STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP2462-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NATHAN J. PAAPE,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN SHEBOYGAN COUNTY CIRCUIT COURT, HONORABLE TIMOTHY VAN AKKEREN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication because the issues presented can be resolved based on controlling law and the briefs of the parties.

ISSUES PRESENTED

1. By failing to raise his challenge in circuit court, has Paape forfeited his challenge to the constitutionality of Wis. Stat. §§ 973.014(1g)(a)2 and 302.114?

The circuit court did not address this issue.

This Court should answer: Yes.

2. Does Paape lack standing to facially challenge the constitutionality of these statutes?

The circuit court did not address this issue.

This Court should answer: Yes.

3. Has Paape failed to show that his life sentence with the possibility of release to extended supervision after thirty years of confinement for first degree intentional homicide is unconstitutional under either the Eighth Amendment or the Due Process Clause of the United States Constitution because under Wisconsin's statutes, he has a meaningful opportunity for release to extended supervision in thirty years?

The circuit court did not address this issue.

This Court should answer: Yes.

SUPPLEMENTAL STATEMENT OF THE CASE

This court, in its Decision dated June 22, 2016 denying the appeal of Nathan Paape's co-defendant, Antonio Barbeau, succinctly summarized the factual background of this horrific crime involving two thirteen-year old boys, Paape and Barbeau:

> On September 17, 2012, thirteen-year-olds Barbeau and [Paape] agreed to murder Barbeau's great-grandmother, Barbara Olson, because she "was somewhat rich and could be killed for money." Later that day, they went to Olson's house. Barbeau brought a hatchet; Paape brought a hammer. When Olson greeted them at the door and then turned her back, Barbeau struck Olson with the blunt end of the hatchet, knocking her to the floor. Barbeau struck Olson several more times with the blunt end of the hatchet, while Olson tried to cover her head and cried for him to stop. Barbeau called for Paape's help, and Paape struck Olson twice in the head with the hammer. Using the sharp end of the hatchet, Barbeau struck Olson, lodging the blade in her head. In total according to the medical examiner, Olson was struck twenty-seven times, eighteen of which were blows to the head. Realizing that Olson was now dead, Barbeau and Paape searched her house, taking jewelry, a purse, and money.

State v. Barbeau, 2016 WI App 51, ¶ 2, 370 Wis. 2d 736, 883 N.W.2d 520. This Court further described the aftermath of the crime when Barbeau and Paape "devis[ed] a plan to conceal their murder of Olson," removing her body from her house and leaving her body in the garage, driving her car a few blocks away and then, the next day, wiping down the interior of the car, leaving the keys and the jewelry in sight hoping "that someone would steal the car and be blamed for the murder of Olson." *Id.* ¶¶ 3–4.

The State charged both Barbeau and Paape with first degree intentional homicide as a party to a crime. (1; 20.)[1] After a hearing, the circuit court denied transfer of Paape's case to juvenile court. (26; 232, 233.) After a four-day trial (246; 247; 248; 249), the jury found Paape guilty of first degree intentional homicide as a party to the crime. (186, A-App. 3:1; 249:73.)

On August 13, 2013, at Paape's sentencing hearing, the State acknowledged that the crime of first degree intentional homicide as party to the crime "carries a mandatory life term. However, the court is allowed if it chooses to set a parole eligibility date, but that eligibility date cannot be less than 20 years." (250:13–14.) The State recommended the same sentence for Paape as that imposed on co-defendant Barbeau the previous day: "that he not be eligible for parole for 36 years until he turns 50 years of age." (250:26.) Defense counsel requested that Paape be made eligible "for release in 20 years." (250:41.)

After Paape addressed the court, the court began its sentencing decision, focusing on the seriousness of the crime, the gravity of the offense, the minimum sentence necessary to address the severity of the crime, and the need to protect the public, taking into account Paape's youth and his slightly lesser degree of culpability than his co-defendant Barbeau. (250:42–49, A-App. 4:1–8.) Ultimately, the court sentenced Paape to a sentence slightly less than Barbeau's sentence: "life imprisonment with eligibility for parole to be on December 2, of 2043. And that again would be based on his birth date. That would again take him to his 45th year.

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[1] Barbeau pled no-contest to the charge and was sentenced the day before Paape, on August 12, 2013, to life in prison with eligibility for parole in thirty-five years on his 50th birthday, November 24, 2048. *Barbeau*, 370 Wis. 2d 736, ¶¶ 5–7.

The circumstance involved in this particular instance is one that does require this at a bare minimum." (250:50, A-App. 4:9.)

The court advised Paape that his extended supervision eligibility date could be extended by statute if he violated prison rules and regulations and also discussed credit for time served and declined to order restitution. (250:50–52, A-App. 4:9–11.) The court entered the judgment of conviction, sentencing Paape to one life term in prison, eligible for parole on December 2, 2043 on his 45th birthday. (197, A-App. 5.)[2]

Two years later, Paape filed a postconviction motion seeking to vacate the judgment of conviction. (261.) In the motion, Paape alleged that his trial counsel performed deficiently and that Paape was prejudiced. Specifically, Paape asserted that his trial counsel was ineffective for failing to seek "dismissal of the prosecution because Wisconsin's original adult jurisdiction statute, Wis. Stats, § 938.138 (1)(am), as applied to Paape, violates the Eighth Amendment to the United States Constitution" and "violates his right to Due Process and Equal Protection under the Fifth and Fourteenth Amendment of the United States Constitution," and further was ineffective for failing to seek dismissal because "the reverse waiver statute and reverse waiver hearing, pursuant to Wis. Stats. 970.032 (2), and the original adult jurisdiction statute, Wis. Stats, § 938.138 (1)(am) on its face and, as applied to Paape, violate

[2] For clarification, because Paape committed the homicide after December 31, 1999, he was sentenced under Wis. Stat. § 973.014(1g)(a)(2). Therefore, he is not eligible for a parole determination by the parole board on December 2, 2043, but rather, he is eligible to file a petition with the circuit court for release to extended supervision pursuant to Wis. Stat. § 302.114(1) on that date.

the Due Process Clause of the Fifth Amendment and the Equal Protection Claus [sic] of the United States Constitution." (261:4–5.)

