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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 12-CF-511

Appeal No. 2014AP2876CR

ANTONIO D. BARBEAU,

Defendant-Appellant.

Brief of Antonio D. Barbeau Concerning the Judgment of Conviction and Order Denying Post Conviction Relief Entered By Sheboygan County Circuit Court, The Honorable Timothy Van Akkeren

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STATEMENT OF ISSUES

1. Did Mr. Barbeau present a new factor to the circuit court which warranted modification of his sentence?

Answered by Trial Court – no.

2. Is the Truth-in-Sentencing scheme for First-degree Intentional Homicide, in particular the provision which does not allow extended supervision to be considered until a confinement term of at least twenty years has been served, excessive and unconstitutional as applied to youthful offenders?

Answered by Trial Court – no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As the facts of the case are straight forward and well documented, and given the law applicable to the issues at hand is long-standing and unambiguous, appellant does not believe oral argument is necessary.

Appellant does expect the Appellate Court's ruling will require explanation, modification, or rejection of existing law or policy, and therefore, appellant does believe the Appellate Court's ruling merits publication.

STATEMENT ON OF THE CASE

Mr. Barbeau currently stands as the second youngest person serving a life sentence in Wisconsin — Mr. Nathan Paape, his codefendant, is just a few days younger. These two children are the youngest sentenced to life terms since 2001 Wis. Act. 109 fully implemented Truth-in-Sentencing on February 1, 2003.

On September 21, 2012, the State of Wisconsin filed in Sheboygan county a Criminal Complaint charging the defendant, Antonio D. Barbeau, with First-degree Intentional Homicide, as party to a crime, pursuant to Wis. Stats. Secs. 940.01(1)(a) and 939.05. The charge resulted from the death of Barbara Olson, Mr. Barbeau's great grandmother, on September 17, 2012. At the time of the offense, Mr. Barbeau was just thirteen years old. Also charged was Nathan Paape, who was thirteen years old as well.

On October 2, 2012, Mr. Barbeau appeared before the Trial Court for a preliminary hearing. Probable cause was found, and he was bound over for trial. An Information was filed containing the same charge as the Criminal Complaint. On January 24, 2013, having previously requested a reverse-waiver hearing to transfer his case back to the juvenile court, Mr. Barbeau withdrew the reverse-waiver request and entered pleas of not guilty and not guilty by reason of mental disease or defect to the charge in the Information.

Ultimately, and as part of a plea agreement, Mr. Barbeau changed his plea to no contest to the charge in the Information. Sentencing took place on August 12, 2013. Throughout the sentencing hearing, the parties and the Trial Court discussed a parole eligibility date (as opposed to extended supervision). The State recommended, per the plea agreement, that Mr. Barbeau be eligible for parole after thirty-five years. The defendant, through counsel, recommended the minimum term of twenty years before

eligibility for parole. The Trial Court, as required by statute imposed a sentence of life sentence in prison with eligibility for parole on Mr. Barbeau's fiftieth birthday. A Judgment of Conviction was entered accordingly. Appendix – 1.

Subsequently, on August 14, 2013, the Department of Corrections (DOC) wrote the Trial Court indicating that under Truth-in-Sentencing Mr. Barbeau "would need to be eligible for extended supervision, not parole." In response, the State moved to correct the sentence. Defense counsel, in a letter to the Trial Court, indicated that he did not object to changing "parole" to "extended supervision." The Trial Court wrote to the parties expressing the opinion that the flaw in the Judgment mentioned by the DOC was "simply a matter of terminology." Therefore, the Trial Court proposed that the word "parole" should be removed from the Judgment and replaced with the phrase "extended supervision" and that this amendment could be made without a hearing. Defense counsel wrote the Trial Court indicating no objection to the Trial Court's proposed amendment. However, no hearing was held on the matter and no amended judgment was entered.

The defendant timely filed a Motion for Postconviction Relief. In his motion, Mr. Barbeau argued his sentence should be modified because: (1) there was a new factor (specifically that both the parties and the Trial Court mistakenly discussed and imposed parole as opposed to extended supervision as part of his sentence), and (2) his sentence was unconstitutional (as the statutory provision which required Mr. Barbeau serve at least twenty (20) years in prison before extended supervision could be considered was cruel and excessive). The matter was scheduled for hearing.

The hearing to consider the motion was held on November 12, 2014. After hearing the arguments of the parties, the Trial Court denied Mr. Barbeau's motion to modify his sentence. The Trial Court did amend the Judgment of Conviction

to remove any reference to parole and replace it with the phrase "extended supervision". Appendix – 2. The Amended Judgment of Conviction was filed on November 12, 2014. Appendix – 3.

This appeal followed.

ARGUMENT

I. PREFATORY COMMENTS AND STANDARD OF REVIEW.

Mr. Barbeau's first basis for sentence modification is the presence of a new factor. He argues the parties and the Trial Court applied the wrong law when setting Mr. Barbeau's sentence, as he was sentenced to parole rather than extended supervision. Moreover, he maintains this was a significant error, because had the proper statute been applied in setting his sentence, trial counsel should have made other important arguments and presented other pertinent information, and the Trial Court should have considered additional factors at the sentencing hearing.

