilitated. The sentencing court noted a damaged brain can

[5] The Libertas discharge summary signed by both William Reynders, M.D. and Patricia Wisnecki, CADC, documented Liebzeit's brain damage as having been determined after extensive intelligent testing. (R144-3-4).

repair itself. It was just one more reason to believe Liebzeit might be capable of rehabilitation. But by isolating the brain damage issue, and ignoring how it interfaced with the emerging adult brain science, the appellate court managed to kill both birds, though it needed *two* stones, and also needed to isolate each bird in a separate cage, when both birds were of a piece.

IV. THE APPELLATE COURT'S DECISION FAILS TO RECOGNIZE THAT WHEN A MANDATORY LIFE SENTENCE MUST BE IMPOSED AND THE *POSSIBILITY* OF PAROLE ADDRESSED, THE THRESHOLD QUESTION OF WHETHER IT IS EVEN *POSSIBLE* TO REHABILITATE THE DEFENDANT TAKES CENTER STAGE, AND IS AN INQUIRY DRIVEN LARGELY BY THE GRAVITY OF THE OFFENSE.

In a passage that tends to elide issues needing elucidation, while again doing a disservice to a sentencing court's discretion, the appellate court states:

> The circuit court's 1997 sentencing reveals that the court was focused on the gravity and nature of the killing, the need to protect the public, and outright punishment. Due to these factors, the court found that Liebzeit could not be rehabilitated.

(App. A, pp. 14-15). The appellate court went on to posit that the original sentencing court deemed Liebzeit incapable of

rehabilitation, not because of his impulsive decision making, but because of his planning and the brutality of the killing. (*Id.* at 15).

This reasoning, in the first instance, is something of a distraction. It is not terribly relevant *why* the original sentencing court deemed Liebzeit beyond repair. What is relevant is that *it did so*. What is also relevant is that new medical and social science, fully embraced by the Supreme Court, convinced Liebzeit's sentencing court that it had been hubristic and wrong to have presumed to forecast the future dangerousness of a 19-year-old in perpetuity.

In either event, Liebzeit's sentencing court *explained* why it had reached that erroneous conclusion, and the above-quoted passage supports its explanation. The gravity, nature and brutality of the killing is the explanation it offered, when it modified the sentence, for having originally deemed Liebzeit irredeemable. Having acknowledged at least that much of the sentencing court's explanation, the appellate court should have proceeded to examine the Supreme Court's post-*Ninham* observations that even youthful offenders who commit heinous crimes can change. *Miller*, *supra; Montgomery*, *supra.* The sentencing court obviously read and overtly relied on these cases, and so they were baked-in to its thinking. This issue did not, however, even garner a tip of the hat from the appellate court.

More troublesome are the appellate court's other putative candidates for what supposedly drove the original determination that Liebzeit could not be rehabilitated: (1) the need to protect the public; and (2) punishment. This makes no

sense. They are non sequiturs. The original sentencing court did *not* deem Liebzeit beyond rehabilitation *because of the need to protect the public*, or *because of punishment*. As it explained, it deemed Liebzeit beyond rehabilitation *because of the gravity and nature of the killing*. (R193-36) ("the Court placed almost all of the weight on the monstrous nature of the homicide").

The original sentencing court deemed Liebzeit beyond rehabilitation solely because of the heinous nature of the crime. And it said so in real time. It was not the need to protect the public, or punishment, that somehow gave rise to the impossibility of rehabilitation. Here we find yet another facet of an undue lack of deference to the sentencing court. The sentencing court's cogent and record-supported explanations for its actions back then and more recently have been twisted, to some meaningful degree, in the service of the appellate court's preferred outcome.