By written decision and without a hearing, the circuit denied Paape's claims of ineffective assistance of counsel based on his allegations that Wis. Stat. §§ 938.183(1)(am) and 970.032(2) are unconstitutional. (265, A-App. 6.) Paape appeals from the judgment of conviction and from the order denying his motion for postconviction relief. (266.)

On appeal, Paape does not challenge the constitutionality of the reverse waiver and original adult jurisdiction statutes as he did in his postconviction motion. Instead, he raises new challenges to the constitutionality of different statutes, asserting that the statutes pursuant to which he was sentenced and which govern the procedure for him to petition for extended supervision in thirty years–Wis. Stat. §§ 973.014(1g)(a)2 and 302.114–are facially unconstitutional and that his life sentence with possibility of release to extended supervision after thirty years of confinement imposed pursuant to these statutes is a "de facto" life sentence and thus violates the Eighth Amendment and the Due Process Clause of the United States Constitution. (Paape's Brief at 1–2.)

RELEVANT STATUTES

Wisconsin Stat. §§ 939.50 and 940.01 describe the offense of first degree intentional homicide and the penalty of life imprisonment:

> **939.50 Classification of felonies. . . . (3)** Penalties for felonies are as follows:
>
> (a) For a Class A felony, life imprisonment.
>
> . . . .
>
> **940.01 First-degree intentional homicide. (1)** OFFENSES. (a) Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

Wisconsin Stat. §§ 973.014(1g)(a)2 and 302.114 are the statutes under which the circuit court sentenced Paape for first degree intentional homicide committed after December 31, 1999:

> 973.014 Sentence of life imprisonment; parole eligibility determination; extended supervision eligibility determination.
>
> . . . .
>
> (1g) (a) Except as provided in sub. (2), when a court sentences a person to life imprisonment for a crime committed on or after December 31, 1999, the court shall make an extended supervision eligibility date determination regarding the person and choose one of the following options:
>
> 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 later date 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.
>
> (b) When sentencing a person to life imprisonment under par. (a), the court shall inform the person of the provisions of s. 302.114 (3) and the procedure for petitioning under s. 302.114 (5) for release to extended supervision.
>
> (c) A person sentenced to life imprisonment under par. (a) is not eligible for release on parole.

Wis. Stat. § 973.014 (1g).

Wisconsin Stat. § 302.114, in relevant part, governs the procedure for filing a petition with the circuit court for release to extended supervision pursuant to a life sentence imposed under Wis. Stat. § 973.014(1g)(a)1 or 2:

> **302.114 Petition For Release And Release To Extended Supervision For Felony Offenders Serving Life Sentences.**
>
> (1) **An inmate is subject to this section if he or she is serving a life sentence imposed under s. 973.014 (1g) (a) 1. or 2.** An inmate serving a life sentence s. 939.62 (2m) or 973.014 (1g) (a) 3. is not eligible for release to extended supervision under this section.
>
> (2) Except as provided in subs. (3) and (9), **an inmate subject to this section may petition the sentencing court for release to extended supervision** after he or she has served 20 years, if the inmate was sentenced under s. 973.014 (1g) (a) 1., or **after he or she has reached the extended supervision eligibility date set by the court, if the inmate was sentenced under ss. 973.014 (1g) (a) 2.**
>
> . . . .
>
> **(5) (a) An inmate subject to this section who is seeking release to extended supervision shall file a petition for release to extended**

supervision with the court that sentenced him or her. An inmate may not file an initial petition under this paragraph earlier than 90 days before his or her extended supervision eligibility date. If an inmate files an initial petition for release to extended supervision at any time earlier than 90 days before his or her extended supervision eligibility date, the court shall deny the petition without a hearing.

(**am) The inmate shall serve a copy of a petition for release to extended supervision on the district attorney's office that prosecuted him or her, and the district attorney shall file a written response to the petition within 45 days after the date he or she receives the petition.**

(b) After reviewing a petition for release to extended supervision and the district attorney's response to the petition, 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 this paragraph, the hearing shall be before the court without a jury. The office of the district attorney that prosecuted the inmate shall represent the state at the hearing.

(c) Before deciding whether to grant or deny the inmate's petition, the court shall allow a victim, as defined in s. 950.02(4), to make a statement or submit a statement concerning the release of the inmate to extended supervision. The court may allow any other person to make or submit a statement under this paragraph. Any statement under this paragraph must be relevant to the release of the inmate to extended supervision.

(cm) A court may not grant an inmate's petition for release to extended supervision unless the inmate proves, by clear and convincing evidence, that he or she is not a danger to the public.

Wis. Stat. § 302.114.

ARGUMENT

I. Paape has forfeited his facial and as-applied challenges to the constitutionality of Wis. Stats. §§ 973.014(1g)(a)2 and 302.114 by failing to raise them below.

Paape has forfeited both his facial and as-applied challenges to the constitutionality of Wis. Stat. §§ 973.014(1g)(a)2 and 302.114 by failing to raise them in his post-conviction motion before the trial court.

"Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727; *see also Rehab. Of Seg. Account of Ambac Assur. Corp.*, 2012 WI 22, ¶ 22, 339 Wis. 2d 48, 810 N.W.2d 450. Forfeiture refers to "the failure to make the timely assertion of right" and "waiver is the intentional relinquishment or abandonment of a known right." *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W. 2d 612. The purpose of the forfeiture doctrine includes "enabl[ing] the circuit court to avoid or correct any error with minimal disruption to the judicial process, eliminating the need for appeal" and to give the parties and the circuit court "notice of the issue." *Id.* ¶ 30. "There is a recognized need for forfeiture in the criminal justice system." *State v. Thompson,* 2012 WI 90, ¶ 72, 342 Wis. 2d 674, 818 N.W.2d 904. It facilitates the fair, orderly administration of justice, encourages vigilance by litigants, and conserves judicial and prosecutorial resources. *State v. Pinno*, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207. However, waiver or forfeiture is a rule of judicial administration which a reviewing court, in its discretion, may choose not to apply if the interests of justice require

review of an otherwise waived issue. *See State v. Davis*, 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1996).

