STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP2098

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OMER NINHAM,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A POSTCONVICTION MOTION UNDER WIS. STAT. § 974.06, ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE KENDALL M. KELLEY, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

BRAD D. SCHIMEL
Wisconsin Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Constitutional Provisions

Statutes

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-without-parole sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Does *Miller* apply to a life sentence imposed under Wis. Stat. § 973.014,[1] which allows a circuit court to exercise discretion and make a parole eligibility determination, including the option to impose a life-without-parole sentence?

The circuit court answered: No.

2. Did the sentencing court fail to comply with the requirements of *Miller* and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) when it sentenced Ninham to a life-without-parole sentence?

The circuit court answered: No.

3. Did the postconviction court err when it concluded that Ninham is so irreparably corrupt that a life-without-parole sentence was justified without a resentencing hearing?

The circuit court did not answer.

---

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

INTRODUCTION

Omer Ninham challenges his sentence of life without parole for the horrific, tragic death of Zong Vang, a thirteen-year-old boy. After the jury convicted Ninham of first-degree intentional homicide and physical abuse of a child, the circuit court[2] sentenced Ninham, taking a variety of factors into consideration, including Ninham's age. On appeal, the Wisconsin Supreme Court rejected Ninham's claim that the sentence violated the Eighth Amendment. *State v. Ninham,* 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451. Later, after the U.S. Supreme Court issued *Miller*, Ninham brought the postconviction motion that is the subject of this appeal, arguing that *Miller* compels a different result.

The circuit court properly denied that motion. First, *Miller* applies only to a statutorily mandated life-without-parole sentence. It did not apply to Ninham's life-without-parole sentence imposed under Wis. Stat. § 973.014, which required the sentencing court to exercise discretion and make an individualized sentencing determination regarding Ninham's parole eligibility. Second, even if *Miller* applied to Ninham's case, Ninham's sentence does not offend *Miller* because the sentencing court accounted for Ninham's age-related characteristics when it sentenced him. Based on the gravity of Ninham's crimes, his character, and the need to protect the public, Ninham's life-without-parole sentence did not constitute cruel and unusual punishment.

---

[2] The Hon. J. D. McKay presided over the original sentencing proceeding in 2000. (R. 70.) The Hon. Kendall M. Kelley decided Ninham's postconviction motion that is the subject of this appeal. (R. 124.)

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because *State v. Ninham,* 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451, and *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), control this Court's resolution of Ninham's case.

STATEMENT OF THE CASE

I. Legal Framework.

A conviction for first-degree intentional homicide is punishable as a Class A felony. Wis. Stat. § 940.01(1). The penalty for a Class A felony is life imprisonment. Wis. Stat. § 939.50(3)(a). When a circuit court imposes a life sentence, Wis. Stat. § 973.014(1) requires the circuit court to determine parole eligibility. Under sec. 973.014(1), the circuit court may choose from three options when it determines parole eligibility. First, it may specify that the person is eligible for parole under Wis. Stat. § 304.06(1)(b), which provides that a person serving a life sentence is not eligible for parole unless he or she has served 20 years. Wis. Stat. § 973.014(1)(a). Second, it may set a parole eligibility date provided that it is longer than the 20-year term specified in sec. 304.06(1)(b). Wis. Stat. § 973.014(1)(b). Third, it may decide that a person is not eligible for parole and impose a life-without-parole sentence. Wis. Stat. § 973.014(1)(c).

II. Factual History.

Ninham's crimes. Thirteen-year-old Zong Vang was bicycling home from the grocery store with tomatoes for his family. Fourteen-year-old Omer Ninham and four other

juveniles approached him. *Ninham*, 333 Wis. 2d 335, ¶ 9. One of the juveniles, Richard Crapeau, told Ninham that he wanted to "mess with [Vang]," whom none of the juveniles knew. Ninham replied that he would back up Crapeau in a fight. *Id.* ¶ 10. Ninham and Crapeau taunted Vang. Crapeau bumped into Vang's shoulder, yanked Vang's bicycle away from him, and threw Vang's grocery bag to the ground. Vang asked for his bicycle back. Ninham then punched Vang, knocking him to the ground. *Id.* ¶ 11.

Vang ran towards the St. Vincent's Hospital parking ramp. The five juveniles chased him, eventually catching up to him on the ramp's top or fifth floor. Crapeau punched Ninham in the face. When Vang asked why they wanted to hurt him and pleaded with them to leave him alone, Ninham and Crapeau pushed Vang back and forth between them in a game called "chicken." *Id.* ¶ 12. As Vang was pushed back and forth, Ninham punched Vang in the chest. *Id.* When Ninham pinned Vang by his wrists against the wall, Vang attempted to escape Ninham's grasp. Crapeau punched Vang in the face. *Id.* ¶ 13.