In Wisconsin, circuit courts possess the inherent power to modify a sentence. **Rosado v. State**, 70 Wis.2d 280, 288 N.W.2d 69 (1975); **State v. Harbor**, 2011 WI 28, ¶35, 333 Wis. 2d. 53, 797 N.W. 2d 828. A circuit court may not modify a sentence based merely upon "reflection and second thoughts" but may base a modification on the defendant's showing of a new factor or the original sentence shocks the court's conscience. **State v. Grindeman**, 2002 WI App 106, 255 Wis. 2d 632, 648 N.W. 2d 507.

Deciding a motion for sentence modification based on a new factor involves a two-step inquiry. First, the defendant has the burden of demonstrating to the circuit court (by clear and convincing evidence) the existence of a new factor. **State v.**

Franklin, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). On review, the determination of whether or not the evidence the defendant presents amounts to a new factor is a question of law. **State v. Hegwood,** 113 Wis 2d. 544, 547, 335 N.W.2d 399 (1983).

Next, if a new factor has been demonstrated by the defendant, then the circuit court must decide if the new factor justifies sentence modification. **Franklin,** 148 Wis. 2d at 8. In determining if the new factor warrants sentence modification, the circuit court exercises its discretion. The exercise of such discretion is reviewed on appeal using the abuse of discretion standard (or failure to properly exercise discretion standard). **Harbor,** 2011 WI 28, ¶63.

Mr. Barbeau's second basis for sentence modification is a constitutional challenge to the sentencing statute.

Under both the Eight Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution, all persons are protected from cruel, unusual or excessive punishment. Mr. Barbeau contends for youthful offenders (such as himself) who have been convicted of First-degree Intentional Homicide, the mandatory confinement term of twenty (20) years before extended supervision is cruel and excessive.

When reviewing a particular sentence to determine if it is cruel or excessive, the appellate courts apply the abuse of discretion (or failure to properly exercise discretion) standard. **State v. Giebel,** 198 Wis. 2d 207, 541 N.W.2d 815 (Ct. App. 1995).

On appeal, a challenge to the constitutionality of a statute presents a question of law reviewed independently of the circuit court. **State v. Janssen,** 219 Wis. 2d 362, 580 N.W.2d 260 (1998).

II. A COMPARISON OF WISCONSIN'S TRUTH-IN-SENTENCING SCHEME TO THE FORMER SENTENCING SCHEME REVEALS SIGNIFICANT DIFFERENCES.

In 1998, the Legislature passed the first legislation bringing what is known as "Truth-in-Sentencing" to Wisconsin. 1997 Wis. Act 283 ("TIS-1"). Truth-in-Sentencing brought sweeping changes to criminal sentencing in Wisconsin, including the elimination of parole and the creation of bifurcated sentences (consisting of a set term of initial confinement followed by extended supervision) to be imposed by the circuit court at sentencing. The implementation of Truth-in-Sentencing was completed by the passage of 2001 Wis. Act 109 ("TIS-2").

As a consequence, the former sentencing scheme of indeterminate sentences with the possibility of parole was largely eliminated and replaced with a new sentencing scheme consisting of an initial period of confinement followed by a period of extended supervision.

The Wisconsin Supreme Court has provided a useful discussion of the elimination of parole and the use of bifurcated sentences:

> The center of gravity for determining when an inmate should be released from prison changed from the parole Commission's determination, positioned much later in the process, to the judiciary's sentencing determination at the outset.
>
> ¶32 Previously the sentencing court had only modest control over the length of time actually spent in prison. Judges were thought to possess inadequate information to address the future progress of the inmate. Instead, only prison officials with sustained contacts with the inmate were thought to be in a position to determine if the rehabilitative efforts had been successful. Likewise, if the inmate was determined to be incorrigible over the years,

> it was thought that the on-the-scene prison officials advising the parole Commission were better positioned to assess the inmate's dangerousness and commensurate need for additional prison time.
>
> ¶33. Parole Commissions, in essence, served as a check on sentencing courts' exercise of discretion. Under truth-in-sentencing legislation, parole is abolished and that check is removed.

State v. Gallion, 2004 WI 42, ¶¶ 31-33, 270 Wis. 2d 535, 678 N.W.2d 197. Clearly, the new scheme vests far greater power with the circuit court when it comes to eligibility for release from prison.

While the Truth-in-Sentencing legislation eliminated indeterminate sentencing for most criminal offenses, indeterminate sentencing remained for one Class A felony, First-degree Intentional Homicide, Wis. Stats. Sec. 940.01(1)(a). As pertains to Mr. Barbeau, who was a minor at the time of the offense, this crime is assigned to the original jurisdiction of the court of criminal jurisdiction (adult court). Wis. Stats. Sec. 938.183(1)(am). The sentencing framework provides for a mandatory life sentence with a minimum period of confinement of twenty years before extended supervision may be permitted. There is no exception for youthful offenders.

