**STATE OF WISCONSIN COURT OF APPEALS**
**DISTRICT 3**

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| STATE OF WISCONSIN, | ) | |
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| 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

# REPLY BRIEF OF DEFENDANT-APPELLANT

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The United States Supreme Court's decisions in ***Miller v. Alabama***, 567 U.S. 460 (2012), and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), establish that the sentencer must consider the mitigating qualities of youth before condemning a young adolescent to lifetime incarceration. 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. The State's arguments to the contrary ignore controlling precedent and misstate ***Miller***'s requirements.

### I. THE STATE'S ARGUMENTS THAT *MILLER* DOES NOT APPLY TO OMER'S LIFE-WITHOUT-PAROLE SENTENCE ARE UNPERSUASIVE, AND THIS COURT HAS THE POWER TO GRANT HIS APPEAL.

As explained in Omer's opening brief, ***Miller v. Alabama***, 567 U.S. 40 (2012), applies to life-without-parole sentences for crimes committed when a defendant was a juvenile even under a discretionary sentencing scheme, and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), eliminates any lingering doubt that that is the case. Thus, ***Miller*** must be applied to Omer's case.

### A. The State ignores the significance of *Montgomery v. Louisiana*.

In arguing that ***Miller*** does not apply to Omer's sentence because it was not mandatory, the State dismisses the United States Supreme Court's remands of non-mandatory sentences for reconsideration under ***Montgomery***, as well as the decisions of other jurisdictions' courts finding that ***Montgomery*** clarified that ***Miller*** applies to non-mandatory sentences, Pl.-Resp't's Br. at 20-23, but almost wholly fails to engage with the ***Montgomery*** decision itself. The State makes only brief references to ***Montgomery***'s text in its brief, most of which merely note that ***Montgomery*** found ***Miller*** retroactive. Pl.-Resp't's Br. at 12, 19-20.

But in order to find ***Miller*** retroactive, the ***Montgomery*** Court had to determine whether ***Miller*** established a procedural requirement that "regulate[s] only the *manner of determining* the defendant's culpability," 136 S. Ct. at 732, or a substantive restriction on which children can be sentenced to life without parole. The Court rejected the proposition that ***Miller*** was merely a procedural rule. ***Id.*** Rather, the Court found that

***Miller*** "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole." ***Id.*** at 734. The Court concluded that, under ***Miller***, "[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*, 567 U.S. at 479). By noting only that ***Montgomery*** found that ***Miller*** was retroactive, while glossing over the very reason why the Court did so, the State entirely ignores critical binding precedent that governs this Court's decision in this case.

The State's only non-conclusory reference to ***Montgomery*** comes in a footnote, in which the State writes that "the Supreme Court did not require sentencing 'courts to make a finding of fact regarding a child's incorrigibility.'" Pl.-Resp't's Br. at 24 n.13 (quoting *Montgomery*, 136 S. Ct. at 735). Rather than supporting the State's case, however, this passage explains exactly why ***Miller***'s holding ***does*** apply to discretionary sentences. The Court concludes the paragraph containing the cited clause with: ***"[t]hat Miller did not impose a formal factfinding***

***requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole.*** To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." ***Montgomery***, 136 S. Ct. at 735 (emphasis added). In other words, regardless of what procedure is used or what sentencing options are available, ***Miller*** requires the sentencer to consider the ways in which youth "counsel[s] against irrevocably sentencing [a child] to a lifetime in prison," 567 U.S. at 480, and in fact prohibits such sentences for "the vast majority of juvenile offenders." ***Montgomery***, 136 S. Ct. at 734. As such, the State's claim that a sentencing court must consider the factors outlined in ***Miller*** only "*if Miller* applies to discretionary life sentencing decisions" cannot be reconciled with ***Miller*** itself. Pl.-Resp't's Br. at 24 (emphasis added). The Supreme Court held that a court must *always* determine whether a child is irreparably corrupt before sentencing him or her to life without parole. ***Miller***, 567 U.S. at 483; ***Montgomery***, 136 S. Ct. at 735. A ***mandatory*** life-without-parole sentence is only unconstitutional because the sentencing court ***cannot*** consider those factors. A ***discretionary***

life-without-parole sentence is still unconstitutional if the sentencing court ***does not*** consider those factors, and thus ***Miller*** must be applied to sentences given under a discretionary scheme.

While ***Miller*** logically compels this conclusion on its own**,** ***Montgomery*** made it explicit. In ***Montgomery***, the Court wrote that "[i]n *Miller* . . . the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." 136 S. Ct. at 725. There was no restriction as to whether this applied only to mandatory sentences. ***Montgomery*** made clear that this consideration is required for ***all*** juveniles sentenced to life without parole, and that thus ***Miller*** applies to ***all*** such defendants, not just those sentenced under a mandatory scheme.

