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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. **Case No. 2015AP002462CR**

NATHAN J PAAPE,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION RELIEF, HONORABLE TIMOTHY VAN AKKEREN, PRESIDING, ENTERED IN THE SHEBOYGAN COUNTY CIRCUIT COURT AND ORDER DENYING § 809.30 WIS. STATS.

CORRECTED DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

STATEMENT OF ISSUES

I. WHETHER UNDER WISCONSIN STATUTES §§ 973.014 (1g)(a)2 and 302.114 , PAAPE'S LIFE SENTENCE, WITH ELIGIBILITY FOR RELEASE IN THIRTY YEARS UNDER EXTENDED SUPERVISION IS A DE FACTO LIFE SENTENCE IN VIOLATION OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION .

This question was not presented to the circuit court.

II. WHETHER WISCONSN STATUTE § 302.114 RENDERS PAAPE'S LIFE SENTENCE A DE FACTO LIFE SENTENCE BECAUSE HE HAS NO MEANINGFUL OPPORTUNITY FOR RELEASE THIRTY YEARS INTO THE FUTURE.

This question was not presented to the circuit court.

STATEMENT OF THE CASE

By criminal complaint in Case No. 2012CF512, filed on September 21, 2012, the State charged Nathan J. Paape and Antonio D. Barbeau, co-defendant, with First Degree Intentional Homicide - PTAC, in violation of §940.01(1)(a), §939.50(3)(a), §939.05, Wis. Stats., a Class A felony, occuring on September 17, 2012, for causing the death of Barbara Olson, in Sheboygan County Circuit Court.(1:1-4). On September 21, 2012, Paape made his initial appearance with counsel. The preliminary hearing was scheduled at that time to commence on October 2, 2012. (228: 1-9; 229: 1-27; 230: 1)

On October 2, 2012, the preliminary hearing commenced. After hearing testimony from witnesses and arguments of counsel , the circuit court found probable cause to believe that a felony had been comitted and Paape was bound over for trial. The circuit court also made a finding that a level of probable cause had been demonstrated that Paape

did, at least, as party to the crime, commit the crime of 1st Degree Intentional Homicide, pursuant to Wis. Stats. §948.01(1)(a), 939.50(3)(a), and 939.05. (60: 1-73).

Evidentiary hearings were held on Paape's reverse waiver request that jurisdiction of the case be transferred to juvenile court under Wis. Stats. §970.032(2) on January 29 and 30, 2013. At the conclusion of the reverse waiver hearing, the circuit court considered the testimony and arguments and ruled that Paape's case would not be transferred to juvenile court. (232: 1-242; 233:1-91;App. 1). On February 5, 2013, the circuit court entered a written order denying transfer of Paape's case to juvenile court. (46:1; App. 2).

Paape was arraigned on a Information charging him with one count of 1st Degree Intentional Homicide, pursuant to Wis. Stats. §948.01(1)(a), 939.50(3)(a), and 939.05 on February 5, 2013 and a plea of not guilty was entered. (20: 1-2; 234:1-9).

On February 5, 2013, Paape filed a motion for change of place of trial as well as an affidavit in support of this motion. (48:1; 49:1-89). On February 14, 2013, a hearing was held on Paape's motion for change of place of trial (55:1; 236:1-58). The circuit court denied Paape's motion for change of place of trial on February 14, 2013. (55:1; 236: 1-58).

On February 19, 2013, Paape filed with the Wisconsin Court of Appeals a petition for leave to appeal the non-final order denying the transfer of his case to juvenile court. His petition for leave to appeal a non-final order was denied by the Court of Appeals on April 4, 2013. (62:1-27; 65:1;80:1; App. 7).

Following a trial held from June 17, 2013 to June 20, 2013, the jury returned a guilty verdict on the charge of 1st-degree intentional homicide, as party to a crime, pursuant to Wis. Stats. Section 940.01(1)(a), and Wis. Stats., Section 939.05. (246: 1-86; 247:1-207; 248:1-211; 249: 1-80; App. 3). On August 13, 2013, Circuit Court sentenced the Paape to life in prison, and ordered Paape eligible for parole 30 years into the future on the anniversary of his birthday. Paape, fourteen years old at the time of his sentencing, will not be eligible parole until December 2, 2043. On the same day, the judgement of conviction was entered. The Department of Corrections (DOC) wrote a letter on August 14, 2013 to the circuit court informing the court that Paape was actually eligible for release to extended supervision and not parole. In a motion filed with the circuit court on August 21, 2013, the district attorney asked for a hearing to correct the judgement of conviction to reflect that Paape would be eligible for release to extended supervision, not parole. The circuit court responded by letter indicating a written order would correct the error. The judgement was never amended. (197:1; 250:1-54; 200:1; 201:1;202: 1-5; 203;204: 1-2; App. 4; App. 5).

