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 HON. J. D. WATTS, PRESIDING

PLAINTIFF-RESPONDENT'S CORRECTED BRIEF

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ISSUES PRESENTED

1. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the supreme court held that a sentencing scheme that requires a court to sentence a juvenile to a mandatory life sentence without the possibility of parole violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Does *Miller* apply to a life sentence imposed under Wis. Stat. § 973.014 (1993-94),[1] which provides a circuit court with the discretion to set a release date?

The circuit court answered: No. (57.)

2. Did the circuit court properly exercise its sentencing discretion under Wis. Stat. § 973.014 when it sentenced Walker for first-degree intentional homicide that he committed as a juvenile?

The circuit court did not answer. (57.)

3. Was Walker entitled to a hearing on his motion for postconviction relief?

The circuit court answered: No. (57.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented

[1] All references to Wisconsin Statutes refer to the 1993-94 edition unless otherwise noted.

involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Walker with first-degree intentional homicide in connection with the September 7, 1994 death of Milwaukee Police Officer William Robertson. (7:1, 11-12.) The complaint alleged that Walker committed the crime while using a dangerous weapon and as a party to a crime under Wis. Stat. §§ 940.01(1), 939.05, and 939.63(1)(a)2. (7:1.) When he killed Robertson, Walker was approximately six weeks shy of his 18th birthday. (7:6.)

A jury found Walker guilty of first-degree intentional homicide while using a dangerous weapon. (19.) On January 22, 1996, the circuit court sentenced Walker to a term of life imprisonment with a parole eligibility date of 2071. (22.)

Walker appealed his conviction. He argued that the circuit court should have suppressed his confession on voluntariness grounds (43:1). This Court disagreed and affirmed Walker's conviction. *State v. Curtis L. Walker*, Wisconsin Court of Appeals, Case No. 1996AP2239-CR (May 20, 1998). (43:1-4.)

Walker subsequently filed a *pro se* motion for postconviction relief under Wis. Stat. § 974.06. (47.) The circuit court denied his motion. (48.) This Court affirmed the circuit court's decision denying Walker's postconviction motion. *State v. Curtis L. Walker*, Wisconsin Court of Appeals, Case No. 1999AP945 (July 28, 2000). (52.)

On April 26, 2016, Walker filed a *pro se* postconviction motion seeking a re-sentencing under Wis. Stat. § 974.06

(2013-14). (56.) He asserted that the circuit court failed to adequately account for his youthful status and why, as a juvenile, he was different from an adult for sentencing purposes. (56:1.) Relying on *Miller,* 132 S. Ct. 2455, Walker contended that his sentence violated the Eighth Amendment's cruel and unusual punishment clause. (56:2; 57:4.)

Because Walker is eligible for parole in 2071, the circuit court concluded that the sentencing court did not impose a sentence without parole that violated the Eighth Amendment's prohibition against cruel and unusual punishment. It denied Walker's motion. (57.)

SUMMARY OF THE ARGUMENT

Walker raises three issues on appeal related to the circuit court's denial of his postconviction motion without a hearing.

First, relying on *Miller*, Walker argues that the circuit court's decision to set his parole eligibility date in 2071 violated the Eighth Amendment's prohibition against cruel and unusual punishment. (Walker's Br. 4-12.) The circuit court properly denied this claim. *Miller* applies only to sentencing schemes that deprive the sentencing authority of the discretion to impose any sentence other than a non-parolable, mandatory life sentence. *Miller* does not apply to Walker's case because the circuit court exercised its sentencing discretion when it set Walker's parole eligibility date under Wis. Stat. § 973.014.

Second, Walker contends that the circuit court erred when it set his parole eligibility date because it did not consider the characteristics of youthful offenders identified in *Miller*. (Walker's Br. 12-15.) Assuming that *Miller* applies

to Walker's case, the record as a whole demonstrates that the circuit court was cognizant of Walker's age and other character traits associated with youthful offenders when it sentenced him.

Third, Walker contends that the circuit court erred when it denied him a hearing on his postconviction motion. (Walker's Br. 15-18.) Because *Miller* does not apply to Walker's case, he is not entitled to the relief that he seeks. As such, the circuit court properly denied his motion without a hearing.