### B. The cases cited by the State are easily distinguishable and do not control this case.

None of the authorities cited by the State undermine Omer's arguments about the requirements of ***Miller*** and ***Montgomery***. The State makes much of ***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, 196 L. Ed. 2d 601 (2017), and ***State v. Ninham***, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451. Pl.-Resp't's Br. at 17. But neither case is controlling here.

The question in ***Ninham*** and ***Barbeau*** was different from the one before this Court because each addressed a challenge that the ***statute*** under which the defendant was sentenced was *categorically* unconstitutional. ***Ninham***, 333 Wis. 2d 335, ¶ 43; ***Barbeau***, 370 Wis. 2d 736, ¶¶ 23-24.[1] Omer has not challenged the statute but instead challenges whether the sentencing ***in his case*** complied with the Constitution.

This Court has made clear that the "duty to abide by decisions of our supreme court" "does not hold where an entirely new and potentially dispositive issue is raised in a subsequent case." ***Wieting Funeral Home of Chilton, Inc. v. Meridian Mut. Ins. Co.***, 2004 WI App 218, ¶ 14, 277 Wis. 2d 274, 690 N.W.2d 442 (citing ***Cook v. Cook***, 208 Wis. 2d 166,189, 560

[1]Further distinguishing *Barbeau* from the current case, the defendant was not sentenced to life without parole but was instead eligible for release after 20 years. ***Barbeau***, 370 Wis. 2d 736, ¶ 41.

N.W.2d 246 (1997)). The Court has further stated that "[i]t is blackletter law that an opinion does not establish binding precedent for an issue ***if that issue was neither contested nor decided***." *Id.*, ¶ 14 (internal citation omitted) (emphasis added). Thus, because the question raised here, of whether the sentencing court in Omer's case complied with the requirements of ***Miller*** before imposing a sentence of life without parole, was not before the Court in either ***Ninham*** or ***Barbeau***, those cases are not controlling.

In addition, ***Ninham*** was issued in 2011, before both ***Miller*** and ***Montgomery*** were decided. The court relied heavily on the fact that the diminished culpability of juveniles recognized by the Supreme Court in ***Graham v. Florida***, 560 U.S. 48 (2010), did not apply with the same force to juveniles convicted of homicide, 333 Wis. 2d 335, ¶¶ 74-76, a contention that ***Miller*** subsequently rejected. 567 U.S. at 473 ("[N]one of what [*Graham*] said about children . . . is crime-specific."). And while the court, after rejecting the categorical challenge, also found that Omer's life-without-parole sentence was constitutional, 333 Wis. 2d 335, ¶¶ 84-86, it did so by applying the standard that a

sentence is not cruel and unusual unless it is "so disproportionate to the offense committed, as to shock public sentiment." *Id.*, ¶ 85 (internal citation omitted). Subsequently, in ***Miller***, however, the Court rejected the application of that proportionality analysis in the context of children, finding it was an example of a situation when "a sentencing rule permissible for adults may not be so for children." 567 U.S. at 481. Instead, the Court found that "the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." ***Id.*** at 473. Thus, key aspects of *Ninham* have been overturned by ***Miller***.

While the State, Pl.-Resp't's Br. at 16, quotes this Court's statement in ***Barbeau*** that "nothing in *Miller* undercuts our supreme court's holding in *Ninham*," 370 Wis. 2d 736, ¶ 32, it is apparent from the opinion that this Court was referring to ***Ninham***'s holding on the *categorical* challenge to the statute. *See* ***Barbeau***, 370 Wis. 2d 736, ¶ 25. Because the Court's analysis and the resulting conclusion addressed only the categorical

challenge, the State is incorrect that ***Barbeau*** and ***Ninham*** control Omer's claim.[2]

Finally, after noting that cases from other jurisdictions are not binding on this Court, the State offers other cases from other jurisdictions which it claims diminish the persuasiveness of those offered by Omer. Pl.-Resp't's Br. at 21-22. All but one of these cases were decided before ***Montgomery***. ***Martinez v. United States***, 803 F.3d 878 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1230 (2016); ***Davis v. McCollum***, 798 F.3d 1317 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1524 (2016), *validity questioned by* ***Cardoso v. McCollum***, 660 F. App'x 678, 681 and n.1 (10th Cir. 2016) (remanding challenge to discretionary sentence for reconsideration under *Montgomery* noting *Davis* "was delivered post *Miller* but, importantly, pre *Montgomery*"); ***Croft v. Williams***, 773 F.3d 170 (7th Cir. 2014); ***Bell v. Uribe***, 748 F.3d 857 (9th Cir. 2014). In the other case, ***United States v. Jefferson***, 816 F.3d 1016 (8th Cir. 2016), the 600-month sentence

