STATE OF WISCONSIN COURT OF APPEALS
DISTRICT 3

STATE OF WISCONSIN,	)	
	)	
Plaintiff-Respondent,	)	
	)	
	)	Appeal No. 2016AP002098
-vs-	)	
	)	
OMER NINHAM,	)	
	)	
Defendant-Appellant.	)	

On Appeal from the Circuit Court of Brown County,
the Honorable Kendall M. Kelley, Presiding

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

1. Does the United States Supreme Court's holding in ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), that the sentencing court is required "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before imposing a life without parole sentence on a juvenile, ***id.*** at 2469, apply to Wisconsin's discretionary sentencing scheme for first degree intentional homicide?

   The circuit court answered: no.

2. Did the original sentencing court fail to comply with the requirements of ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), when it imposed a sentence of life without parole on a fourteen-year-old?

   The circuit court answered: no.

3. Did the circuit court violate ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), by purporting to determine that Omer Ninham is so irreparably corrupt that life without parole is justified without providing him with a full resentencing hearing where he could present evidence of his potential for rehabilitation?

   The circuit court answered: no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Omer Ninham respectfully requests oral argument. This is a case of first impression regarding the application of the United States Supreme Court's recent decisions in ***Miller v. Alabama***,

132 S. Ct. 2455 (2012), and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), to Wisconsin's discretionary sentencing scheme for first degree intentional homicide. Given the complexity and significance of this claim, the recent changes in Supreme Court precedent impacting his case, and the potential impact on other cases, appellant believes that oral argument would assist the Court's consideration and adjudication of the issues presented.

Appellant also submits that publication would be appropriate pursuant to Wis. Stat. Ann. § 809.23(1)(a)(1) & (5). Because this case raises issues of first impression regarding the application of ***Miller*** in Wisconsin, this Court's opinion will likely announce a new rule or clarify existing law. In addition, this Court's decision may impact other juveniles who have received life-without-parole sentences in Wisconsin, and therefore is of substantial and continuing public interest.

STATEMENT OF CASE

Procedural History

Following a four-day trial in the Brown County Circuit Court in September 2000, Omer Ninham was convicted of first-degree intentional homicide for a tragic crime that took place

when he was only fourteen years old. (R. 69:764; R. 82:2.) On June 29, 2000, Omer was sentenced to life without the possibility of parole. In imposing sentence, the judge said he was making his decision based on three factors: the gravity of the offense, the character of the offender, and the need to protect the public. (R. 70:23–24, 26.) The judge "concede[d] for the sake of discussion that Omer Ninham is a child," expressed hope that Omer would change over the course of his life, and sentenced him to lifetime incarceration without any opportunity for parole. (R. 70:24, 28–29.)

Omer filed a motion for post-conviction relief on November 16, 2000 (R. 53), which was denied on March 5, 2001 (R. 58). Omer then appealed to this Court, raising only two issues, both of which related to the trial court's sua sponte excusal of jurors with felony convictions. This Court affirmed Omer's conviction and the denial of his first post-conviction motion on December 4, 2001. ***State v. Ninham***, 2002 WI App 34, 250 Wis. 2d 354, 639 N.W.2d 802 (Wis. Ct. App. Dec. 4, 2001) (unpublished). The Wisconsin Supreme Court denied his petition for review on February 20, 2002. ***State v. Ninham***, 2002 WI 23, 250 Wis. 2d

558, 643 N.W.2d 95.

On October 18, 2007, Omer filed a post-conviction motion for sentencing relief, challenging the constitutionally of imposing life without parole on a fourteen-year-old child under the Eighth and Fourteenth amendments and the United States Supreme Court's then-recent decision in ***Roper v. Simmons***, 543 U.S. 551 (2005). (R. 76.) The circuit court issued a decision and order denying Omer's motion on April 11, 2008. (R. 82.) On March 3, 2009, this Court affirmed. ***State v. Ninham***, 2009 WI App 64, 316 Wis. 2d 776, 767 N.W.2d 326. On September 13, 2010, the Wisconsin Supreme Court granted Omer's petition for review, ***State v. Ninham***, 2010 WI 125, 329 Wis. 2d 371, 791 N.W.2d 380; on May 20, 2011, it affirmed the decision of this Court. ***State v. Ninham***, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451. The United States Supreme Court denied Omer's petition for writ of certiorari on June 29, 2012. ***Ninham v. Wisconsin***, 133 S. Ct. 59, 183 L. Ed. 2d 711 (2012).

On June 25, 2012, the United States Supreme Court decided ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), which held that the sentencing court is required "to take into account how

children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before imposing a life without parole sentence on anyone under the age of 18. ***Id.*** at 2469. Omer filed a petition for post-conviction relief based on ***Miller*** on June 18, 2013. (R. 106). In that motion, he argued that his life-without-parole sentence was unconstitutional under the Eighth and Fourteenth Amendments, the Wisconsin Constitution, and Wisconsin law, because the sentencing court refused to treat his youth and its attendant circumstances as mitigating as required by ***Miller***. (R. 106)

On January 9, 2016, the circuit court ruled that, if ***Miller*** applied to Omer's case, then his claim likely would not be procedurally barred, but held the case in abeyance pending a decision by the United States Supreme Court as to whether ***Miller*** applies retroactively to cases on collateral review. (R. 118.)

On January 25, 2016, the United State Supreme Court issued its opinion in ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), holding that ***Miller*** applies retroactively because it imposes substantive limits on the power of states to impose

sentences of life without parole sentences on children. The Court held that "***Miller*** . . . bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." ***Id.*** at 734. On February 8, 2016, Omer filed a Notice of Supplemental Authority regarding ***Montgomery*** (R. 119), and on July 6, 2016, he filed an additional Notice of Supplemental Authority citing state supreme court and court of appeals decisions that relied on ***Montgomery*** to grant ***Miller*** relief to juveniles serving discretionary sentences of life without parole. (R. 123.)