ARGUMENT

I. Because Walker's case involves a discretionary life sentence with a parole eligibility date, *Miller* does not apply and his sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

A. Standard of Review.

This court must decide whether *Miller* applies to Walker's case. Whether sentencing Walker to a life sentence with an established parole eligibility date under Wis. Stat. § 973.014 violated the Eighth Amendment's prohibition against cruel and unusual punishment raises a legal question that this court reviews *de novo*. *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451.

B. A life sentence imposed under Wis. Stat. § 973.014, which confers discretion on the circuit court to set a parole eligibility date, is consistent with the Eighth Amendment and the U.S. Supreme Court's decision in *Miller*.

In *Ninham*, the Wisconsin Supreme Court held that the cruel and unusual punishment clause of the Eighth Amendment does not prohibit a sentencing court from exercising its discretion under Wis. Stat. § 973.014 and sentencing a juvenile to a life sentence without parole. *Ninham*, 333 Wis. 2d 335, ¶ 4. Walker argues that the U.S. Supreme Court's decision in *Miller* changed that analysis and extends to a life sentence with a discretionary parole date set beyond an offender's natural life expectancy. (Walker's Br. 4-6.) But *Miller* applies only to sentencing schemes that require the sentencing authority to impose a life sentence without the possibility of parole. *Miller*, 132 S. Ct. at 2460. And this Court has held that *Ninham* remains good law after *Miller*. *State v. Barbeau*, 2016 WI App 51, ¶ 32, 370 Wis. 2d 736, 883 N.W.2d 520.

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Similarly, article I, section 6 of the Wisconsin Constitution provides: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted." The Wisconsin Supreme Court has interpreted article I, section 6 in a manner consistent with the United States Supreme court's interpretation of the Eighth Amendment. *See Ninham*, 333 Wis. 2d 335, ¶ 45.

When Walker received his life sentence, Wis. Stat. § 973.014(1) (1993-94) provided in relevant part that:

> . . . the court shall make a parole eligibility determination regarding the person and choose one of the following options:
>
> (a) The person is eligible for parole under s. 304.06 (1).
>
> (b) The person is eligible for parole on a date set by the court. Under this paragraph, the court may set any later date than that provided in s. 304.06 (1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s. 304.06 (l).

Wisconsin Stat. § 304.06(1)(b) provided that the person was not eligible for parole until he or she had served at least 20 years.[2] In Walker's case, the circuit court exercised its discretion under the second option and set Walker's parole eligibility date in 2071. (22.)

In *Ninham*, the Wisconsin Supreme Court 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 and sentencing a juvenile, 14-year-old or younger, to a life sentence without the possibility of parole. *Ninham*, 333 Wis. 2d 335, ¶ 4. It concluded that Ninham failed to establish that there was a national consensus against sentencing 14-year-old to life

[2] Since Walker committed his crime, the Legislature has amended these statutory provisions. *See* Wis. Stat. §§ 304.06(1)(b) and 973.014 (2013-14). It added a third option of life without the possibility of parole. Wis. Stat. § 973.014(1)(c) (1995-96). It also modified the relevant statutes to reflect the replacement of parole with extended supervision under Truth in Sentencing. *See* Wis. Stat. § 973.014(1g) (1997-98). Even if the circuit court had sentenced Walker under a different version of these provisions, the State's analysis of Walker's Eighth Amendment claim remains the same.

imprisonment without parole when the crime is intentional homicide. It also concluded in the exercise of its independent judgment that that the punishment was not categorically unconstitutional. *Id*. Based on the circumstances of his case, the court also decided that Ninham's sentence of life imprisonment without the possibility of parole was not unduly harsh and excessive. *Id*. ¶ 5.

Following *Ninham,* the United States Supreme Court held in *Miller* that the Eighth Amendment's prohibition against cruel and unusual punishments "forbids a sentencing scheme that *mandates life in prison without possibility of parole* for juvenile offenders." *Miller*, 132 S. Ct. at 2469 (emphasis added). *Miller* announced a substantive rule of constitutional law and a defendant may benefit from its retroactive application on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). *Miller* expressly recognized the continued authority of a court to sentence a juvenile to a life term without the possibility of parole. But before it does so, it must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct. at 2469.

