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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

ARGUMENT[1]

I. *Miller v. Alabama,* 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), do not apply to discretionary life sentences imposed under Wis. Stat. § 973.014.

The Remington Center contends that *Miller* extends to discretionary life sentences. (Remington Center's Br. 6–9.) In support of its argument, it relies upon the following language from *Miller*: "Although we do not foreclose a sentencer's ability to [sentence a juvenile to life without parole for homicide], 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." *Miller*, 132 S. Ct. at 2469. *Miller's* actual holding is narrower. "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id*.

In *Miller*, the Supreme Court reasoned that a statutorily mandated life-without-parole sentencing scheme undermines the "requirement of individualized sentencing for defendants facing the most serious penalties" because such a scheme "prevent[s] the sentencer from taking account of these central considerations" associated with youth. *Id*. at 2460, 2466. The court identified five age-related considerations that a mandatory life-without-parole sentencing scheme forecloses a sentencing court from considering. First, it precludes consideration of a juvenile's "age and its hallmark features" including "immaturity, impetuosity, and failure to appreciate

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[1] This Court granted the State's request to file a response to the Remington Center's amicus brief. While the State's response here overlaps with its arguments in its respondent's brief, the State limits its response to addressing the Remington Center's arguments that the State did not previously address in its respondent's brief.

risks and consequences." *Id*. at 2468. Second, "[i]t prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Id*. Third, "[i]t neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." *Id*. Fourth, "it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Id*. (citations omitted). Fifth, "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id*.

The Supreme Court's choice of language for each factor—"precludes," "prevents," "neglects," "ignores," and "disregards"—demonstrates that it was concerned with a scheme of statutorily-mandated life-without-parole sentences that prohibited a sentencing court from considering these factors. But that is not the case under Wisconsin law. When a sentencing court exercises its discretion and sets a parole eligibility date under Wis. Stat. § 973.014(1), it may consider *Miller* factors associated with a juvenile's age. These factors overlap with the primary and secondary sentencing factors that a Wisconsin sentencing court considers when it exercises sentencing discretion, including the nature of the offense, the offender's age, and age-related characteristics such as a juvenile's education, personality, character, and social traits. *See State v. Borrell*, 167 Wis. 2d 749, 773–74, 482 N.W.2d 883 (1992).

Section 973.014(1)'s discretionary life-sentencing scheme differs fundamentally in several other ways from the mandatory life-without-parole sentencing scheme that the

Supreme Court invalidated in *Miller*. First, sec. 973.014(1) does not mandate, much less presume, that a circuit court will sentence a juvenile convicted of first-degree intentional homicide to a life-without-parole sentence. The circuit court truly has discretion to choose the parole eligibility date, provided that it is at least 20 years. *Id.*; Wis. Stat. § 304.06(1)(b); and *Borrell*, 167 Wis. 2d at 764. Second, the circuit court must engage in individualized sentencing determinations. *See Miller*, 132 S. Ct. at 2460. Third, when a circuit court exercises its sentencing discretion, it must do so in a manner that calls for the minimum amount of confinement necessary to accomplish a sentence's various purposes. *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971) (citation omitted).

The Remington Center also misplaces its reliance on *Montgomery*. Montgomery received a life-without-parole sentence imposed automatically upon the jury's guilty verdict. *Montgomery*, 136 S. Ct. at 726. The Supreme Court decided that *Miller* applied retroactively to cases on collateral review. *Montgomery*, 136 S. Ct. at 732. The Supreme Court did not decide whether *Miller* extended to a discretionary life sentencing scheme under a statute like sec. 973.014(1), which requires a sentencing court to engage in an individualized sentencing determination.

