STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1058

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CURTIS L. WALKER,

Defendant-Appellant.

On Appeal From an Order Denying a Motion for
Postconviction Relief Under Wis. Stat. § 974.06,
Entered in Milwaukee County Circuit Court,
the Honorable J.D. Watts, Presiding.

AMICUS BRIEF OF THE UNIVERSITY OF WISCONSIN LAW SCHOOL FRANK J. REMINGTON CENTER

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AMICUS BRIEF OF THE FRANK J. REMINGTON CENTER UNIVERSITY OF WISCONSIN LAW SCHOOL

ARGUMENT

Curtis Walker's Defacto Life-Without-Parole Sentence for a Crime Committed as a Juvenile is Excessive and Disproportionate, Violating Both the United States and Wisconsin Constitutions.

I. Introduction and Summary of Argument

During the last twelve years, the United States Supreme Court has repeatedly held that developmental differences between children under age 18 and adults is Constitutionally significant for purposes of sentencing. ***Roper v. Simmons***, 543 U.S. 551 (2005), ***Graham v. Florida***, 560 U.S. 48 (2010), ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455 (2012), ***Montgomery v. Louisiana***, 136 S.Ct. 718 (2016).

This evolution of Constitutional principles governing sentencing, and its applicability to numerous Wisconsin inmates, has prompted the Remington Center at the University of Wisconsin Law School to create a Juvenile-Life-Without-Parole project with the goal of aligning Wisconsin sentencing practices with these Constitutional principles.

Mr. Walker contends that his sentence, deferring parole eligibility for 78 years, violates the "cruel and unusual punishment" prohibition in the Eighth Amendment to the United States Constitution, and Article I, §6 of the Wisconsin Constitution. Amicus agrees.

Cruel and unusual punishment analysis has two parts. The court considers "objective indicia of consensus," such as legislative enactments and practice, and then determines whether a penalty is disproportionate punishment "in the exercise of our own independent judgment." ***Roper,*** 543 U.S. at 564. ***State v. Barbeau,*** 2016 WI App 51 ¶46, 270 Wis. 2d 736, 833 N.W. 2d 520.

After a brief summary of the United States Supreme Court cases governing the issues in this case, this amicus brief will address both parts of the cruel and unusual punishment analysis.

In ***Roper***, the landmark decision abolishing the death penalty for juvenile offenses, the United States Supreme Court relied heavily on scientific advances in the fields of psychology, neuroscience, medicine

and other social sciences to establish the Constitutional principle that juveniles cannot reliably be classified among the worst offenders. 543 U.S. at 569-570 (2005). The Court identified three distinct differences between juvenile and adult offenders that are highly relevant to sentencing:

First, a "lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions." Therefore, a child is less culpable for his or her crimes. ***Id***., 569. (quoting ***Johnson v. Texas***, 509 U.S. 350, 367 (1993)).

Second, juveniles are more susceptible to negative influences and pressures, including peer pressure," giving them a "greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." ***Id***. 569-570.

Third, the juvenile's character is not as well formed as that of an adult, meaning "a greater possibility exists that a minor's character deficiencies will be reformed." ***Id.*** 570.

The court concluded that the accepted penological justifications for the death penalty apply to juveniles with less force than to adults. It concluded that the death penalty violates the Eighth Amendment when applied to offense committed by children under age 18. ***Id***. 571-572.

These same differences between children and adults were the foundation for the Supreme Court's decision in ***Graham v. Florida***, 560 U.S. 48, in which the court categorically banned life-without-parole sentences for nonhomicide offenses.

In ***Graham***, the court linked developmental differences between adults and children to the recognized justifications for sentencing. In light of the reduced culpability of children, the case for retribution weakened.

Deterrence did not justify a life sentence because juvenile impulsivity makes deterrence less effective. Life-long incapacitation is a legitimate factor only if the court can assume that the juvenile "forever will be a danger to society," whereas the "characteristics of juveniles make that judgment questionable." Finally, rehabilitation is entirely forsworn when the sentence results in life-long imprisonment. ***Id.,*** 71-74.

In ***Miller v. Alabama***, 132 S. Ct. 2455, the court held that the nature of the crime is less important than the distinctive traits of children. It concluded that ***Graham***'s reasoning implicates any life-without-parole sentence imposed on a juvenile." ***Id.***, 2465.

The ***Miller*** court categorically barred mandatory juvenile-life-without-parole for homicide, and provided explicit guidance for discretionary decisions. Noting "children's diminished culpability and heightened capacity for change," it required sentencing courts to consider developmental differences and "how those differences counsel against irrevocably sentencing them to a lifetime in prison." It concluded, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." ***Id***. 2469.