The United States Supreme Court's decision in *Miller* turned on whether the life sentencing scheme prohibited a sentencing court from sentencing a juvenile to any sentence other than a life sentence without the possibility of parole. *Miller*, 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 does not prohibit a sentencing court from applying a discretionary life sentencing scheme like Wis. Stat. § 973.014, which requires an individualized sentencing

determination. In fact, this Court has held that *Ninham* remains good law after *Miller*: "Although *Miller* was decided after *Ninham*, nothing in *Miller* undercuts our supreme court's holding in *Ninham*." *Barbeau*, 370 Wis. 2d 736, ¶ 32. In *Barbeau*, this Court observed that *Miller* builds on the United States Supreme Court's analysis in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). *Barbeau*, 370 Wis. 2d 736, ¶ 31. The *Ninham* decision extensively discussed *Roper* and *Graham* in rejecting Ninham's categorical proportionality challenge to the imposition of a mandatory life sentence. *See Barbeau*, 370 Wis. 2d 736, ¶ 30.

Based on its interpretation of *Miller* and *Ninham*, this Court distinguished the mandatory life sentencing scheme under *Miller* from the discretionary life sentencing scheme under Wis. Stat. § 973.014, which allows circuit courts to impose a mandatory life sentence under appropriate circumstances. *Barbeau*, 370 Wis. 2d 736, ¶ 33. *Miller* applies only to a life sentence without the possibility of parole. This Court declined to apply *Miller* to Barbeau because he was not (a) sentenced to a mandatory life sentence and (b) 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. Wisconsin sentencing law already requires circuit courts to make the individualized sentencing determinations that the Supreme Court contemplated in *Miller*.

C. *Miller* does not apply to Walker's case because the circuit court sentenced him under a discretionary life sentence scheme that required the circuit court to set a parole eligibility date.

When the circuit court sentenced Walker, it lacked the authority to sentence Walker to life without the possibility of parole. Wis. Stat. § 973.014. The Legislature did not provide circuit courts with the option of imposing a life sentence without the possibility of parole until after Walker's offense. *See* Wis. Stat. § 973.014(1)(c) (1995-96) (life without parole option applicable only to class A felonies committed on or after August 31, 1995). When Walker committed his crime, only a persistent repeater faced the potential of a life sentence without the possibility of parole. Wis. Stat. § 939.62(2m)(b). The persistent repeater exception did not apply to Walker.

Further, a circuit court does not set a parole eligibility date in a vacuum, but must do so 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) (citation omitted); *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 parole eligibility determination with respect to life sentences imposed under Wis. Stat. § 973.014. *See Borrell*, 167 Wis. 2d at 774.[3]

Miller simply does not apply to discretionary life sentences imposed under Wis. Stat. § 973.014. Unlike the mandatory life sentence at issue in *Miller*, a Wisconsin sentencing court must (a) impose the minimum amount of confinement consistent with *McCleary*'s primary sentencing factors; and (b) set a release eligibility date. Because the court was required to exercise its sentencing discretion consistent with *McCleary*, *Miller* does not apply to Walker's life sentence imposed under Wis. Stat. § 973.014.

[3] Wisconsin did not allow the imposition of a life sentence without the possibility of release until after Walker committed his crime. But even under current law, a sentencing court is not required to impose a life without the possibility of parole sentence or extended supervision under Wis. Stat. § 973.014 (2013-14). Rather, a sentencing court must affirmatively select this option as part of its exercise of individualized sentencing discretion. *See State v. Ninham,* 2011 WI 33, ¶ 42, 333 Wis. 2d 335, 797 N.W.2d 451.

D. *Miller* does not apply to a "de facto" life sentence.

Walker notes that he will not be eligible for parole until 2071, when he is a 95-year-old. Relying on *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), he contends that his sentence is a "*de facto*" life sentence and that *Miller*'s requirements for sentencing a juvenile to a mandatory life sentence should apply to his case. (Walker's Br. 5.)

In *McKinley*, the Seventh Circuit characterized a life sentence with eligibility for release after 100 years as a *de facto* life sentence. It criticized the Illinois court's sentence because the sentencing court failed to address the relevance of the juvenile's age to his sentence. 809 F.3d at 911. The dissent rejected the majority's analysis, noting that the Seventh Circuit had previously held that *Miller* was inapplicable to a discretionary life sentence. *Id*. at 914 (Ripple, dissenting).

In *Croft v. Williams,* 773 F.3d 170 (7th Cir. 2014), the Seventh Circuit observed that "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; s*ee also 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*.").