Crapeau grabbed Vang by his ankles while Ninham held him by his wrists. Crapeau and Ninham swung Vang back and forth over the concrete ramp's wall. Vang cried and screamed. He begged Ninham and Crapeau not to drop him. Crapeau let go of Vang's feet. Ninham let go of Vang's wrists when Crapeau told Ninham to drop him. Vang fell 45 feet to the ground. *Id.* ¶ 14. Vang suffered a blunt impact to his head and trunk. He died from head trauma due to the fall. *Id.* ¶ 18.

Ninham's conduct while awaiting trial. While awaiting trial, the State filed additional charges against Ninham. The complaint alleged that while Ninham was in a juvenile detention facility, he threatened the life of Judge Richard J.

Dietz who was then presiding over Ninham's case. Upon learning about the other juvenile's statements to the police, Ninham allegedly "threatened to conduct a 'drive by' of [one juvenile]'s house, to 'rape and kill' [another juvenile], and to arrange for the killing of Crapeau's sister." *Id.* ¶ 22.

The presentence investigation report (PSI). A presentence report was prepared. (R. 45.)[3] The report noted Ninham's dysfunctional family background and detailed his serious substance abuse problems. *Ninham*, 333 Wis. 2d 335, ¶ 25. The PSI described the offense. (R. 45:PSI:2–3.) It included Ninham's statements of the offense. Ninham denied responsibility for Vang's death. He claimed that he fabricated his prior statements to law enforcement to appease them. Ninham admitted that he demonstrated to other juvenile inmates how he threw Vang off the ramp, but said he did this merely so that the other inmates would leave him alone. (R. 45:PSI:3–4.) Vang's family members also provided detailed information about how Ninham's crime affected them. (R. 45:PSI:4–6.)

The PSI also addressed Ninham's prior record, including his prior delinquency adjudications and municipal offenses. Ninham explained that his offenses occurred when he was using controlled substances. (R. 45:PSI:6–7.) Ninham also noted that if he were "hassled while incarcerated, he would have no qualms about resorting to violence, including murder." (R. 45:PSI:7.) Ninham also acknowledged his association with gang members in Milwaukee, many of whom were dead by that time. (R. 45:PSI:9.) The PSI addressed

[3] The PSI appears is in the record along with a private presentence report prepared by Vicky L. Padway. (R. 45.) The State will refer to the PSI as follows: "(R. 45:PSI:_.)" It will refer to Padway's report as follows: "(R. 45:PAD:__.)"

Ninham's dysfunctional family life, including issues with his parents and siblings. (R. 45:PSI:7–8.) It also documented his educational background, mental ability, lower level functioning, and substance abuse issues. (R. 45:PSI:8–9.)

The agent who drafted the PSI described Ninham as a "frightening young man" who involved himself "in the most heinous of actions-the random, motiveless murder of a truly innocent victim." (R. 45:PSI:10.) The agent characterized Ninham's crimes as "a terrible act of impetuous violence." (*Id.*) The agent observed that Vang's horrific murder was "made worse by Omer's icy affect, his ruthless, remorseless promise to kill again while in prison." (*Id.*)

When Padway interviewed Ninham, Ninham denied responsibility for Vang's death. He claimed that he had been drinking, bicycled to a local park, and blacked out. (R. 45:PAD:1–2.) Ninham described his relationship with his parents and their drinking. He also described how his father beat him, his mother and his siblings. (R. 45:PAD:2.) In addition, Ninham's brothers also physically abused him. (R. 45:PAD:3, 7.) Ninham told Padway about joining a street gang at age 10. He also described his extensive experience abusing alcohol and drugs. (R. 45:PAD:4.) Padway's report also documented Ninham's educational background and his group home placements. (R. 45:PAD:3, 5.) Padway noted that Ninham had been adjudicated delinquent for operating a vehicle without the owner's consent and burglary. (R. 45:PAD:2.)

Padway concluded that Ninham was learning disabled and was probably more of a follower than a leader. She opined that Ninham's young age impaired his judgment. Padway recommended that the circuit court sentence Ninham to a life sentence with parole eligibility after 25 years. (R. 45:PAD:8.)

The sentencing hearing. At the sentencing hearing, the State moved to dismiss and read in charges related to the threat to the judge and the intimidation of the witnesses. *Ninham*, 333 Wis. 2d 335, ¶ 24. The circuit court acknowledged receipt of the PSI and Padway's report. Neither party objected to the contents of the report. (R. 70:2–3.) Vang's brother provided a statement to the circuit court on behalf of Vang's family and friends. *Ninham*, 333 Wis. 2d 335, ¶ 27. Ninham again denied responsibility for Vang's death, claiming that he "was not there, and that's the honest truth." *Id*. ¶ 28.

Before the circuit court sentenced Ninham, it discussed the sentencing factors that formed the basis for his sentence. The circuit court considered the gravity of the offense, characterizing it as "horrific" and noting that it was "beyond description . . . beyond this Court's ability to describe in very great detail." (R 70:23.)