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[2]It is noteworthy that in ***Barbeau***, ***Montgomery*** was not raised in briefing by either party and the Court did not address it. Thus, this Court has not previously addressed the impact of ***Montgomery*** on juvenile sentencing in Wisconsin.

the court affirmed was imposed after Jefferson's original life sentence was vacated under ***Miller*** and ***Montgomery***. ***Id.*** at 1017-18. The defendant in that case thus had already received the relief that Omer is asking for in this case. For these reasons, none of the cases relied on by the State should be persuasive to this Court.

## II. THE FACTORS CONSIDERED BY THE CIRCUIT COURT WERE NOT SUFFICIENT TO SENTENCE A JUVENILE TO LIFE WITHOUT PAROLE UNDER *MILLER* AND *MONTGOMERY*.

The circuit court did not give the consideration of Omer's youth and its attendant characteristics required by ***Miller*** and ***Montgomery*** before sentencing him to life without parole. The State makes no effort to show that the sentencing court actually considered any of the mitigating qualities of youth the Supreme Court has found to be central to juvenile sentencing, and makes only a cursory effort to argue that the court considered the other relevant factors outlined in ***Miller***. Regarding the mitigating qualities of youth, the "starting premise" of ***Miller*** is that "children are constitutionally different from adults for purposes of sentencing" because they have "diminished culpability and

greater prospects for reform." ***Montgomery***, 136 S. Ct. 718, 733 (2017) (quoting ***Miller***, 567 U.S. at 471 (2012)). The State, however, essentially concedes that the sentencing court failed to treat Omer's age as mitigating when it says the court "viewed Ninham differently from other juveniles." Pl.-Resp't's Br. at 28.

The State's assertion that the circuit court's assessment that Omer's conduct "was not the result of 'being a frightened child' but of being a 'ruthless young man'" was equivalent to the constitutionally necessary "determination that Ninham's crime did not reflect 'transient immaturity,'" *id.* at 27 (quoting (R. 70:26); ***Miller***, S. Ct. at 2469), represents a misunderstanding of ***Miller***'s import. ***Miller*** is not about whether a defendant is "frightened" or "ruthless" at the time of the crime or conviction. ***Miller*** speaks to the future, mandating that a juvenile cannot be sentenced to life without parole unless he has *no* "capacity for change." 567 U.S. at 473. As ***Montgomery*** explained, even if parole eligible, "prisoners who have shown an inability to reform will continue to serve life sentences." 136 S. Ct. at 736. But unless the State can show that "rehabilitation is impossible" for

the juvenile offender, the court cannot impose life without parole. ***Id.*** at 733.[3]

Likewise, it is not enough for the court to merely consider some information bearing on the ***Miller*** factors. The State argues that "[t]he sentencing court appropriately considered *Ninham*'s home environment" because the two presentence reports "documented" his chaotic home life and the court "noted" the "dysfunctional environment" in which he lived. Pl.-Resp't's Br. at 26. But ***Miller*** mandates not just that the sentencer look at these factors but that it take into account how the differences between children and adults "counsel against irrevocably sentencing [children] to a lifetime in prison." ***Montgomery***, 136 S. Ct. at 733 (quoting ***Miller***, 567 U.S. at 480). This requires that the ***Miller*** factors be considered, not in the way they might be for an adult, but specifically through the lens of the facts about juvenile status the Supreme Court has recognized as mitigating.

The State instead focuses almost solely on what it terms the "horrific nature of Ninham's crime." Pl.-Resp't's Br. at 25.

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[3]The Pennsylvania Supreme Court recently vacated a discretionary life-without-parole sentence for just this reason. *Com. v. Batts*, No. 45 MAP 2016 2, 84-85 (Pa. June 26, 2017).

Notably the State titles a subsection of its brief, "The sentencing court considered the circumstances of the homicide including the juvenile's participation and peer pressure," but then within the subsection does not mention peer pressure at all. *Id.* at 25-26. This focus violates the Supreme Court's mandates by ignoring "*Miller*'s central intuition—that children who commit even heinous crimes are capable of change." ***Montgomery***, 136 S. Ct. at 736.