Under the Truth-in-Sentencing scheme then, when sentencing a defendant to life in prison for committing First-degree Intentional Homicide, the circuit court is obligated to impose a life sentence. The circuit court does have the option of allowing for the possibility of extended supervision. In exercising its sentencing discretion, the court must choose from three options relating to extended supervision:

1. The person is eligible for release to extended supervision after serving 20 years.
2. The person is eligible for release to extended supervision on a date set by the court. Under this subdivision, the

court may set any date later than that provided in subd. 1., but may not set a date that occurs before the earliest possible date under subd. 1.

3. The person is not eligible for release to extended supervision.

Wis. Stats. Sec. 973.014(1g). Thus, at a minimum, the circuit court must order incarceration of 20 years before eligibility for extended supervision, and as a maximum, the court may specify that the defendant will never be eligible for extended supervision. In any case, the defendant will never again experience unconditional liberty, and the statute does not permit the court to allow unconditional liberty.

If and when an inmate becomes eligible for extended supervision, he/she may petition the sentencing court for release to extended supervision. Wis. Stats. Sec. 302.114(5)(a). In a petition for release to extended supervision, the inmate bears the burden of showing, "by clear and convincing evidence, that he or she is not a danger to the public." Wis. Stats. Sec. 302.114(5)(cm). The decision is only reviewed for the erroneous exercise of discretion. Wis. Stats. Sec. 302.114(5)(f). If the inmate meets that burden, he/she is released. However, release is not unconditional. Upon violation of a condition, the extended supervision can be revoked. Wis. Stats. Sec. 302.114(9)(am). In the event of revocation, the inmate is returned to the sentencing court, which must order the inmate returned to prison for a minimum of five years. Wis. Stats., Sec. 302.114(9) (am). After that time period has elapsed, in order to be released, the person must again petition the court as described above. Wis. Stats. Sec. 302. 114(9)(bm).

Under the previous sentencing scheme, the Parole Commission (now called the Earned Release Commission) determined whether and when a person would be paroled. Wis. Stats. Sec. 304.01. As part of the process, notification of parole consideration was given to the sentencing court, the prosecuting attorney, and the victim or victims' family, any of whom may

submit written statements relating to parole consideration. Wis. Stats. Sec. 304.06(1)(c). Victims are permitted to attend any interview or hearing and make a statement. Wis. Stats. Sec. 306.06(1)(d) and (eg). Under the previous scheme, when considering parole, the commission was to consider the following criteria:

(a) The inmate had become parole or release to extended supervision eligible under [Wis. Stats. Sec. 304.06] and [Wis. Adm. Code Sec. PAC 1.05].

(b) The inmate had served sufficient time so that release would not depreciate the seriousness of the offense.

(c) The inmate had demonstrated satisfactory adjustment to the institution.

(d) The inmate had not refused or neglected to perform required or assigned duties.

(e) The inmate had participated in and had demonstrated sufficient efforts in required or recommended programs which have been made available by demonstrating one of the following:

1. The inmate had gained maximum benefit from programs.
2. The inmate could complete programming in the community without presenting an undue risk.
3. The inmate had not been able to gain entry into programming and release would not present an undue risk.

(f) The inmate had developed an adequate release plan.

(g) The inmate was subject to a sentence of confinement in another state or is in the United States illegally and may be deported.

(h) The inmate had reached a point at which the commission concluded that release would not pose an unreasonable risk to the public and would be in the interests of justice.

Wis. Adm. Code Sec. PAC 1.06(16).

In sum, under the old sentencing scheme, the circuit court established a range of confinement time, and the Parole Commission (with a host of factors set forth by statute and administrative code) determined the actual release date to parole. In other words, both the circuit court and the Parole Commission played active roles in the confinement and release dates. Under the new scheme, the circuit court is vested with full authority in setting confinement time and release on supervision. And, importantly, the circuit court looks to just one factor, whether the inmate has shown by clear and convincing evidence that he is not a danger to the public in deciding if release is appropriate. *Compare* Wis. Stats. Sec. 302.114(5)(cm) *with* Wis. Adm. Code Sec. PAC 1.06(16).

From Mr. Barbeau's perspective, these differences are significant, particularly when arguing for and setting a sentence on a charge of First-degree Intentional Homicide. He believes sentencing for First-degree Intentional Homicide under the new sentencing scheme requires a more in-depth hearing.

III. THERE IS A NEW FACTOR IN MR. BARBEAU'S CASE, ONE THAT WARRANTS SENTENCE MODIFICATION.

In Mr. Barbeau's case, application of the wrong law constitutes a new factor.