The Seventh's Circuit analysis in *McKinley* does not bind this Court's analysis of Walker's claim. *See State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993) (determinations on federal questions by lower federal courts

do not bind state courts). Further, its persuasive value is limited. The Seventh Circuit's decision in *McKinley* is inconsistent with its prior decisions in *Croft* and *Martinez*. It is also inconsistent with decisions from other appellate courts.[4]

More importantly, this Court has previously rejected a *Miller* challenge to the discretionary life sentence scheme under Wis. Stat. § 973.014. In *Barbeau*, this Court limited *Miller*'s application to a 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 that parole, and the circuit court's discretion was not totally circumscribed."). This Court's prior decision in *Barbeau* binds its resolution of Walker's claim. *See Cook v. Cook*, 208 Wis. 2d 166, 185-90, 560 N.W.2d 246 (1997) (Court

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[4] Other courts have concluded that *Miller* does not extend to discretionary life sentences. *See also United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) and cases cited therein; *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* said nothing about non-mandatory life-without-parole sentencing schemes and thus cannot warrant granting relief from a life-without-parole sentence imposed under such a scheme . . . *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,* 218, 876 N.W.2d 876, 888 (2016) ("Strictly read, *Miller* forbids only the 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,* 110 A.3d 1205, 1206 (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").

of Appeals lacks power to overrule, modify, or withdraw language from a previously published decision.). It should decline Walker's invitation to extend *McKinley* to his case.

II. Even if *Miller* applies to sentences imposed under Wis. Stat. § 973.014, the circuit court exercised the sentencing discretion contemplated under *Miller* when it set Walker's parole eligibility date.

For the above reasons, this Court should decline to review Walker's claim that the circuit court erred when it set his parole eligibility date under Wis. Stat. § 973.014. But if it does, then it must consider whether the circuit court's determination of Walker's parole eligibility date is consistent with the factors associated with sentencing juveniles identified in *Miller*. That is, in the exercise of its sentencing discretion, did the circuit court take into account how Walker as a 17-year old child was "different" in terms of his "diminished culpability and heightened capacity for change"? *See Miller*, 132 S. Ct. at 2469.[5]

Because the circuit court did not have the benefit of *Miller* when it sentenced Walker, this Court may review the record to determine whether the circuit court's exercise of discretion comports with *Miller*. *See McCleary v. State*, 49

[5] To the extent that Walker is challenging the circuit court's exercise of sentencing discretion generally, his challenge is barred. Walker's current appeal stems from a Wis. Stat. § 974.06 motion, which is limited to constitutional and jurisdictional challenges. *See State v. Nickel*, 2010 WI App 161, ¶ 7, 330 Wis. 2d 750, 794 N.W.2d 765 (noting that a Wis. Stat. § 974.06 motion may not be used to challenge a sentence based on the erroneous exercise of discretion provided that the sentence is otherwise lawful). Walker should have raised any challenges to the circuit court's general exercise of sentencing discretion through a Wis. Stat. § 974.02 (2013-14) postconviction motion.

Wis. 2d 263, 282, 182 N.W.2d 512 (1971) (even if the circuit court fails to adequately set forth its reasons for its sentence, a reviewing court is still "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.").

Here, the circuit court had significant information available to it as it exercised its sentencing discretion. It presided over the jury trials for both Walker and his codefendant, Denziss Jackson. (41:26.) In addition, it also reviewed the presentence investigation report[6] as well as a sentencing report prepared by Ms. Paasch-Anderson Consulting. (41:26.) In addition, the circuit court also had the benefit of a psychological evaluation of Walker prepared in conjunction with the initial delinquency action. (27; 41:19.)

Information in the record supports the conclusion that the circuit court properly sentenced Walker in a manner that accounted for his youthful status when he killed Officer Robertson. It set a parole eligibility date 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 Walker's rehabilitative needs.

Gravity of the offense: In discussing the egregious nature of Walker's crime, the circuit court observed that it involved:

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[6] The presentence report does not appear in the record. *See State v. McAttee,* 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 ("It is the appellant's responsibility to ensure completion of the appellate record and when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.") (citation and quotations omitted).

> a shooting and killing of a police officer and certainly, because we depend so much on our police officers and on our law enforcement people to protect us, they hold a special place in our community, and when one of them is killed in the line of duty, it further traumatizes all of us, and all of us feel the pain that's attended to the death in the line of duty in that regard.

(41:27.) In describing Walker's role in the homicide, the circuit court observed, "[Y]ou set it up and did all the things that would lead to it, and you did so apparently with a clear mind in that regard." (41:29.)