The circuit court also discussed Ninham's character. It conceded that Ninham "is a child, but he's a child beyond description to this Court. He's a frightening young man . . . almost beyond description to this Court." (R. 70:24.) The circuit court acknowledged Ninham's age, that he was a young man and he lacked emotional stability. (*Id*.) The circuit court later stated, "I have already conceded that he's a child, but he's a child of the street who knew what he was doing." (R. 70:25.) It noted Ninham's dysfunctional background, acknowledging that it could not condone the circumstances that Ninham encountered. (*Id*.) The circuit court asked "whether Omer Ninham's character is a result of his being a frightened child or the result of his being a ruthless young man." (R. 70:26.) The circuit court concluded "that there is more ruthlessness in Omer Ninham than there is [a] frightened child." (*Id*.)

With respect to its consideration of the protection of the public, the circuit court also stated that the community needed "to be protected from children or young men that act out in the manner of an Omer Ninham." (*Id*.)

III. Procedural History.

A jury convicted Ninham of first-degree intentional homicide, contrary to Wis. Stat. § 940.01(1), and physical abuse of a child, contrary to Wis. Stat. § 948.03(2)(b), for the death of Zong Vang, a thirteen-year-old male. (R. 7; 42:1–2.)

The circuit court ordered the preparation of a presentence investigation report (PSI). (R. 45.) Ninham also submitted a private presentence report prepared by Vicky Padway. (R. 45.) At the sentencing hearing (R. 70), the circuit court sentenced Ninham to a life-without-parole conviction for first-degree-intentional homicide (R. 47). The circuit court also sentenced Ninham to a five-year term of imprisonment on the charge of physical abuse of a child, consecutive to his life sentence. (R. 47.)

Ninham's first postconviction motion and appeal. Ninham moved for postconviction relief. He alleged that the jury selection process deprived him of due process and that trial counsel was ineffective for failing to object to the circuit court's decision related to jury selection. (R. 53:1–2.) Following a hearing, the circuit court denied Ninham's postconviction motion. (R. 58.) This Court affirmed Ninham's conviction. *State v. Omer Ninham*, Case No. 01AP716-CR (per curiam) (December 4, 2001). (R. 75.)

Ninham's second postconviction motion and appeal. In 2007, Ninham moved for postconviction relief under Wis. Stat. § 974.06. He challenged his sentence on several grounds,

including that it violated his rights under the Eighth and Fourteenth Amendments of the United States Constitution. (R. 82.)[4] The circuit court denied his motion. (R. 82:20.) This Court affirmed. *State v. Omer Ninham*, Case No. 08AP1139 (March 3, 2009) (R. 93.) The Wisconsin Supreme Court affirmed. *Ninham*, 333 Wis. 2d 335, ¶ 3. (R. 104.) The supreme court concluded that the imposition of a life-without-parole sentence on a 14-year-old does not categorically constitute cruel and unusual punishment. *Id.* ¶ 83. It also rejected Ninham's claim that his life-without-parole sentence was unduly harsh and excessive. *Id.* ¶ 86.

Ninham's third postconviction motion. In 2013, Ninham moved for postconviction relief under Wis. Stat. § 974.06, again alleging that his life-without-parole sentence violated the Eighth and Fourteenth Amendments. He specifically asserted that the sentencing court failed to adequately consider Ninham's youth and associated age-related characteristics when it sentenced him. (R. 106:1–2.)

The circuit court denied Ninham's postconviction motion. (R. 124.) First, it held that *Miller* did not apply to Ninham's case because his life-without-parole sentence was discretionary and not mandatory. (R. 124:6–8.) Second, the circuit court held that the sentencing court sufficiently considered Ninham's youth when it sentenced him. (R. 124:8–11.)

Ninham appealed.

[4] While the State responded to Ninham's motion (R. 81), the record appears to be missing a copy of the motion.

STANDARD OF REVIEW

Whether sentencing Ninham to a life-without-parole sentence 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.

Sentencing is generally left to the circuit court's broad discretion. This Court's review is limited to determining whether the sentencing court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

ARGUMENT

I. A discretionary life sentence without parole imposed under Wis. Stat. § 973.014 does not violate the Eighth Amendment's prohibition against cruel and unusual punishment as interpreted in *Miller v. Alabama*.

A. *Miller v. Alabama* does not apply to a discretionary life-without-parole sentence because Wisconsin law requires individualized sentencing determinations.

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 State v. Ninham,* 2011 WI 33, ¶ 45, 333 Wis. 2d 335, 797 N.W.2d 451.

1. The prohibition against cruel and unusual punishment and juvenile life sentences.

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-years-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 a 14-year-old to life without parole when the crime is an intentional homicide. It also concluded in the exercise of its independent judgment that the punishment was not categorically unconstitutional. *Id*. Based on the circumstances of his case, the court also decided that Ninham's life-without-parole sentence was not unduly harsh and excessive. *Id*. ¶ 5.

Following *Ninham*, the U.S. Supreme Court held 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). The Supreme Court expressly recognized the continued authority of a sentencing court to sentence a juvenile to life without parole when the juvenile's crime reflects "irreparable corruption." *Id*. at 2469 (citation omitted). But before it does so, the sentencing court must "take into account how children are different, and how those

differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which also involved an automatically imposed life-without-parole sentence imposed on a juvenile for an intentional homicide, the Supreme Court clarified that *Miller* announced a substantive rule of constitutional law and a defendant may benefit from its retroactive application on collateral review. *Montgomery*, 136 S. Ct. at 736.