A post-conviction motion was filed on September 18, 2015. Notice on the Attorney General was served. An amended post-conviction motion was filed on September 23, 2015 and Paape served an Amended Notice on the Attorney General that he had filed a challenge to the constitutionality of statutes. On October 13, 2015, The Wisconsin Attorney General's Office filed a letter with the circuit court acknowleging that the Notices relating to a challenge to the constitutionality of statutes had been received. (261:1-27; 262: 1-3; 274:1-26; 275:1-4; 263:1)

By written order and decision entered on November 10, 2015, the circuit court denied the post-conviction motion and amended post-conviction motion without a hearing. (261: 1-27; 274:1-26; 265: 1-9; App. 6) Paape continues to serve a life sentence with only the possibility of parole of parole. To be more than precise, he is only statutorily eligible for extended supervision thirty years into the future on the anniversary of his birthday. Paape filed a timely Notice of Appeal from the judgement of conviction and the order denying his post-conviction motion. (226:1-2). This appeal follows.

STATEMENT OF FACTS

On September 17, 2012, two thirteen year old boys, Antonio Barbeau and Nathan Paape, commited together an unspeakable crime. They took the life of Barbeau's seventy eight year old great-grandmother, Barbara Olson in her home in Sheboygan Falls, Wisconsin. (1:1-4; 60;1-73;232: 1-242; 233:1-91; 246: 1-86; 247:1-207; 248:1-211; 249: 1-80 1-80; Slip Opinion of the Wisconsin Court of Appeals in *State v. Barbeau*, decided June 22, 2016, 1-25; App. 8: 1-25).

That day, the boys had a plan of sorts. Or at least, the sort of plan only two gravely disturbed and impulsive youngsters could cook up in their thirteen-year-old minds. The plan went something like this. Barbeau had an idea. He and Paape would go to Olson's house. And at Olson's home, they would kill her and get some money. As Paape would tell law enforcement officers later, Barbeau got a hatchet and Paape got a hammer. Paape's mother gave the two boys a ride to Olson's home. During the car ride, Paape's mother was unaware that the boys hid their weapons in their clothing. The boys were dropped off at Olson's home. (1:1-4; 60: 1-73; 232: 1-242; 233:1-91; 246: 1-86; 247:1-207; 248:1-211; 249: 1-80;Slip Opinion of the Wisconsin Court of Appeals in *State v. Barbeau*, decided June 22, 2016, 1-25; App. 8: 1-25).

Olson greeted Barbeau and Paape at the door. Mayhem and murder ensued as she turned her back on the two. Barbeau struck Olson with the blunt end of the hatchet. Olson fell to the floor. Barbeau continued to strike Olson several more times with the blunt end of the hatchet. Olson tried to cover her head and cried out for Barbeau to stop. Barbeau called for Paape's help. Then Paape landed two hammer blows to Olson's head. Finally Barbeau struck Olson's head with the sharp edge of the hatchet. In so doing, he lodged the blade of the hatchet in Olson's head. The hatchet was stuck there. Both boys pulled the hatchet loose. After all of the carnage, and believing Olson to be dead, Barbeau and Paape searched Olson's house, taking jewelry, a purse, and money. (1:1-4; 60: 1-73; 246: 1-86; 247:1-207; 248:1-211; 249: 1-80;).1-80; Slip Opinion of the Wisconsin Court of Appeals in *State v. Barbeau*, decided June 22, 2016, 1-25; App. 8: 1-25)

Barbeau and Paape then engaged in a ill conceived and hapless efforts to conceal Olson's murder. After failing in an attempt to put Olson in the trunk of her car, they left Olson's bloody body wrapped in a blanket on the floor of her garage. They wiped down portions of the house, placed the wipes in bags, and put the bags, along with the hammer and hatchet, and items pilferred from the house into Olson's car. Paape put a pillow on the driver's seat so

that he could see above the steering wheel, and then drove the car with Barbeau in the passenger seat back to Sheboygan, parking near a church, a few blocks from Paape's home. (1:1-4; 60: 1-73; 232: 1-242; 233:1-91; 246: 1-86; 247:1-207; 248:1-211; 249: 1-80;1-80; Slip Opinion of the Wisconsin Court of Appeals in *State v. Barbeau*, decided June 22, 2016, 1-25; App. 8: 1-25).

