STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2015AP2462-CR

NATHAN J. PAAPE

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING A MOTION FOR POST-CONVICTION RELIEF HONORABLE TIMOTHY VAN AKKEREN , PRESIDING, ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY,

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. PAAPE HAS NOT FORFEITED HIS FACIAL CHALLENGES TO WIS. STATS. §§ 973.014(1g)(a)(2) and 302.114.

The State argues that Paape has forfeited his facial challenge to the constitutionality of Wisconsin Statutes §§ 973.014(1g)(a)(2) and 302.114. This contention is without merit. (State's brief at 9-12) Although Paape is a juvenile sentenced to life with the possibility of "parole", or in fact the possibility of extended supervision, in 30 years, he is not asking this court to declare the statutes as unconstitutional as applied to him. Paape argues that the statutes above are unconstitutional for all juvenile offenders tried and convicted in adult court and sentenced as if they were adults under statutes that render their sentences "de facto" life sentences because the statutory apparatus provides no meaningful opportunity for release. See Graham v Florida, 560 U.S. 48, 75 (2010). As to these offenders, these statutes are clearly unconstitutional as violating the Eighth, Fifth, and Fourteenth Amendments to the United States Constitution.

As such, these statutes are unconstitutional not only because of the treatment of a whole class of juvenile lifers, but these statutes are unconstitutional because they affect adult offenders as well who under these statutory schemes also suffer de facto life sentences even when they're granted a possibility of seeking release on extended supervision sometime in the future.

Admittedly Paape's constitutional challenge centers on the plight of juvenile offenders sentenced to de facto life sentences, nevertheless there is an argument that these statues are unconstitutional in terms of de facto life sentences for adult offenders convicted of 1st degree intentional homicide with an eligibility for extended supervision as well. Paape has never claimed in his brief that he only speaks for himself and only claims that the statute are unconstitutionally applied to him and him alone. Paape's challenge is a facial challenge because he speaks for all juvenile lifers, not just himself.

Both these statues are null and void. 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. And if declared unconstitutional, these statutes will be declared unconstitutional as to all offenders convicted of 1st degree intentional homicide, juveniles and adults, who receive a life sentence and are given a date for eligibility to apply for release on extended supervision.

All of this being said. This court has the authority to consider all of Paape's claims. The concepts of waiver or forfeiture are rules 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).

II. PAAPE HAS STANDING TO MAKE HIS CONSTITUTIONAL CHALLENGES.

Under, Wis. Stats. §§ 973.014(1g)(a)(2) and 302.114, Paape has absolutely no meaningful opportunity for release because the deck is stacked against him. His challenge is wholly different from the challenge made by his co-defendant in State v Barbeau , 370 Wis. 2d 736 ¶24. Barbeau only challenged the facial constitutionality of Wis. Stats. § 973.014(1g)(a)3 on the grounds that it permitted a sentencing court to impose life imprisonment with no extended supervision. Id. Paape has standing because he challenges not only the sentencing statute but also Wis. Stats. 302.114 which provides him with no meaningful opportunity for release because it does not comport with the standards for providing a constitutionally meaningful opportunity for release as envisioned by 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).

This is not a speculative claim. This is a realistic claim in light of the fact that 30 years into the future under Wis. Stats. 302.114 he has no chance for release. In this regard, the landmark decision of the Massachusetts Supreme Judicial Court in Diatchenko v. Dist. Attorney for the Suffolk Dist. (Diatchenko III), 27 N.E.3d 349, 353 n.3 (Mass. 2015) is so important to Paape's argument that his sentence is a de facto sentence because the above statute denies him any meaningful opportunity for release. In Diatchenko III, the court's majority held that, given the significance of a 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.

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. The 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. Massachusetts may seem like an outlier right now. However, Graham, Miller, and Montgomery, require nothing less than what Massachusetts 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.

In short, Paape has clear standing to bring his challenges because he is injured by the lack of due process protections as set forth above. Wis. Stats. 302.114, in particular, does not provide right to counsel, access to experts and any realistic or meaningful opportunity to gather educational, medical and legal paperwork, decades old, from behind a prison cell.

Barbeau did not raise this argument. Paape has raised it and has standing to raise it because one can only conclude that his present sentence is a de facto life sentence because he and all juvenile life offenders lack a meaningful opportunity for release rendering Wis. Stats. §§ 973.014(1g)(a)2 and 302.114 in violation of the Eight Amendment as well as the Due Process Clause of the Fifth and Fourteenth Amendment and the holdings of the United States Supreme Court 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)

III. PAAPE HAS SHOWN THAT UNDER EXISTING LAW HIS SENTENCE FAILS TO PROVIDE A MEANINGFUL POSSIBILITY OF RELEASE.

Life sentences may offer the possibility of release, but this opportunity may not rise to the level of being "meaningful." As one legal commentator argues, "[i]f the chance of release is not meaningful under a state's existing parole system, then a sentence of life with parole is equivalent to an LWOP sentence for Eighth Amendment purposes." See Sarah French Russell, Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment, 89 Ind. L.J. 373, 377 (2014).

The reasoning and holding in Graham and Miller require a meaningful opportunity to obtain release for all juvenile offenders regardless of their sentence or offense. In other words, those sentenced to lengthy term-of-years sentences and to life with the possibility of parole should be entitled to the same opportunities for release as those sentenced to the more extreme sentence of LWOP. It would be illogical for the Court to create a legal standard that gives those sentenced to the more serious sentence of LWOP a more realistic chance of release than those sentenced to life with the possibility of parole. See State v. Null, 836 N.W.2d 41, 72 (Iowa 2013) ("We conclude that Miller 's principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under Miller."). Furthermore, the Supreme Court anticipated that this requirement would apply to all life sentences. The Graham opinion specifically says that when a state "imposes a sentence of life it must provide . . . some realistic opportunity to obtain release before the end of that term." Graham v Florida, 560 U.S. 48, 82 (2010). By referring to "a sentence of life" rather than "a sentence of life without parole," the reasoning confirms that Graham's holding goes far beyond those sentenced to LWOP.

Finally Paape also contends that the State has failed to adequately address his argument that growing national consensus exists on the unconstitutionality of discretionary life sentences with no meaningful opportunity for release. (See Defendant-Appellant's Corrected Brief at 23-27). The emerging consensus favors the legitimacy of Paape's arguments.

CONCLUSION

Paape renews all claims and arguments raised in his initial brief. (Defendant-Appellant's Corrected Brief at 10-28). He is entitled to a sentence which is constitutional and imposed under statutes which are constitutional. His 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. He is entitled to a new sentencing hearing under constitutional statutes which comply with Supreme Court directives which guarantee a meaningful opportunity for release.

Dated at Milwaukee, Wisconsin, 7th day of December, 2016.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1826 words.

Dated at Milwaukee, Wisconsin, this 7th day of December, 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 served on today's 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 7th day of December, 2016.

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