Nonetheless, the Remington Center contends that the Supreme Court's decision to issue orders granting, vacating, and remanding in five post-*Montgomery* cases[2] "demonstrate[s] the Supreme Court's intention to subject

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[2] *Tatum v. Arizona*, 137 S. Ct. 11 (2016); *Arias v. Arizona*, 137 S. Ct. 370 (2016); *DeShaw v. Arizona*, 137 S. Ct. 370 (2016); *Purcell v. Arizona*, 137 S. Ct. 369 (2016); and *Najar v. Arizona*, 137 S. Ct. 369 (2016).

discretionary juvenile-life-without-parole decisions to Constitutional scrutiny." (Remington Center's Br. 7–8) (emphasis added.) For several reasons, the Remington Center has misplaced its reliance on these grant, vacate, and remand (GVR) orders, remanded "for further consideration" in light of *Montgomery*.

First, Walker did not receive a life-without-parole sentence imposed under either a discretionary or mandatory life sentencing scheme. The circuit court set a parole eligibility date.[3]

Second, the Remington Center's argument rests on the assumption that the GVR orders in *Tatum* and the other cases have precedential value. They do not. "[A] GVR order itself does not constitute a final determination on the merits; it does not even carry precedential weight." *Gonzalez v. Justices of Mun. Court of Boston*, 420 F.3d 5, 7 (1st Cir. 2005). A GVR order "is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it." *Id*. "Given that a GVR makes no determinative impact on an underlying case, it stands to reason that a GVR similarly has no impact on the merits of a wholly separate and independent case." *Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013).

The Remington Center also cites several cases from other jurisdictions that hold *Miller* and *Montgomery* extend to discretionary life sentences. (Remington Center's Br. 8–9.)

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[3] The Remington Center contends that Walker's parole eligibility date transforms his sentence to a *de facto* life sentence and that *Miller* and *Montgomery* apply to a review of Walker's sentence. (Remington Center Br. 9–11.) The State addressed the *de facto* life sentence argument in its brief and does not repeat its argument here. (State's Br. 11–13.)

But as the State noted in its brief, other appellate courts have reached the opposite conclusion. (State's Br. 12, n.4.)

Recently, in *Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017), the Virginia Supreme Court rejected attempts to extend *Miller* and *Montgomery* to a discretionary life sentence imposed under a statutory scheme that allowed an offender to present mitigation evidence at his sentencing hearing. *Id.* at 713. The court reasoned that "[b]oth *Miller* and *Montgomery* remedies presuppose that the original life sentence was mandatory such that no mitigating evidence presented at the original sentencing . . ." *Id.* at 722. "[T]he whole point of *Miller* was to preclude a sentencing scheme from imposing a mandatory life-without-parole sentence because doing so would eliminate the sentencing court's discretion to impose anything less than that. Only in those nondiscretionary sentencing schemes are the offender's 'youth and attendant characteristics,' [ ], truly irrelevant." *Id.* (citation omitted).

Likewise, the Minnesota Supreme Court has held that, because the U.S. Supreme Court "has not held that the *Miller/Montgomery* rule applies to sentences other than life imprisonment without the possibility of parole[,]" it would not extend the rule to a juvenile offender sentenced to consecutive sentences. *State v. Ali*, No. A16-0553, 2017 WL 2152730, at *7 (Minn. May 17, 2017).

Because sec. 973.014(1) provides for the exercise of individualized sentencing discretion in which a court may consider age-related characteristics in setting a parole eligibility date, a sentence imposed under this section does not violate *Miller*'s proscription against life-without-parole sentences.

II. This Court has already decided that *Ninham* remains good law after *Miller*.

The Remington Center asserts that this Court is not bound by the supreme court's prior decision in *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451,[4] or this Court's decision in *State v. Barbeau*, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520, *review denied*, 2016 WI 98, 372 Wis. 2d 275, 891 N.W.2d 408, and *cert. denied*, 137 S. Ct. 821 (2017). (Remington Center's Br. 12–13.) The State disagrees.