The next day Barbeau and Paape returned to the vehicle. After driving it to a bowling alley, the boys then walked to a pizzeria where they ate pizza. At a nearby supermarket, they purchased gloves and cleaning wipes. After returning to the car, they wiped down the interior and left the car unlocked with the keys in it. Most of the jewlery taken from Olson's home was exposed in the rear seat of the abandoned vehicle. Adjacent to the bowling alley parking lot, Barbeau and Paape tossed some wipes and gloves in the bushes. Then they returned to the car, wiped down the interior for fingerprints and blood, and left the car keys in the front seat with the jewelry in sight. in the hope that someone would steal the car and be blamed for the murder of Olson. Paape later said that the boys hoped that someone would steal the car and get blamed for the death.Barbeau and Paape took Olson's purse, which contained $150. Olson's purse was tossed into a storm drain near Paape's house. (1:1-4; 60: 1-73;232: 1-242; 233:1-91; 246: 1-86; 247:1-207; 248:1-211; 249: 1-80; 1-80; Slip Opinion

of the Wisconsin Court of Appeals in *State v. Barbeau*, decided June 22, 2016, 1-25; App. 8: 1-25).

Police found Olson's car. They recovered the hammer and hatchet, jewelry, and a school paper containing the name "Nate" from the vehicle. (1:1-4;60: 1-73; 246: 1-86; 247:1-207; 248:1-211; 249: 1-80; 1-80;Slip Opinion of the Wisconsin Court of Appeals in *State v. Barbeau*, decided June 22, 2016, 1-25; App. 8: 1-25).

In total, according to the medical examiner, Olson was struck twenty-seven times, eighteen of which were blows to the head. (1:1-4; 60: 1-73;232: 1-242; 233:1-91; 246: 1-86; 247:1-207; 248:1-211; 249: 1-80;1-80;Slip Opinion of the Wisconsin Court of Appeals in *State v. Barbeau*, decided June 22, 2016, 1-25; App. 8: 1-25).

Further facts will be discussed where necessary below.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are requested because of the significant issues raised in this appeal.

ARGUMENT

I. UNDER WISCONSIN STATUTES §§ 973.014(1g)(a)2 and 302.114 , PAAPE'S LIFE SENTENCE, WITH ELIGIBILITY FOR RELEASE IN THIRTY YEARS UNDER EXTENDED SUPERVISION, IS A DE FACTO LIFE SENTENCE IN VIOLATION OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION .

Standard of Review

The constitutionality of a statute is a question of law that that court of appeals review de novo. *See State v. Baron*, 2009 WI 58, ¶10, 318 Wis. 2d 60, 769 N.W.2d 34. A facial challenge to a statute alleges that the statute is unconstitutional on its face and thus is unconstitutional under all circumstances. *State v. Smith,* 2010 WI 16, ¶ 10 n. 9, 323 Wis.2d 377, 780 N.W.2d 90. Courts of review presume statutes are constitutional. A party attempting to argue a statute is unconstitutional carries a heavy burden. *Id*. In a facial challenge, the "challenger must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional." *State v. Wanta*, 224 Wis.2d 679, 690, 592 N.W.2d 645 (Ct.App. 1999).

At the outset, it bears noting that Paape has not waived or forfeited his constitutional challenges to Wis. Stats. §§ 973.014 (1g)(a)2 and 302.114 under the Eight, Fifth, and Fourteenth Amendments by not raising these arguments in the circuit court. Paape is raising facial challenges to the constitutionality of

Wis. Stats. §§ 973.014 (1g)(a)2 and 302.114 not as applied challenges to these statutes.

In both *State v. Cole*, 2003 WI 112, ¶46, 264 Wis. 2d 520, 665 N.W.2d 328, and *State v. Trochinski*, 2002 WI 56, 253 Wis.2d 38, ¶34 n.15, 644 N.W.2d 891 , 253 Wis. 2d 38, the Wisconsin Supreme Court ruled that while an "as applied" challenge to the constitutionality of a statute may be waived, a facial challenge is a matter of subject matter jurisdiction and cannot be waived. These holdings are entirely consistent with Article VII, Section 8 of the Wisconsin Constitution. Article VII, Section 8 states that "[e]xcept as otherwise provided by law," circuit courts have original jurisdiction "in all matters civil and criminal." If a statute is unconstitutional on its face, any action premised upon that statute fails to present any civil or criminal matter in the first instance. As the court of appeals correctly noted in *State ex rel. Skinkis v. Treffert*, 90 Wis.2d 528, 280 N.W.2d 316 (Ct.App.1979), if the facial attack on the statute were correct, the statute would be null and void, and the court would be without the power to act under the statute. Skinkis, 90 Wis. 2d at 538. This is contrasted from an "as applied" challenge, where the court initially has jurisdiction over the subject matter, as the statute is valid upon its face.

A. The Relevant Sentencing, Original Jurisdiction and Reverse Waiver Statutes.

A person who commits first-degree intentional homicide is guilty of a class A felony, Wis. Stats. § 940.01(1), the penalty for which is life imprisonment, Wis. Stats. § 939.50 (3) (a).