Finally, in ***Montgomery v. Louisiana***, 136 S.Ct. 718, the court held that ***Miller*** had established a retroactive, substantive Constitutional rule and it further clarified ***Miller's*** application to discretionary sentences. It reasoned that the ***Miller*** decision was substantive, not procedural, because:

> [E]ven 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."

136 S. Ct. 733.

These decisions are the basis for consideration of all of the issues in this case.

II. Objective Indicia of Societal Standards Demonstrate a Consensus Against Life-Without-Parole Sentences for Children Both Nationally and in Wisconsin.

Data from the Wisconsin Department of Corrections, cross-checked with the Wisconsin Circuit Court Access website, demonstrate that during the last thirteen years, sentencing practices in Wisconsin have moved away from extreme sentences for children.

The Remington Center has determined that Mr. Walker is one of 16 juvenile offenders sentenced during the thirteen-year period from 1991 to 2004, to life-without-parole or life with eligibility for parole/extended supervision deferred for 70 years or more. During the last thirteen years, however, only one juvenile offender in Wisconsin has received such a harsh sentence. Thus Wisconsin's evolving societal standards reject such extreme sentences for children under age 18.

Nationally, the ***Miller*** decision prompted many states to re-think their juvenile sentencing laws. In 2011, only five states banned life-without-parole sentences for children. ***See*** "***Righting Wrongs: The Five-Year Groundswell of State Bans on Life Without Parole for Children,***" at fairsentencingofyouth.org.

Today, that number has quadrupled. Nineteen states and the District of Columbia ban all juvenile-life-without-parole sentences. ***See "States That Ban Life Without Parole for Children"*** at fairsentencingofyouth.org/reports-and-research/sentenceeliminated**.**
The nation's evolving societal standards reject extreme sentences for children under age 18.

Both nationally, and in Wisconsin, the "objective indicia" of societal standards weigh strongly in favor of determining that Mr. Walker's sentence is Constitutionally-prohibited cruel and unusual punishment.

III. The Principles Underlying the Supreme Court's Juvenile Sentencing Cases Establish Constitutional Protection from All Extreme Sentences for Juveniles, Whether Mandatory or Discretionary, and Whether DeJure Life or DeFacto Life.

Given the decisions in ***Roper, Graham, Miller,*** and ***Montgomery***, this case raises three specific issues:

1. Do the decisions in ***Miller*** and ***Montgomery*** apply to discretionary sentencing decisions?

2. Do the decisions in ***Miller*** and ***Montgomery*** apply to defacto life-without-parole sentences?

3. Did the sentencing court properly determine that Mr. Walker was one of those rare juvenile offenders whose crime reflected permanent incorrigibility?

The briefs of the parties sometimes conflate these issues. This brief addresses each issue separately.

A. ***Miller's*** substantive constitutional rule applies equally to all juvenile-life-without-parole sentences, whether imposed under a mandatory or discretionary sentencing scheme.

Miller held that a life-without-parole sentence mandated by statute for a juvenile offender was cruel and unusual punishment. But it did not

stop there. It issued definitive instructions to courts considering discretionary life-without-parole sentences: "Although we do not foreclose a sentencer's ability to [order juvenile-life-without-parole] in homicide cases, we ***require*** it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469 (emphasis added).

The Court clarified ***Miller's*** application to discretionary sentences further in ***Montgomery v. Louisiana***, in which the court held that ***Miller*** had established a substantive Constitutional rule. It reasoned:

> 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."

136 S. Ct. 733.

Recent decisions on certiorari petitions further demonstrate the Supreme Court's intention to subject discretionary juvenile-life-without-parole decisions to Constitutional scrutiny. Just a few months ago, the Court granted petitions for certiorari, vacated sentencing orders, and remanded the cases of five petitioners sentenced to juvenile-life-without-parole under Arizona's discretionary sentencing scheme. *See* ***Tatum v. Arizona***, 580 U.S. __, 137 S.Ct. 11 (mem.) (Oct. 31, 2016), ***Purcell v. Arizona***, 15-8842; ***Najar v. Arizona***, 15-8878; ***Arias v. Arizona***, 15-9044; and ***DeShaw v. Arizona***, 15-9057. Though Arizona's sentencing scheme is a discretionary one, Justice Sotomayor explained in ***Tatum***:

> It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the

> imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child whose crimes reflect transient immaturity or is one of those rare children whose crimes reflect irreparable corruption for whom a life without parole sentence may be appropriate.

Tatum, 137 S. Ct., 13 (Sotomayor, J., concurring).