A. *Miller* does not undermine the supreme court's reasoning in *Ninham*.

The Remington Center contends that *Ninham* is inapplicable to Walker's case because *Ninham* addressed a categorical challenge to sentencing a juvenile to a life-without-parole sentence. (*Id.*) While the supreme court's decision focused primarily on Ninham's categorical challenge to his sentence, the supreme court also addressed whether Ninham's claim that his sentence in his case constituted cruel and unusual punishment because it was unduly harsh and excessive. *Ninham*, 333 Wis. 2d 335, ¶¶ 84–86. Based on its review of the record, the supreme court upheld the circuit court's exercise of sentencing discretion and determined that Ninham's life-without-parole sentence was not disproportionate to the crime that he committed. *Id.* ¶ 86. Because Ninham's sentence was not excessive in a

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[4] Just days after the Supreme Court decided *Miller v. Alabama*, 132 S. Ct. 2455 (2012), it denied Ninham's petition for certiorari. *Ninham v. Wisconsin*, 133 S. Ct. 59 (2012). Ninham subsequently moved for postconviction relief under *Miller*. The circuit court denied Ninham's postconviction motion. Ninham has appealed and briefing is in progress. *State of Wisconsin v. Omer Ninham*, case no. 2016AP2098.

disproportionate sense, it did not constitute cruel and unusual punishment.

The Remington Center contends that the supreme court got it wrong in *Ninham* when "It distinguished the decision in [*Graham v. Florida*, 130 S. Ct. 2011 (2010)] 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." (Remington Center Br. 13.) As the Remington Center notes, in *Miller*, the Supreme Court recognized that none of what *Graham* said about a child's "distinctive (and transitory[)] mental traits and environmental vulnerabilities—is crime-specific." (Remington Center Br. 13, citing *Miller*, 132 S.Ct. at 2465.) Based on this language, the Remington Center asserts that "contrary to the court's conclusion in *Ninham*, juvenile homicide offenders must be credited with lesser culpability at sentencing." (Remington Center Br. 13.)

The Remington Center misreads *Ninham*. In *Ninham*, the Wisconsin Supreme Court actually accepted the U.S. Supreme Court's assessment that juvenile offenders, including those charged with homicide, have "lesser culpability." *Ninham*, 333 Wis. 2d 335, ¶¶ 60–61. The Wisconsin Supreme Court specifically cited *Roper v. Simmons*, 543 U.S. 551 (2005), in which the U.S. Supreme Court identified several general differences between juvenile and adult offenders that prompted the U.S. Supreme Court to conclude that "given the lesser culpability of juvenile offenders, the case for retribution and deterrence is simply not as strong with a minor as with an adult." *Ninham*, 333 Wis. 2d 335, ¶ 61, citing *Roper*, 543 U.S. at 571–72. Based on the differences between juvenile and adult offenders, the U.S. Supreme Court in *Roper* held that the Eighth Amendment prohibits the imposition of the death penalty upon all juvenile offenders under the age of 18. *Id.*

Thus, even before the U.S. Supreme Court decided *Miller*, the Wisconsin Supreme Court recognized that juvenile homicide offenders must be credited with lesser culpability than adult homicide offenders. At the same time, relying upon *Graham*, the Wisconsin Supreme Court observed that a juvenile who commits a homicide stands on different footing than juveniles who "do not kill, intend to kill or foresee[s] that life will be taken" because they are "categorically less deserving of the most serious forms of punishment than are murderers." *Ninham*, 333 Wis. 2d 335, ¶ 63, citing *Graham*, 130 S. Ct. at 2027. In *Graham*, the Supreme Court distinguished homicide crimes from serious violent crimes "in a moral sense." *Id*. While serious, nonhomicide crimes may be devastating in their harm, "in terms of moral depravity and of the injury to the person and to the public, . . . they cannot be compared to murder in their severity and irrevocability." *Id*. (citation omitted).

Further, relying on *Roper*, the supreme court in *Ninham* differentiated between the juveniles whose crimes reflect "unfortunate yet transient immaturity" and the "rare juveniles" whose crimes are the product of "irreparable corruption. In the case of those rare juveniles, a sentence of life imprisonment without parole measurably contributes to the legitimate goal of incapacitation." *Ninham*, 333 Wis. 2d 335, ¶ 82, citing *Roper*, 543 U.S. at 573. Based on its understanding of *Roper*, the Wisconsin Supreme Court recognized that the Eighth Amendment's prohibition against cruel and unusual punishment did not prohibit a sentencing court from sentencing a juvenile to a life-without-parole sentence. *Ninham*, 333 Wis. 2d 335, ¶ 83. Just as the Wisconsin Supreme Court did in *Ninham*, the U.S. Supreme Court relied on *Roper*'s "irreparable corruption" language when it upheld the authority of a sentencing court to impose a life-without-parole sentence provided that it takes into account how children are different. *Miller*, 132 S. Ct. at 2469.