First degree intentional homicide refers to causing "the death of another human being with intent to kill" that person. Wis. Stat. § 940.01(1)(a). A person convicted of first degree intentional homicide is subject to life with extended supervision after twenty years, life with extended supervision beginning on a particular date, or life without extended supervision. Wis. Stat. § 973.014(1g)(a) 1,2, 3.

Wisconsin circuit courts have original adult jurisdiction over a juvenile who commits first-degree intentional homicide on or after the juvenile's tenth birthday. See Wis. Stats. § 938.183 (1) (am),(1m). A juvenile offender charged with first degree intentional homicide on or after the juvenile's tenth birthday has a statutory right to a reverse waiver hearing. Wis. Stats. 970.032 (2). Essentially, the adult criminal court must retain jurisdiction unless the juvenile proves all of the following: (1) the juvenile could not receive adequate treatment in the adult criminal system; (2) transferring the case to the juvenile system would not depreciate the seriousness of the offense; and (3) retaining the case in the adult criminal court is not necessary to deter other juveniles from committing similar offenses. Wis. Stats. 970.032 (2)(a)(b) & (c).

B. Supreme Court decisions in *Miller* and *Montgomery* mark a new era for juvenile sentencing jurisprudence in terms of the Eight Amendment and the Fifth and Fourteenth Amendment.

1. Eight Amendment and Juveniles Sentenced in Adult Court to Life Imprisonment

Now, “[a]n offender's age is relevant to the Eighth Amendment,” *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 ,2462 (2012). A court must consider the juvenile offender's age “before imposing a

particular penalty." Id. at 2471.

In *Miller*, the Supreme Court examined the cases of two juvenile offenders convicted of homicide offenses and sentenced to life in prison without parole pursuant to sentencing schemes in their states that mandated the imposition of a life-without-parole sentence. 132 S.Ct. at 2460. The juvenile offenders contended that these mandatory sentencing schemes violated the Eighth Amendment by running "afoul of *Graham* 's admonition that '[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.' " *Miller*,132 S.Ct. at 2462 (quoting *Graham v. Florida* , 560 U.S. at 75 (2010)).

The Supreme Court ruled in favor of the juvenile offenders and reversed the sentences imposed and held that 'mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments". The Court took its previous pronouncements on juvenile offenders sentenced in adult court much further than before. The Court amplified on previous precedent establishing that children are constitutionally different from adults for purposes of sentencing. The Court went on to recognize that juveniles have diminished culpability and greater prospects for reform. And therefore, 'they are less deserving of the most severe punishments." *Miller*, 132 S.Ct. at 2464 (quoting *Graham* 560 U.S. at 68).

While *Roper v. Simmons*, 543 U.S. 551 (2005) baned the death penalty for juvenile offenders, and *Graham* pronounced a rule banning the imposition of a life sentence without parole for juvenile offenders who commit nonhomicide offenses, *Miller* "set out a

different [rule] (individualized sentencing) for homicide offenses." *Miller*, 132 S.Ct. at 2466 n. 6. *Miller* 's rule of individualized sentencing for juvenile offenders is effectuated through a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors," since such a hearing "is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery v. Louisiana* , ___U.S.___, 136 S.Ct. 718, 735 (2016) (internal citation omitted). As the Supreme Court has made clear, "The hearing does not replace but rather gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Id. (emphasis added).

Miller, then, mandates that a sentencing court consider the juvenile offender's "chronological age and its hallmark features" before imposing sentence. A sentencer must "consider[ ] a juvenile's lessened culpability and greater capacity for change" as compared to an adult. *Miller*, 132 S.Ct. at 2460 (internal quotation omitted). The sentencer must consider the juvenile offender's "lack of maturity and [ ] underdeveloped sense of responsibility," that lead to "recklessness, impulsivity, and heedless risk-taking." Id. at 2464 (internal quotation omitted). The Supreme Court's requirement of individualized sentencing for juvenile offenders forbids a sentencer from "treat[ing] every child as an adult," because doing so inevitably ignores the "incompetencies associated with youth," and "disregards the possibility of rehabilitation even when the circumstances most suggest it." Id. at 2468.

The *Montgomery* decision issued this year further clarifies the import of *Miller* in that the Eight Amendment places a ceiling on punishment for the vast majority of juvenile offenders. According to the

Court in *Montgormery*, the holding of Miller ″did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of “the distinctive attributes of youth. Even 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*, 136 S. Ct. at 734 (internal quotations marks and citatons omitted). A life sentence without parole for juvenile offender is excessive for all but "‘the rare juvenile offender whose crime reflects irreparable corruption'" *Miller*, 567 U.S. ___, 132 S. Ct. at 2465.

