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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2021AP9-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,
v.

JONATHAN LIEBZEIT,

Defendant-Respondent-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR REVIEW

On Petition from a Decision of the Wisconsin Court of Appeals, District III

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief in support of Jonathan Liebzeit's Petition for Review on the grounds that the Court of Appeals misconstrued controlling legal standards for assessing when brain development research unknown to or overlooked by the original sentencing judge may be a "new factor" justifying modification of a sentence.

While WACDL takes no position regarding the ultimate decision of whether Liebzeit is entitled to modification of his sentence, as the sentencing court determined, it is concerned about the lower court's misinterpretation of ***State v. Ninham***, 2011 WI 33, 333 Wis.2d 335, 797 N.W.2d 451, as categorically excluding from "new factors" analysis of a sentencing court's ignorance or oversight regarding brain development and its

impact on the culpability and rehabilitation of juvenile and young adult offenders. Court of Appeals Decision, ¶¶33-45. This case gives the Court an excellent opportunity to both correct the Court of Appeals' misinterpretation of ***Ninham*** and to clarify conflicting lines of its own cases regarding whether new factor analysis should be assessed on a case-by-case or categorical basis. And finally, this case provides an opportunity for the Court to clarify that, although the ultimate determination of whether certain factors constitute a "new factor" that may justify modification of a sentence is an issue of law reviewed *de novo*, determinations of historical fact critical to that analysis, such as whether the sentencing court knew of the alleged new factors and whether those new factors would have been important to the court's sentencing determination, are reviewed for clear error.

ARGUMENT

Review Is Appropriate to Clarify Application of the "New Factors" Standard for Sentence Modification, Both in General and Regarding Brain Development Research In Particular

Review is appropriate in this case, both because the Court of Appeals seriously misinterpreted this Court's decision in ***Ninham***, *supra*, regarding the impact of brain development research on the culpability and rehabilitation of juvenile and young adult offenders and because this Court's own decisions are in conflict regarding whether new factors for sentence modification must be assessed on a case-by-case or categorical basis. Review also will help clarify that the *de novo* standard of review for the "new factors" determination does not alter the traditional requirement that predicate factual determinations are reviewed for clear error.

A. Sentence Modification Based on New Factors

Wisconsin circuit courts have discretion to modify a sentence upon a showing of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis.2d 53, 797 N.W.2d 828. The applicable standard requires, first, that the defendant "demonstrate that there is a new factor justifying a motion to modify a sentence." ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609 (1989).

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 the parties." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69 (1975).

Only satisfying the ***Rosado*** standard is required; the new factor need not frustrate the purpose of the original sentence. ***Harbor***, 2011 WI 28, ¶¶41-52 (abrogating "frustrates the purpose" test). Accordingly, the defendant need only show that the new factor is highly relevant to the issue of sentencing but was unknown to or overlooked by the sentencing court and the parties. ***Id.***

Second, the court must make the discretionary determination of "whether the new factor justifies modification of the sentence." ***Franklin***, 148 Wis.2d at 8. In making this determination, as in any sentencing determination, the court must evaluate whether, in light of the new information and all the surrounding circumstances, the original sentence remains the least punishment consistent with the purposes of sentencing or whether some lesser punishment would satisfy those purposes. *E.g.*, ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

Existence of a new factor is a question of law reviewed *de*

novo. *E.g.*, ***Harbor***, 2011 WI 28, ¶33. The second prong of the standard–whether a new factor justifies sentence modification–is an exercise of the circuit court's discretion and reviewed for erroneous exercise of discretion. ***Id.***

However, although this Court has not specifically so held in the context of sentence modification motions, predicate factual determinations are reviewed for clear error. *See, e.g.*, ***State v. Carter***, 2010 WI 77, ¶20, 327 Wis.2d 1, 785 N.W.2d 516 (Findings of fact shall not be set aside unless clearly erroneous."); *cf.*, ***Harbor***, 2011 WI 28, ¶34 (although ultimate determination of whether counsel provided deficient performance and prejudiced the defendant are issues of law reviewed *de novo*, "[w]e will not disturb the circuit court's findings of fact unless they are clearly erroneous.").

B. Juvenile/Young Adult Brain Development is Highly Relevant to Sentencing

It is a "foundational principle" of due process "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." ***Miller v. Alabama***, 567 U.S. 460, 474 (2012). Due process and the ban on cruel and unusual punishments require that, when sentencing someone for an act committed as a child, the Court must consider not merely the fact of the defendant's age, but the consequences of that fact, i.e., that children are both less culpable than adults and have a greater capacity for positive change. ***Montgomery v. Louisiana***, 577 U.S. 190, 206-09 (2016); ***Miller***, *supra*; ***McKinley v. Butler***, 809 F.3d 908 (7th Cir. 2016).

The Supreme Court concluded in ***Miller*** that a life sentence without parole is unconstitutional for all but the "rare juvenile offender whose crime reflects irreparable corruption." ***Miller***, 567 U.S. at 479-80, quoting ***Roper v. Simmons***, 543 U.S.