Contrary to the Remington Center's assertion, the supreme court's reasoning in *Ninham* is not flawed and rests upon the same foundation as the U.S. Supreme Court's decision in *Miller*.

B. This Court correctly recognized *Miller* does not undercut *Ninham*.

More importantly, the Remington Center ignores this Court's prior assessment of the impact of *Miller* on *Ninham*. In *Barbeau*, this Court stated that *Miller* did not undercut the supreme court's holding in *Ninham*. *Barbeau*, 370 Wis. 2d 736, ¶ 32. "In sum, 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." *Id.* ¶ 33. This Court explained that "the principle that emerges from *Miller* is that . . . a judge must be able to make an 'individualized' sentencing determination, allowing for the consideration of the juvenile's age." *Id.* ¶ 41. This Court declined to extend *Miller* to Barbeau's sentence because "Barbeau was not sentenced to life in prison without the possibility of parole, and the circuit court's discretion was not totally circumscribed." *Id.* Similarly, *Miller* does not apply to Walker's sentence because the circuit court's discretion was not totally circumscribed and because it did not impose a life-without-parole sentence.[5]

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[5] This Court also rejected Barbeau's contention that it was unconstitutional to mandate a minimum, 20-year term of imprisonment for a juvenile who commits first-degree intentional homicide. *State v. Barbeau*, 2016 WI App 51, ¶¶ 34–44, 370 Wis. 2d 736, 883 N.W.2d 520, *review denied*, 2016 WI 98, 372 Wis. 2d 275, 891 N.W.2d 408, and *cert. denied*, 137 S. Ct. 821 (2017). This Court also held that Barbeau "failed to show that the current statutory

C. Both *Ninham* and *Barbeau* bind this Court's resolution of Walker's case.

The State disagrees with the Remington Center's assertion that *Ninham* and *Barbeau* do not bind resolution of Walker's case. (Remington Center's Br. 13.) Both *Ninham* and *Barbeau* recognize the authority of circuit courts to sentence a juvenile to a life sentence and exercise discretion in deciding whether to set a parole or extended supervision release date. *Miller* prohibits a scheme that mandates a life-without-parole sentence for a juvenile homicide defendant. It does not prohibit courts from exercising the sentencing discretion contemplated under Wisconsin law that requires individualized sentencing determinations and the imposition of the least amount of confinement necessary to accomplish the sentence's goals. While the circuit court may not have had the benefit of *Roper*'s or *Miller*'s guidance when it sentenced Walker, it nonetheless took his youth into account when it sentenced him. (State's Brief at 18–20.)

Even if this Court were to decide that *Miller* and *Montgomery* undermine *Ninham* and *Barbeau*, this Court lacks the authority to "overrule, modify or withdraw language" from prior supreme court decisions or its own decisions. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). Only the supreme court has the power to overrule, modify, or withdraw language from prior Wisconsin cases. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 54, 324 Wis. 2d 325, 782 N.W.2d 682. If this Court believes that *Ninham* and *Barbeau* were wrongly decided or that the reasoning in those cases is flawed, it may certify the case to the supreme court. Alternatively, it "may decide the appeal, adhering to a prior

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scheme denie[d] him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* ¶¶ 45–49.

case but stating its belief that the prior case[s] [were] wrongly decided." *Cook*, 208 Wis. 2d at 190. Even if *Miller* and *Montgomery* undermine *Ninham* and *Barbeau*, which both rejected Eighth Amendment challenges to life sentences imposed under sec. 973.014, this Court lacks the authority to overrule those cases and should deny Walker's appeal.

CONCLUSION

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

Dated this 28th day of June, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,898 words.

_____
DONALD V. LATORRACA
Assistant Attorney General

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 28th day of June, 2017.

_____
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