The Supreme Court has rendered life without parole an unconstitutional penalty for “**a class of defendants because of their status'”—that is, juvenile offenders whose crimes reflect the transient immaturity of youth**. *Penry* [*v. Lynaugh*, 492 U.S. 302, 330,(1989)]. *Montgomery*, 136 S.Ct. at 734 (emphasis supplied). In discussing the procedural requirement of the *Miller* decision, the *Montgomery* Court noted that “*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.” *Id.* As the Court reasoned, just because “*Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.” Id. at 735.

2. Procedural Due Process

The constitutional guarantee of due process of

law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The due process clause of the Fifth Amendment, ratified in 1791, asserts that no person shall "be deprived of life, liberty, or property, without due process of law." This amendment restricts the powers of the federal government and applies only to actions by it. The Due Process Clause of the Fourteenth Amendment, ratified in 1868, declares, "[n]or shall any State deprive any person of life, liberty, or property, without due process of law" (§ 1).This clause limits the powers of the states, rather than those of the federal government. The Due Process Clause of the Fourteenth Amendment incorporates protections of the Bill of Rights, so that those protections apply to the states as well as to the federal government. The United States Supreme Court in *Moore v. Dempsey*, 261 U.S. 86 (1923) ruled that the defendants' mob dominated trials deprived the defendants' of due process under the Fourteenth Amendment. The *Moore* decision established precedent for the Supreme Court's review of state criminal trials in terms of their compliance with the Bill of Rights.

The Due Process Clause is essentially a guarantee of basic fairness. Fairness can, in various cases, have many components: notice, an opportunity to be heard at a meaningful time in a meaningful way, a decision supported by substantial evidence, etc. In general, the more important the individual right in question, the more process that must be afforded.

The most obvious requirement of the Due Process Clause is that states afford certain

procedures ("due process") before depriving individuals of certain interests ("life, liberty, or property"). "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." The Court went on to hold that the same requirement also is mandated when the deprivation involved loss of liberty. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). *Id.* (citing, *e.g., Grannis v. Ordean*, 234 U.S. 385 (1914) (taking of private property)).

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the State afforded parolees the right to remain at liberty as long as the conditions of their parole were not violated. Before the State could alter the status of a parolee because of alleged violations of these conditions, the Supreme Court held that the Fourteenth Amendment's guarantee of due process of law required certain procedural safeguards.

Keeping these Supreme Court decisions in mind, the Due Process Clause serves two basic goals. One is to produce, through the use of fair procedures, more accurate results: to prevent the wrongful deprivation of interests. The other goal is to make people feel that the government has treated them fairly by listening to their side of the story.

II. WISCONSN STATUTE § 302.114 RENDERS PAAPE'S LIFE SENTENCE A DE FACTO LIFE SENTENCE BECAUSE HE HAS NO MEANINGFUL OPPORTUNITY FOR RELEASE THIRTY YEARS INTO THE FUTURE.

Paape was only thirteen years of age when he and his co-defendant, Barbeau, took the life of Barbara Olson. (1:1-4). He was fourteen at the time of his sentencing on August 13, 2013. (250: 1-53). His first opportunity to petition for release on

extended supervision does not come until the anniversary of his birth date, thirty years into the future, December 2, 2043. He will be forty five years old before it will be possible for him to petition for relese on extended supervision (250:42-53 ;App. 4:1-12).

The issue Paape presents to this court is whether a life sentence with eligibility for extended supervision imposed on a juvenile offender is unconstitutional under the Eighth Amendment, Fifth and Fourteenth Amendment to the United States Constitution based on the United States Supreme Court decisions in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*,___U.S.___, 132 S.Ct. 2455 (2012), and *Montgomery v. Louisiana*, ___U.S.___,136 S.Ct. 718 (2016) when the statute which governs his or her chance for extended supervision renders his or her sentence a de facto life sentence because he or she has no "meaningful opportunity" for release on extended supervision "based on demonstrated maturity and rehabilitation". What flows from his argument is that Paape's sentence is unconstitutional since Wis. Stats. § § 973.014(1g)(a)2 and 302.114 do not provide Paape with a meaningful opportunity for release when he turns 45 years old. His argument is not only driven by the reality that his sentence requires him to serve what may well be a de facto life sentence in violation of the Eight Amendment's Cruel and Unusual Punishment ban. But Paape also argues that Wis. Stats. §§ 973.014 (1g)(a)2 and 302.114 violate his right to procedural due process under the Fifth and Fourteenth Amendment to the United States Constitution because these statutes do not provide him the meaningful opportunity for release which the decisions in *Graham, Milller, and Montgomery* mandate for juveniles sentenced to life imprisonment even in discretionary sentencing regimes such as

Wisconsin's.

Thirty years from the date of his fourteenth birthday, Paape will not have an opportunity to believe that govenment has treated him fairly. Nor will he have a meaingful opportunity to tell his side of the story. Or at least not in the "meaningful" way *Graham*, *Miller* and *Montgomery* require him to have.

