STATE OF WISCONSIN

IN SUPREME COURT

No. 2016AP2098

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

OMER NINHAM,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

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) 294-2907 (Fax)
latorracadv@doj.state.wi.us

INTRODUCTION

The State of Wisconsin opposes Omer Ninham's petition for review of the Wisconsin Court of Appeals summary disposition order affirming the circuit court's order denying Ninham's Wis. Stat. § 974.06 motion. *State v. Omer Ninham*, No. 2015AP2098, slip op. (January 25, 2022) (unpublished). Ninham sought resentencing, alleging that his life-without-parole sentence, imposed for a homicide that he committed as a 14-year-old, violated his rights under the Eighth and Fourteenth Amendments to the United States constitution. *Id.*, slip op. at 1–2.

A jury found Omer Ninham guilty of first-degree intentional homicide and physical abuse of a child in connection with 13-year-old Zong Vang's death. *State v. Ninham*, 2011 WI 33, ¶ 2, 333 Wis. 2d 335, 797 N.W.2d 451. Characterizing Ninham's crime as "horrific and senseless," this Court previously detailed the trial evidence related to Ninham's responsibility for Vang's death. *Id.* ¶¶ 8–20.

The sentencing court reviewed a presentence investigation report (PSI) that documented Ninham's continued denial of his responsibility of Vang's death, Ninham's dysfunctional family structure, his significant substance abuse, and his newfound interest in Native American spirituality. *Ninham*, 333 Wis. 2d 335, ¶ 25. The sentencing court also considered a private presentence report that placed emphasis on Ninham's age, emotional stability, and background, and which recommended parole eligibility after he served 25 years. (R. 70:17–18, 24.) The sentencing court was aware of the devastating impact of Vang's loss to his family. *Ninham*, 333 Wis. 2d 335, ¶¶ 26–27. In addition to Ninham's convictions for first-degree intentional homicide and physical abuse of a child, the sentencing court also considered several dismissed and read-in offenses, including threats to the judge presiding over his case and three counts

of intimidation of a witness, related to Ninham's efforts to intimidate three witnesses. *Id.* ¶¶ 22, 24.

In imposing Ninham's sentence, the sentencing court addressed the three primary sentencing factors, including the gravity of Ninham's offenses, his character, and the need to protect the public. *Ninham*, 333 Wis. 2d 335, ¶ 30. In assessing Ninham's character, the sentencing court acknowledged that Ninham was "a child, but he's a child beyond description . . . he's a frightening young man . . . I recognize his age. He's a young man . . . I recognize his emotional stability or lack thereof." (R. 70:24); *Ninham*, 333 Wis. 2d 335, ¶ 30. It rejected the private presentence assessment that Ninham character was the "result of being a frightened child . . . [rather than] a ruthless young man." (R. 70:25–26.)

In 2001, the court of appeals affirmed the circuit court's denial of a postconviction motion that raised non-sentencing related issues. *State v. Omer Ninham*, No. 2001AP716-CR (December 4, 2001). (R. 75.)

Ninham's 2007 challenge to his sentence. Ninham brought a section 974.06 motion challenging his sentence. *Ninham*, 333 Wis. 2d 335, ¶ 3. He asserted that his sentence of life-without-parole sentence violated his rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Section 6 of the Wisconsin constitution. *Id.* Alternatively, Ninham sought sentence modification, arguing that "(1) new scientific evidence relating to adolescent brain development constitutes a new factor that is relevant to the sentence imposed; (2) his sentence is unduly harsh and excessive;" and (3) the sentencing court improperly considered the victim's family's religious beliefs." *Id.*

The circuit court denied Ninham's section 974.06 motion. *Ninham*, 333 Wis. 2d 335, ¶¶ 36–37. The court of

appeals affirmed. *Id.* ¶¶ 38–39. This Court granted review and affirmed. *Id.* ¶ 40.

This Court concluded that neither the Eighth Amendment nor Article I, Section 6 of the Wisconsin Constitution categorically prohibited a court from sentencing a 14-year-old who commits an intentional homicide to a life-without-parole sentence. *Ninham*, 333 Wis. 2d 335, ¶¶ 71–81. After rejecting Ninham's categorical challenge to his life-without-parole sentence, this Court also considered whether his sentence constituted "cruel and unusual" punishment under the Eighth Amendment and Article I, Section 6 of the Wisconsin Constitution. *Ninham*, 333 Wis. 2d 335, ¶¶ 84–86. This Court determined that, notwithstanding his age and difficult childhood, Ninham's sentence was not disproportionate to his crime based on his offense's severity, i.e., the "horrific and senseless" way Ninham took Vang's life, and Ninham's refusal to accept responsibility. *Id.* ¶ 86.

