STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 12-CF-511

Appeal No. 2014AP2876-CR

ANTONIO D. BARBEAU,

Defendant-Appellant.

Reply Brief of Antonio D. Barbeau On Appeal from An Order Denying Post Conviction Relief, and a Judgment of Conviction Both Entered in Sheboygan County Circuit Court, The Honorable Timothy Van Akkeren, presiding.

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TABLE OF CONTENTS

AUTHORITIES CITED

A. Table of Cases: Page

ARGUMENT

I. THE TRIAL COURT DID NOT PROPERLY EXERCISE ITS DISCRETION IN DENYING MR. BARBEAU'S MOTION FOR SENTENCE MODIFICATION ON GROUNDS OF A NEW FACTOR.

As detailed in Section II of Mr. Barbeau's initial brief, there are profound differences between sentencing under the old sentencing scheme and the truth-in-sentencing scheme. This is particularly true for youthful offenders such as Mr. Barbeau charged and convicted of First-degree Intentional Homicide, who face the possibility of spending much of their lives in confinement.

Under the truth-in-sentencing system, arguments and evidence defense/counsel historically would not present at sentencing (because they would be addressed later by the Parole Commission as part of the parole eligibility decision made well after sentencing), and therefore the trial court would not consider, have now become both relevant and essential. Without presentation of these arguments and evidence at sentencing, the evidence/arguments may never be considered in determining the extended supervision eligibility date, and the trial court may not properly exercise its discretion when setting the eligibility date for extended supervision.

Mr. Barbeau flatly rejects the argument there was no mistake or misunderstanding at his sentencing hearing. Repeatedly, counsel and the Trial Court discussed parole eligibility, not extended supervision. Not once does the prosecuting attorney mention eligibility for extended supervision. Rather, he speaks only of parole eligibility. R-113, at 85, 94 and 98. What more, defense counsel argued that the Parole Commission (not the trial court) could deny Mr. Barbeau's parole indefinitely, even after an eligibility date was set. R-113 AT 102-03. Obviously, trial counsel was laboring under a mistaken impression of the review process. And finally, the Trial Court described Mr. Barbeau's release as parole.

Moreover, given the shift to determining the eligibility date for extended supervision at the time of sentencing (rather than long after sentencing), and given further the determination is now made by the trial court (as opposed to the Parole Commission), Mr. Barbeau believes the nature of the sentencing hearing (specifically the evidence which should be presented, the issues that ought to be addressed, and the

arguments to be made) must be more involved. As stated in Mr. Barbeau's initial brief, defense counsel must be prepared with evidence and arguments as to both sentencing and eligibility to extended supervision.

When reviewing the sentencing transcript, Mr. Barbeau does not see such evidence or arguments from defense counsel. Nor does Mr. Barbeau see the State address the factors the Parole Commission previously considered when setting a parole date. And, most importantly, Mr. Barbeau does not see that the Trial Court adequately addressed all relevant factors and considerations when it set the sentence and extended supervision eligibility date. For example, Judge Van Akkeren did not address the criteria (described in Wis. Adm. Code Sec. PAC 1.06(16)) the Parole Commission was formerly obligated to review as part of the parole eligibility determination process when setting the eligibility date.

In Mr. Barbeau's estimation, it is clear the parties and Trial Court were mistaken as to the precise procedure for setting a sentence and determining extended supervision eligibility date for this crime. Moreover, Mr. Barbeau contends the Trial Court could hardly engage in a proper exercise of discretion when so many factors and evidence were never mentioned or considered at the sentencing hearing.

II. MR. BARBEAU HAS DEMONSTRATED THE PENALTY FOR FIRST-DEGREE INTENTIONAL HOMICIDE COMMITTED BY A MINOR IS UNCONSTITUTIONAL.

The State argues Mr. Barbeau has not shown the penalty imposed by Wisconsin law for committing First-Degree Intentional Homicide as a minor is unconstitutional. Respectfully, Mr. Barbeau disagrees.

Under Wisconsin's current sentencing scheme, when a person is convicted of First-Degree Intentional Homicide, he/she faces an automatic life sentence. At sentencing, the trial court is obligated to set an eligibility date for extended supervision. The trial court has three options – set the date at the statutory minimum of 20 years, set the date for some time after 20 years, or deny extended supervision altogether.

For the reasons cited in Mr. Barbeau's initial brief, there can be no doubt the third option (to deny altogether extended supervision) violates the Eighth Amendment as interpreted by the Supreme Court in **Roper v. Simmons**, 125

S.Ct. 1183, 543 U.S. 551 (2005), **Graham v. Florida**, 130 S. Ct. 2011, 560 U.S. ____ (2010) and **Miller v. Alabama**, 132 S. Ct. 2455, 567 U.S. _____ (2012).

Furthermore, in its interpretation of the Eighth Amendment in the context of criminal penalties for minors, the Supreme Court emphasized the extended supervision review process: (1) must afford the youthful offender a "meaningful opportunity" for supervision, and the (2) account for the unique circumstances and enhanced rehabilitative potential of youthful offenders.

As applied to youthful offenders, Wisconsin's extended supervision review process directs the trial court to consider only one factor – danger to the public – as opposed to the host of factors recommended by learned commentators. It is noteworthy that Wisconsin's review process has not been revised or reformed since **Roper, Simmons** and **Miller** were handed down. And, importantly, the process does not except minors from mandatory minimums as many other Wisconsin criminal penalty statutes do (see Mr. Barbeau's initial brief at Pages 30-32).

In Mr. Barbeau's estimation, Wisconsin's review process for setting and approving extended supervision for First-Degree Intentional Homicide does not meet the criteria the United States Supreme Court has thus for concluded Eighth Amendment guarantees require. As Wisconsin's statute describing the review process has not been revised to comport with Supreme Court holdings, only one conclusion can be drawn – that the Wisconsin statute is unconstitutional.

III. MR. BARBEAU DOES HAVE STANDING TO CHALLENGE WISCONSIN'S PENALTY STATUTE FOR FIRST-DEGREE INTENTIONAL HOMICIDE.

The right Mr. Barbeau seeks to defend on appeal is his Eighth Amendment right against cruel and unusual punishment. Based on the interpretation of the Eighth Amendment by the United States Supreme Court in **Roper, Graham** and **Miller**, Mr. Barbeau contends the current penalty scheme and review procedure for establishing an extended supervision eligibility date is not constitutional.

The current penalty scheme and review procedures sets a 20 year mandatory minimum of confinement time before extended supervision may be granted; this applies to youthful offenders the same as adults.

Mr. Barbeau reads **Roper, Graham** and **Miller,** as do other courts and learned commentators, to reject a mandatory minimum penalty for this offense as relates to youthful offenders, and to require a finding that Wisconsin's current review process is constitutionally inadequate. Because the procedure used by the Trial Court to determine his eligibility date is flawed, Mr. Barbeau has, in fact, been injured. Moreover, given the Supreme Court's holding in **Roper, Graham** and **Miller**, the interest of Mr. Barbeau to have his eligibility for extended supervision properly determined is one clearly within the scope of protection afforded by the Eighth Amendment.

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, November, 2015.

_____

Attorney Daniel R. Goggin II
SPD Appointed Appellate Counsel
for Antonio D. Barbeau

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: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum 60 characters per full line of body text. The length of this brief is 1,598 words.

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ELECTRONIC FILING CERTIFICATION

I, Attorney Daniel R. Goggin, II, hereby certify that (1) the electronic copy of this brief or no merit report is identical to the text of the paper copy of the brief or no merit report, and an electronic copy of the brief has been filed.

Dated this _____ day of November, 2015.

_____

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