The U.S. 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 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 Supreme Court identified five specific factors 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 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."

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.*[5]

When a sentencing court has the authority to exercise individualized sentencing discretion in parole eligibility determinations, it may consider these five factors in its sentencing calculus. This is precisely what the Supreme Court intended when it held "that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2475. A discretionary life sentencing scheme is consistent with *Miller* when it allows a sentencing court to make an individualized sentencing determination and consider the *Miller* factors in mitigation of the harshest available sentence.

2. Neither *Miller* nor *Montgomery* prohibits a sentencing court from imposing a life-without-parole sentence under sec. 973.014(1).

Parole eligibility determinations under sec. 973.014(1) do not violate *Miller* and *Montgomery* because a Wisconsin

[5] The Supreme Court's choice of language for each factor—"precludes," "prevents," "neglects," "ignores," and "disregards"—suggests that it was concerned with a statutorily mandatory life-without-parole scheme that prohibits a court's consideration of these factors when sentencing a juvenile. *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012). In contrast, a sentencing court that engages in an individualized sentencing determination may consider these *Miller* factors when it exercises its discretion.

sentencing court must make an individualized sentencing determination when it exercises its sentencing discretion. "[I]ndividualized sentencing is a cornerstone to Wisconsin's system of indeterminate sentencing." *State v. Lechner*, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998).

As part of this individualized sentencing responsibility, the supreme court has directed circuit courts to impose sentences that "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, 773–74, 482 N.W.2d 883 (1992). These same sentencing principles that require an individualized sentencing determination extend to a circuit court's parole eligibility determination with respect to life sentences imposed under sec. 973.014(1). *See Borrell*, 167 Wis. 2d at 774.

Thus, sec. 973.014(1)'s discretionary life sentencing scheme differs significantly in several 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); *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. Fourth, when a sentencing court sets parole eligibility, it may consider a variety of factors 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 Id.* at 2475. *Borrell*, 167 Wis. 2d at 774.

Because sec. 973.014(1) provides for the exercise of individualized sentencing discretion, it does not violate *Miller*'s proscription against life-without-parole sentences.

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

Relying on the supreme court's prior decision in *Ninham* and this Court's decision in *Barbeau*, the circuit court correctly determined that *Miller* did not apply to life-without-parole sentences imposed through the exercise of discretion. (R. 124:5–8.) In *Barbeau*, 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. This Court further observed that *Miller* builds on the U.S. Supreme Court's analysis in *Roper v. Simmons*, 543 U.S. 551 (2005),[6] and *Graham v. Florida*, 560 U.S. 48 (2010).[7] *Barbeau*, 370 Wis. 2d 736, ¶ 31. The *Ninham* decision extensively discussed *Roper* and *Graham* in rejecting Ninham's prior categorical proportionality challenge to the imposition of a mandatory life sentence. *See Barbeau*, 370 Wis. 2d 736, ¶ 30.

Based on its analysis of *Miller*, this Court concluded that what the Supreme Court "found unconstitutional [in *Miller*] was a statutory scheme that mandates a punishment of life imprisonment without the possibility of parole for a juvenile convicted of intentional homicide." *Barbeau*, 370 Wis. 2d 736, ¶ 33.

In contrast, because sec. 973.014(1g)[8] does not mandate a life-without-release sentence and merely provides the

---

[6] In *Roper*, the Supreme Court held that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

[7] In *Graham*, the Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham v. Florida*, 560 U.S. 48, 82 (2010).

[8] While Ninham's case involves setting a parole eligibility date, *Barbeau* concerned a sentencing court's exercise of discretion when it set an extended supervision release date under Wis. Stat. § 973.014(1g). *Barbeau*, 370 Wis. 2d 736, ¶¶ 16–17. While parole and extended supervision are legally distinct procedures, the Eighth Amendment analysis remains unchanged.

sentencing court with the discretion to impose such a sentence, it does not violate *Miller's* prohibition against life-without-parole sentences. *Barbeau*, 370 Wis. 2d 736, ¶ 33.[9]

This Court declined to hold that *Miller*'s prohibition applied 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. To be sure, Ninham, unlike Barbeau, received a life-without-parole sentence. But, as with Barbeau's case, the circuit court's discretion was not circumscribed when it sentenced Ninham. It exercised its discretion and imposed a life-without-parole sentence, an option available but not mandated under sec. 973.014(1). Because *Miller* is limited to statutorily mandated life-without-parole sentences, it does not apply to Ninham's case.