This Court also rejected Ninham's argument that recent research regarding adolescent brain development, constituted a new factor that frustrated the purpose of Ninham's sentence and, therefore, warranted sentence modification. *Ninham*, 333 Wis. 2d 335, ¶¶ 84–93. Finally, this Court determined that the sentencing court did not rely on improper factor, i.e., Vang's family's religious views, when it sentenced Ninham. *Id.* ¶¶ 94–96.

The United States Supreme Court denied Ninham's certiorari petition. *Ninham v. Wisconsin*, 567 U.S. 948 (2012).

Ninham's second and current challenge to his sentence. Ninham filed a section 974.06 motion seeking resentencing contending that his life-with-out parole sentence violated his rights under the Eight and Fourteenth Amendments to the United States Constitution. *Ninham*, slip op. 1–2. The postconviction court rejected Ninham's argument that *Miller v. Alabama*, 567 U.S. 460 (2012) required the sentencing court

to consider his youth and its attendant circumstances when it sentenced Ninham to life-without-parole. *Ninham*, slip op. 2.

On appeal, Ninham argued that *Miller* applied to discretionary life-without-parole sentences and that *Miller* and *Montgomery v. Louisiana*, 577 U.S. 190 (2016) required the sentencing court to consider Ninham's youth and its attendant circumstances as mitigating factors and whether he was permanently incorrigible. *Ninham*, slip op. 3. The court of appeals held its decision in Ninham's case in abeyance pending this Court's decision on a petition for review in *State v. Jackson*, No. 2017AP712, slip op. (August 28, 2018) and the Supreme Court's decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). *Ninham*, slip op. 3.

Relying on *Jones*, the court of appeals rejected Ninham's appeal. *Ninham*, slip op. 3. The court of appeals relied on several principles articulated in *Jones* to decide Ninham's case. First, the "*Jones* Court held that 'a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient' under the Eighth Amendment for a case involving a juvenile offender who committed a homicide offense." *Ninham*, slip op. 3, citing *Jones*, 141 S. Ct. at 1313. Second, "*Miller* ... mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Ninham*, slip op. 4, citing *Jones*, 141 S. Ct. at 1316 (citation omitted). Third, a sentencing court is not required to "provide an on-the-record sentencing explanation with an explicit or implicit factual finding of permanent incorrigibility." *Ninham*, slip op. 4, citing *Jones*, 141 S.Ct. at 1218–21. Applying these principles to Ninham's case, the court of appeals concluded that Ninham's sentence was not contrary to *Miller* or *Montgomery* based on the sentencing court's consideration of Ninham's age and its attendant circumstances. *Ninham*, slip op. 4.

CRITERIA FOR GRANTING REVIEW

Citing Wis. Stat. § (Rule) 809.62(1r)(a), (c), and (d), Ninham asks this Court to grant review because his case presents a real and significant questions of constitutional law, the resolution of which will have a statewide impact, and because the court of appeals' decision conflicts with *Miller*, *Montgomery*, and *Jones*. (Pet. 3–5.)[1] Ninham's case does not warrant this Court's review.

I. Ninham's petition is nothing more than an attempt to relitigate an Eighth Amendment claim that this Court already decided.

"A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis.2d 985, 990, 473 N.W.2d 512 (Ct.App.1991). Ninham asks this Court to decide whether his life-without-parole sentence violates his right to be from cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution. (Pet. 18, 25, 32, 38–39.)[2] But this Court has previously considered and rejected Ninham's Eighth Amendment challenges to his sentence when it determined

---

[1] The State refers to the clerk's assigned electronic page numbers to Ninham's petition rather than Ninham's assigned page numbers.

[2] Because the Eighth Amendment of the United States Constitution and Article 1, Section 6 of the Wisconsin Constitution are "virtual identical," this Court has generally interpreted these provisions in a manner coextensively with each other, "largely guided by the Supreme Court's Eighth Amendment jurisprudence." *State v. Ninham*, 2011 WI 33, ¶ 45, 333 Wis. 2d 335, 797 N.W.2d 451. While Ninham references Article I, Section 6, he does not assert that it confers greater rights than those afforded under the Eighth Amendment. Therefore, the State does not address his state constitutional claim.

that (1) his life-without-parole sentence was not categorically unconstitutional and (2) Ninham's sentence was not so disproportionate as to constitute cruel and unusual punishment. *Ninham*, 333 Wis. 2d 335, ¶ 83–86.

True, the United States Supreme Court decided *Miller*, *Montgomery*, and *Jones* after this Court decided *Ninham*. But his efforts to cloak his cruel and unusual punishment claim in *Miller's*, *Montgomery's*, and *Jones's* language does not create a new issue, much less one warranting this Court's review. *See State v. Crockett*, 2001 WI App 235, ¶ 15, 248 Wis. 2d 120, 635 N.W.2d 673 ("Rephrasing the same issue in slightly different terms does not create a new issue."). Ninham's petition does not identify how *Miller*, *Montgomery*, and *Jones* conflict or otherwise cast doubt on this Court's prior decision upholding his life-without-parole sentence.