The opportunity for release must provide due process protections which afford the juvenile, when he seeks release, a hearing in which he will be able to meaningfully make his case for release. Otherwise, the sentence is nothing more than de facto life sentence and may very well be a de jure life sentence. And Wis. Stat. 302.114 is unconstitutional because it does not comply with the Supreme Court's due process pronouncement that Paape be given "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75

A. Wisconsin Statute § 302.114 is Constitutionally Infirm.

Under Wisconsin Statute 302.114 (1) (2), inmates serving life sentences may file a petition for release and release to extended supervision after 20 years or after the extended supervision eligibility date set by the court.

An inmate subject to this statute must file a petition for release to extended supervision with the court that sentenced him or her. The petition must be filed no earlier than 90 days before his or her extended supervision eligibility date. He or she is also required to file a copy of the petition on the district attorney’s office that prosecuted him or her. The

district attorney shall file a written response to the petition within 45 days after the date he or she receives the petition. Wis. Stats. § 302.114 (5) (a) (am).

After reviewing the inmate's petition and the district attorney's response, the court shall decide whether to hold a hearing on the petition or, if it does not hold a hearing, whether to grant or deny the petition without a hearing. If the court decides to hold a hearing under the statute, the hearing shall be before the court without a jury. The same district attorney's office that prosecuted the inmate shall represent the state at the hearing. The court shall allow a victim to make a statement or submit a statement concerning the release of the inmate to supervised release. The court may also allow any other person to make or submit a statement. The only guide to the nature of the statement is it must be relevant to the release of the inmate to extended supervision.§ 302.114 (5) (b) (c).

The burden is on the inmate to show by clear and convincing evidence that he or she is not a danger to the public. And if the inmate fails to meet this burden, the court may not grant the petition. Wis. Stats. 302.114 (5) (cm).

If the court denies the inmate's petition for release to extended supervision, the court shall specify the date on which the inmate may file a subsequent petition under this section. An inmate may file a subsequent petition at any time on or after the date specified by the court, but if the inmate files a subsequent petition for release to extended supervision before the date specified by the court, the court may deny the petition without a hearing. Wis. Stats. 302.114 (5) (e).

An inmate is allowed to appeal an order denying his or her petition for release to extended supervision. In an appeal, the appellate court may reverse an order denying a petition for release to extended supervision only if it determines that the sentencing court erroneously exercised its discretion in denying the petition for extended supervision. Wis. Stats. 302.114 (5) (f).

B. Paape's Life Sentence with Eligibility for Extended Supervision Does Not Provide a Meaningful Opportunity for Release on Extended Supervision

Paape argues that Wis. Stats. 302.114 provides him with no "meaningful opportunity" for release as required by *Graham*, *Miller*, and *Montgomery*. Paape is serving a life sentence with only the eligibility for release after filing a petition thirty years from his fourteenth birthday. He deserves a chance at going home and a chance at liberty even if that liberty is under extended release supervision. That's the thrust of all the of Supreme Court rulings discussed above. *Graham*, *Miller*, and *Montgomery* recognize that children are different than adults when it comes to crime and punishment - less culpable for their actions and more amenable to change. But Wis. Stats. 302.114 as well as Wisconsin case law do not so recognize.

One of the core due process problems of Wis. Stats. 302.114 is that the severity of the offense will always trump all other considerations. Left out of the analysis under this staute is the transient immaturity of youth, the diminished culpability of children, and the attendant circumstances of children. All of these factors are now to be considered under the holdings in *Graham*, *Miller*, and *Montgomery*. Wis. Stats. 302.114 provides no opportunity for these

considerations because this statute was designed to evaluate adults sentenced to life, not juvenile offenders. As such, it patently violates Paape's rights under the Eight Amendment, but also the Procedural Due Process Clause of the Fifth and Fourteenth Amendment.

And Wisconsin case law does nothing to ensure that Paape obtains even a bare minimum of due process protection when his time comes to seek release on extended supervision. When an offender should first be eligible to seek release on extended supervision is governed by the same factors that govern a sentencing decision: "the gravity of the offense, the character of the offender, and the need for protection of the public." See *State v. Young*, 2009 WI App 22, ¶22, 24-25, 316 Wis. 2d 114, 762 N.W.2d 736 (citation omitted). These same factors have been used to guide a court's decision on when an offender should be eligible to seek release on parole. *See State v. Seeley*, 212 Wis. 2d 75, 87, 567, N.W.2d 897 (Ct. App. 1997).*See State v. Brown*, 2006 WI 131, ¶6, 298 Wis. 2d 37, 725 N.W.2d 262 ("Under Truth in Sentencing, extended supervision and reconfinement are, in effect, substitutes for the parole system that existed under prior law."). Wis. Stats. 302.114 and Wisconsin case law interpreting eligibility for release under extended supervision provide only an unconstitutional mechanism for a circuit court's decision whether or not to grant a hearing and, for that matter, whether or not to grant a petition for release on extended supervision. Again, the gravity of the offense will always trump any other consideration.