On October 7, 2016, the Brown County Circuit Court denied Omer's third postconviction petition. (R. 124). The court ruled that "Ninham is not entitled to resentencing under ***Miller*** because his life-without-parole sentence was discretionary, not mandatory." (R. 124:8.) The court went on to rule in the alternative that "the sentencing Court appropriately considered Ninham's youth and related characteristics when imposing this sentence." (R. 124:11.) Finally, the court noted that it would independently reach the conclusion that life without parole was justified in this case. (R. 124:11.) This appeal follows.

Factual Background

At age fourteen, Omer Ninham is the youngest person in the State of Wisconsin who has been sentenced to life imprisonment without the possibility of parole, and among a handful of the youngest children in the country to receive that sentence.[1]

The circuit court previously found it "undisputed that [Omer Ninham] had an extremely difficult and tumultuous childhood." (R. 82:1.) During nearly his entire life prior to his present incarceration, Omer experienced and witnessed chronic violence and instability as a result of his parents' extreme alcoholism. (R. 76:13.) Omer's parents struck each other as well as Omer and his siblings with closed fists and weapons. (R. 76:14.) The police were repeatedly called to the home by neighbors or sometimes the children themselves. (R. 76:14.) Omer's father was repeatedly incarcerated for domestic violence and went to prison for violating a restraining order initiated by

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[1]Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison, at 20, 32 (2007) (hereinafter "Equal Justice Initiative"), available at http://eji.org/eji/files/ 20071017cruelandunusual.pdf.

Omer's mother. (R. 76:14.) Omer's older brothers were also physically and verbally abusive to him. (R. 76:14.)

Apart from physical violence, Omer's parents provided no parental guidance or support, and their severe alcoholism contributed to their inability to ensure Omer consistently had shelter and other basic necessities. (R. 76:14.) Omer's family moved approximately twenty times during his childhood and at times were homeless. (R. 76:14.) Omer received his first toothbrush from youth shelter employees when he was fourteen. (R. 76:Ex. 1, ¶ 11.)

Omer tried to flee his violent and chaotic environment by repeatedly running away, as did two of his siblings. (R. 76:14.) Omer, who had a strong genetic predisposition for alcoholism, also used alcohol to alleviate his depression, chronic severe stress, and alienation. (R. 76:15.) He experimented with alcohol as early as the fifth grade, and was drinking excessively by the seventh grade, often alone and to the point of unconsciousness. (R. 76:15.) Brown County Human Services Mental Health Center diagnosed Omer's alcohol abuse disorder and suggested, but did not provide, treatment. (R. 76:15.)

At age fourteen, according to the circuit court's findings, Omer was with four other young teenagers when a bullying episode escalated into a tragic assault, resulting in the death of Zong Vang, a thirteen-year-old boy whom Omer and another teen pushed or threw from a parking ramp. (R. 82:2–3.) Brown County Social Services subsequently referred Omer to the Oneida Boys Home because of his family background of abuse and neglect and because he was suffering suicidal thoughts. (R. 76:15.) Omer, who is Native American, made significant progress at the Boys Home, where he was exposed for the first time to positive role models and structure guided by Native American spirituality. However, six months after his arrival, his treatment and progress were cut short when he was arrested for this offense. (R. 76:15.)

Despite having no prior violent record, and based in part on statements made while in pre-trial detention that, for all their adolescent bluster and poor judgment, were unaccompanied by violent acts, Omer Ninham was sentenced to lifelong imprisonment with no possibility of parole. (R. 70:23–29.) Seven years later, at age twenty-three, Omer was examined by a clinical neuropsychologist who concluded that he no longer suffers from

the severe behavioral dyscontrol that dominated his young teenage years, that he does not suffer from psychopathy or any serious psychiatric disorder, and that he has grown into a thoughtful young man whose prognosis for successful re-entry into the community, and absence of recidivism, is very good. (R. 76:24–25.)

ARGUMENT

The United States Supreme Courts decisions in ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), establish that youth matters in determining whether a child can be sentenced to lifetime incarceration, and that such a punishment is unconstitutional in the vast majority of cases where the crime reflects transient immaturity. Because these requirements apply to Wisconsin and were not followed at the original sentencing in this case, Omer Ninham is entitled to a new sentencing hearing.

I. *MILLER V. ALABAMA* APPLIES TO DISCRETIONARY SENTENCES OF LIFE IMPRISONMENT WITHOUT PAROLE.

In ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), the United States Supreme Court held that, before imposing a sentence of

life without parole on a juvenile, the sentencer is required "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." ***Id.*** at 2469. Because the two petitioners before the Court in ***Miller*** were both sentenced pursuant to mandatory sentencing schemes that prohibited any consideration of their young age or other mitigating circumstances, the Court struck down those mandatory sentencing schemes as unconstitutional. ***Id.*** at 2475 ("By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment."). Nevertheless, nothing about the Court's exhortation that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole" was limited only to mandatory sentences. ***Id.*** at 2465. Thus, as the vast majority of courts to consider this question have concluded, the requirement of ***Miller*** that the

sentencer consider youth and the ways in which it counsels against lifetime incarceration, applies even where, as in this case, the sentence was not mandatory.

In ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), the Supreme Court further elucidated the universal nature of the principles announced in ***Miller***. The Court explained that "***[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.'" ***Id.*** at 734 (quoting ***Miller***, 132 S. Ct. at 2469) (emphasis added). This followed from the fact that, in addition to striking down mandatory life-without-parole sentences for juveniles, ***Miller*** "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." ***Montgomery***, 136 S. Ct. at 734.