Proper consideration of Omer's participation and the role of peer pressure would include the leading role played by Ricky Crapeau in initiating every aspect of the offense: Crapeau instigated the group's harassment of Vang because Crapeau "wanted to fight or see a fight," pointing out the victim and saying, "Let's mess with this kid," and it was Crapeau who "let go of Vang's feet and told Ninham to 'drop him.'" ***Ninham***, 2011 WI 33, ¶¶ 9-14, 333 Wis. 2d 335, 797 N.W.2d 451. Three other teens also chased Vang with them and then egged them on as they swung him over the wall, one encouraging them to "Drop him." *Id.,* ¶ 12; (R. 45:PSI at 3.) All of these facts make peer influence and its impacts on adolescent behavior unusually central to the

circumstances of the offense in this case. The State's case at trial also made clear that this was an impulsive, rather than pre-planned, offense, making the Supreme Court's recognition of children's "recklessness, impulsivity, and heedless risk-taking" particularly relevant. ***Miller***, 567 U.S. at 471 (internal citation omitted).

Finally, recognizing that all murders are undeniably tragic, the crime here is no more reflective of irretrievable depravity than others where the opportunity for parole has been granted. For example, in ***Barbeau***, on which the state heavily relies, the defendant planned and executed, with another boy, the murder of his own great-grandmother "for money," by hitting her in the head with a hatchet and hammer 18 times while she "cried for him to stop." 370 Wis. 2d 736, ¶ 2. Despite these facts, Barbeau will have the opportunity for release after 20 years.

The State seems to suggest that what distinguishes this case from others is Omer's alleged threatening statements while awaiting trail and his failure to accept responsibility. But Omer's behavior as a young teen facing trial in the adult criminal justice system reflects precisely the type of youthful incapacity to cope

with that system that the Supreme Court recognized must be considered before imposing life without parole. ***Miller***, 467 U.S. at 477-78 (sentencer must consider juvenile's "inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys"). The statements the State characterizes as the threats of a hardened criminal could just as easily have been the adolescent bluster of an overwhelmed and scared child. And while the State emphasizes that Omer purportedly "candidly acknowledged that he would kill again in prison if necessary," Pl.-Resp't's Br. at 27 (citing R. 45: PSI at 10), it fails to acknowledge the extremely high rates of victimization incarcerated juveniles encounter, particularly in adult prisons, Nat'l Prison Rape Elimination Comm'n, *National Prison Rape Elimination Commission Report* 16 (2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf, or that Omer had explained that he was referring to what he would do if someone tried to rape him. (R. 45:Memorandum at 6). Critically, the State put forth no evidence that any of these statements were accompanied by any actual acts of violence.

Finally, the evidence strongly suggests Omer had the capacity for rehabilitation. When Omer was for once in his life taken out of an abusive, alcohol-soaked environment and given structure, he thrived. (R. 45:Memorandum at 5, 7-8). Contrary to the State's arguments, Pl.-Resp't's Brief at 28, the fact that he later struggled after being thrown into the adult criminal justice system does not undermine his ***potential*** for change. More importantly, today, if he is given the consideration he is still due under ***Miller***, he will be able to show not just the possibility but the reality of his rehabilitation, making him ineligible for this most severe of juvenile sentences under the Constitution. *See* ***Montgomery***, 136 S. Ct. at 736 (discussing evidence that juvenile had become a "model member of the prison community" as the "kind of evidence that prisoners might use to demonstrate rehabilitation").

## 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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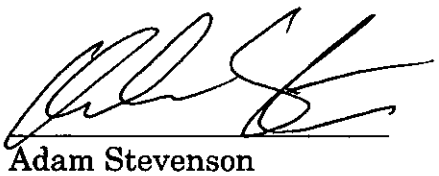

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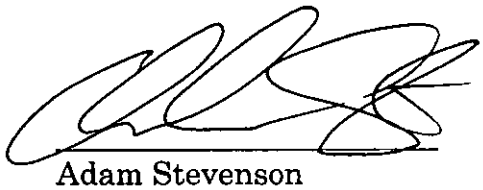

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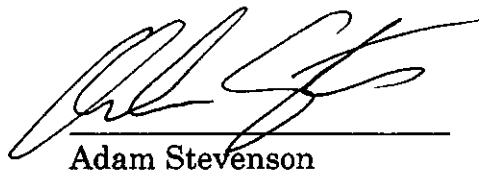

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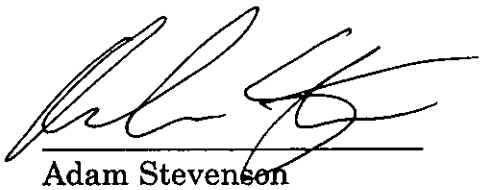

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