FILED
10-05-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP09-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JONATHAN LIEBZEIT,

Defendant-Respondent-Petitioner.

# RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

## INTRODUCTION

Liebzeit, like many defendants before him, asks this Court to overturn a decade of case law holding that general research concluding that the human brain does not fully mature until one's mid-twenties is not a new factor warranting sentence modification as a matter of law. This argument regarding general "brain science" studies has been repeated ad nauseum under various federal constitutional and state law theories since this Court's holding in *State v. Ninham*[1] and the court of appeals's holding in *State v. McDermott*[2], and *Ninham* and *McDermott* have nevertheless stood firm. *Ninham*'s and *McDermott*'s correctness has further been underscored by the Supreme Court's decisions in *Miller v. Alabama*[3] and *Jones v. Mississippi*[4]. And this Court recently denied a petition for review in *State v. Jackson*[5] that presented nearly identical arguments to Liebzeit's, even though in that case the defendant was a juvenile when he committed the crime and thus had a much more compelling argument under the relevant Supreme Court case law that his sentence should be revisited—unlike Liebzeit, who committed an unspeakably brutal murder as an adult.

This Court has further already established in *State v. Harbor*, 2011 WI 28, ¶¶ 54–63, 333 Wis. 2d 53, 797 N.W.2d 828, that something that was known to the sentencing court but not highly relevant to the imposition of the original

---

[1] *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451.

[2] *State v. McDermott*, 2012 WI App 14, 339 Wis. 2d 316, 810 N.W.2d 237.

[3] *Miller v. Alabama*, 567 U.S. 460 (2012).

[4] *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

[5] *State v. Jackson*, 2018 WI App 62, 384 Wis. 2d 271, 921 N.W.2d 4 (unpublished), *pet. for rev. denied Aug. 11, 2021, cert. denied Jan. 18, 2022.*

sentence—like Liebzeit's alleged brain damage from huffing inhalants at age 13—is not a new factor simply because the defendant later fleshes it out with further information, either.

In short, Liebzeit's petition for review presents nothing that this Court has not already considered and rejected. It should be denied.

## BACKGROUND

Around midnight on October 27, 1996, 19-year-old Alex Schaefer received a call from his best friend he'd known since childhood, also 19-year-old Jonathan Liebzeit. Alex had just returned to Kaukauna from spending the summer after high school graduation in Texas with his sister. Unbeknownst to Alex, Liebzeit had been harboring anger toward him for years—for stealing a picture of Liebzeit's girlfriend in the eighth grade, stealing a hair tie from Liebzeit's former girlfriend a year previously, and for not repaying $15 Alex owed to a mutual friend, Daniel Mischler, who said he had forgiven the debt.

For these unimaginably trivial infractions, Liebzeit decided to kill Alex. Liebzeit lured Alex to Liebzeit's father's house with an invitation to drink beer and smoke marijuana, but with the plan for Liebzeit and another friend, James Thompson, to take him to a park and beat him to death with a baseball bat. And they did just that. Alex pleaded for his life and as the beating continued, feebly offered that he'd give them money to stop, but Liebzeit swore at him and continued the beating. He took a particularly vicious swing that connected with the back of Alex's head with a loud crack. Alex stumbled into the water in a drainage pipe and Thompson, who was accompanied by Mischler at Liebzeit's direction, held him under the water until he stopped moving. Liebzeit and Thompson stole Alex's wallet and later laughed about Alex offering them money when they found he had only three dollars.

For this vicious, unprovoked, cold-hearted "thrill-killing," Liebzeit received a sentence of life without parole.[6] Twenty-four years later, however, the sentencing court, sua sponte, invited defense counsel to file a motion for sentence modification based on a research paper concluding that the human brain does not fully mature until age 25. The State vigorously protested both the procedure and the basis for the sentence modification, noting that this Court in *Ninham* and the court of appeals in *McDermott* had already found that such research is not a new factor as a matter of law. Nevertheless, the sentencing court determined it was "not bound by" those cases after the Supreme Court's decision in *Miller*, and modified the sentence to make Liebzeit eligible for parole in 2023 on the ground that it (somehow) did not realize in 1997 that 18-to-22-year-olds are more impulsive than older adults. It further determined that modification was proper because it did not know in 1997 that Liebzeit's brain damage could cause impulsivity.