The vast majority of courts to consider the issue have found that ***Miller*** applies to discretionary sentences like the one at issue here. First, the Supreme Court has itself applied ***Miller*** and ***Montgomery*** to discretionary life-without-parole sentences by sending a number of cases involving discretionary sentences

back to the state courts for reconsideration in light of ***Miller*** and ***Montgomery***. *See, e.g.*, ***Arias v. Arizona***, 137 S. Ct. 370 (2016) (granting, vacating, and remanding case in which defendant was given *discretionary* life-without-parole sentence as juvenile for further consideration in light of ***Montgomery***); ***DeShaw v. Arizona***, 137 S. Ct. 370 (2016) (same); ***Purcell v. Arizona***, 137 S. Ct. 369 (2016) (same); ***Najar v. Arizona***, 137 S. Ct. 369 (2016) (same); ***Tatum v. Arizona***, 137 S. Ct. 11, 12 (2016) (same); ***Blackwell v. California***, 133 S. Ct. 837, 184 L. Ed. 2d 646 (2013) (granting, vacating, and remanding case in which defendant was given *discretionary* life-without-parole sentence as juvenile for further consideration in light of ***Miller***); ***Mauricio v. California***, 133 S. Ct. 524, 184 L. Ed. 2d 335 (2012) (same); ***Guillen v. California***, 133 S. Ct. 69, 183 L. Ed. 2d 708 (2012) (same). Justice Sotomayor, concurring in the remand for five of these cases, specifically noted that the remands were appropriate even though "the judges in these cases considered petitioners' youth during sentencing." ***Tatum***, 137 S. Ct. at 12. Following ***Montgomery*** and ***Tatum***, the Supreme Court has made clear that ***Miller*** unquestionably applies to discretionary sentences of

life without parole.

In recognition of this, since ***Montgomery***, state supreme courts in Georgia, Florida, Arizona, and New Jersey have found that ***Miller*** applies to discretionary sentences. In ***Veal v. State***, 784 S.E.2d 403 (Ga. 2016), the Georgia Supreme Court reversed a sentence of life without parole imposed on a 17-year-old and remanded for resentencing under ***Miller***. The court held that ***Miller*** applied, even though Georgia's sentencing statute for murder "does not under any circumstance *mandate* life without parole but gives the sentencing court discretion over the sentence to be imposed after consideration of all the circumstances in a given case, including the age of the offender and the mitigating qualities that accompany youth." ***Id.*** at 410. "Had this appeal been decided before ***Montgomery***," the court wrote, it might have upheld the trial court's ruling that ***Miller*** did not apply, but "the explication of ***Miller*** by the majority in ***Montgomery*** demonstrates that our previous understanding of ***Miller*** . . . was wrong." ***Id.*** at 409, 410.

In ***Landrum v. State***, 192 So.3d 459 (Fla. 2016), the Florida Supreme Court invalidated a discretionary life-without-

parole sentence imposed for a crime committed when the defendant was 16 years old as unconstitutional under ***Miller***, holding that "***Miller*** applies to juvenile offenders whose sentences of life imprisonment without parole were imposed pursuant to a discretionary sentencing scheme when the sentencing court, in exercising that discretion, was not required to, and did not take 'into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" ***Id.*** at 460 (quoting ***Miller***, 132 S. Ct. at 2469). The court noted that "***Montgomery*** clarified that the ***Miller*** Court had no intention of limiting its rule of requiring individualized sentencing for juvenile offenders only to mandatorily-imposed sentences of life without parole, when a sentencing court's exercise of discretion was not informed by ***Miller***'s considerations." ***Id.*** at 467. Failing to ensure that sentencing discretion is informed by these considerations, the court wrote, "would mean life sentences for juveniles would not be exceedingly rare, but possibly commonplace." ***Id.***

Similarly, in ***State v. Valencia***, 386 P.3d 392 (Ariz. 2016), the Arizona Supreme Court applied ***Miller*** to two discretionary

life-without-parole sentences, reversing the trial court's rejection of defendants' postconviction petitions claiming ***Miller*** violations. ***Id.*** at 393–94, 396. The State had argued "that ***Miller*** bars mandatory sentences of life without parole and thus requires only that the sentencing court consider the juvenile's age as a mitigating factor before imposing a natural life sentence." ***Id.*** at 395. The Court, however, wrote that "***Montgomery*** refutes these arguments by expressly holding that ***Miller*** reflects a substantive rule and noting, '[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.'" ***Id.*** (quoting ***Montgomery***, 135 S. Ct. at 734).

Likewise, in ***State v. Zuber***, 152 A.3d 197 (N.J. 2017), the New Jersey Supreme Court consolidated two cases and held that both petitioners were entitled to new sentencing hearings at which "the trial court should consider the ***Miller*** factors when it determines the length of [the] sentence and whether the counts of convictions should run consecutively." ***Id.*** at 204, 215–16. Comer, one of the two defendants, had received a discretionary

consecutive aggregate sentence of 75 years with parole eligibility after 68 years and 3 months, for crimes including felony murder. ***Id.*** at 203–04. The court found this sentence to be "the practical equivalent of life without parole." ***Id.*** at 201. Concluding "that, before a judge imposes consecutive terms that would result in a lengthy overall term of imprisonment for a juvenile, the court must consider the ***Miller*** factors," the court remanded both cases for resentencing. ***Id.*** at 201–02.

Even before ***Montgomery***, a number of courts had found that ***Miller*** applies to discretionary sentences. In ***McKinley v. Butler***, 809 F.3d 908 (7th Cir. 2016), the Seventh Circuit held that "[***Miller***'s] concern that courts should consider in sentencing that 'children are different' extends to discretionary life sentences." ***Id.*** at 914. The Seventh Circuit explicitly rejected the State's argument that ***Miller*** applied only to *mandatory* statutory schemes under which juveniles are sentenced to life without parole. ***Id.*** at 911. Rather, the Court stated that the Supreme Court's finding that "children are different" "cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences

must be guided by consideration of age-relevant factors." ***Id.***

Similarly, even before ***Montgomery***, state supreme courts in Iowa, Connecticut, South Carolina, Ohio, California, and Wyoming found that ***Miller*** applies to discretionary sentences of life without parole. *See* ***State v. Seats***, 865 N.W.2d 545, 552, 555, 558 (Iowa 2015) ("In a case in which the court has discretion to sentence a juvenile to life in prison without the possibility of parole, ***Miller*** and ***Null*** require the sentencing judge to consider the [***Miller***] factors before sentencing a juvenile to life in prison without the possibility of parole."); ***State v. Riley***, 110 A.3d 1205, 1206, 1213, 1219 (Conn. 2015) ("[T]he dictates set forth in ***Miller*** may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole."); ***Aiken v. Byars***, 765 S.E.2d 572, 576–77 (S.C. 2014) ("[W]hether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment."); ***State v. Long***, 8 N.E.3d 890, 892–93, 899 (Ohio 2014) (vacating discretionary consecutive life-without-parole

sentences imposed on a child and remanding for resentencing under ***Miller***); ***People v. Gutierrez***, 324 P.3d 245, 268–70 (Cal. 2014) (finding petitioner entitled to new sentencing hearing where he had received a discretionary life without parole sentence because the sentencer had failed to consider as mitigating "chronological age and its hallmark features" as well as other ***Miller*** factors); ***Bear Cloud v. State***, 334 P.3d 132, 141-44, 147 (Wyo. 2014) (reversing lengthy, nonmandatory aggregate sentence under ***Miller*** because it was the "functional equivalent of life without parole" and the sentencer did not consider the "juvenile's diminished culpability and greater prospects for reform").