While Paape purports to appeal from the order denying his postconviction motion, he did not present or argue the issues he raises on appeal in his postconviction motion. In his postconviction motion, Paape argued that his trial counsel was ineffective for not moving to dismiss the prosecution because Wisconsin's original adult jurisdiction statute, Wis. Stat. § 938.183(1)(am), is unconstitutional as applied to Paape and because Wisconsin's reverse waiver statute, Wis. Stat. § 970.032(2) and the hearing under that section, are unconstitutional both facially and as applied to Paape. Paape sought an order declaring *these statutes* unconstitutional as applied to Paape, vacating his conviction, dismissing the case and returning his case to juvenile court. (261.) Paape did *not* challenge the constitutionality of the statutes under which he was sentenced.

Therefore, Paape presents the issue of the constitutionality of Wis. Stat. §§ 973.014(1g)(a)2 and 302.114 for the first time on direct appeal. Because he did not raise this issue in the circuit court, Paape has forfeited his challenge to the statutes' constitutionality. By not raising the constitutional basis in the circuit court, Paape has deprived the State of notice of his challenge. He has also deprived this Court of the benefit of the circuit court's reasoning on the matter. *See Dyson v. Hempe*, 140 Wis. 2d 792, 803, 413 N.W.2d 379 (Ct. App. 1987).

Paape concedes that he did not raise his constitutional challenge to these statutes in the circuit court. (Paape's Br. 10.) But, he argues that he "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," and that while an "as applied" constitutional challenge can be

waived, a "facial" constitutional challenge cannot be waived, citing *State v. Cole,* 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 and *State v. Trochinski*, 2002 WI 56, 253 Wis. 2d 38, 644 N.W.2d 891 (Paape's Br. 10–11). In *Cole*, this Court determined that where the defendant had pled guilty, "a 'facial' constitutional challenge was a matter of subject matter jurisdiction and could not be waived" but "an 'as applied' challenge was a non-jurisdictional defect that could be waived." *Cole,* 264 Wis. 2d 520, ¶ 46 (citing *Trochinski*, 253 Wis. 2d 38, ¶ 34 n.15).

However, in this case, the issue is not whether Paape waived his constitutional challenge by pleading guilty; the issue is whether Paape has forfeited his challenges by failing to raise them in the circuit court. Paape confuses the concepts of "waiver" of a constitutional claim as a result of entering a guilty plea, and "forfeiture" as a result of failing to raise a constitutional claim in the circuit court. In this case, Paape has forfeited his constitutional claims by not raising them in his postconviction motion in the circuit court. Because *Cole* and *Trochinski* address the issue of waiver of a constitutional issue in the context of a guilty plea, these cases are inapplicable to this case where Paape had a jury trial and do not support Paape's argument that he is able to challenge the constitutionality of these statutes for the first time on appeal.

In theory, Paape would not have waived a facial challenge to the statutes by pleading guilty or no contest. But, Paape is not actually making a facial challenge to the constitutionality of Wisconsin's life imprisonment/extended supervision eligibility and petition for release to extended supervision statutes for anyone convicted of a Class A felony. "[A] facial challenge to the constitutionality of a statute cannot prevail unless that statute cannot be enforced

"'under any circumstances." *State v. Padley*, 2014 WI App 65, ¶ 16, 354 Wis. 2d 545, 849 N.W.2d 867. (citation omitted). Paape's arguments on appeal are not that these statutes are unconstitutional as to any individual convicted of a Class A felony. Instead, Paape argues that *his particular sentence*—life with the ability to petition for release to extended supervision in 30 years—is unconstitutional because he is a juvenile and these statutes do not take that into account and he does not have a meaningful opportunity for release. (Paape's Br. 10–27.) Thus, Paape is not making a facial challenge because he asserts that the statutes are unconstitutional as applied to him as a juvenile convicted of first degree intentional homicide and sentenced to life in prison with eligibility for extended supervision in thirty years.

Regardless of whether Paape makes facial or as-applied challenges, Paape has forfeited his constitutional challenges to Wis. Stat. §§ 973.014(1g)(a)2 and 302.114. He failed to argue that the statutes were unconstitutional in the circuit court, and he may not raise this issue for the first time on appeal.

II. Paape does not have standing to facially challenge the statutes.

Even if Paape has not forfeited his constitutional challenge to these statutes, Paape does not have standing to facially challenge the statutes. Paape has not shown that he has a suffered an injury in fact as a result of the circuit court's exercise of its discretion under Wis. Stat. § 973.014(1g)(a)2 to sentence him to life with eligibility for extended supervision in thirty years, or an injury in fact as a result of the procedures for petitioning for extended supervision under Wis. Stat. § 302.114.

Wisconsin courts employ "a two-step analysis for a challenge to standing: '(1) Does the challenged action cause the petitioner injury in fact? and (2) is the interest allegedly injured arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?'" *Coyne v. Walker*, 2015 WI App 21, ¶ 7, 361 Wis. 2d 225, 862 N.W.2d 606 (quoting *Wisconsin's Envtl. Decade, Inc., v. PSC,* 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975)). A party has standing to challenge the constitutionality of a statute "if that statute causes that party injury in fact and the party has personal stake in the outcome of the action." *State v. Iglesias*, 185 Wis. 2d 117, 132, 517 N.W. 2d 175 (1994).