4. Both the *Ninham* decision and *Barbeau* decision bind this Court's resolution of Ninham's current appeal.

Without ever saying so, Ninham is effectively arguing that the supreme court incorrectly decided his case when it held that a life-without-parole sentence imposed under sec. 973.014(1) does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Ninham also does not address *Barbeau*, a decision that the circuit court relied on when it denied Ninham's challenge. (R. 124:6.) But if Ninham had, he would probably challenge this Court's

---

[9] 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. *Barbeau*, 370 Wis. 2d 736, ¶¶ 34–44. This Court also held that Barbeau "failed to show that the current statutory scheme denie[d] him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. ¶¶ 45–49.

statement that "nothing in *Miller* undercuts our supreme court's holding in *Ninham*." *Barbeau*, 370 Wis. 2d 736, ¶ 32.

The State disagrees that *Miller* and *Montgomery* undermine *Ninham* and *Barbeau*. But even if Ninham were correct, 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 exclusive 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, it may certify the case to the supreme court. Alternatively, it "may decide the appeal, adhering to a prior 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 Wisconsin cases that have rejected Eighth Amendment challenges to life sentences imposed under sec. 973.014, this Court lacks the authority to overrule those cases and should deny Ninham's appeal.

B. Recent U.S. Supreme Court orders and decisions from other jurisdictions do not demonstrate that *Ninham* and *Barbeau* were wrongly decided and should apply to Ninham's case.

1. Recent Supreme Court orders granting, vacating and remanding cases following decisions in *Montgomery* and *Miller* do not undermine *Ninham* or *Barbeau*.

Ninham argues that the Supreme Court's recent orders in *Tatum v. Arizona*, 137 S. Ct. 11 (2016), four other Arizona

cases,[10] and three earlier California cases,[11] extended *Miller* and *Montgomery* to discretionary life sentences. (Ninham's Br. 12–14.) Ninham misplaces his reliance on *Tatum* and those other cases. In *Tatum* and the companion Arizona cases, the Supreme Court granted certiorari, vacated, and remanded Tatum's case "for further consideration" in light of *Montgomery*. *Tatum*, 137 S. Ct. at 11. The grant, vacate, and remand (GVR) order provided no additional guidance. Justice Sotomayer wrote a concurrence, which no other justices joined, explaining why the GVR order was appropriate. *Id*. at 13. Justice Alito, joined by Justice Thomas, dissented from the GVR order. *Id*. The dissent observed that *Montgomery* simply held that *Miller* is retroactive and that it was inappropriate to use the GVR to direct the lower courts to reconsider the application of *Miller* in those cases. *Id*.

Based on *Montgomery* and *Tatum*, Ninham boldly asserts that "the Supreme Court has made clear that *Miller* unquestionably applies to discretionary sentences of life without parole." (Ninham's Br. 13–14.) The State disagrees for two reasons.

First, in *Montgomery*, Montgomery received a life sentence without parole imposed automatically upon the jury's guilty verdict. *Montgomery*, 136 S.Ct. at 726. The question the Supreme Court decided was whether *Miller* applies retroactively to cases on collateral review.

---

[10] *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).

[11] The Supreme Court issued its GVR orders in the California cases for further consideration of *Miller*. *Montgomery* had not yet been decided. *See Blackwell v. California*, 133 S. Ct. 837 (2013); *Mauricio v. California*, 133 S. Ct. 524 (2012); and *Guillen v. California*, 133 S. Ct. 69 (2012).

Montgomery, 136 S.Ct. at 732. The Supreme Court did not decide whether *Miller* extends 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.

Second, Ninham's argument rests on the assumption that the GVR orders in *Tatum* and the other cases that he cited 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 a 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).[12]

The Supreme Court's GVR orders in post-*Miller* and post-*Montgomery* cases simply do not establish that *Miller* applies to discretionary life-without-parole sentences imposed under sec. 973.014(1).

---

[12] On June 29, 2012, just four days after it decided *Miller*, the Supreme Court denied Ninham's petition for certiorari and, at the same time, issued its GVR order in *Guillen v. California*, 133 S. Ct. 69 (2012). *Ninham v. Wisconsin*, 133 S. Ct. 59 (2012). The Supreme Court's GVR orders in *Guillen* and the other cases Ninham cites carry no more weight than the court's denial of certiorari in Ninham's prior appeal.

2. Cases from other jurisdictions are not binding on this court.

Ninham cites cases from other jurisdictions to bolster his argument that *Miller* and *Montgomery* compel resentencing in his case. (Ninham's Br. 14–19.) Unlike the supreme court's decision in *Ninham* or this Court's decision in *Barbeau*, these cases from other jurisdictions do not bind this Court's resolution of Ninham's case.

None of the cases involve a sentence imposed under Wisconsin's discretionary sentencing scheme, where the court determines whether the defendant sentenced for first-degree intentional homicide should be eligible for parole in 20 years, a term of more than 20 years, or not at all. Wis. Stat § 973.014(1g)(a). Further, Ninham does not suggest that these other states' courts, when determining parole eligibility, have been directed by their supreme courts to impose "*the minimum amount of custody or confinement* that is consistent with the need to protect the public, the gravity of the offense and the rehabilitative needs of the convicted defendant." *Borrell*, 167 Wis. 2d at 764 (emphasis added).