District Attorney DeCecco at the outset of his sentencing argument stated, "Judge, as you well know, the purpose of us being here today is to have the court set a parole eligibility date." R-113 at 85. He recommended parole eligibility after thirty-five (35) years, meaning Mr. Barbeau "would be about 48 years old when he is first considered for parole." R-113 at 98. Also thinking the former law of parole (rather than the current law of extended supervision) applied to Mr. Barbeau's case, defense counsel argued that "the Parole Review Committee has every right to continue to

deny [parole] . . . until … Antonio dies in prison." R-113at 102-03. Defense counsel ultimately requested "a 20 year parole eligibility date." Finally, the Trial Court discusses Mr. Barbeau's possible release from prison as parole. R-113 at 117-118. Thus, it is clear that the State, defense counsel, and the Trial Court were operating under the impression that Mr. Barbeau would one day be eligible for parole (not extended supervision).

As outlined above, with Truth-in-Sentencing, the release decision for someone like Mr. Barbeau (a minor convicted of First –degree Intentional Homicide) was transferred from the Parole Commission to the circuit court. Thus, under the current sentencing scheme, the only way a youthful offender convicted of First-degree Intentional Homicide and serving a life sentence may be released to extended supervision is by order of the circuit court. As the Supreme Court in **Gallion** noted, Truth-in-Sentencing gave the sentencing court essentially exclusive control over the release decision.

In Section II of this brief, as pertains to sentencing a youthful offender for First-degree Intentional Homicide, Mr. Barbeau has highlighted the significant differences between release on parole under the old sentencing scheme and release to extended supervision under the new scheme. For example, over time, a host of factors have been identified by statute and administrative code for the Parole Commission to review when determining release on parole. In addition, the process requires notice to various parties (the sentencing court, the victim, the prosecution and the defense) and welcomes the input of these parties. The procedure and factors allow the Parole Commission to develop a comprehensive assessment of the offender when deciding when to release the offender on parole. The new system requires the circuit court merely to consider the offenders risk to the public when deciding release to extended supervision. Given these differences and others, Mr. Barbeau believes it is incumbent upon trial counsel to do more at a sentencing hearing. As a matter of course, Mr.

Barbeau contends trial counsel should secure an alternative Pre-Sentence Investigation, asking the investigator to specifically address in the report all the factors previously considered by the Parole Commission under the former sentencing scheme.

Furthermore, given the recent Supreme Court cases described in Section IV below, trial counsel will want, to the extent possible at sentencing, present a full assessment of a youthful offender's rehabilitative needs and the time needed to address those needs, as well as material to remind the trial court of the diminished culpability of youthful offenders. These cases draw a clear distinction between life sentences for adults and youthful offenders (who have a diminished culpability for the crimes they commit and greater rehabilitative potential), and they strongly suggest that a key factor in determining the time and place for release of a youthful offender depends on the rehabilitation of the youthful offender.

At sentencing, trial counsel is no longer principally concerned with presenting evidence related to and making an argument regarding the length of the sentence. Under the new scheme, trial counsel must also present evidence and make appropriate argument concerning release to extended supervision. Given the narrow review criteria for permitting extended supervision for youthful offenders convicted of First-degree Intentional Homicide under the Truth-in-Sentencing scheme, at the sentencing hearing, trial counsel will want to present all information which might have a bearing on the release date, for later on, because the statutory review criteria are so narrow, the circuit court may consider it irrelevant. Therefore, even though historically trial counsel may have given some thought to the release date at the time of sentencing, under the new scheme, presenting a comprehensive argument regarding release is no less important than the argument relating to the overall length of the sentence.

Applying the case law to this case, Mr. Barbeau believes the Court of Appeals should find application of the wrong law at the time of his sentencing constitutes a new factor.

A new factor has been defined as "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 N.W. 2d 69 (1975).

There can be no argument that the parties had "overlooked" the proper law to apply when arguing and setting Mr. Barbeau's sentence. Simply put, everyone – prosecution, defense and circuit court – applied the wrong law concerning Mr. Barbeau's release from prison. Furthermore, given Mr. Barbeau's youth, the non-confinement portion of his sentence (be it parole or extended supervision) may far exceed his confinement time. Hence, it seems to him there is no doubt this oversight is highly relevant to his sentence. In short, Mr. Barbeau has readily met his burden of showing the fact or set of facts he presents amount to a new factor.

At the postconviction motion hearing, it should be noted the Trial Court does not directly address Mr. Barbeau's argument of a new factor. To Mr. Barbeau, the Trial Court instead focuses its comments on the issue of cruel and excessive punishment. As mentioned previously, the Court of Appeals reviews independently the determination of whether or not a new factor exists.

In addition, he contends the error warrants sentence modification.

From Mr. Barbeau's perspective, for the various reasons spelled out earlier in this brief, the new scheme for determining eligibility for extended supervision obliges trial counsel to expand

and augment his/her sentencing arguments to be sure a full presentation is made both to properly address the length of the sentence and the date for eligibility for extended supervision. The new sentencing scheme dramatically narrows the criteria for determining eligibility to extended supervision. Therefore, trial counsel must be prepared at the sentencing hearing to present all evidence relevant to the eligibility date. If this information is not presented at the time of sentencing, it may well not be considered later on.