As these courts have recognized, the lower court's finding here that "Ninham is not entitled to resentencing under ***Miller*** because his life-without-parole sentence was discretionary, not mandatory," (R. 124:8.), cannot be reconciled with ***Miller*** and ***Montgomery***.[2] Because ***Miller*** applies to Omer's case, he is

[2]In reaching this conclusion, the circuit court did not discuss ***Montgomery***. Instead, it relied solely on two non-binding precedents that were decided prior to ***Montgomery***. Notably, the Georgia Supreme Court had also ruled prior to ***Montgomery*** that ***Miller*** did not apply to discretionary sentences, but found in

entitled to a full resentencing hearing consistent with the that opinion. This Court should reverse the lower court's finding to the contrary.

II. THE ORIGINAL SENTENCING IN THIS CASE DID NOT COMPLY WITH THE STANDARDS SET OUT IN *MILLER V. ALABAMA* AND *MONTGOMERY V. LOUISIANA*.

The United States Supreme Court's decisions in ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), require that sentencing courts take into account a juvenile defendant's "youth and its attendant characteristics" before imposing a sentence of life without parole. ***Miller***, 132 S. Ct. at 2460. These decisions further make clear that life without parole is unconstitutional in the "vast majority" of cases and can only be imposed in the rarest of circumstances where the child is so irreparably corrupt that "rehabilitation is impossible." ***Montgomery***, 136 S. Ct. at 733, 734. Because the sentencing court did not comply with these requirements in

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Veal those precedents could not be squared with ***Montgomery***'s explanation of ***Miller***'s holding. *See* ***Veal***, 784 S.E.2d at 410–11 ("[T]he explication of ***Miller*** by the majority in ***Montgomery*** demonstrates that our previous understanding of ***Miller*** . . . was wrong . . . .").

imposing the sentence in this case, Omer Ninham is entitled to a new sentencing hearing.

In ***Miller***, the Supreme Court held that a sentencer is "require[d] [] to take into account [not only] how children are different," but "how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469. In other words, the Court found that a sentencer is required to "consider the 'mitigating qualities of youth.'" ***Id.*** at 2467 (quoting ***Johnson v. Texas***, 509 U.S. 350, 367 (1993)). By way of example, the Court discussed "hallmark features" of youth that are inherently mitigating including: "immaturity, impetuosity, and failure to appreciate risks and consequences"; "brutal or dysfunctional" family circumstances "from which [a juvenile] cannot usually extricate himself"; "circumstances of the crime" including "the way familial and peer pressures may have affected him"; and the "inability" of youths "to deal with" police officers, prosecutors, and even their own attorneys. ***Id.*** at 2468. Moreover, the Court found that because "a child's character is not as 'well formed' as an adult's," a child's actions are "less likely to be 'evidence of irretrievabl[e] deprav[ity],'" which also counsels

against the imposition of an irrevocable sentence of life without parole. ***Id.*** at 2464 (quoting ***Roper v. Simmons***, 543 U.S. 551, 570 (2005)).

Thus, the core proposition of ***Miller*** is that youth and the "wealth of characteristics and circumstances attendant to it" are mitigating and a sentencer must treat them as mitigating before subjecting a youth to life without parole. ***Id.*** at 2467, 2471. "***Miller*** . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" ***Montgomery***, 136 S. Ct. at 734 (quoting ***Miller***, 132 S. Ct. at 2465). Thus, "[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.'" ***Id.*** (quoting ***Miller***, 132 S. Ct. at 2469). Instead, "the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption,'" ***Montgomery***, 136 S. Ct. 726 (quoting ***Miller***, 132 S. Ct. at 2469),

and is justified for only "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible," ***Montgomery***, 136 S. Ct. at 733.

In Omer's case, the judge did not examine the ways in which youth and the specific mitigating characteristics of it impacted whether Omer was one of the "rarest of children, those whose crimes reflect 'irreparable corruption,'" ***Montgomery***, 136 S. Ct. 726 (quoting ***Miller***, 132 S. Ct. at 2469), or whether for him "rehabilitation [was] *impossible*." ***Montgomery***, 136 S. Ct. at 733 (emphasis added). Indeed, in 2000 when Omer was sentenced, over 11 years before ***Miller*** was decided, the court arguably *could not have* considered the appropriate factors because the United States Supreme Court had not announced what they were. *See* ***McKinley v. Butler***, 809 F.3d 908, 914 (7th Cir. 2016) (in vacating discretionary life-without-parole sentence, observing, "*Miller* . . . obviously had no bearing on the original sentencing . . . since it hadn't been decided yet"); *see also* ***Adams v. Alabama***, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) ("The last factfinders to consider petitioners' youth did so more than 10—and in most cases more than 20—years ago. . . . Those

factfinders did not have the benefit of this Court's guidance regarding the 'diminished culpability of juveniles' and the ways that 'penological justifications' apply to juveniles with 'lesser force than to adults.'" (quoting ***Roper***, 543 U.S. at 571)).