In *State v. Barbeau*, Paape's co-defendant challenged the facial constitutionality of Wis. Stat. § 973.014(1g)(a)3 on the grounds that it permitted a sentencing court to impose life imprisonment with no extended supervision. This Court found that Barbeau lacked standing to challenge that subsection because Barbeau was not sentenced to life without an opportunity to petition for release: "[s]ince Barbeau was not found ineligible for release to extended supervision, he was not injured by §973.014(1g)(a)3 and thus, has no standing to challenge it." 370 Wis. 2d 736, ¶ 24.[3]

[3] Although this Court found that Barbeau did not have standing to challenge life imprisonment of juveniles without parole under Wis. Stat. § 973.014(1g)(a), it exercised its discretion to address and deny Barbeau's challenge on the merits, finding that "our supreme court rejected a similar, but slightly different, categorical challenge to the application of the sentencing scheme for first-degree intentional homicide to juvenile offenders in" *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W. 2d 451, and that *"Miller v. Alabama,* __U.S. __, 132 S. Ct. 2455, 2463-64, 183 L. Ed. 2d 407 (2012) does not alter the analysis of *Ninham."* *Barbeau*, 370 Wis. 2d 736, ¶ 25.

Similarly, Paape lacks standing to challenge the constitutionality of the entirety of Wis. Stat. § 973.014(1g)(a) because he did not receive his sentence under Wis. Stat. § 973.014(1g)(a)1., which allows a court to impose a life sentence with the possibility of extended supervision after 20 years, or Wis. Stat. § 973.014(1g)(a)3., which provides for life imprisonment without the possibility of parole. *See Barbeau*, 370 N.W. 2d 736, ¶ 24. Instead, Paape was sentenced under Wis. Stat. § 973.014(1g)(a)2., which gives the circuit court discretion to set the eligibility date for extended supervision. Paape does not allege that the circuit court erroneously exercised its discretion in determining that he will be eligible for extended supervision in 30 years; therefore, he has not shown that he was injured by the court's exercise of its sentencing discretion under that provision.

Further, Paape lacks standing to facially challenge the constitutionality of Wis. Stat. § 302.114 because he has not been injured by this statute. The statute provides for the procedure for petitioning for release to extended supervision after the stated time period in the sentence expires: in this case, on Paape's 45th birthday. Any injury that Paape "may" suffer in thirty years, as a result of the procedure under Wis. Stat. § 302.114 for petitioning for release to extended supervision, is wholly speculative and will occur far in the future; therefore, it is not an "injury in fact."

Paape lacks standing to facially challenge the constitutionality of Wis. Stat. §§ 973.014(1g)(a)2 and 302.114. Therefore, even if his constitutional challenges had merit, his appeal must be denied.

III. Paape has failed to show that his sentence and the statutes he challenges are unconstitutional because under controlling case law, a life sentence imposed on a juvenile for first degree intentional homicide that takes into account the juvenile's "transient immaturity" by providing the ability to petition for release to extended supervision after a set period is constitutional.

If this court chooses to not apply forfeiture, finds that Paape has standing, and addresses Paape's constitutional claims on the merits, his claims still fail.

Paape presents two inter-related issues. First, Paape argues that the statutes under which he was sentenced are facially unconstitutional and therefore his sentence violates to Eighth Amendment and the Due Process Clauses of the United States Constitution. (Paape's Br. 10–17.) Second, Paape argues that the procedure for petitioning for release to extended supervision under Wis. Stat. § 302.114 renders his sentence a "de facto" life sentence because he has no meaningful opportunity for release in thirty years. (Paape's Br. at 17–27.)

Paape frames the issues as follows:

> [W]hether a life sentence with eligibility for extended supervision imposed on a juvenile offender is unconstitutional under the Eighth Amendment, Fifth and Fourteenth Amendment of 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 that 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."

(Paape's Br. 18.)[4] Paape's arguments are without merit.

A. Relevant law and standard of review.

"The constitutionality of a statutory scheme is a question of law that [an appellate court] review[s] de novo." *Ninham*, 333 Wis. 2d 335, ¶ 44. In *Ninham*, the Wisconsin Supreme Court described the heavy burden carried by one challenging the constitutionality of a statute:

> Every legislative enactment is presumed constitutional. As such, [an appellate court] will "'indulge[ ] every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [an appellate court] must resolve that doubt in favor of constitutionality.'" Accordingly, the party challenging a statute's constitutionality faces a heavy burden. The challenger must demonstrate that the statute is unconstitutional beyond a reasonable doubt. In this case, [the defendant] faces the heavy burden of demonstrating that a punishment approved by the Wisconsin legislature, and thus presumably valid, is cruel and unusual in violation of the Eighth Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution.

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[4] The Social Security Administration publishes actuarial tables showing the statistically calculated remaining life of a person at any given age. Paape, who was sentenced at age 15, had 66.64 additional years of life expectancy as of that age (i.e., statistically, he could expect to live to a bit beyond his 81st birthday), so extended-supervision eligibility, in 30 years at 45 years of age, hardly amounts to a life sentence, de facto or otherwise. *See* https://www.ssa.gov/oact/STATS/table4c6.html (last visited Nov. 22, 2016)

Id. (citations omitted). The presumption of the constitutionality of a statute and the burden on the challenger to show it is unconstitutional beyond a reasonable doubt "apply to as-applied constitutional challenges to statutes as well as to facial challenges." *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227.

Under the Eighth Amendment to the United States Constitution, which applies to States through the Fourteenth Amendment, individuals are protected against "excessive sanctions" such as "cruel and unusual punishments." *Ninham*, 333 Wis. 2d 335, ¶ 45. "[T]he Supreme Court has determined that a punishment is 'cruel and unusual' in violation of the Eighth Amendment if it falls within one of two categories: (1) 'those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted' in 1791; or (2) punishment inconsistent with 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* ¶ 46. (citations omitted.)

B. Paape was not sentenced as a juvenile to life without the possibility of parole under a mandatory statutory scheme and therefore, under *Miller*, his sentence imposed under Wisconsin's discretionary statutory scheme is not cruel and unusual punishment.