The State appealed, and the court of appeals reversed. The court of appeals noted that *Ninham* and *McDermott* were binding law that had already held that the conclusions reached by these types of studies are not new and say nothing about any particular defendant's culpability, and, moreover, nothing about Liebzeit's purported immaturity was highly relevant to the imposition of the initial sentence; to the contrary, the sentencing court expressly found in 1997 that the murder was coldly calculated and based its sentence primarily on the gravity of the offense, which was not at all altered by "brain science" showing that Liebzeit's brain was likely still growing at the time.

---

[6] The crime was committed prior to the change to extended supervision under the Truth-In-Sentencing changes took effect in 1999.

## ARGUMENT

Nothing presented in Liebzeit's petition is worthy of this Court's review.

First, Liebzeit's claim that the circuit court has "plenary discretion" to modify a sentence based upon a new factor, and thus the court of appeals's opinion here creates a "conflict" with the cases he cites, is patently wrong. (Pet. 2, 12–20.) All of the cases he cites are about the circuit court's wide discretion at the *initial sentencing hearing*. (Pet. 13–14.) No one disputes that sentencing courts have wide discretion at initial sentencing. It has been established law for decades, however, that after the time for direct appeal has passed, that discretion is greatly circumscribed and can only be exercised if the defendant shows that a "new factor" exists as a matter of law and that it warrants modification as a matter of discretion. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

And there can be no dispute, at this late stage of the law development, that what Liebzeit presented to the circuit court—research papers showing that the brain continues to mature beyond age 18, and a Libertas report from 1990 showing that his brain damage from inhalant abuse (of which the sentencing court was well aware at sentencing) had been hindering his progress in treatment when he was 13 years old—were not new factors as a matter of law, because this Court has already held that they are not.

This Court and the court of appeals have already considered and rejected these same arguments that research about the maturing early-adult brain are a new factor in scores of cases.[7] *See, e.g.*, *State v. Ninham*, 2011 WI 33, ¶¶ 87–

[7] The State cites the following unpublished cases not for any persuasive value or authority, but for the proper purpose of

93, 333 Wis. 2d 335, 797 N.W.2d 451; *State v. McDermott*, 2012 WI App 14, ¶¶ 16–22, 339 Wis. 2d 316, 810 N.W.2d 237, *pet. for rev. denied* Aug. 2, 2012; *State v. Garcia*, 2020AP1484-CR, 2022 WL 1600017 (Wis. Ct. App. Jan. 13, 2022) (unpublished); *State v. Swadner*, 2020AP1164-CR, 2021 WL 3160164, ¶¶ 21–24 (Wis. Ct. App. July 27, 2021) (unpublished) *pet. for rev. denied* Dec. 15, 2021; *State v. Brown*, 2019AP1006-CR, 2021 WL 8566571, *2 (Wis. Ct. App. Mar. 16, 2021) (unpublished); *State v. Linton*, 2019AP2264-CR, 2021 WL 1619282, ¶¶ 15–21 (Wis. Ct. App. Apr. 27, 2021) (unpublished) *pet. for rev. denied* Sept. 14, 2021; *State v. Morgan*, 2017AP2357, 2022 WL 1573402, *2–*3 (Wis. Ct. App. Jan. 25, 2022) (unpublished); *State v. Young*, 2018AP308-CR, 2019 WL 761637, ¶¶ 18–27 (Wis. Ct. App. Feb. 20, 2019) (unpublished); *State v. Jackson*, 2018 WI App 62, 384 Wis. 2d 271, 921 N.W.2d 4 (unpublished), *pet. for rev. denied Aug. 11, 2021, cert. denied Jan. 18, 2022.*; *State v. Rogers*, 2016AP2094-CR, 2017 WL 5760429, ¶¶ 8–9 (Wis. Ct. App. Nov. 28, 2017) (unpublished); *State v. Moore*, 2016AP1014-CR, 2017 WL 2438700, ¶¶ 12–16 (Wis. Ct. App. June 6, 2017) (unpublished). These are common-sense rulings. Particularized science on the topic is not a "new" factor when it has always been a matter of common knowledge that even after reaching legal adulthood human beings become more responsible and less impulsive as they age. College students are typically aged 18-22, and no reasonable person could argue with a straight face that until reading a particular scientific study, they didn't realize that young adults of this age group are more impulsive than adults over 25.