Ninham suggests that this Court got it wrong when it rejected "the contention 'that 14-year-olds who commit intentional homicide are categorically less deserving of life imprisonment without parole.'" (Pet. 13, citing *Ninham*, 333 Wis. 2d 335, ¶ 74.) But Ninham is not categorically challenging the applicability of a life-without-parole sentence to all juveniles; rather, Ninham claims that the sentence "is unconstitutionally disproportionate *as applied to him*." (Pet. 18) (emphasis added). And this Court already concluded that it was not. *Ninham*, 333 Wis. 2d 335, ¶¶ 84–86. Because this Court previously considered and rejected this claim, it should not grant review to reconsider it.

II. *Miller*, *Montgomery*, and *Jones* reinforce the correctness of this Court's decision in *Ninham*.

This Court should not grant review because neither its prior decision in *Ninham* nor Ninham's sentence is contrary to *Miller*, *Montgomery*, and *Jones*.

In *Miller*, the 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*, 567 U.S. at 479 (emphasis added). However, the Supreme Court expressly recognized the continued discretionary authority of sentencing courts to sentence a juvenile to a life-without-parole sentence when the crime reflects "irreparable corruption." *Id.* at 479–80.

In *Montgomery*, another case where state sentencing law mandated a non-parolable life sentence, the Supreme Court declared that "*Miller* announced a substantive rule of constitutional law" and, therefore, a defendant could benefit from its retroactive application on collateral review. *Montgomery*, 577 U.S. at 208–09.

In *Jones*, the Supreme Court held that a discretionary juvenile life sentence is constitutional because for Eighth Amendment purposes, "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Jones*, 141 S. Ct. at 1313. *Jones* clarified that the Court's previous decisions in *Miller* and *Montgomery*, together required "a discretionary sentencing procedure" for sentencing juveniles to life imprisonment, because mandatory life-without-parole sentences for offenders under 18 "pose[d] too great a risk of disproportionate punishment." *Id* at 1317 (citation omitted).

The Supreme Court concluded that when a sentencing court exercises its discretion to impose a juvenile life sentence, it is *not required* to make either an explicit or implicit factual finding of the juvenile's "permanent incorrigibility." *Jones*, 141 S. Ct. at 1317–18. Such a finding is not necessary based on applicable precedents nor is it "necessary to make life-without parole sentences for juvenile offenders relatively rare" or to "ensure that a sentencer considers a defendant's youth." *Jones*, 141 S. Ct. at 1318–19.

The Court described that the "key assumption" of *Miller* and *Montgomery* "was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Jones*, 141 S. Ct. at 1318. Moreover, the Court explained that its opinion was consistent with and did not overrule or unduly narrow the holdings in *Miller* and *Montgomery* "that a State may not impose a mandatory life-without-parole sentence on a murderer under 18." *Id.* at 1321 (emphasis added).

The key takeaways from *Jones* are that (1) so long as a state does not have a mandatory life sentence statute but rather, like Wisconsin, has a discretionary sentencing system that allows the court to consider the offender's youth, a juvenile life sentence is constitutional; (2) a court exercising its sentencing discretion to impose a juvenile life sentence need not make an explicit or implicit finding that the offender is permanently incorrigible; and (3) discretionary sentencing necessarily allows the sentencer to consider the offender's youth and ensures that a court will impose a juvenile, life-without-parole sentence only where appropriate and not disproportionate.

Unlike in *Miller* and *Montgomery*, Ninham was not sentenced under a sentencing scheme that mandated that he serve a life-sentence following his conviction for first-degree intentional homicide. Rather, Wisconsin Stat. § 973.014(1) (1997-98) provided the sentencing court with discretion to (a) specify that the person is eligible under Wis. Stat. § 304.06(1)(b), i.e., eligibility in 20 years; (b) set a parole eligibility date if it is longer than the 20-year term specified in sec. 304.06(1)(b); or (c) impose a life-without-parole sentence.

And this Court's precedent circumscribed how the sentencing court was to exercise this discretion: "The sentence

imposed in each case should recognize 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." *State v. Borrell*, 167 Wis. 2d 749, 764, 482 N.W.2d 883 (1992), citing *McCleary v. State,* 49 Wis.2d 263, 276, 182 N.W.2d 512 (1971). Thus, in contrast to state laws that mandated life-without-parole sentences in *Miller* and *Montgomery*, this Court's precedents required the circuit court to set Ninham's parole eligibility date consistent with its duty to impose the minimum amount of confinement, considering the need for public protection, the gravity of Ninham's offense, and his rehabilitative needs. As this Court already recognized, the sentencing court considered these primary sentencing factors, informed by Ninham's age and childhood experiences, when it fashioned his sentence. *Ninham*, 333 Wis. 2d 335, ¶ 30.