On appeal, Paape cites several United States Supreme Court cases to support his argument that the statutes under which he was sentenced and under which he may petition for release to extended supervision in thirty years, Wis. Stat. §§ 973.014(1g)(a)2 and 304.114, are unconstitutional. (Paape's Br. 12–19.) But none of the sentencing schemes at issue in those cases are like the statutes under which Paape was sentenced.

Paape cites *Roper v. Simmons,* 543 U.S. 551 (2005), where 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." *Id.* at 578. But in Wisconsin, a court may not impose the death penalty. As the Wisconsin Supreme Court held in *Ninham*, *Roper* does not support a claim where the offender was sentenced to life without parole: "*Roper* does not, however, stand for the proposition that the diminished culpability of juvenile offenders renders them categorically less deserving of the second most severe penalty, life imprisonment without parole. Indeed, the Roper Court affirmed the Missouri Supreme Court's decision to modify the 17-year-old defendant's death sentence to life imprisonment without eligibility for parole." *Ninham*, 333 Wis. 2d 335, ¶ 75 (citation omitted). Here, Paape is two steps removed because he was not even sentenced to life without parole, but instead was sentenced to life with eligibility for extended supervision in thirty years.

Paape also cites *Graham v. Florida*, 560 U.S. 48 (2010), where the Court declared that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82. *Graham* is inapposite to Paape's claims because that case involved juveniles convicted of non-homicide crimes and because Paape's sentence is not a life sentence without the possibility of release on extended supervision. Unlike the Florida sentencing statute at issue in *Graham*, Wisconsin's sentencing statute allows a sentencing court to impose a sentence of life imprisonment with a possibility of release before the end of the term. *See* Wis. Stat. § 973.014(1g)(a). And *Graham* recognized that a State need not guarantee eventual freedom:

> [a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a

> nonhomicide crime. . . . [W]hile the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 75.

Paape primarily relies on the recent Supreme Court decisions in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). But these cases are distinguishable, as well.

In *Miller,* which involved the homicide convictions of two 14-year-old offenders, the Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment "forbids a sentencing scheme that *mandates life in prison without possibility of parole* for juvenile offenders." 132 S. Ct. at 2469 (emphasis added). In *Montgomery,* the Supreme Court clarified that *Miller* announced a substantive rule of constitutional law and a defendant may benefit from its retroactive application on collateral review. 136 S. Ct. at 736.

As to juveniles, the Court extended the prohibition on mandatory life-without-parole sentences to reach homicide convictions as well as convictions for nonhomicide crimes. However, the Court did *not* hold that a sentence must guarantee supervised release before the conclusion of a life sentence; instead, the Court quoted (without rejecting or otherwise criticizing*) Graham's* reminder that "'[a] State is not required to guarantee eventual freedom.'" *Miller***,** 132 S. Ct. at 2469, quoting *Graham*, 560 U.S. at 75. The *Miller* Court expressly recognized the continued authority of a court to sentence a juvenile to a life term without the possibility of parole.

Miller looked at whether the life sentencing scheme deprived a sentencing court of the discretion to sentence a juvenile to any sentence other than a life sentence without the possibility of parole. 132 S. Ct. at 2460, 2475. The Court reasoned that such a scheme "runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id*. at 2460. *Miller* requires a sentencing court to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime of imprisonment." *Id.* at 2469. A discretionary life sentencing scheme that allows for an individualized sentencing determination, such as Wis. Stat. § 973.014(1g)(a), does not run afoul of *Miller*.

Prior to *Miller*, the Wisconsin Supreme Court in *State v. Ninham*, 333 Wis. 2d 335, held that the Eighth Amendment's cruel and unusual punishment clause did not categorically prohibit a court from exercising its discretion under Wis. Stat. § 973.014 to sentence a 14-year-old or younger juvenile convicted of first degree intentional homicide to a life sentence without the possibility of parole. *Ninham*, 333 Wis. 2d 335, ¶ 4. Most recently, this Court

applied *Miller* and affirmed Paape's co-defendant Barbeau's sentence of life in prison with the possibility of release to extended supervision in 35 years, holding that "what the United States Supreme Court in *Miller* found unconstitutional was a statutory scheme that mandates a punishment of life imprisonment without the possibility of parole for a juvenile convicted of intentional homicide. Wisconsin Stat. § 973.014(1g)(a) does not mandate life imprisonment without the possibility of release to extended supervision, but gives the circuit court the discretion to impose such a sentence if circumstances warrant it." *Barbeau*, 370 Wis. 2d 736, ¶ 33.

Further, this Court stated that "although *Miller* was decided after *Ninham*, nothing in *Miller* undercuts our supreme court's holding in *Ninham*" because *Miller* "did not 'foreclose a sentencer's ability to [sentence a juvenile to life without the possibility of parole] in homicide cases,' but required sentencing courts 'to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a life time in prison.'" *Id.* ¶ 32 (citing *Miller,* 132 S. Ct. at 2469.)

In reaching its conclusion, this Court observed that *Miller* builds on the Supreme Court's analysis in *Roper* and *Graham* to hold that a statute that mandates life imprisonment without the possibility of parole for a juvenile convicted of capital murder violates the prohibition against cruel and unusual punishment because "such a statute precludes a judge from considering a juvenile's lessened culpability due to age. [*Miller*, 132 S. Ct.] at 2460, 1267." *Barbeau*, 370 Wis. 2d 736, ¶ 31.