The record supports the circuit court's assessment of the particularly serious nature of the crime. It demonstrates that Walker planned and premeditated a deadly assault on a randomly selected Milwaukee police officer that resulted in Officer Robertson's death. Robertson and fellow officer James Andritsos were on routine patrol in a marked police patrol wagon. (38:49-52.) After Andritsos turned onto 24th Street, he heard a horrific noise inside the van and thought someone had dropped a firecracker in the van. (38:53-54, 61.) The van's interior filled with smoke and dust. Robertson said: "'I'm hit, I'm hit.'" (38:61.) Andritsos saw Robertson slump in his seat and lose color. (38:62.)

The medical examiner opined that Robertson bled to death from a bullet fragment that struck Robertson in the left shoulder blade, pierced his left lung, passed through both sides of his heart and stopped in the right lung. (39:114, 118.) The State's firearms analyst testified that the bullet fragment recovered from Robertson's lung was consistent with parts of a .308 caliber bullet. (39:85, 115.)

LC testified that the night before the shooting, Walker came to his house and took a .308 calber rifle with a scope. (38:149, 153-54.) During a search of Denziss Jackson's home, police recovered the .308 Winchester rifle with a scope that Walker had taken from LC's home. (38:153, 170, 173-75.)

During a custodial interview, Walker stated that he wanted to shoot a police officer because of lyrics in rap artist Tupac Shakur's record that reference killing a police officer. (39:32, 40.)[7] The evening before the shooting, Walker and Jackson talked about shooting a police officer and a police car. (39:39.) Walker agreed to be the shooter and chose to use the .308 rifle with a scope. (39:39.) While they walked to the scene of the shooting, Jackson agreed to stand by the phone on the corner and raise his hand as a signal to shoot when a squad car came. (39:40.) Walker waited for 40 minutes to an hour in a vacant lot for a police car. After getting the signal from Jackson, Walker saw both police officers in the van through the scope. After the van turned, he fired one shot into the van's side. Walker was not sure if he hit the van until it slowed down. (39:41.) He and Jackson returned to Jackson's home. Walker told him to get rid of the gun. (39:42.)

Walker's offense is particularly grave. He planned and executed a premeditated plan to assassinate a randomly selected police officer. Under the circumstances, it was entirely appropriate for the circuit court to place primary

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[7]In an interview with a psychologist, Walker indicted that "he had been thinking about and/or listening to a recording by Tupac Shakur in which the words that kept reverberating in his head were '. . . my brother died looking down the barrel of a 45. . . .'" (27:3.) The psychologist noted that the disc on which this song appears also contains many songs that refer to shooting police officers. (27:3.)

weight on the gravity of Walker's crime. (41:31-32.) But the circuit court did not rest its sentence solely on the gravity of the offense. It also took into account other sentencing considerations including protection of the public, his rehabilitative needs, his age, and other pertinent character traits.

Protection of the public. Based on the facts and Walker's past, the circuit court found Walker was dangerous. (41:29.) And potential dangerousness is certainly a consideration in deciding when a lengthy sentence is needed to protect the public. The record supports the circuit court's assessment of dangerous.

When the homicide occurred, Walker had been referred to children's court in connection with at least 17 delinquency matters. (7:6.) He had previously been adjudicated delinquent for multiple counts of burglary, criminal damage to property, and operating auto without owner's consent. (7:6.) When Walker killed Officer Robertson, he had pending charges associated with possession of a dangerous weapon by a child and possession of a controlled substances at the time that he killed Officer Robertson. (7:8.) Walker's conduct was part of an escalating pattern of antisocial criminal behavior that required a lengthier and more certain period of incarceration to protect the public from his potential, future misconduct.

Walker's crime involved violent, concerted, and premeditated conduct that demonstrated callousness and disregard for human life. In light of Walker's willful and carefully planned criminal behavior, a lengthier prison term was necessary to protect the public from the future danger that he posed.

Walker's character. In *Miller*, the Supreme Court recognized the vulnerability of children to negative influences and outside pressures, including their family and peers, their limited control over their environment, and their inability to extricate themselves from settings that produce criminal behavior. *Miller*, 132 S. Ct. at 2464.[8] In assessing Walker's character, the circuit court's comments suggest that it did not sentence Walker as a hardened, adult career criminal. Consistent with *Miller*, the circuit court appreciated that Walker's behavior was the product of difficult childhood experiences. (41:28-29.)