In trying to obtain release thirty years from now, Paape will face the same insurmountable hurdle he faced at trying to convince the court that his case should be transferred from adult court to juvenile court. This is so because the heinous nature of the

crime will always trump any other consideration. Nowhere in any of the statutes discussed above, including Wis. Stats, 302.114, is there a recognition that children are constitutionally different than adults as Graham, *Miller,* and *Montgomery* demands.

Paape acknowledges that there is no constitutionally protected liberty interest in a grant of parole. *See Greenholz v. Inmates of the Neb. Penal & Correctional Complex,* 442 U.S. 1, 7 (1979). However, the Supreme Court has recognized that in some cases a liberty interest in parole requires, at least, some minimal due process rights. These rights may derive from language in a State' sparole statute that creates a "protectable expectation of parole." *See Greenholz*, at 11-12 (statutory language of Nebraska statute created expectancy of release constituting liberty interest entitled to protection of due process). *See also Board of Pardons v. Allen*, 482 U.S. 369, 371-372, 381 (1987).Wis. Stats. §§ 973.014(1g)(a)2 and 302.114 create an expectancy of release. The holdings of *Graham*, *Miller* and *Montgomery* mandate that since children are constitutionally different than adults in terms of sentencing, this expectancy of release is enforceable. However, under Wis. Stats. 302.114 and Wisconsin case law, Paape has little chance of release.

C. A Growing National Consensus on the Unconstitutionality of Discretionary Life Sentences With No Meaningful Opportunity for Release

The Supreme court left it up to states how to handle the unconstitutionality of juvenile life without parole, but suggested parole boards were a good choice. "Allowing those offenders to be considered for parole,"

gives states a way to identify "juveniles whose crimes reflected only transient immaturity - and who have since matured." *Montgomery*, 136 S. Ct at 735.

Most states have taken this option, changing juvenile lifers' sentences en masse from life *without* to life *with* the possibility of parole. And many states have revised sentencing statutes which affect juvenile life sentences, in the wake of *Graham* and *Miller*. *See, e.g.*, California.Penal Code § 1170(d)(2)(A)(i),(H) (offering juvenile offenders sentenced to life without **parole** the opportunity to ask for a reduced sentence after serving fiteen years; if not granted a subsequent petition may be made after serving twenty years and a final petition after serving twenty four years and establishes seperate criteria for the court to use when considering wether to conduct a hearing and whether to grant a petition. Delaware Code Annotated Title 11, § 4209A (providing sentences of not less than twenty five years for juveniles convicted of first-degree murder); Pennsylvania Statutes Title 18 § 1102.1 (a)(1), (2) (providing parole eligibility for juveniles age fifteen and older convicted of homicide after thirty-five years and for those under fifteen years of age after twenty-five years); Utah Criminal Code Title 76 § 76-3-209 (providing that punishment for juveniles convicted of first-degree murder is a indeterminate prison term of not less than twenty five years to life) Wyoming Statute § 6-10-301(c) (providing parole eligibility for juveniles convicted of first-degree murder after twenty-five years imprisonment); Arkansas Code § 5-10-101 (provides that juveniles convicted of first-degree murder may be sentenced to life in prison without possibility of parole for twenty-eight years); Louisiana Revised Statutes 15:574.4 (E) (providing,

the possibility of parole eligibility for juveniles convicted of first or second-degree murder after thirty-five years imprisonment); Nebraska Revised Statute 28-105.02 (giving a trial court discretion to impose a term-of-years sentence ranging from forty years to life after considering specific factors related to youth);South Dakota Codified Laws 22-6-1, 22-6-1.3 (judges have the discretion to sentence a juvenile to any term of years and the penalty of life imprisonment may not be imposed upon any defendant for any offense committed when the defendant was less than eighteen years of age).

Some state supreme courts ruled that sentences of life without parole imposed in discretionary sentencing regimes violated *Miller. See, e.g.*, *State v. Riley*, 110 A.3d 1205, 1216 (Conn. 2015); *Aiken v. Byars*, 765 S.E.2d 572, 576–77 (S.C. 2014); *People v. Gutierrez*, 324 P. 3d 245, 249–50 (Cal. 2014); *cf. State v. Seats*, 865 N.W. 2d 545, 555–558 (Iowa 2015) (based on *Miller* and Iowa constitution). The Seventh Circuit Court of Appeals has observed that "even discretionary sentences must be guided by consideration of age-relevant factors." *McKinley v. Butler,* 809 F.3d 908*,* 911 (7th Cir. 2016). In Wisconsin, the sentencing of a 14 year-old to life without parole is still viewed as consititutional. *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451**.**