Since ***Montgomery***, however, the Supreme Court has reaffirmed that sentencing courts are required to make such findings before imposing a sentence of life without parole. *See* ***Tatum v. Arizona***, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring) ("On the record before us, none of the sentencing judges addressed the question ***Miller*** and ***Montgomery*** require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" (quoting ***Montgomery***, 136 S. Ct. at 734)). State courts around the country have recognized that because of these new requirements those sentenced to life without parole as juveniles must receive resentencing hearings in which those specific questions are answered. *See, e.g.*, ***Landrum v. State***, 192 So. 3d 459, 469 (Fla. 2016) ("This absence of individualized sentencing consideration prevented Landrum from showing that her 'crime did not reflect irreparable corruption;

and, if it did not,' that she must be given 'hope for some years of life outside prison walls.'" (quoting ***Montgomery***, 136 S. Ct. at 736–37)); ***Veal v. State***, 784 S.E.2d 403, 411 (2016) ("The ***Montgomery*** majority explains . . . that by *uncommon,* ***Miller*** meant *exceptionally rare,* and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt*." (quoting ***Montgomery***, 136 S. Ct. at 733–36) (footnote omitted)); ***State v. Sweet***, 879 N.W.2d 811, 832 (Iowa 2016) ("If life without the possibility of parole may be imposed at all under federal law, . . . it may be imposed only in cases where irretrievable corruption has been demonstrated by the 'rarest' of juvenile offenders." (quoting ***Montgomery***, 136 S. Ct. at 734)); ***State v. Seats***, 865 N.W.2d 545, 558 (Iowa 2015) ("The question the court must answer at the time of sentencing is whether the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society, notwithstanding the juvenile's diminished responsibility and greater capacity for reform that

ordinarily distinguishes juveniles from adults."); ***State v. Montgomery***, 194 So. 3d 606, 607 (La. 2016) ("In resentencing, the District Court shall determine whether relator was 'the rare juvenile offender whose crime reflects irreparable corruption.'" (quoting ***Miller***, 132 S. Ct. at 2469)).

An examination of the sentencing court's treatment of each of the factors outlined in ***Miller*** demonstrates that the sentencing in this case did not meet the required constitutional standard. In ***Miller***, the Supreme Court held that because "children[] [have] diminished culpability and heightened capacity for change," 132 S. Ct. at 2469, the "chronological age of a minor is itself a relevant mitigating factor of great weight," ***id.*** at 2467 (citations omitted). The Court found that the characteristics of all children—"transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" 132 S. Ct. at 2465 (citations omitted). These considerations apply with special force in this case because of Omer's extremely young age.

At age fourteen, Omer is one of the youngest children in the country to have been sentenced to life imprisonment without parole, and the youngest person in Wisconsin ever to receive such a sentence.[3] Among teens, because of their earlier developmental stage, young adolescents have the least capacity to control their impulses, resist peer pressure, and evaluate risks and consequences.[4] Young adolescents also have the greatest capacity

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[3] Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison*, at 20, 32 (2007), *available at* http://eji.org/eji/files/ 20071017cruelandunusual.pdf.

[4] *See* B. Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, in *From Attention to Goal-Directed Behavior* 249, 252–56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Dev. Psycho. 1531, 1540 (2007) ("[R]esistence to peer influence increases linearly after age 14 . . . ."); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., *Adolescent Decision-Making*, 12 J. Adolescence 265, 267–70 (1989) (young adolescents show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than mid-adolescents); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older

for change because they are at the beginning of one of the most intense periods of rapid growth in their lifetime.[5]

The sentencing court did not, however, treat Omer's very young age as mitigating. The judge stated that he would "concede ***for the sake of discussion*** that Omer Ninham is a child, but he's a child beyond description to this Court." (R. 70:24.) Under ***Miller***, Omer's young age is a critical fact, not merely for the purposes of discussion, but because "children are constitutionally different from adults for purposes of sentencing" in that their "diminished culpability and greater prospects for reform" make them "less deserving of the most severe punishments." 132 S. Ct. at 2464 (citations omitted).

Both the Supreme Court itself and numerous other courts around the country have recognized that merely acknowledging

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adolescents than younger ones).

[5] *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 54 (2008) (discussing changes in brain structure during adolescence that increase behavioral control); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 428–29 (2000) ("[A]dolescence is second only to the neonatal period in terms of both rapid biopsychosocial growth as well as changing environmental characteristics and demands.").

a teenager's young age is not enough to comply with ***Miller***. In ***Montgomery***, the Supreme Court explained that "[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. at 734 (quoting ***Miller***, 132 S. Ct. at 2469). Subsequently, Justice Sotomayor, concurring the in the decision to send several cases back to the Arizona courts for reconsideration following ***Montgomery***, noted that "[i]t 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." ***Tatum v. Arizona***, 137 S. Ct. 11, 13 (2016) (Sotomayor, J., concurring); *see also* ***id.*** at 12 (finding it insufficient under ***Miller*** for a sentencer to "identif[y] as mitigating factors that the defendant was '16 years of age' and 'emotionally and physically immature.'"); ***Veal v. State***, 784 S.E.2d 403, 412 (2016) (remanding for resentencing under ***Miller*** even though "the trial court appears generally to have considered Appellant's age and perhaps some of its associated characteristics").

Moreover, at every point that the sentencing court mentioned Omer's age, it discounted the mitigating effect of Omer's youth. The sentencing court found that Omer was a "frightening young man" and a "child of the street" who "knew what he was doing." (R. 70:24–25.)[6] The court then concluded

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[6] In reaching this conclusion, the sentencing court relied on a court-ordered pre-sentence report prepared by Steve Daniels, Probation and Parole Agent for the Division of Community Corrections, on May 12, 2000, and introduced into the trial record. (R. 45:Daniels Presentence Investigation, *hereinafter* "PSI.") This report described Omer as "[a] new type of youth capable of casual killing who frightens society beyond words." (R: 45, 10.) This language echoed the now-discredited media hysteria that dominated public discourse in the years leading up to Omer's conviction in 2000. During that period, "[t]he fears of a juvenile crime wave . . . became embodied in the notion of [] 'juvenile superpredator[s]' . . . . characterized as ruthless sociopaths who lacked a moral conscience and were unconcerned about the consequences of their actions and undeterred by punishment." Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners, at 8, ***Jackson v. Hobbs***, Nos. 10-9647, 10-9646 (U.S. Jan. 12, 2012), 2012 WL 174240, at *8. These so-called "mean-street youngsters," ***id.*** at *13, were thought to be "dangerous, living in [] hopeless situation[s], [] not worthy of empathy or support," ***id.*** at *15, and wholly without the capacity to change, ***id.*** at *20-21. New research has shown that "most antisocial youths outgrow their behavior through the support of specific environmental impacts such as marriage and employment" and has even conclusively proved that "the trajectory of antisocial development can be interrupted." ***Id.*** at 21. In fact, Professor DiIulio, the creator of the "superpredator" myth, has repudiated the idea and "expressed regret, acknowledging that the prediction was never fulfilled." ***Id.*** at *18–19.