551, 573 (2005). *See also* ***Montgomery***, 577 U.S. at 206-09. "[C]hildren are constitutionally different from adults for purposes of sentencing." ***Miller***, 567 U.S. at 471. "Because juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.'" ***Id.***, quoting ***Graham v. Florida***, 560 U.S. 48, 68 (2010). As explained by the Supreme Court, there are at least "three significant gaps between juveniles and adults." ***Id.***

> First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as " well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

Id., quoting ***Roper***, 543 U.S. at 569-70. The Court held that those specific consequences of youth "– transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his '"deficiencies will be reformed."'" ***Id.*** at 472 (citation omitted).

The Supreme Court has further explained that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." ***Id.*** at 472 (citations omitted).

> 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, 567 U.S. at 472-73.

Accordingly, due process bars imposition of the most extreme sentences for the vast majority of even the most heinous offenses committed by children.

> [G]iven all we have said in ***Roper***, ***Graham***, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in ***Roper*** and ***Graham*** of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." ***Roper***, 543 U.S. at 573; ***Graham***, 560 U.S. at 68.

Miller, 567 U.S. at 479-80.

While recognizing the rare case in which "irreparable corruption" may justify imprisoning a child beyond his or her life expectancy, the ***Miller*** Court required the sentencing court first consider not just that children are different, but *why* they are different, and to reach the conclusion that the crime and the specific child before it reflect the exceedingly rare case of "irreparable corruption" rather than the usual "transient

immaturity of youth." ***Montgomery***, 577 U.S. at 208-09.

> Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Miller, 567 U.S. at 480.[1]

Accordingly, it is not sufficient for the sentencing court merely to mention the defendant's youth as an unspecified "mitigating factor." *See* ***Franklin***, 148 Wis.2d at 14-15 (sentencing court is not deemed to have considered particular factor unless it expressly mentions it); *cf.*, ***State v. Grady***, 2007 WI 81, ¶30, 302 Wis.2d 80, 734 N.W.2d 364 (court complies with statutory requirement to "consider" sentencing guidelines "when the record of the sentencing hearing demonstrates that the court actually considered the sentencing guidelines and so stated on the record.").

Rather, "[a] hearing where 'youth *and its attendant characteristics*' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." ***Montgomery***, 577 U.S. at 210, quoting ***Miller,*** 567 U.S. at 465. Under ***Miller,*** moreover, "[e]ven

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[1] ***State v. Barbeau***, 2016 WI App 51, 370 Wis.2d 736, 883 N.W.2d 520, did not hold otherwise. The Court of Appeals there merely addressed Barbeau's argument that Wisconsin's statutory Class A felony sentencing scheme was unconstitutional as applied to juveniles in light of ***Miller*** (***Montgomery*** had not yet been decided). Consistent with ***Miller's*** recognition that a life sentence without parole could possibly be justified in a particular case with "'the rare juvenile offender whose crime reflects irreparable corruption,'" 567 U.S. at 479-80 (citation omitted), the Court of Appeals merely held that Wisconsin's statutory scheme is not *per se* unconstitutional on its face. ***Barbeau*** was not asked to address, and did not address, a sentencing court's failure to comply with due process requirements to consider not only the fact of the defendant's age, but the consequences of that fact as required by ***Miller*** and ***Montgomery***.

if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" ***Montgomery***, 577 U.S. at 208 (quoting ***Miller***, 567 U.S. at 479 (emphasis added)).

C. This Court's Conflicting "New Factors" Analyses and the Court of Appeals' Misinterpretation of *Ninham* Justify Review

The Court of Appeals, and presumably the state, do not dispute that research regarding the impact of brain development on a young defendant's culpability and susceptibility to rehabilitation is highly relevant to the issue of sentencing. The United States Supreme Court already had held that it is. *See* Section B, *supra*. Nor does there appear to be any dispute that the sentencing court in this case either did not know or overlooked the impact of that information when sentencing Liebzeit to life in prison without possibility of release for something he did as a 19-year-old. The circuit court so held as a matter of fact. See Liebzeit's Petition at 3-4, 7. *Compare* ***State v. Ninham***, 2009 WI App 64, ¶ 9, 316 Wis.2d 776, 767 N.W.2d 326 (post-conviction court found as fact that it *was* aware at sentencing of the information Ninham claimed was new), *aff'd*, 2011 WI 33, 333 Wis.2d 335, 797 N.W.2d 451; *see* ***Ninham***, 2011 WI 33, ¶39.

This case thus focuses squarely on the purely legal question of whether a "new factor" is to be assessed using a case-by-case or categorical approach.