Even before ***Montgomery***, at least six state supreme courts had concluded that the principles of Miller applied to discretionary sentences. ***State v. Riley***, 315 Conn. 637, 110 A. 3d 1205 (2015); ***State v. Seats***, 865 N.W. 2d 545 (Iowa 2015); ***Aiken v. Byars***, 410 S.C. 534, 765 S.E.2d 572 (2014); ***State v. Long***, 8 N.E.3d 890 (Ohio 2014), ***People v. Gutierrez***, 324 P. 3d 245 (Cal. 2014); ***Bear Cloud v. State***, 334 P. 3d 132 (Wyo. 2014).

The decision in ***Montgomery*** has prompted at least three other state supreme courts to conclude that ***Miller*** standards govern discretionary sentences. In ***Veal v. State***, 298 Ga. 691, 784 S.E. 2d 403 (2016), the court noted that "had this appeal been decided before ***Montgomery***," it might have held ***Miller*** inapplicable to a challenge to a discretionary sentence. "But then came ***Montgomery***," the court said. Based on ***Montgomery***'s clarification of the substantive nature of the Constitutional requirements set forth in ***Miller***, the court ordered resentencing of the juvenile offender. ***Id.*** 699-703.

Similarly, the Oklahoma Supreme Court recently held:

> There is no genuine question that the rule in ***Miller*** as broadened in ***Montgomery*** rendered a life without parole sentence constitutionally impermissible, notwithstanding the sentencer's discretion to impose a lesser term, unless the sentence takes into account how children are

> different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Luna v. State, ¶14, 2016 OK CR 27, 387 P. 3d 956. [1]

As the Florida Supreme Court concluded in ***Landrum v. State***, 192 So. 3d 459 (2016), the basis for the cruel and unusual punishment decisions "does not emanate from the mandatory nature of the sentence imposed." ***Id.*** 466. Rather, the reduced culpability and the unparalleled potential for redemptive change in children are the golden threads running throughout the Court's juvenile sentencing decisions. The substantive Constitutional standard, first established in ***Miller***, is applicable to discretionary sentencing of juvenile offenders.

B. ***Miller's*** substantive constitutional rule applies equally to dejure and defacto life sentences.

Barring legal intervention, Mr. Walker will die in prison. He does not become eligible for parole until he is 95 years old, 26.5 years beyond his life expectancy. U.S. Department of Health and Human Services, ***Vital Statistics of the United States, 1994 Reports, Life Tables***. https://www.cdc.gov/nchs/data/lifetables/life94_2.pdf. (accessed April 20, 2017).[2]

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[1] At page 12 of its brief, the state cites ***State v. Cardeilhac***, 218 N.W. 2d 786 (Neb. 2016) as holding that ***Miller*** does not extend to discretionary life sentences. Actually, the court reached its decision on other grounds, concluding: "We need not decide whether ***Miller*** applies." ***Id.***, 222.

[2] The life expectancy of an inmate sentenced to life in prison is less. For juveniles sentenced to life, the average life expectancy is 50.5 years. ***Kelly v. Brown***, 851 F. 3d 686, 688 (7th Cir. 2017); (Posner dissent).

The principles governing the Supreme Court's decisions make no distinction based on labels or technical differences between the kinds of sentences that result in a juvenile offender's death in prison. Whether the court explicitly denies parole, delays parole eligibility beyond the offender's life expectancy, or imposes a life-long term of years, the result is the same: the juvenile offender will die in prison.

As one commentator noted, the differences in types of sentence is merely a matter of semantics:

> because the reality is the same either way. All sentencing courts would have to do is stop issuing [life-without-parole-sentences] and instead start sentencing those same juveniles to 100 years, and the problem is solved. Gone would be the idea that juveniles are different, less culpable, and more deserving of a meaningful opportunity for release. Gone would be the incentive to rehabilitate. Gone would be ***Graham***.

Leane Palmer, ***Juvenile Sentencing in the Wake of Graham v. Florida***, 17 Barry L. Rev. 133, 147 (2011).

State supreme courts throughout the country have agreed that a life-long delay in parole eligibility creates a defacto life sentence. The mitigating qualities of youth are the "same concerns [that] apply to sentences that are the practical equivalent of life without parole . . . The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence." ***State v. Zuber,*** 152 A. 3d 197, 227 N.J. 422 (2017). *See also*, ***State v. Ramos***, 387 P. 3d 650, (2017), ***State v. Moore***, 2016 Ohio 8288, ___ N.E.3d ____; ***Casiano v. Commissioner of Corrections,*** 317 Conn. 42, 115 A. 3d 1031 (2015); ***State v. Null***, 838 N.W. 2d 41 (Iowa, 2013); ***People v. Caballero***, 55 Cal. 4th 262, 282 P. 3d 291 (2012).