"that there is more ruthlessness in Omer Ninham than there is frightened child." (R. 70:26.) The sentencing court's repeated refusal to treat Omer as a fourteen-year-old child who, by the fact of his age alone, was less culpable for his actions and possessed great potential for rehabilitation, conflicts with the requirements of ***Miller*** for the consideration that must be given to youth before a sentence of life without parole can be imposed. 132 S. Ct. at 2469.

Miller also held that, in addition to the general mitigating qualities of youth, the constitution requires that before life without parole can be imposed on a child, the sentencer must "tak[e] 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.*** at 2468. In this case, the sentencing court refused to take into account just such evidence of brutality and dysfunction. The court was presented with evidence that Omer's childhood was dominated by physically abusive and alcoholic parents, who, in addition to not adequately providing for Omer's most basic needs, also permitted him to be both physically and sexually abused by others. Again,

the sentencing court refused to treat this evidence as mitigating. The court stated it was "aware of Omer Ninham's background" but could not "allow that to become an excuse" for his offense, and discounted the extraordinary trauma Omer had experienced by finding his background was not really "dysfunctional because it's an overused . . . word" and most families are "in some context dysfunctional." (R. 70:24–25.)

In fact, "dysfunctional" was an understatement, because, as in ***Miller***, "if ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here." 132 S. Ct. at 2469. Like the petitioner in ***Miller***, Omer was subjected to horrific physical abuse by his family, including being beaten with 2x4s, beer bottles, knives, and extension cords. (R. 45:Daniels Presentence Investigation, *hereinafter* "PSI," at 8; R.45:Padway Sentencing Memorandum, *hereinafter* "Memorandum," at 2.) Similar to the petitioner in ***Miller***, 132 S. Ct. at 2462, Omer repeatedly attempted suicide. (R. 45:Memorandum at 4.). Also like the petitioner in ***Miller***, 132 S. Ct. at 2469, Omer's parents were severe alcoholics and, as a result, neglected him and "failed to supervise or guide his

behavior, health, and educational development." (R. 45:Memorandum at 2–3; R. 76:Ex. 1, ¶ 11.) ***Miller*** held that "a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty." 132 S. Ct. at 2469. The Court noted that these factors are particularly mitigating because children have "limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." ***Id.*** at 2464 (quoting ***Roper***, 543 U.S. at 569). In direct contravention of this, the sentencing court here blamed Omer for his traumatic childhood and for "allow[ing] [his] dysfunction to drive [his] li[fe]." (R. 70:25.)

Miller further requires the sentencing court to consider mitigation related to the "circumstances of the homicide offense." 132 S. Ct. at 2468. Like the petitioner in ***Miller***, this offense, while horrific, was committed "when high on . . . alcohol." ***Id.*** at 2469; (R. 45:Memorandum at 1; *see also* R. 76: Ex. 1, ¶ 22 (noting the impact of alcoholism on Omer's brain function and behavior).). On the day of the offense, he had "consumed a 12-pack of beer, half a pint of brandy, and two 40-ounce bottles of Old English."

(R. 45:Memorandum at 1.) After that, he blacked out and does not remember the rest of the evening. (R. 45:Memorandum at 1.)

The role that alcohol played in this case was also particularly mitigating in light of Omer's background. In addition to having a bilineal genetic predisposition to alcoholism inherited from his parents, and likely lacking an enzyme which inhibits alcohol metabolization, Omer was exposed to alcohol in utero, and excessive alcohol usage permeated his home. (R. 76:Ex. 1, ¶¶ 10, 17, 18, 22.) As a result of these factors and the stress of his chaotic homelife, Omer began abusing alcohol as young as age ten, "[drinking] every day, mostly alone, and usually to unconsciousness." (R. 45:PSI at 9; R. 45:Memorandum at 4; *see also* R. 76:Ex. 1, ¶ 17–22.)

Research has shown that juveniles subjected to trauma, abuse, and neglect suffer from cognitive underdevelopment, immaturity, lack of responsibility, impulsiveness, and susceptibility to outside influences greater even than those suffered by normal teenagers.[7] In Omer's case, the presence of

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[7] *See* Nancy Kaser-Boyd, Ph.D., *Post-Traumatic Stress Disorders in Children and Adults: The Legal Relevance,* 20 W. St. U. L. Rev. 310, 325–27 (1993); *see also* (R: 76, Ex. 1, ¶ 20.).

physical abuse, a chaotic and neglectful family life requiring removal from the home, and drug and alcohol abuse exacerbated the problems of adolescence in precisely the way that ***Miller*** held "counsel[s] against irrevocably sentencing [children] to a lifetime in prison." 132 S. Ct. at 2469. Rather than consider this evidence as mitigating, however, the sentencing court found that Omer "let" alcohol become "part of the problem." (R. 70:27.) The sentencing court also relied heavily in imposing a sentence of life without parole on Omer's failure to accept responsibility (R. 70:22, 26 (finding it "amaz[ing]" that Omer said that "I wasn't there" during the sentencing hearing)), when in fact this may have been because his alcohol use meant that he had no recollection of what happened.

In addition to family pressures and alcohol and drug abuse, the sentencing court also refused to consider the impact of peer pressure on this offense, which was committed with a group of other teens. ***Miller*** recognized that "[n]umerous studies . . . indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency." 132 S. Ct. at 2464 n.5. Indeed, extreme vulnerability to peer

influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is statistically aberrant for boys to refrain from minor criminal behavior during this period.[8] ***Miller*** requires that the sentencing court consider this mitigating circumstance, but the court here instead fully discounted the role of negative influence of peers when stating, "I have already conceded that he's a child, but . . . he knew his relationship to . . . his friends, his peers." (R. 70:25.)