D. Due Process After *Miller* in Massachusetts

The Massachusetts Supreme Judicial Court has recognized that juveniles sentenced to life

sentences are entitled to more protections and due process than even adults sentenced to life sentences enjoy. The holding in *Diatchenko II* acknowledged that giving life without parole was a disproportionate punishment considering that the offense was committed by a juvenile, yet it left open the issue concerning how a juvenile homicide offender's opportunity for release on parole would be protected. *Diatchenko v. Dist. Attorney for the Suffolk Dist*. (*Diatchenko II*), 1 N.E.3d 270, 274 (Mass. 2013). To ensure that their opportunity for release through parole would be meaningful, Diatchenko and another juvenile lifer filed petitions with the Supreme Judicial Court of Massachusetts ("*Diatchenko III*") arguing that access to counsel, funds for expert witnesses, and an opportunity for judicial review of the decision on their parole applications were necessary. MASS CONST. art. XXVI; Diatchenko v. Dist. Attorney for the Suffolk Dist. *(Diatchenko III)*, 27 N.E.3d 349, 353 n.3 (Mass. 2015) (citing *Miller*, 132 S. Ct. at 2455) (explaining that the term "juvenile homicide offender" refers to a person who has been convicted of murder in the first degree and was under the age of eighteen at the time the murder was committed); see *Diatchenko II*, 1 N.E.3d at 280, 281. In *Diatchenko III*, the court's majority agreed and held that, given the significance of a mandatory life sentence to juvenile homicide offenders, the parole process takes on a constitutional liberty interest. *See id.* at 357. Thus, juvenile homicide offenders should have access to counsel, fees for expert witnesses, and judicial review of parole board decisions. *See id.* at 353.

The Masssachusetts Supreme Judicial Court in *Diatchenko III* went to recognize that juvenile lifers must be given the chance to prove that their crime was commited, at least in part, *because* they were young - immature, impressionable, dependent on adults - but to do that requires gathering educational,

medical, and legal paperwork, sometimes decades old, from behind bars. "An unrepresented, indigent juvenile homocide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately." *See id* at 353-357.

What the Massachusetts Supreme Court has done is not revolutionary. It has set the bare mandatory due process requirements which juvenile offenders serving life sentences may constitutionally expect when they are sentenced to the expectancy of parole or extended supervision. Wisconsin sentencing regime is woefully inadequate. And therefore must be struck down as unconstitutional.

Paape at the time he files his first petition thirty years from his fourteenth birthday will be without counsel, indigent and without access to experts. By that time, he will be unable to gather educational, medical and legal paperwork, decades old, from behind a prison cell. Thus he will lack under Wis. Stats. 302.114 any meaningful opportunity to prove his offense was committed because he was young, immature and less culpable than his co-defendant, Barbeau. But the Eight Amendment as well as the Due Process Clause of the Fifth and Fourteenth Amendment demands this and more. Without counsel and access to experts, Paape has no meaningful opportunity thirty years from now to obtain his release. His sentence creates an expectancy of release in thirty years and it must be enforced. Massachuesetts may seem like an outlier right now. However, under *Graham*, *Miller*, and *Montgomery,* require nothing less than what Massachuesetts is doing to set things right. Since Paape's sentence does not provide a meaningful opportunity for release, his sentence must be vacated because Wis. Stats. §§ 973.014(1g)(a)2 and 302.114 are unconstitutional.

CONCLUSION

In light of the arguments advanced above, Nathan J. Paape respectfully asks that this Court to vacate his sentence because the sentence violates the Eight Amendment, Fifth Amendment and Fourteenth Amendment to the United States Constitution. Paape suffers an unconstitutional sentence because he has been sentenced to a de facto life sentence with no meaningful opportunity for release.. Since Paape was thirteen at the time of his offense and fourteen when he was sentenced to life in prison, he is entitled to a meaningful opportunity for release. Neither Wis. Stats. §§ 973.014(1g)(a)2 nor 302.114 provide him with a meaningful opportunity for release.

Dated at Milwaukee, Wisconsin, this 24th day of October, 2016

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(b) and (c) for a brief produced using the following font:

Arial: 14 characters per inch; 2 inch margin on the left and right; 1 inch margins on the top and bottom. The brief's word count is 6,693 words.

Dated at Milwaukee, Wisconsin, this 24th day of October, 2016.

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CERTIFICATE OF COMPLIANCE WITH 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 s. 809.19(12). I further certify that: 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 at Milwaukee, Wisconsin, this 24th day of October, 2016.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this Brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis.Stat. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinions of the trial court;
(4) portions of the record essential to an under- standing of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.
(5) and a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

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.
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