In addition, not all of the cases upon which Ninham relies are particularly persuasive. For example, relying on *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), he contends that the Seventh Circuit has rejected the argument that *Miller* applies only to mandatory sentencing schemes. (Ninham's Br. 17–18.) In *McKinley*, the majority of a Seventh Circuit panel 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; *see 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*.").

Other courts have concluded that *Miller* does not extend to discretionary life sentences. For example, in *United States v. Jefferson*, 816 F.3d 1016 (8th Cir. 2016), a case decided after *Montgomery*, the Eighth Circuit declined to "consider [defendant's] contention that *Miller's* categorical ban applies to his '*de facto* life sentence.'" *Id*. at 1019. Likewise, the Ninth Circuit declined to extend *Miller* to discretionary life sentences: "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*." *Bell v. Uribe*, 748 F.3d 857, 870 (9th Cir. 2014). The Tenth Circuit observed that "*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." *Davis v. McCollum*, 798 F.3d 1317, 1321–22 (10th Cir. 2015).

As Ninham correctly notes, courts in some other states have decided that *Miller* applies to discretionary life sentences. (Ninham's Br. 14–16.) But even those courts have recognized a split of authority on whether *Miller* applies to

life-with-parole sentences and life-without-parole sentences imposed as a matter of discretion. *See State v. Riley*, 110 A.3d 1205, 1214 n.5 (2015), *cert. denied*, 136 S. Ct. 1361 (2016); *see also State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (recognizing that other courts have "viewed *Miller* more narrowly, holding that it applies only to mandatory sentences of life without parole"). Further, some states that have applied *Miller* principles to juvenile sentences have done so under their state constitutions. *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) ("[W]e conclude a sentence of life without the possibility of parole for a juvenile offender violates . . . the Iowa Constitution.").

Courts from other jurisdictions have not uniformly and conclusively held that a life-without-parole sentence imposed under a discretionary life sentence scheme like Wis. Stat. § 973.014(1) violates *Miller*. The supreme court's rejection of Ninham's prior Eighth Amendment categorical challenge to his life-without-parole sentence forecloses this Court's consideration of

* * * * *

Miller and *Montgomery* simply do not apply to discretionary life sentences imposed under Wis. Stat. § 973.014. Unlike the life-without-parole sentencing schemes in *Miller* and *Montgomery,* the circuit court had the authority to exercise discretion when it considered Ninham's parole eligibility. In exercising this discretion, it was required to impose the minimum amount of confinement consistent with *McCleary's* primary sentencing factors. That it elected to sentence Ninham to a life-without-parole sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

II. While Ninham's sentencing hearing occurred before *Miller*, the circuit court addressed the types of age-related considerations that *Miller* mandates.

If *Miller* applies to discretionary life sentencing decisions, then a sentencing court must take into account age and other age-related factors that differentiate juveniles from adults and differentiate between juveniles whose crimes reflect "transient immaturity" from the "rare juvenile" whose crime reflects "irreparable corruption." *Miller*, 132 S. Ct. at 2469.[13] These age-related factors include hallmark features associated with a juvenile's age such as immaturity, impetuosity, and failure to appreciate risks and consequences; consideration of the juvenile's home environment; the circumstances of the homicide including the juvenile's participation and peer pressure; whether the juvenile might have been charged and convicted of a lesser offense but for his or her youth; and the possibility of rehabilitation. *Id*. at 2468.

In Ninham's case, the circuit court did not have the benefit of *Miller*'s guidance when it sentenced Ninham. The question becomes whether the circuit court used a framework consistent with *Miller* that accounted for various factors associated with Ninham's youth and age-related characteristics. Even if the circuit court did not expressly address the specific factors identified in *Miller*, this Court may review the record to determine whether the circuit court's exercise of discretion comports with *Miller*'s requirements. *See McCleary*, 49 Wis. 2d at 282 (even if the circuit court fails to adequately set forth its reasons for its

[13] While a sentencing court must assess whether the juvenile's crimes reflect irreparable corruption, the Supreme Court did not require sentencing "courts to make a finding of fact regarding a child's incorrigibility." *Montgomery*, 136 S. Ct. at 735.

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").

Consistent with *McCleary*, the circuit court reviewed the record and determined "that the sentencing Court appropriately considered Ninham's youth and related characteristics when imposing this sentence." (R. 124:11.) The record supports the circuit court's determination.

The sentencing court considered the circumstances of the homicide including the juvenile's participation and peer pressure. Miller, 132 S. Ct. at 2468. The sentencing court appropriately recognized the horrific nature of Ninham's crime, which the supreme court detailed in its decision. (R: 70:23–24.) *Ninham*, 333 Wis. 2d 335, ¶¶ 8–20. When Crapeau saw Vang and decided to "mess" with him, Ninham told Crapeau that he had his back. *Id*. ¶ 10. Crapeau bumped Vang, took away his bicycle, and threw Vang's grocery bag. When Vang asked for his bicycle back, "Ninham punched him, knocking Vang down." *Id*. ¶ 11. When Vang fled into the parking structure, Ninham and the others chased him. When they caught him, Crapeau punched Vang in the face. Ninham continued to strike Vang as they pushed him back and forth between them. *Id*. ¶ 12. Ninham and Crapeau swung Vang back and forth over the parking structure wall. Crapeau told Ninham to let go and Vang fell 45 feet to his death. *Id*. ¶ 14.