Mr. Walker's sentence is the functional equivalent of life-without-parole, and is therefore governed by the decisions in ***Miller*** and ***Montgomery.***

C. The trial court failed to consider Mr. Walker's age and all its attendant characteristics before sentencing him to die in prison.

The standard for discretionary sentencing of juvenile offenders for homicide is set forth in ***Miller*** and ***Montgomery***: "we require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." ***Miller,*** 2469. "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. 733.

The import of these cases is that the sentence must reflect the child's background, character, and potential for change. It is not sufficient that a sentencer simply considers the mitigating effect of youth before imposing a sentence. Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 Conn. L. Rev. 1121, 1129 (2016).

Nor can a sentencer justify a life without parole sentence simply because a child has committed a serious or shocking offense. ***Adams v. Alabama***, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) quoting ***Roper***, 543 U.S. 570: ("[T]he gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'").

In this case, the court referenced Mr. Walker's traumatic childhood, saying it wondered "if I personally could have survived" that childhood. (41:27). It spoke philosophically about society's failure to effectively provide better opportunities to "young people such as yourself, young African American males" who turn to crime at an early age. It stated a hope that "some day we will find help for human beings to get over this and become productive citizens." (41:29).

However, it concluded that given the gravity of the offense, that a life sentence with parole eligibility deferred until the year 2071, was appropriate. (41:31-32).

What the court failed to recognize at sentencing was the significance of Curtis' immaturity. It did not mention his age. It hoped for effective treatment, but overlooked the role of maturation. It did not consider the fact that "a greater possibility exists that a minor's character deficiencies will be reformed." ***Roper,*** 543 U.S. at 570**.** And it erroneously based its decision almost solely on the gravity of the offense. ***Roper,*** 543 U.S. at 570.

The court's sentencing remarks demonstrate it did not consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" as required by ***Miller,*** 2469. In fact, instead of determining that Curtis was "irreparable corrupt," it found that he had the capacity to "develop meaningful relationships that may someday help you to live differently to live a better life." (41:30).

Given the court's sentencing statement, Mr. Walker's defacto juvenile-life-without-parole sentence is unconstitutionally cruel and unusual.

D. This court is not bound by the pre-***Miller*** decision in ***State v. Ninham***. Nor is it bound by the holding in ***State v. Barbeau*** that the sentencing statute is not facially unconstitutional.

Neither the decision in ***State v. Ninham***, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451, nor the decision in ***State v. Barbeau***, 2016 WI App 51, 370 Wis. 2d 73, 883 N.W. 2d 520, govern this case. ***Ninham*** categorically challenged the practice of sentencing ***any*** 14-year-old to juvenile-life-without-parole, and ***Barbeau*** argued that Wisconsin's sentencing statutes were facially unconstitutional. ***Ninham***, ¶3; ***Barbeau,*** ¶¶1, 23.

Mr. Walker's claim is not a categorical challenge or a challenge to the facial validity of the sentencing statute. It is limited to his own particular sentence.

Additionally**,** ***Ninham*** was decided before the United States Supreme Court decided ***Miller*** and ***Montgomery***. It distinguished the decision in ***Graham*** on the ground that "juvenile offenders who commit homicide lack the second layer of diminished moral culpability on which the ***Graham*** court based its conclusion." ***Ninham,*** ¶76. However, in ***Miller***, the court found that the distinction between homicide and non-homicide crimes was legally insignificant:

> But none of what [***Graham***] said about children – about their distinctive (and transitory mental traits and environmental vulnerabilities – is crime-specific. . . . So ***Graham***'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

Miller at 2465. Thus, contrary to the court's conclusion in ***Ninham***, juvenile homicide offenders must be credited with lesser culpability at sentencing.

No Wisconsin appellate court has yet decided the issues raised in this case. This court must independently determine, applying the law to the facts of the case, the issues raised in this appeal.

CONCLUSION

Because the sentencing court did not "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," when it sentenced Curtis Walker, his defacto life-without-parole sentence violates the Eighth Amendment to the United States Constitution and Wisconsin Constitution, Article I, §6. This court should remand this case to the circuit court for a new sentencing hearing, governed by the standards established by the United States Supreme Court in ***Miller v. Alabama and Montgomery v. Louisiana.***

Respectfully submitted this ____ day of May, 2017.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief meets the form and length requirements of Rules 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body of text. The length of the brief is 2,987 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 parties.

Dated this ____ day of May, 2017

_____

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