As the parties, in particular trial counsel for Mr. Barbeau, were operating under the assumption the previous sentencing scheme (with parole and parole eligibility determined by the Parole Commission), there was not the full and comprehensive argument as to a release date Mr. Barbeau contends is now essential under the Truth-in-Sentencing law. As a consequence, his right to a full and fair sentencing hearing was compromised.

Connected to this issue is the performance of Mr. Barbeau's trial counsel. By not knowing the current Wisconsin law regarding life sentences for youthful offenders, Mr. Barbeau's trial attorney at sentencing was constitutionally ineffective.

A claim of ineffective assistance of counsel has two components. "First, the defendant must show that counsel's performance was deficient." **Strickland v. Washington**, 104 S. Ct. 2052, 466 U.S. 668, 687 (1984). In showing deficiency, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." **Id**. at 688. The deficiency prong is met when counsel's error resulted from oversight rather than a reasoned defense strategy. *See* **Wiggins v. Smith**, 123 S. Ct. 2527, 539 U.S. 510, 534 (2003). "Second, the defendant must show that the deficient performance prejudiced the defense." **Strickland**, 466 U.S. at 687. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." **Strickland** at 694.

In this case, it goes without saying that being unaware of the current sentencing scheme for a Class A felony, when representing a client in a Class A felony, falls below the objective standard of reasonableness. *See, e.g.,* Wisconsin State Public Defender Minimum Attorney Performance Standards for Appointed Private Bar Counsel at 2 (September 1, 2009) ("An appointed attorney shall know to a reasonably proficient standard all relevant Wisconsin substantive law and procedure and keep abreast of developments in substantive and procedural law.") There is no doubt in Mr. Barbeau's mind that trial counsel's performance in this regard is deficient.

Turning to the second prong of the test, Mr. Barbeau has identified: the significant differences between the current scheme for determining eligibility for extended supervision and former scheme for determining eligibility for parole, the increased scope and breath of trial counsel's presentation, and some of the steps trial counsel should taken under the new scheme. Here, much of what Mr. Barbeau argues trial counsel is now obliged to do at the time of sentencing was not done. There was no alternative PSI, there was no submission from defense counsel which provided the Trial Court with a full assessment of Mr. Barbeau's rehabilitative needs or the time necessary to address those needs (although there was testimony to describe prior injuries Mr. Barbeau sustained and how they have be implicated in commission of the crime), there was no offering from defense counsel to consider all the factors the Parole Commission was prescribed to consider under the former scheme, and there were no studies or reports to remind the trial court of the diminished culpability of youthful offenders (a significant factor the Supreme Court has mentioned again and again in the cases cited in Section IV below). Without this information to temper the Trial Court's consideration of the facts and circumstances surrounding the crime, Mr. Barbeau had little to offer regarding the time and circumstances of his release. With all

that Mr. Barbeau argues trial counsel must now do for sentencing of a youthful offender convicted of First-degree Intentional Homicide, and that most of it was not done for his sentencing, he has no doubt sentencing result would have been different but for trial counsel's oversights.

IV. GIVEN THE UNMISTAKEABLE TREND TO AFFORD YOUTHFUL OFFENDERS GREATER PROTECTION FROM EXCESSIVE PUNISHMENT, THE COURT SHOULD FIND WISCONSIN'S PENALTY FOR FIRST-DEGREE INTENTIONAL HOMICIDE COMMITTED BY A MINOR IS UNCONSTITUTIONAL.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII. So axiomatic is this principle that the framers of the Wisconsin Constitution enacted largely verbatim the language of the Eighth Amendment. Wis. Const. Art. I, Sec. 6. The interpretation of the Wisconsin section "is largely guided by the [United States] Supreme Court's Eighth Amendment jurisprudence [.]" **State v. Ninham**, 2011 WI 33, ¶ 45, 797 N.W.2d 451. However, the Wisconsin Supreme Court has indicated that "[i]t is [that court's] responsibility to examine the State Constitution independently." **State v. Ward**, 2000 WI 3, ¶ 59, 231 Wis. 2d 723, 604 N.W.2d 517. The Wisconsin Supreme Court "is free to interpret our constitution in a manner which affords greater protections." **State v. Tompkins**, 144 Wis. 2d 116, 132, 423 N.W.2d 823 (1987).

The past decade has seen a progression in the Supreme Court's jurisprudence in applying the Eighth Amendment's prohibition against cruel and unusual punishment to children prosecuted in adult criminal court. "[C]hildren are constitutionally different from adults for purposes of sentencing. Because juveniles

have diminished culpability and greater prospects for reform, "they are less deserving of the most severe punishments." **Miller v. Alabama**, 132 S. Ct. 2455, 2464, 567 U.S.___ (2012).