Over the years, this Court has applied conflicting analyses regarding whether a particular fact or circumstance constitutes a new factor as necessary for sentence modification under ***Rosado,*** *supra*. Sometimes, the Court applies a case-by-case analysis, focusing on whether the alleged new factor was highly

relevant to the particular sentencing judge's sentencing determination. *Compare* ***Kutchera v. State***, 69 Wis.2d 534, 552-53, 230 N.W.2d 750 (1975) (parole policies overlooked or unknown at sentencing constitute new factor), *with* ***Franklin***, 148 Wis.2d at 15 (post-sentencing change in parole polices not new factor where sentencing judge did not mention parole eligibility as important when imposing sentence). At other times, the Court has held that particular facts or circumstances categorically do not constitute new factors. *E.g.*, ***State v. Kluck***, 210 Wis.2d 1, ¶14, 563 N.W.2d 468 (1997) (defendant's prison rehabilitation not a new factor). See also Liebzeit's Petition at 18-19 and cases cited.

In ***State v. Ninham***, 2011 WI 33, ¶¶87-93, 333 Wis.2d 335, 797 N.W.2d 451, this Court addressed whether research about adolescent brain development was a new factor. Using a case-by-case approach, the Court found that ***Ninham*** did not demonstrate that a new factor existed on the facts of his case. ***Id.***, ¶91. Specifically, given that generalized knowledge confirmed by later studies was available at the time of his sentencing, Ninham failed to show that his sentencing judge in fact overlooked existing scientific evidence explaining adolescent brain development and its impact on both the culpability and rehabilitative potential of young offenders.[2] ***Id.***, ¶¶91-93. Ninham also failed to show that the scientific findings regarding the enhanced likelihood of rehabilitation applied to him. ***Id.***, ¶93.

Ninham did not apply a categorical approach and

[2] The post-conviction court, which also was Ninham's sentencing court, found as fact that it *was* aware at sentencing of the factors that Ninham claimed were new. ***State v. Ninham***, 2009 WI App 64, ¶ 9, 316 Wis.2d 776, 767 N.W.2d 326, *aff'd*, 2011 WI 33, 333 Wis.2d 335, 797 N.W.2d 451; *see* ***Ninham***, 2011 WI 33, ¶39.

therefore does not stand for the proposition that advancements in adolescent brain development research may never be a new factor. Rather Ninham simply failed to prove it was a new factor "for purposes of modifying Ninham's particular sentence." ***Id.***, ¶93. This Court left unanswered the question of whether the new research would constitute a new factor when the full effects of adolescent brain development were in fact unknown by the circuit court in a given case or, if previously known, forgotten or overlooked.

In ***State v. McDermott***, 2012 WI App 14, 339 Wis.2d 316, 810 N.W.2d 237, the Court of Appeals majority nonetheless applied a categorical approach, brushing aside the issue with references to Aristotle, *The Illiad*, and Ben Franklin, and concluding that adolescent brain research can never be a new factor, even when unknown or overlooked by the sentencing court. ***McDermott***, 2012 WI App 14, ¶¶16-22. The Court of Appeals effectively, if illogically, held that, if an alleged new factor was knowable, it necessarily was known by the sentencing court.[3]

The Court of Appeals here deemed Liebzeit's new factors argument controlled by ***McDermott's*** interpretation of ***Ninham***, *supra*, as holding that a sentencing court's ignorance or oversight regarding adolescent brain development research categorically can never be a new factor. 2012 WI App 14, ¶¶16-22. *See* Court of Appeals Decision, ¶¶33-43. However, ***McDermott*** misconstrues ***Ninham***, which did *not* establish a categorical exception for brain development research and instead emphasized Ninham's personal failure to show either that the sentencing court had overlooked that research or that the

[3] The ***McDermott*** dissent, on the other hand, deemed the advancements in adolescent brain development research to be a new factor on the facts of that case. ***Id.***, ¶¶28-30.

research would have been highly relevant to Ninham's own sentencing. 2011 WI 33, ¶¶91-93.

Moreover, by applying a categorical exception to the new factors analysis for factors the United State's Supreme Court has considered highly relevant as a matter of due process, ***McDermott's*** analysis, and thus that of the court below, also conflicts with ***Harbor's*** insistence on ***Rosado's*** original, case-by-case analysis. Review by this Court is necessary to clarify whether "new factors" analysis is addressed on a case-by-case basis consistent with its origins in ***Rosado***, or whether the Court of Appeals' categorical approach applies.

CONCLUSION

This Court should accept this case to clarify the approach lower courts should take to new factor cases. While this Court in ***Ninham*** held that Ninham did not prove a new factor in his particular circumstances, it did not go far enough and explain the type of approach the lower courts should take in addressing new factor motions. This Court should do so now, and accept this case in order to identify whether or when a categorical approach is permissible as opposed to the case-by-case analysis suggested by ***Rosado***.

Only this Court can correct the Court of Appeals' mistake in ***McDermott***, and repeated below, and this Court's own conflicting lines of cases. ***Cook v. Cook***, 208 Wis.2d 166, 560 N.W.2d 246 (1997). Until this Court acts, the lower courts will continue to be bound by the Court of Appeals' error and confusion regarding the proper approach for assessing new factors.

Dated at Milwaukee, Wisconsin, October 7, 2022.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,990 words.

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I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 7th day of October, 2022, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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