This Court distinguished the mandatory life sentencing scheme without the possibility of parole for a juvenile convicted of first degree intentional homicide under *Miller* from the discretionary life sentencing scheme under Wis. Stat. § 973.014(1g)(a), which allows a circuit court the discretion to impose a life sentence under appropriate circumstances and to determine eligibility for extended supervision. *Barbeau*, 370 Wis. 2d 736, ¶ 33. Because *Miller* only applies to a life sentence without the possibility of parole, this Court declined to apply *Miller* to Barbeau because he was not sentenced to a mandatory life sentence and the circuit court's sentencing discretion was not totally circumscribed. *Id.* ¶ 41. *Miller* does not extend to discretionary life sentences imposed under Wis. Stat. § 973.014.[5] Wisconsin law already requires sentencing

[5] Other courts have also concluded that *Miller* does not extend to discretionary life sentences. *See Croft v. Williams,* 773 F.3d 170, 171 (7th Cir. 2014), ("life sentences for murder are discretionary under Illinois law. This is a critical difference from the situation presented in *Miller,* which considered only 'mandatory life-without-parole sentences for juveniles.'" *Id.* at 171, citing *Miller*, 132 S.Ct. at 2464); *Martinez v. United States*, 803 F. 3d 878, 883 (7th Cir. 2015), *cert denied*, 136 S. Ct. 1230 (2016) ("Because [the juveniles]' life sentences were imposed after an individualized sentencing, and not by statutory mandate, we conclude that the district court did not violate *Miller*."); *United States v. Jefferson*, 816 F.3d 1016, 1018–19 (8th Cir. 2016) ("*Miller* did not hold that the Eighth Amendment categorically prohibits imposing a sentence of life without parole on a juvenile offender" but only prohibits "*mandatory* penalty schemes"); *Bell v. Uribe,* 748 F.3d 857, 870 (9th Cir. 2013) ("Because the sentencing judge did consider both mitigating and aggravating factors under a sentencing scheme that affords discretion and leniency, there is no violation of *Miller*."); *Davis v. McCollum,* 798 F.3d 1317, 1321–22 (10th Cir. 2015) ("*Miller* did not purport to alter the law governing statutory schemes giving the sentencing authority a choice between imposing life with or without possibility of parole on juvenile offenders."); and *State v. Cardeilhac,* 293 Neb. 200, 218, 876 N.W.2d 876 (2016) ("Strictly read, *Miller* forbids only the

courts to make the individualized sentencing determinations for juveniles convicted of first degree intentional homicide that the Supreme Court contemplated in *Miller*.

Miller does not help Paape. His sentence did not provide for life imprisonment without the possibility of release before the end of that term. Instead, the circuit court appropriately exercised its discretion to impose a life sentence with eligibility for release to extended supervision in 30 years. Therefore, Paape was not sentenced under a mandatory life sentence statutory scheme that was prohibited by *Miller* for juvenile offenders.

Wisconsin Stat. § 973.014(1g)(a) provides a sentencing court with three sentencing options for a sentence of life imprisonment: eligibility for release to extended supervision after 20 years; eligibility for release to extended supervision on a date set by the court in more than 20 years; or no eligibility for release to extended supervision. In this case, the sentencing court did not sentence Paape to a life sentence without eligibility for release to extended supervision or to eligibility for release after 20 years. As it was allowed to do under the statute and under existing case law, the sentencing court exercised its discretion to make Paape eligible for release to extended supervision on "a date set by the court": Paape's forty-fifth birthday (250:50.) Nothing in *Graham, Miller* or *Montgomery* suggests that the circuit court's exercise of its discretion to set a date for Paape's eligibility to petition for release to extended

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imposition of a mandatory sentence of life imprisonment without parole on a person under age 18 who has committed a homicide"). *But See State v. Riley,* 315 Conn. 637, 641, 110 A.3d 1205 (2015), *cert. denied,* 136 S. Ct. 1361 (2016); and *State v. Null,* 836 N.W.2d 41, 72 (Iowa 2013) (but recognizing that other courts have "viewed *Miller* more narrowly, holding that it applies only to mandatory sentences of life without parole").

supervision is unconstitutional. Therefore, as applied to Paape, Wisconsin's sentencing statutes do not offend any of the standards set out in *Graham*, *Miller* and *Montgomery*.

And, even more importantly, as described above, this Court has recently rejected Paape's co-defendant's challenge under *Miller* to the discretionary life sentence scheme under Wis. Stat. § 973.014. In *Barbeau*, this Court limited *Miller*'s application to mandatory life sentences. *Barbeau*, 370 Wis. 2d 736, ¶ 41 ("[T]his principle is not at stake here. Barbeau was not sentenced to life in prison without the possibility of parole, and the circuit court's discretion was not totally circumscribed.") This Court's prior decision in *Barbeau* binds its resolution of Paape's claim. *See Cook v. Cook*, 208 Wis. 2d 166, 185–90, 560 N.W.2d 246 (1997) (Court of Appeals lacks power to overrule, modify, or withdraw language from a previously published decision.) Therefore, this Court should reject Paape's claim that the statutory scheme and his sentence violate the constitutional prohibition against cruel and unusual punishment.

C. The sentencing court considered the appropriate factors when exercising its discretion to sentence Paape to a life sentence with eligibility to petition for release to extended supervision in 30 years.

If this Court decides to review the circuit court's discretionary sentencing decision to determine whether it was fair and consistent with the factors associated with sentencing juveniles identified in *Miller,* it must consider whether, in the exercise of its sentencing discretion, the circuit court took into account how Paape, as a 13-year-old boy, was "different" in terms of his "diminished culpability and heightened capacity for change." *See Miller*, 132 S. Ct. at 2469.

Here, the circuit court had significant information available to it as it exercised its sentencing discretion. It presided over the jury trial of Paape and also the plea and sentencing of his co-defendant Barbeau. (246; 247; 248; 249; 250:42.) At sentencing, the circuit court heard and considered the statements from the children and grandchildren of the victim, many of whom focused on Paape's youth and the need to take that into account when sentencing him for the first degree intentional homicide. (250:2–134.) The circuit court was also presented with information from the defense about Paape's difficult childhood through letters from family members, which described an absent father but a supportive mother, sister and grandmother. (250:31–32.) Further, the defense presented testimony at both the reverse waiver hearing and at the jury trial from the doctor who conducted a psychological evaluation of Paape, finding that Paape had an "extreme need for acceptance," was "a follower" and was someone who was easily manipulated and mistreated. (250:33.) While in custody awaiting trial, Paape completed his eighth grade education despite being in isolation. (250:34–36.) His mental health records showed that he was "highly depressed, lonely and anxious" while confined. (250:36.) His defense counsel told the court that Paape had, while confined, read articles "about juveniles who made terrible mistakes and spent many years in custody, but turned it around and were successful upon release" and stated that Paape "hopes to prove that he, too, can be one of these success stories once he's released." (250:36–37.)