Ninham's crime is fundamentally different from the "botched robbery" in *Miller* that turned "into a killing." *Miller*, 132 S.Ct. at 2465. Rather, Ninham engaged in a series of deliberate, escalating acts that culminated in Vang's death. Ninham could have stopped any number of times. Despite Vang's repeated pleas for mercy, Ninham and Crapeau terrorized Vang. Ninham literally held Vang's life in his hand, yet he chose to extinguish it.

In assessing the gravity of Ninham's crimes, the circuit court appropriately characterized them as "horrific" and noting that it was "beyond description . . . beyond this Court's ability to describe in very great detail." (R. 70:23.) The supreme court agreed. "The manner in which Ninham took Vang's life was horrific and senseless. The severity of the homicide was compounded by the fact that Ninham refused to take any responsibility and in fact threatened the lives of other juveniles who did." *Ninham*, 333 Wis. 2d 335, ¶ 86.

The sentencing court appropriately considered Ninham's home environment. *Miller*, 132 S. Ct. at 2468. Both the Department of Corrections' PSI and Padway's report thoroughly documented the chaotic circumstances surrounding Ninham's home life, including the domestic abuse and substance abuse that he and his siblings experienced. (R. 45:PSI:7–8; 45:PAD:2–3.) The sentencing court noted the dysfunctional environment in which Ninham was raised. (R. 70:24–25.)

The circuit court considered Ninham's age and age-related factors associated with his age. *Miller*, 132 S. Ct. at 2468. The circuit court acknowledged that Ninham was a child, but a "child beyond description to this Court" who is a "frightening young man . . . beyond description to this Court." (R. 70:24.) It characterized Ninham as a "child of the street who knew what he was doing and knew what his circumstances were. . ." (R. 70:25.)

The sentencing court did not make these assessments in a vacuum, but was guided by the information contained in the PSI and Padway's report. Both the PSI and Padway's report documented Ninham's educational and substance abuse challenges, factors associated with youthful offenders. (R. 45:PSI:8–9; 45:PAD:3–4.) Padway's report reflected that Ninham became a street gang member at age 10. (R.

45:PAD:4.) She also noted that Ninham's young age impaired his judgment. (R. 45:PAD:8.)

Based on its review of the record, the sentencing court rejected the notion that age drove Ninham's behavior. It concluded Ninham's conduct was not the result of "being a frightened child" but of being a "ruthless young man." (R. 70:26.) This assessment reflects the sentencing court's implicit determination that Ninham's crime did not reflect "transient immaturity" but was the "rare juvenile offender whose crime reflect[ed] irreparable corruption." *Miller*, 132 S.Ct. at 2469.

The circuit court also considered Ninham's prospects for rehabilitation. *Miller*, 132 S. Ct. at 2468. The sentencing court implicitly questioned Ninham's prospects for rehabilitation. "You had some opportunities in your life to turn away from all of the negative implications and aspects of what was going on, and you chose not to do that. . . ." (R. 70:27.) After Ninham killed Vang but before he was charged, Ninham was placed at the Oneida Group Home, which provided him with stability, mental health treatment, and educational opportunities. (R. 45:PAD:5.) But once charges were filed, Ninham threatened the judge presiding over his case and other juveniles who had cooperated. *Ninham*, 333 Wis. 2d 335, ¶ 22. During his presentence interview, he candidly acknowledged that he would kill again in prison if necessary. (R. 45:PSI:10.) Finally, the sentencing court noted that Ninham had refused to accept responsibility for Vang's death: "[i]t absolutely amazes me, Omer, that you would sit here and contend that you weren't even there." (R. 70:26.)

Ninham's failure to accept responsibility after trial, his threats to witnesses, and his promise to kill while in prison arose after his positive stay at the Oneida Group Home. Ninham's post-charging conduct could have reasonably raised

concerns in the sentencing court's mind regarding Ninham's realistic prospects for rehabilitation. (*But see* Ninham's Br. 28.)

The circuit court did not consider whether Ninham might have been charged and convicted of a lesser offense but for his or her youth. Miller, 132 S. Ct. at 2468. While the sentencing court did not consider the possibility of convictions to lesser charges when it sentenced Ninham, this consideration should carry little weight based on the facts of Ninham's case. Vang's death was not the result of reckless conduct. Rather, it resulted from Ninham's and Crapeau's intentional acts committed with the intent to kill him. Ninham's decision to let go of Vang as he dangled over the wall, 45 feet above a parking structure, was practically certain to cause Vang's death. *See* Wis. Stat. § 939.23(3). Based on the absence of mitigating circumstances, including adequate provocation or self-defense, there is no likelihood that a jury would have found Ninham guilty of a lesser homicide charge. *See* Wis. Stat. §§ 940.01(2) and 940.05.