In 2005, the Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." **Roper v. Simmons**, 125 S. Ct. 1183, 543 U.S. 551, 578 (2005).

And again in 2010, the Supreme Court took a step further, holding that, "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." **Graham v. Florida**, 130 S. Ct. 2011, 2034, 560 U.S.___ (2010). In doing so, the Court stated that the State need not guarantee release, however, "the State must do is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." **Graham** at 2030.

Most recently, in 2012, relying on **Roper** and **Graham**, the Supreme Court found that a mandatory sentence of life without parole for a juvenile violates the Eighth Amendment. **Miller**, 132 S. Ct. at 2475. There, the Supreme Court extended the holding in **Graham** to "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." **Miller** at 2469.

In determining whether a punishment is cruel or unusual, our courts are to consider "the evolving standards of decency that mark the progress of a maturing society." **Miller**, 132 S. Ct. at 2463 (quoting **Estelle v. Gamble**, 97 S. Ct. 285, 429 U.S. 97, 102 (1976)). The **Miller** holding summarized some of the differences between children and adults which warrant this disparate treatment of youthful offenders:

> First, children have a "lack of maturity and an

underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. **Roper**, 543 U.S. at 569. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from 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]." **Roper** 543 U.S. at 569-570.

These decisions rested not only on common sense - on what "any parent knows" - but on science and social science as well. **Roper** 543 U.S. at 569. In **Roper**, we cited studies showing that "[o]n1y a relatively small proportion of adolescents" who engage in illegal activity "develop entrenched patterns of problem behavior." **Roper** 543 U.S. at 570. And in **Graham**, we noted that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds - for example, in parts of the brain involved in behavior control. **Graham** 130 S. Ct. at 2026. We reasoned that those findings of 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." **Graham**, 130 S. Ct., at 2027 (quoting **Roper**, 543 U.S. at 570).

Roper and **Graham** emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because "'[t]he heart of the retribution rationale'" relates to an offender's blameworthiness, "the case for retribution is not as strong

> with a minor as with an adult." **Graham**, 130 S. Ct. at 2028. 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. **Graham**, 130 S. Ct. at 2028 (quoting **Roper**, 543 U.S. at 571). 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 making a judgment that he is incorrigible — but incorrigibility is inconsistent with youth. **Graham** 130 S. Ct. at 2029. And for the same reason, rehabilitation could not justify that sentence. Life without parole forswears altogether the rehabilitative ideal. **Graham**, 130 S. Ct. at 2030. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change. **Ibid**.

The Supreme Court in **Miller** further made clear that none of **Graham's** statements about children is crime specific.

Graham prohibited life without release sentences for children convicted of non-homicide crimes. The Supreme Court required in **Graham** that any child sentenced to a life term for a non-homicide crime must be afforded a meaningful opportunity for release. Without a meaningful opportunity for release, a life sentence is "life without parole." A few shorts years later, **Miller** prohibited mandatory life without release sentence for children. Read together, a clear rule emerges: children cannot be subject to mandatory life terms unless there is a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

For several reasons, Mr. Barbeau argues the current scheme for release to extended supervision enacted in Wisconsin does not afford a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

First, as described above, following the elimination of parole in Wisconsin, when the circuit court sets a sentence for a minor convicted of First-degree Intentional Homicide, it has three options - allow extended supervision after 20 years, allow extended supervision at some point greater than 20 years, not allow extended supervision at all. At least in part (specifically the third option), this provision of the statute is not in accord with **Roper, Graham** and **Miller.**

Next, the statute prescribes only one criterion for the trial court to consider in reviewing a petition for release – does the inmate pose a danger or risk to the public. As explained below, in **Roper, Graham,** and **Miller,** the Supreme Court has strongly suggested that rehabilitation of the youthful offender is of paramount concern when looking at release from prison.

And finally, the statute contains a mandatory minimum confinement time. For the reasons identified later in this section, Mr. Barbeau maintains that mandatory minimum confinement times for youthful offenders is contrary to the law.

In **Roper, Graham,** and **Miller,** the Supreme Court does not fully develop the concept of what a "meaningful opportunity" entails, leaving it to the states to "explore the means and mechanisms for compliance." **Graham**, 130 S. Ct. at 2030; *see also id.* at 2057. Clearly, there are gaps to be filled in. In his dissenting opinion in **Graham**, Justice Thomas raised several … "What exactly does such a 'meaningful' opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole Commissions the Court now demands that States empanel?"); *accord, generally,* Russell and Green, infra. Ideally, the legislature should create a statutory scheme which does just that. To date, the Wisconsin legislature has not done so.

While the Supreme Court has not fully developed this

concept, various writers have commented on it. According to one commentator, to comport with the constitutional protections described in **Roper, Graham,** and **Miller,** such a system must include: (1) a chance for release at some point in time, (2) a realistic likelihood of release for the rehabilitated, and (3) a meaningful opportunity to be heard. *See* Sarah French Russel, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment.* 89 Ind. L.J. 373, 431-433 (2014) (discussing court-based review procedures for juvenile offenders). In the same article, Professor Russel identifies other potential Eighth Amendment concerns related to these procedures, including whether or not the inmate has a right to appear at the release review hearing, the right to see and rebut evidence or reports prior to the release review hearing, and limits on the right to counsel.