Defense counsel emphasized that under the statute, the date that Paape would be eligible for release to extended supervision was not "automatic," but that Paape would need to petition for release and prove "by clear and convincing evidence that he is not the danger to the public," and that the court could impose conditions if it grants Paape release

on extended supervision. (250:39.) Defense counsel also presented and the court considered testimony from a doctor regarding adolescent brain development, indicating that a 13-year-old has an undeveloped brain with an "inability to control the impulses to use executive function and to use reasoning." (250:39–40.)

Therefore, there was a plethora of testimony and information in the record that the circuit court considered before it sentenced Paape. In particular, the circuit court expressly considered Paape's age and the resulting diminished culpability when he killed the victim, Barbeau's great-grandmother. The circuit court made its sentencing decision, setting the eligibility date for Paape to file a petition for release to extended supervision, consistent with its duty to impose the minimum amount of confinement in light of the need to protect the public, the gravity of the offense, and Paape's rehabilitative needs.

In discussing the egregious nature of Paape's crime, the circuit court observed that it "is clearly at the high end of severity and, *but for the fact that this individual is a juvenile,* I would be strongly considering the sentence of a life sentence with no possibility of parole." (250:42–43.) (emphasis added.) The court continued by discussing "the minimum sentence to address the severity of the offense and to protect the public," first examining Paape's character and the fact he was "approximately three months away from his 14th birthday" at the time he committed the crime. (250:43–44.) The court looked at Paape's upbringing and background, including that his father is a criminal who did not pay child support and also acknowledged that according to "testing that was done and the general information provided to the court concerning adolescent brain development, [he] is someone who is easily manipulated, someone with a very strong need for acceptance" who

"obviously did not make the right choices on that particular day." (250:44–45.)

The court discussed in detail the fact that Paape was "still an adolescent" who could be expected to have "changes" as his brain function improved, but found that it was unknown whether as he matured he would "continue to follow along with others in engaging in horrendous actions." (250:47.) Although punishment was not the court's primary concern in sentencing, the court found that "there is only one punishment available under statute" and "[t]he only issue is when there may be eligibility for parole." (250:48.) The court emphasized that "the issue of protection of the public is foremost in the mind of this court," with deterrence of both Paape and others also a consideration in the court's sentencing decision. (250:48.) The court found that "young people need to know there will be serious consequences for what they do when they take someone's life, particularly in such a horrendous fashion." (250:49.)

The court further found that compared to his co-defendant Barbeau, "there is less culpability on the part of Mr. Paape, but that is a small matter of degree in this particular instance" because although Barbeau took "the initial actions," Paape "followed in a way that no person should consider doing." (250:49.) After sentencing Paape to life imprisonment with eligibility for release to extended supervision after 30 years, the court addressed Paape:

> THE COURT: Now, Mr. Paape, obviously this is a long time that you will be facing in prison. And, indeed, you can decide to just let things get worse over time or you can decide to make the best of it. Obviously, you have had some opportunity to read about individuals who have made the best of their situation even in long-term incarceration. I hope you will follow the same.

(250:52.)

The record supports a finding that the circuit court properly assessed the particularly serious nature of the crime and found that, under the circumstances, it was entirely appropriate to place primary weight on the gravity of the crime. But the circuit court did not rest its sentence solely on the gravity of the offense. It also took into account the other sentencing considerations including protection of the public, Paape's youth, level of culpability, and other pertinent character traits. The circuit court specifically addressed Paape as a juvenile and implored him to try to use his time in prison to rehabilitate himself and become eligible for release on extended supervision.

The circuit court sentenced Paape applying the considerations required by *Miller* for sentencing juveniles for first degree intentional homicide. The circuit court closely examined and considered the gravity of the offense and Paape's character, expressly taking into account his youth and susceptibility to pressure, but found that his actions were culpable and that punishment was required. After fully considering all of this information, the circuit court exercised its discretion to make Paape eligible for release to extended supervision after 30 years, on his 45th birthday, finding that "[t]he circumstance involved in this particular instance is one that does require this at a bare minimum." (250:50.) The circuit court's exercise of sentencing discretion simply did not violate the Eighth Amendment's prohibition against cruel and unusual punishment as circumscribed in *Miller*.

D. Paape has not shown that his due process rights are violated, because under Wis. Stat. §§ 973.014(1g)(a)2 and 302.114, Paape has a meaningful opportunity for release in thirty years when he files a petition for release to extended supervision and presents evidence to that he is no longer a danger to the public.

For the first time on appeal, Paape argues that Wis. Stat. §§ 973.014(1g)(a)2 and 302.114 violate his right to due process because they do not provide a him a "meaningful opportunity for release which the decisions in *Graham, Miller* and *Montgomery* mandate for juveniles sentenced to life imprisonment even in discretionary sentencing regimes such as Wisconsin's." (Paape's Br. 18–19.) In support of his claim, Paape outlines the procedures under Wis. Stat. § 302.114 for petitioning for release to extended supervision and claims that these procedures provide no "meaningful opportunity for release" because they do not take into consideration "the transient immaturity of youth, the diminished culpability of children, and the attendant circumstances of children." (Paape's Br. 19–21.) Paape argues that the statute is 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" because "the gravity of the offense will always trump any other consideration." (Paape's Br. at 21–22.) Paape's argument is wholly speculative and without merit.