Miller did not prohibit the sentencing court from sentencing Ninham to life without parole. Rather, it required the sentencing court to engage in an individualized sentencing determination that allowed it to consider mitigating sentencing information. *Miller*, 132 S. Ct. at 2475. This is precisely what happened here. The sentencing court sat through Ninham's four-day jury trial. (R. 124:9.) It examined two detailed presentence reports that documented Ninham's life, including many aspects related to his youthful character. (R. 70:25; 124:9.)

While the sentencing court did not have the benefit of *Miller*'s guidance, its exercise of sentencing discretion demonstrates that it viewed Ninham differently from other juveniles, characterizing him as more like a "ruthless young

man" than a "frightened child." (R. 70:26.) This is precisely the distinction that *Miller* requires a sentencing court to make before it imposes a life-without-parole sentence. The sentencing court's comments reflect its assessment that Ninham's conduct was not merely the result of "transient immaturity," but the product of a "rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. 2469.

Based on this record, the postconviction court could reasonably conclude that the sentencing court "appropriately considered Ninham's youth and related characteristics" when it sentenced Ninham to life-without-parole. (R. 124:11.)While age-related characteristics associated with juvenile offenders may mitigate a sentence, they do not override a sentencing court's consideration of other legitimate considerations including its assessment of the seriousness of the offense and need to protect the public. And here, the particularly horrific circumstances of Vang's death when coupled with Ninham's statement that he would kill again in prison could legitimately trump any mitigating factors, including those based on Ninham's age, which would have supported a lesser sentence.

Because the circuit court exercised its discretion consistent with *Miller, McCleary*, and *Borrell*, Ninham's life-without-parole sentence under sec. 973.014 was not cruel and unusual under the facts of his case. [14]

---

[14] The supreme court not only rejected Ninham's categorical challenge to a life-without-parole sentence for a juvenile, it also denied Ninham's claim that a life-without-parole sentence in his case constituted cruel and unusual punishment because it was unduly harsh and excessive. *Ninham*, 333 Wis. 2d 335, ¶¶ 84–86. While acknowledging Ninham's age and difficult childhood, the

III. The postconviction court did not make an independent finding of "irreparable corruption."

"Sentencing decisions are afforded a presumption of reasonability consistent with our strong public policy against interference with the circuit court's discretion." *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W. 2d 409. Accordingly, even when the record does not indicate the sentencing court's reasoning, a reviewing court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *McCleary*, 49 Wis. 2d at 282.

Here, the postconviction court reviewed the record from the original sentencing proceeding to determine whether the sentencing court "appropriately considered Ninham's youth and related characteristics." (R. 124:11.) For the reasons identified in Section II above, the postconviction court determined that the record supported the sentencing court's decision to impose a life-without-parole sentence.

Ninham asserts that the postconviction court made independent findings of irreparable corruption. (Ninham's Br. 42–47.) The State disagrees. The postconviction court reviewed the sentencing record. It determined that the sentencing court accounted for Ninham's age-related characteristics, even if it did not use the framework that the Supreme Court subsequently adopted in *Miller*. (R. 124:8–11.)

---

supreme court noted other factors that supported the sentencing court's exercise of discretion, including the horrific and senseless manner in which Ninham took Vang's life, Ninham's failure to take responsibility, and his threatening the lives of other juveniles who did. *Id*. ¶ 86.

It then made the following finding:

> Upon examination of the entire record, the Court is therefore satisfied that the sentencing Court appropriately considered Ninham's youth and related characteristics when imposing this sentence. Notably, *even if the Court were compelled* to resentence Ninham, the Court would be obligated to assess the same factors considered by the Court at Ninham's sentencing in 2000—and, although the Court may now use terminology more consistent with *Miller* and related decisions, the only conceivable conclusion is that sentencing Ninham to life in prison without parole for Vang's murder is just [as] warranted in 2016 as it was in 2000.

(R. 124:11) (emphasis added). The postconviction court's comments are nothing more than its observation that it would have reached the same conclusion based on the record. It did not purport to resentence Ninham, but merely expressed its agreement with the sentencing court's original assessment.

But if the Court agrees with Ninham and concludes that the postconviction court erroneously made an independent finding of irreparable corruption, Ninham is not necessarily entitled to relief. Ninham is only entitled to a new sentencing hearing if this Court concludes that: (a) *Miller* extends to life sentences imposed under sec. 973.014; and (b) if *Miller* applies, the sentencing court did not adequately account for Ninham's age-related characteristics as *Miller* requires. For the reasons articulated in Sections I and II above, the State respectfully requests this Court to affirm the postconviction court's decision denying Ninham's request for a new sentencing hearing.

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm the circuit court's denial of Ninham's postconviction motion.

Dated this 14th day of June, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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 7,738 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 14th day of June, 2017.

_____
DONALD V. LATORRACA
Assistant Attorney General