---

demonstrating consistency of reasoning and result when these arguments have been made. *See In re Matthew D.*, 2016 WI 35, ¶ 107 n.27, 368 Wis. 2d 170, 880 N.W.2d 107 (Abrahamson, J., and Ann Walsh Bradley, J., dissenting).

And this Court has further already held that presenting the court with additional information about a mental illness or medical condition that the court was aware of at sentencing—and the court was well aware at sentencing that Liebzeit had a major problem with inhalant abuse that affected his behavior—is not a new factor, either. *State v. Harbor*, 2011 WI 28, ¶¶ 54–63, 333 Wis. 2d 53, 797 N.W.2d 828.

Liebzeit's petition sets forth nothing to suggest that anything has actually undermined these decisions, nor any real argument explaining why they are no longer sound. (Pet. 13–20.) Really, he simply asks this Court to revisit these questions because he disagrees with the answers. That is not a proper reason for this Court to take a case.

Next, Liebzeit attempts to undo decades of case law holding that whether a new factor exists is a question of law reviewed de novo. (Pet. 21–22.) But to do so he asks this court to essentially just do away with the first part of the new factor test and allow a circuit court to modify a sentence any time it determines something was "highly relevant to the imposition of sentence, but not known to the trial judge at the time." (Pet. 21 (quoting *Harbor*, 333 Wis. 2d 53, ¶ 40).) So, essentially, Liebzeit asks this Court to bestow upon the trial courts the same broad degree of discretion to modify a sentence even decades after it was imposed as the court had at the initial sentencing hearing, regardless whether the information could have been presented then and regardless if it merely casts information that was before the sentencing court in a different light.

Apart from the fact that Liebzeit presents no compelling argument that any constitutional, statutory, or even any public policy consideration requires such a vast departure from *Rosado* and its progeny, doing so would upend the State's and the public's weighty and important interest in the finality of criminal cases and require this Court to overrule

over 50 years of Wisconsin sentencing law. *See Hayes v. State*, 46 Wis. 2d 93, 175 N.W.2d 625 (1970) (changing the state rule prohibiting sentence modification to allow modification under the court's inherent authority within 90 days of sentencing) *codified at* Wis. Stat. § 973.19; *Rosado*, 70 Wis. 2d at 288 (holding that sentence modification after the 90-day period has expired is appropriate only if the defendant meets the now-familiar two-pronged "new factor" test).

Liebzeit has not provided anything showing a necessity for such a drastic about-face in the law. He cites to no decisions that conflict with *Ninham* and *McDermott* (Pet. 30–34), he fails to acknowledge that *Harbor* definitively disposed of his argument that the 1990 Libertas report stating that his brain damage was affecting his treatment was a new factor, (Pet. 36–38), and he draws a distinction without a difference by arguing that, somehow, while research about the adolescent brain is insufficient to warrant modifying juvenile sentences, it *is* sufficient to modify the sentences of those aged 18 to 25, (Pet. 27–28). That is nonsensical.

At bottom, Liebzeit's petition for review asks this Court to overrule at least two dozen cases and 50 years of precedent to make the sentencing court's decision to modify a sentence carry more weight than its original sentencing pronouncement without showing any reason why that change in the law is warranted. This Court should decline his request.

## CONCLUSION

This Court should deny Liebzeit's petition for review.

Dated this 5th day of October 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 294-2907 (Fax)
kumferle@doj.state.wi.us

## FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2,092 words.

Dated this 5th day of October 2022.

LISA E.F. KUMFER
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this petition or response filed with the court and served on all opposing parties.

Dated this 5th day of October 2022.

LISA E.F. KUMFER
Assistant Attorney General