And another commentator, Professor Sally Terry Green, has identified other fundamental concerns regarding the youthful offender review procedure. She notes that in **Graham,** the Supreme Court recognized that youthful offenders charged within the juvenile court system are often afforded more rehabilitative options, whereas youthful offenders charged in adult court face a broader array of punishments and less rehabilitative options. The implication, according to Professor Green, is this reduction of rehabilitative options for youthful offenders (such as Mr. Barbeau) is not consistent with a child's Eighth Amendment protections. Moreover, Professor Green reads the **Roper, Graham,** and **Miller** holdings to place the rehabilitative progress of the youthful offender as the principal consideration when looking to release on parole or supervision. Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation*: *How the States must Provide Meaningful Opportunity for Release.* 16 Berkeley J. Crim. L. 1, 30 (2011) (footnotes omitted, emphasis in original).

In Wisconsin, the legislature has not modified the review procedure in response to **Roper, Grahan** and **Miller.** Wisconsin's current court-based statutory scheme of release to extended

supervision falls short of providing such a "meaningful opportunity." The legislature has provided only one criterion for the release determination, and that criterion is inconsistent with the reasoning in **Graham**. As described above, under the current Wisconsin law, the offender must petition the sentencing court for release. The court may only look to one factor: whether the offender is a danger to the public. This is an exceedingly narrow inquiry, and by the very words of the statute, fails to take account of maturity and rehabilitation. This petition process stands in stark contrast to the considerations of Wisconsin's former system of parole, described above, which took a holistic, multifaceted approach to the release decision. Additionally, the statute does not guarantee the right to a hearing on the release decision and a right to counsel to assist the offender in applying for release.

Similarly, the twenty-year minimum period of confinement is a cruel and unusual punishment when applied to children.

When determining whether a sentencing practice is categorically unconstitutional as a cruel and unusual punishment, the court first looks to objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. **Graham v. Florida**, 560 U.S. _____, 130 S. Ct. 2011, 2022 (quoting **Roper v. Simmons**, 543 U.S. 551, 572 (2005)); **Ninham**, 2011 WI 33 at ¶50. Although entitled to great weight, a conclusion as to national consensus is not determinative of the constitutional question. **Graham**, 130 S. Ct. at 2026; **Ninham** 2011 WI 33 at 58. Following a determination on national consensus, guided by controlling precedents, "the Court must determine in the exercise of its own judgment whether the punishment in question violates the Constitution." **Graham,** 130 S. Ct. at 2022 and **Ninham**, 2011 WI 33 at ¶50.

As outlined above, recent decisions of the United States Supreme Court have found the following sentences for juveniles to

be cruel and unusual punishment: the death penalty *(***Roper***)*, life without parole for non-homicide crimes (**Graham**), and mandatory life without parole for homicide *(***Miller**).

When it decided **Miller**, the Supreme Court found that a mandatory life sentence without release was unconstitutional because it fails to take into account the vagaries of youth. **Miller** , 132 S. Ct. at 2468. While **Miller** dealt with a mandatory life without release sentence, the same logic applies to other mandatory sentences. To paraphrase the Iowa Supreme Court, **Miller** effectively crafted a new subset of categorically unconstitutional sentences: sentences in which the legislature has forbidden the sentencing court from considering important mitigating characteristics of an offender whose culpability is necessarily and categorically reduced as a matter of law. **State v. Lyle**,____ N.W.2d _____, no. l l-1339, slip op. at 16 (Iowa July 18, 20 14) (available at http://www.iowacourts.gov/About_the_Courts/Supreme Court/Supreme_Court_Opinions/Recent_Opinions/20140718/11-1339%20as%20amended.pdf). Looked at another way, life in prison is the most extreme minimum confinement penalty.

Although the holding in **Miller** does not specifically address mandatory penalties aside from mandatory life without parole, the reasoning is equally applicable to other mandatory sentences:

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other - the l7-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses — but really,

> as **Graham** noted, a *greater* sentence than those adults will serve.

Miller,132 S. Ct. at 2468-69.

It has long been the common law of sentencing in Wisconsin (now codified) to consider the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." Wis. Stats. Sec. 973.017(2)(ad)-(ak). *See* **Mc Cleary v. State**, 49 Wis. 2d 263, 182 N.W.2d 275 (1971). These factors are by no means exhaustive. In addition to legislatively defined aggravating and mitigating factors in Sec. 973.017(2), a litany of additional factors has also been articulated and recently reaffirmed by the Wisconsin Supreme Court. Specifically, these factors include: (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality; character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. **State v. Gallion**, 2004 WI 41, ¶ 43 n. 11, 270 Wis. 2d 525, 678 N.W.2d 197 (quoting **Harris v. State** 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). It is clear that the law in Wisconsin requires a holistic sentencing decision. A mandatory sentence for a child in adult court greatly hampers, if not eliminates, the court's discretion regarding these statutory and common law factors, many of which relate to the defendant's rehabilitative needs, the capacity for and degree of culpability, and the defendant's age.