Miller also instructs the sentencer to consider as mitigating the "incompetencies associated with youth" that make children much less prepared "to deal with" the adult criminal system. 132 S. Ct. at 2468; see also ***Graham v. Florida***, 560 U.S. 48, 78, 130 S. Ct. 2011, 2032 (2010) ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings."). Here, as noted above, the sentencing court relied heavily in imposing a sentence of life without parole on Omer's failure to accept responsibility (R.

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[8] L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 421 (2000); N. Dickon Reppucci, *Adolescent Development and Juvenile Justice*, 27 Am. J. Community Psychol. 307, 319 (1999).

70:22, 26), and on the sentencing court's perception that Omer generally "dealt with [] things appositionally." (R. 70:28.) However, the court failed to consider that Omer's poor presentation in court may have been due to his youthful "incapacity to assist his own attorneys," ***Miller***, 132 S. Ct. at 2468. The Supreme Court has recognized that teens' "reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects . . . can lead to poor decisions by one charged with a juvenile offense." ***Graham***, 130 S. Ct. at 2032. Similarly, the sentencing court failed to consider that Omer's threats while in jail may have been ill-considered juvenile efforts to manage an adult environment that he did not understand, rather than true harbingers of violent intent. ***Id.*** (recognizing that children have "limited understandings of the criminal justice system"); (R. 45:Memorandum at 6).

Finally, ***Miller*** requires that before a child is sentenced to life without parole, the sentencer must consider "the possibility of rehabilitation." 132 S. Ct. at 2468. This factor is particularly critical because it is only in the case of "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is

impossible" that "life without parole is justified." ***Montgomery***, 136 S. Ct. at 733. The sentencing court here refused to consider the possibility that Omer could be rehabilitated despite strong evidence to that effect.

It is noteworthy that Omer had no history of violence prior to this incident. His juvenile record consisted largely of status offenses such as "Runaway," "Truancy," "Curfew," and "Underage Drinking" (R. 45:PSI at 6), which more reflect the chaos and instability of Omer's home life than hardened criminality. The remainder are primarily property offenses. (R. 45:PSI at 6.)

In addition, the only time in Omer's life when he lived in a structured, safe, supportive environment was when Omer was placed in the Oneida Group Home, and, while there, he thrived: he was exposed to Native American spiritual practices, did well in school, participated in drug and alcohol treatment, and refrained from substance use or criminal behavior. (R. 45:Memorandum at 5.) Unfortunately, this intervention only took place after the present offense, but it was strong evidence of Omer's amenability to rehabilitation.

Omer's development since his incarceration also

demonstrates the wisdom of ***Miller***'s warning that courts should be hesitant to impose life without parole on children "because of the great difficulty we noted in ***Roper*** and ***Graham*** of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" ***Miller***, 132 S. Ct. at 2469 (quoting ***Roper***, 543 U.S. at 573; ***Graham***, 130 S. Ct. at 2026–27). Dr. Ralph Tarter of the University of Pittsburgh, a clinical neuropsychologist, examined Omer in May 2007, when Omer was twenty-three years old. (R. 76:Ex. 1, ¶¶ 6–8.) Dr. Tarter concluded that Omer had completed neurological maturation, that his behavioral self-control was therefore better than it was at the time of the crime, and that Omer exhibited no signs of psychopathy or serious psychiatric disorders. (R. 76:Ex. 1, ¶¶ 23, 26.) Dr. Tarter opined that Omer has grown into a thoughtful young man and expressed a high degree of confidence that, with appropriate support, Omer would make a successful re-entry into the community, free from recidivism. (R. 76:Ex. 1, ¶¶ 25–27.)

Under ***Miller***, the sentencing court was required to

consider this information as weighing against a sentence of life without parole, but the court refused to do so, instead concluding that "Mr. Ninham's character is fraught with negative . . . because for the most part that's the direction he chose to go." (R. 70:25.)

Even though it did not weigh this evidence as mitigating, the sentencing court did acknowledge that Omer had the potential for rehabilitation. The sentencing court told Omer, "*you're going to have to change. And I would hope – I can't do anything but give you the benefit of that.*" (R.70: 28 (emphasis added).) The court expressed hope that Omer would change through a turn to spirituality that had already begun:

> I would hope that your turn to spirituality. [sic] Native American spirituality gives you something to build on in that regard. It had better because I can tell you right now if your attitude and your ruthlessness and the perception that you have of your relationship to the community in which you are going to find yourself continues as it is, you're in for a real tough ride.

(R. 70:28.) It specifically noted its hopes that prison would rehabilitate Omer and the possibility of that happening, telling him, "The interruption that you caused in your own life back on that evening in September is going to force you to *change the*

direction of that life under circumstances over which I had some control, but *you have the most control*. And *if you don't make that adjustment*, God help you." (R. 70:29–30 (emphasis added).) Under the standard set out in ***Miller*** and ***Montgomery***, these statements, acknowledging the possibility that Omer could be rehabilitated, indicate that Omer is *not* eligible for life without parole.

Life without parole is the harshest penalty available under Wisconsin law, even for the most aggravated adult homicide offenders. But because of his young age, Omer will actually "serve more years and a greater percentage of his life in prison than an adult offender" with the same sentence, ***Graham***, 130 S. Ct. at 2028, and thus, has in a very real sense received "a greater sentence than those adults will serve," ***Miller***, 132 S. Ct. at 2468. He was given this disproportionate sentence without the determination of irreparable depravity, through an evaluation of his youth and its attendant characteristics, made constitutionally necessary by ***Miller***. Because the sentencing court's consideration of Omer's youth and its attendant circumstances failed to comply with the requirements of ***Miller***, his sentence is

cruel and unusual in violation of the Eighth and Fourteenth amendments to the United State constitution. He is entitled to be resentenced in compliance with ***Miller***.

III. THE CIRCUIT COURT BELOW ERRED TO THE EXTENT THAT IT PURPORTED TO BE ABLE TO ITSELF MAKE A FINDING OF IRREPARABLE CORRUPTION.