While under *Miller,* a court when sentencing a juvenile to life imprisonment must take into account their youth and how that may "counsel against irrevocably sentencing them to a life time in prison," the Supreme Court in *Miller* did not "foreclose a sentencer's ability to [sentence a juvenile to life

without the possibility of parole] in homicide cases. *Barbeau* 370 Wis. 2d 736, ¶ 32 (citing *Miller,* 132 S. Ct. at 2469.) Here, the circuit court complied with *Miller* when it took Paape's youth into account when sentencing him to life with the possibility of release to extended supervision in thirty years. However, Paape has no due process liberty interest in discretionary parole, *see State v. Setagord*, 211 Wis. 2d 397, 413, 565 N.W.2d 506 (1997) and, when Paape is eligible to petition to the court for release to extended supervision in 2043, he will have a full opportunity under Wis. Stat. § 302.114 to present evidence that he is "not a danger to the public." Paape's argument that the court will not take into account his age when the crime was committed and the years that have passed since that time simply has no arguable merit.

As Paape admits in his brief, the United States Supreme Court has said that allowing juvenile offenders to be considered for parole is a means "to identify 'juveniles whose crimes reflect only transient immaturity – and who have since matured.' *Montgomery*, 136 S. Ct. at 735." (Paape's Br. 23–24.) When sentencing Paape under Wis. Stat. § 973.014(1g)(a)2, the circuit court did exactly that. As set forth in detail in part C of this brief, the circuit court devised the sentence it imposed with Paape's youth and "transient immaturity" in mind, shaping Paape's sentence providing for release to extended supervision after thirty years to allow him to turn things around while in prison. The circuit court specifically stated that because the horrendous crime was "clearly at the high end of severity," it would have considered a life sentence with no possibility for parole "but for the fact that this individual is a juvenile[.]" (250:42–43.) The circuit court's sentencing decision, making Paape eligible for extended supervision in thirty years, reflected its recognition of Paape's youth and its hope that

he would be able to develop and rehabilitate himself while in prison.

Paape's claim that Wis. Stat. § 302.114 denies him due process fails because that statute *does* allow consideration that Paape's crime reflected his "transient immaturity." This is because, when Paape is eligible to petition for extended supervision under Wis. Stat. § 302.114, he must show that he is "not a danger to the public." Wis. Stat. § 302.114(5)(cm). When the circuit court sentenced Paape to life with an opportunity to petition for release to extended supervision in thirty years, it anticipated Paape's opportunity to file such a petition, telling Paape that while he was in prison, he could "decide to just let things get worse over time or . . . to make the best of it" and that the court hoped that he would make "the best of [his] situation even in long-term incarceration." (250:52.) The circuit court advised Paape that if he could turn things around while he served his prison sentence, he would have an opportunity to present evidence of his rehabilitation and show that he was "not a danger to the public." Wisconsin Stat. § 302.114 allows for consideration of the fact that Paape's crime reflected his immaturity, as demonstrated in this case by Paape's opportunity to present evidence in his petition for release to extended supervision that his conduct while in prison demonstrates that he has matured, he has been rehabilitated, and he is no longer a danger to the public.

On appeal, Paape argues that his opportunity for release in 2043 is not meaningful because "at the time he files his first petition thirty years from his fourteenth birthday [he] will be without counsel, indigent and without access to experts" and "will be unable to gather educational, medical and legal paperwork, decades old, from behind a prison cell" and thus will not have a "meaningful opportunity to prove his offense was committed because he

was young, immature and less culpable than in his co-defendant, Barbeau." (Paape's Br. at 27.) These claims are pure speculation. The procedure for petitioning for extended supervision under Wis. Stat. § 302.114 provides a legal avenue to achieve release to extended supervision by filing a petition and presenting evidence that the petitioner, after serving prison time, "is not a danger to the public." *See* Wis. Stat. § 302.114(5)(cm). Paape's speculative allegations that he will not be able to offer such proof in thirty years are insufficient to prove that his life sentence with possibility of release to extended supervision in thirty years is unconstitutional.

Further, Paape's argument that "his sentence creates an expectancy of release in thirty years and it must be enforced" is simply false. Paape does not have a guaranteed right to release to extended supervision. *Miller* does not require that a life sentence guarantee supervised release before the conclusion of a life sentence: "'[a] State is not required to guarantee eventual freedom.'" *Miller***,** 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 75.)

A circuit court does not set an extended supervision eligibility date in a vacuum, but based on the exercise of its individualized sentencing discretion. Both Wis. Stat. § 973.014 and Wisconsin case law have long required circuit courts to make appropriate individualized sentencing determinations that the Supreme Court contemplated in *Miller*. "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971); *see also State v. Gallion*, 2004 WI 42, ¶ 23, 270 Wis. 2d 535, 678 N.W.2d 197. When assessing these primary sentencing factors, courts also consider:

> the vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Borrell, 167 Wis. 2d 749, 774, 482 N.W.2d 883 (1992). These same sentencing principles apply to a circuit court's extended supervision determination with respect to life sentences imposed under Wis. Stat. § 973.014. *See id.*, 167 Wis. 2d at 774.

The circuit court took into account Paape's "transient immaturity" before sentencing him and when it imposed Paape's sentence. In imposing sentence on Paape, the circuit court explained its sentencing rationale at length and concluded by finding that "[t]he circumstance involved in this particular instance is one that does require this at a bare minimum." (250:50.) The circuit court's discretionary determination to impose a life sentence with eligibility for release to extended supervision on Paape's forty-fifth birthday did not deprive Paape of his due process rights. Paape will receive a meaningful opportunity for release in thirty years, after he has served the sentence the court determined was warranted for the first degree intentional homicide he committed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's judgment of conviction.

Dated this 23rd day of November, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General
State Bar #1031600

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9224
(608) 266-9594 (Fax)
murphyac@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 9150 words.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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. Stat. § (Rule) 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 this 23rd day of November, 2016.

/s/Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General