In assessing Walker's character and prospects for change, the circuit court noted Walker's significant rehabilitative needs against the backdrop of his young age and experiences. It considered Walker's past history of placements and counseling that Walker had received in the juvenile justice system. (41:29.) It recognized the challenges of finding "refined methods for helping people who are as you are in your circumstances[,]" young males who have

[8] In *McKinley*, the majority suggested that a "competent judicial [sentencing] analysis would require expert psychological analysis of the murderer and also of his milieu." *McKinley v. Butler*, 809 F.3d 908, 913 (7th Cir. 2016). Here, the circuit court had the benefit of this type of information when it sentenced Walker. It had a presentence investigation report, Paasch-Anderson's sentencing report (41:26), and psychologist Ingrid Hick's evaluation which was prepared in conjunction with the initial delinquency action. (27; 41:19.) That the circuit court imposed a disposition different from what Paasch-Anderson or Hick's reports suggested does not mean that the circuit court ignored their observations regarding his age, his background, or the crime. Rather, it means that the circuit court chose to exercise its discretion differently with an emphasis on the seriousness of the offense and the need to protect the public.

committed "very serious crimes at very, very early ages, and we are not able to spout th[is] flow." (41:28-29.)

The circuit court observed that the tools available for helping someone in Walker's situation "have not worked" and that Walker is "dangerous" as a result. (41:29.) It recognized that the prospects for rehabilitative change were limited and long-term in Walker's case. "[W]e have limited methods [to change people]. You need an awful lot of work to be done within yourself." To make meaningful change, Walker would need to "turn [his] back on everything that you have known. That is a big challenge for you." (41:31.) Based on this record, the circuit court could reasonably conclude that Walker's untreated, significant rehabilitative needs made him dangerous and that a lengthy period of time was necessary to facilitate his rehabilitation.

Walker's crime was not the product of character traits easily influenced by outside pressures or impulsivity that often drive juvenile misconduct. *See Miller*, 132 S. Ct. at 2464. His crime did not stem from "a situation of excitement, [where he lacked] the maturity to consider whether to obey his confederate's order, or was prevented by the circumstances from making a rational decision about whether to obey." *McKinley*, 809 F.3d at 911-912.

Walker did not act impulsively or as a result of outside pressure. Walker and Jackson wanted to avoid getting caught so they discussed their plan alone. (39:23.) They planned to shoot a police officer in a police car, and Walker would be the shooter. (39:39.) Walker carefully chose his weapon, a .308 rifle with a scope, because he intended to shoot from a distance. (39:24.) Walker selected a location from which to execute his crime with Jackson giving the

signal when the target was in range. (39:40.) Walker then waited patiently, for at least 40 minutes, before his opportunity arose. (39:40.) He could have changed his mind at any time. Without encouragement, he pulled the trigger, resulting in Officer Robertson's tragic death.

Even if the circuit court had had the benefit of *Miller*'s guidance when it sentenced Walker for a crime committed just before his 18th birthday, the outcome would not have been any different based on the gravity of the offense, Walker's dangerous, and his extensive rehabilitative needs. 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*.

III. The circuit court properly denied Walker's request for an evidentiary hearing on his postconviction motion.

Walker claims that the circuit court erred when it denied his postconviction motion without a hearing. (Walker's Br. 15-18.)

Applicable legal principles. A circuit court may deny a postconviction motion without a hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." *State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 682 N.W.2d 433. The circuit court must "form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Id.* ¶ 9 (quotation marks and citation omitted).

Whether a postconviction motion alleges sufficient facts to entitle a defendant to a hearing for relief presents a mixed standard. An appellate court reviews de novo whether a motion on its face alleges sufficient material facts that would entitle the defendant to relief. But it reviews the circuit courts discretionary decisions under the deferential erroneous exercise of discretion standard. *Id*.

Application to Walker's case. The circuit court properly denied Walker an evidentiary hearing. Walker's motion presents the legal question of whether *Miller* extends to discretionary life sentences like the sentence that he received. (Walker's Br. 16.) As the State argued in Sections I. C.-E. and for the reasons articulated in *Barbeau, Miller* does not extend to a discretionary life sentence in which the circuit court sets a parole eligibility date. Further, even if *Miller* applied in Walker's case, a review of the record reflects that the circuit court considered Walker's youthful status when it sentenced him. Because Walker is not legally entitled to relief, the circuit court properly denied his motion without a hearing.

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm the circuit court's order denying Walker's motion for postconviction relief.

Dated this 13th day of June, 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,388 words.

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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 13th day of June, 2017.

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