The appellate court decision also fails to appreciate that the original sentencing court was *required* to consider Liebzeit's prospects for rehabilitation. *Gallion*, at ¶40. And it did, on several additional occasions. *See* (R190-60) ("it is difficult to know how we could rehabilitate somebody that thinks the way he does"). *See also* (R190-61) ("Rehabilitation, I think it would be very problematic to deal with such an antisocial personality as this"). Moreover, rehabilitation was a metric by which the court was required to gauge the minimum period of custody necessary. *McCleary*, 49 Wis.2d at 276 (sentence imposed shall call for minimum amount of confinement consistent with protection of the public, gravity of the offense and rehabilitative needs of defendant). The original sentencing court recognized that obligation as well, and

concluded that no amount of confinement would ever yield any prospect of rehabilitation.

Nor should it surprise anyone that the possibility of rehabilitation, *vel non*, would weigh heavily in deciding the possibility of parole, *vel non.* And the *possibility* of rehabilitation, of course, is where the analysis should begin, because if rehabilitation is *not* possible, no further consideration is needed. This is where the door shut on Liebzeit in 1997.

V. THE COURT OF APPEALS ERRED WHEN CONCLUDING THAT THE SENTENCING COURT'S WELL-REASONED SENTENCE MODIFICATION WAS BASED SOLELY ON MERE REFLECTION OR SECOND THOUGHTS.

Part of the appellate court's divide and conquer approach, and its myopic focus on impulsivity, ends with the court concluding the sentence modification was nothing more than mere reflection:

> Sentence modification based on a new factor requires a high degree of relevance to the *imposition* of the original sentence - something Liebzeit fails to demonstrate by clear and convincing evidence. The requirements for sentence modification are meant to promote the policy of finality of judgments while at the same time satisfying the purpose of sentence modification, which is the correction of unjust sentences. To allow the circuit court to modify Liebzeit's sentence based on the mere

> conclusion that his brain damage and alleged subsequent impulsivity were relevant to rehabilitation - when in 1997 it expressly found that the homicide was premeditated, that the public needed to be protected, and that Liebzeit could not be rehabilitated - would allow the court to base a sentence modification on reflection and second thoughts alone.

(App. A, p. 15) (emphasis in original; citations and quotations omitted).

It is remarkable the appellate court could conclude that Liebzeit failed to demonstrate by clear and convincing evidence that rehabilitation was highly relevant to his original sentence. Rehabilitation was woven throughout, and at the core of, the original sentencing remarks. Here, once again, the absence of deference to a sentencing court and the standard of review problem rear their ugly heads. The appellate court deigned to inform the sentencing court what *really* was highly relevant to the sentence *it* imposed.

This faulty premise then leads the appellate court to opine that the sentencing court based its modification on nothing more than second thoughts. This, too, lacks respect for the sentencing court. The sentencing court articulated a rational basis for its modification. Its original decision to make Liebzeit ineligible for parole arose from its belief, in 1997, that he could never be rehabilitated. Two new factors unknown to it at that time – Liebzeit's brain damage and the new scientific consensus that the 19-year-old brain is far from fully formed – radically changed and exposed the flaw in that belief. The sentencing court therefore decided, in the exercise of its broad

discretion, that Liebzeit should at least be *eligible* for parole. This was not mere reflection.

Conclusion and Relief Requested

Liebzeit understands there is an elephant in this room: an unspoken concern that recognizing the new brain science as a potential "new factor" could open the floodgates to sentence modification motions. While such a concern ought to pale in comparison to the death, in prison, of even one fully rehabilitated person whose sentencing court mistakenly ordained him incapable of such at age nineteen, the reality is that the concern itself is overblown. Prisoners serving life-without-parole sentences are a small fraction of the prison population. Those who committed their offense at age 18-22 is even smaller. And most sentencing courts will likely say that even though it may be a new factor, it does not, in the exercise of the court's discretion, warrant a modification.

For all the foregoing reasons, Liebzeit respectfully requests this Court grant his petition.

Dated this 27th day of September, 2022.

Electronically signed by:

Rex Anderegg
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Attorney for Defendant-Respondent-Petitioner

CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this petition is 7,975 words, as counted by Microsoft Office 365.

I further hereby certify that filed with this petition is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this petition is from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that the electronic copy of the Petition for Review filed with this Court is identical to the paper copies filed with the Court.

Finally I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have

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Electronically signed by:

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