Looking at other sections of the Wisconsin criminal and juvenile code - sections containing mandatory minimum sentences - supports the conclusion the legislature has intended to treat children differently from adults. Under current law, only a handful of Wisconsin felonies are subject to mandatory minimum prison

time. According to a report from the Legislative Fiscal Bureau, the felonies to which mandatory minimums apply are Operating While Intoxicated, various child sex offenses, and several repeat sex offenses. Christina Carmichael, *Felony Sentencing and Probation* 89, Legislative Fiscal Bureau 2013. The report does not include First-degree Intentional Homicide in the list even though the crime has a mandatory penalty.

Wis. Stats. Secs. 939.616 and 939.617 provide the mandatory minimum periods of confinement for a number of child sex offences. Interestingly, the legislature provided that these mandatory minimums sentences *do not apply* to an offender who is "under 18 years of age when the violation occurred." Wis. Stats. Secs. 939.616(3) & 939.617(3). As initially proposed, neither statute allowed an exception for children, but one was added to today's Sec. 939.617 before it was enacted.

Wis. Stats. Sec. 939.618 provides a mandatory minimum of three years and six months confinement for repeat offenders of First- or Second-degree Sexual Assault. Likewise, Wis. Stats. Sec. 346.65 provides mandatory minimums for all criminal OWI offenses, and sets minimum periods of confinement in prison for seventh and subsequent offenses. Additionally, prior to TIS-2, the legislature had provided numerous minimum penalties for the delivery of or possession with intent to deliver controlled substances. S*ee, generally,* Wis. Stats. Sec. 961.41(1) & (1m) (1999). However, such sentences were not mandatory; the legislature noted that they were presumptive, and the court could impose lesser sentence or place the defendant on probation in certain circumstances. Wis. Stats. Sec. 961.438 (1999).

It is noteworthy that the Wisconsin legislature excepted juvenile offenders from the mandatory minimum for child sex crimes. The other felonies with mandatory minimum periods in prison are crimes that are repeat offenses for which a juvenile would be hard-pressed to qualify for.

In the **Lyle** case, supra, the Iowa Supreme Court found it significant that its legislature had recently enacted a statute excluding juveniles from mandatory minimums. **Lyle**, slip op. at 17. The **Lyle** court concluded all mandatory minimum sentences constitute cruel and unusual punishment under that state's constitution when applied to children. **Lyle**, slip op. at 36.

Turning to the case at bar, the same principles that guided the courts in **Miller** (and **Graham** and **Roper***)* and **Lyle** are present. At sentencing in this case, the Trial Court judged a boy who committed a crime at the age of thirteen on the same footing as a fully mature adult. The court specifically stated, "Obviously, when the legislature set the matter up as to eligibility for parole they were looking at things that the court should direct more or less on a scale of things. Where does this crime fit on that scale? Obviously, way on the more severe end." R-113 at 117. In other words, the Trial Court viewed the sentence as a spectrum and sought to place the defendant on the spectrum, treating him no differently than an adult. The twenty-year minimum served as a bottom anchor point for purposes of release from prison. **Roper, Graham,** and **Miller,** this much is clear - the least culpable child convicted of First-degree Intentional Homicide is *less culpable* than the least culpable adult convicted of same offense. As such, applying the same sentence - life in prison with a minimum of twenty years incarceration – squarely contradicts the recent developments in Supreme Court jurisprudence.

CONCLUSION

Based on the foregoing, the defendant, Antonio D. Barbeau respectfully requests Judgment of Conviction be modified so his eligibility for release to extended supervision may be granted after twenty years of confinement, or in the alternative, a new factor is found or Wisconsin's penalty scheme for youthful offenders of First-degree Intentional Homicide is unconstitutional,

and the matter be remanded to the circuit court for sentence modification consistent with the Court of Appeals ruling in this case.

Dated this _____ day of July, 2015.

_____
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APPENDIX

APPENDIX CERTIFICATION

I hereby certify that with this brief, either as a separate document or as part of this brief, is an Appendix that complies with Section 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the Record.

Dated this ____ day of July, 2015.

_____
Attorney Daniel R. Goggin II

FORM CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum 60 characters per full line of body text. The length of this brief is 8,530 words.

Dated this _____ day of July, 2015.

_____
Attorney Daniel R. Goggin II

CERTIFICATE OF COMPLIANCE WITH WIS. STATS. Sec. (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. Sec. (Rule) 809.19(12).

This electronic brief 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 brief filed with the court and served on all opposing parties.

Dated this _____ day of July, 2015.

_____
Attorney Daniel R. Goggin II