In denying relief in this case, the circuit court also stated that, if Omer were entitled to resentencing, "the Court would be obligated to assess the same factors considered by the Court at Ninham's sentencing in 2000—and . . . the only conceivable conclusion is that sentencing Ninham to life in prison with parole for Vang's murder is just as warranted in 2016 as it was in 2000." (R. 124:11.) The circuit court, however, was not in a position to make that judgment without providing Omer the opportunity for a new sentencing hearing.

The Supreme Court's decisions make plain that the remedy for failing to adequately consider the mitigating qualities of youth must be to either conduct a new sentencing hearing or to make the juvenile eligible for parole. *See* ***Montgomery v. Louisiana***, 136 S. Ct. 2455 (2016) ("A State may remedy a ***Miller*** violation by permitting juvenile homicide offenders to be considered for

parole, rather than by resentencing them."). There can be no "shortcut." ***Adams v. Alabama***, 136 S. Ct. 1796, 1801 (2016) (Sotomayor, J., concurring).

It is also apparent from the Supreme Court's decisions that the court would be required to do more than simply "to assess the same factors" that the pre-***Miller*** sentencer considered. At the time of the original sentencing, the court did not "address[] the question ***Miller*** and ***Montgomery*** require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" ***Tatum v. Arizona***, 137 S. Ct. 11, 12 (2016) (quoting ***Montgomery***, 136 S. Ct. at 734). The original sentencing court also "did not have the benefit of [the Supreme] Court's guidance regarding the 'diminished culpability of juveniles[,]' . . . the ways that 'penological justifications' apply to juveniles with 'lesser force than to adults[,]' . . . [or] . . . that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption." ***Adams***, 136 S. Ct. at 1800 (Sotomayor, J., concurring) (quoting ***Roper,*** 543 U.S. at 571); s*ee also* ***McKinley v. Butler***, 809 F.3d 908, 914 (7th Cir. 2016) ("***Miller*** . . .

obviously had no bearing on the original sentencing . . . since it hadn't been decided yet.").

It is not only the judge who did not have the benefit of ***Miller*** and ***Montgomery***. Omer's attorneys did not have the benefit of those cases either. The circuit court cannot assume that, without the benefit of recent caselaw, Omer's attorneys would have presented the same evidence in the same way. There is thus no guarantee that all evidence bearing on "transient immaturity" and "irreparable corruption" was introduced at Omer's original sentencing hearing since it was not known at the time that these were the critical factors for the court to consider. Assuming otherwise precludes the court from being able "to consider whether petitioners' sentences comport with the exacting limits the Eighth Amendment imposes on sentencing a juvenile offender to life without parole." ***Adams***, 136 S. Ct. at 1799 (Sotomayor, J., concurring). And given the "grave risk" of allowing an illegal sentence that failure to make this consideration creates, ***Montgomery***, 136 S. Ct. at 736, the circuit court's assumption in this regard does not meet ***Miller***'s commands.

There is also at least one type of evidence Omer *could not* have presented to the original sentencing court and which, under ***Miller***, he is entitled to present. The ***Montgomery*** Court stated that the petitioner there "discussed in his submissions to this Court his evolution from a troubled, misguided youth to a model member of the prison community." ***Montgomery***, 136 S. Ct. at 736. The Court wrote that those "submissions are relevant . . . as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation." ***Id.*** And such evidence is particularly relevant because it goes to "***Miller***'s central intuition—that children who commit even heinous crimes are capable of change." ***Id.*** Omer requested the opportunity to present precisely this type of evidence (R. 134:10-11; *see also* R.133:32), but the court's denial of a resentencing hearing precludes him his constitutional opportunity to do so. By refusing to grant Omer a full resentencing hearing, thus precluding the examination of perhaps the most relevant evidence, the circuit court makes it that much harder to accurately answer the question that ***Miller*** requires the sentencer to resolve before imposing life-without-parole on juvenile: whether he was beyond

rehabilitation.[9] Denying Omer the opportunity to present evidence on that question in light of the dictates of ***Miller*** violates Omer's rights to due process, a reliable sentence, and not to be subjected to cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments to the United States

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[9]In fact, among the states that have outlawed juvenile life-without-parole sentences in light of ***Miller*** , at least two have done so largely because of the impossibility of making a finding of irreparable corruption while the defendant is still a juvenile. In ***State v. Sweet***, 879 N.W.2d 811 (2016), the Iowa Supreme Court concluded that:

> sentencing courts should not be required to make speculative up-front decisions on juvenile offenders' prospects for rehabilitation because they lack adequate predictive information supporting such a decision. The parole board will be better able to discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available.

Id.at 839. Similarly in ***Diatchenko v. Dist. Attorney for Suffolk Dist.***, 1 N.E.3d 270 (2013) (internal citations omitted), the Massachusetts Supreme Court relied on the fact that: "Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted." ***Id.*** at 284 (citations omitted).

Constitution and Wisconsin law. Only two remedies are available to correct Omer's illegal sentence: granting him a full resentencing hearing that complies with the mandates of ***Miller***, or making him eligible for parole.

CONCLUSION

For the foregoing reasons, Omer Ninham asks that this Court vacate his sentence of life imprisonment without parole and remand to the trial court with instructions to conduct a full resentencing hearing in accordance with the requirements of *Miller*.

Respectfully submitted,

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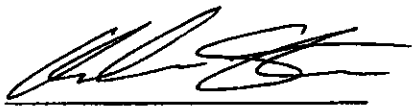
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8742 words.



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I hereby certify that on March 28, 2017, I have submitted an electronic copy of this brief, including the appendix, 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 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.

Adam Stevenson

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I hereby certify that this brief, including the appendix, was delivered to a third-party commercial carrier for overnight delivery to the Clerk of the Court of Appeals on March 28, 2017. I further certify that the brief, including the appendix, was correctly addressed and the fee for delivery was paid.

Adam Stevenson

CERTIFICATE OF SERVICE

I certify that, on March 28, 2017, three true and correct copies of the foregoing motion were furnished by first-class U.S. mail, postage prepaid to each of the following:

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