Here, the court of appeals identified the relevant principles articulated in *Miller*, *Montgomery*, and *Jones* that guided its decision. *Ninham*, slip op. 3–4. By reference to the record, the court of appeals noted the sentencing court's consideration of Ninham's youth and its attendant circumstances when it fashioned the sentence. *Id.* at 4. And based on the sentencing court's consideration of Ninham's youth and its attendant circumstances, the court of appeals determined that Ninham's sentence was not contrary to *Miller* and *Montgomery*. *Id.* at 4.

In seeking review, Ninham notes that juveniles in other jurisdictions previously sentenced to life-without-parole sentences have been resentenced since *Miller*. (Pet. 14–15) Ninham does not identify how many of those juveniles were originally sentenced under mandatory life-without-parole schemes declared unconstitutional in *Miller* as opposed to a scheme like Wisconsin's that required courts to exercise discretion. *Borrell*, 167 Wis. 2d at 765. And more importantly, if this Court grants review, this data would not inform this

Court's reassessment of whether Ninham's sentence violates his Eighth Amendment rights.

Ninham identifies several jurisdictions that ban juvenile life-without-parole sentences by operation of statute. (Pet. 15 n.4, 5.) The Wisconsin Legislature could, as other state legislatures have done, prohibit or limit the imposition of juvenile life-without-parole sentences for first-degree intentional homicide. But these other state legislative choices about the appropriate range of sentences provides no guidance on the question that Ninham raises in his petition: Whether his sentence is unconstitutionally disproportionate as applied to him. (Pet. 18.)

Ninham also seeks review to address whether the sentencing court's failure to consider Ninham's age as mitigating requires a new sentencing hearing. (Pet. 28.) What matters in assessing whether sentence contravenes *Miller* is whether Ninham's sentencer had the "discretion 'to consider the mitigating qualities of youth' and impose a lesser punishment." *Jones*, 141 S.Ct. at 1314 (citation omitted). The sentencing court had this discretion, and, as the record demonstrates, it considered whether Ninham's age and childhood experience were mitigating. *Ninham*, 333 Wis. 2d 335, ¶ 30. (R. 70:25–26). That the sentencing court exercised its discretion in a manner that placed greater weight on other sentencing factors, including the severity of the offense and need to protect the public, rather than age and childhood experience did not otherwise render Ninham's sentence constitutionally infirm.

Ninham contends this Court should grant review to determine whether the postconviction court could state that Ninham's life-without-parole sentence was appropriate without conducting a resentencing hearing. (Pet. 35.) The postconviction stated in part, that it would "assess the same factors considered by the [sentencing court] . . . and 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.) Ninham ignores the postconviction court's statement immediately preceding the challenged statement: "Upon examination of the entire record, the Court is satisfied that the sentencing Court appropriately considered Ninham's youth and related characteristics when imposing this sentence." (R. 124:11.) The postconviction court's decision as whole reflects that its decision was grounded in its review of the sentencing court's record based on Ninham's challenge under *Miller* rather than how it might have exercised its sentencing discretion. (R. 124:8–11.) And it was on this basis that the postconviction court reasonably concluded, "even if *Miller* applies to a discretionary life-without-parole sentence, Ninham's sentence is not unconstitutional[,] and he is therefore not entitled to resentencing." (R. 124:11.)

In a conclusory manner, Ninham also asserts that his sentence violates due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. (Pet. 18, 27, 34, 38.) Ninham referenced due process once in his court of appeals' brief and did not otherwise develop an argument that his sentence violated his due process rights separate and apart from any rights he had under the Eighth Amendment. (Defendant-Appellant's Br. 46.) Ninham forfeited his right to have this Court decide whether his sentence also violated his due process rights because he did not timely assert that right and develop it in a manner that allowed the circuit court or the court of appeals to address it. *See State v. Ndina*, 2009 WI 21, ¶¶ 29–30, 315 Wis. 2d 653, 761 N.W.2d 612.

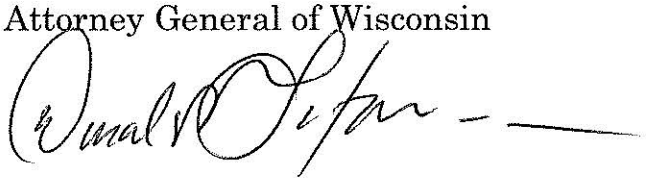
CONCLUSION

This Court should deny Ninham's petition for review.

Dated this 1st day of April 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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) 294-2907 (Fax)
latorracadv@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,176 words.

Dated this 1st day of April 2022.

Respectfully submitted,

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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) (2019-20).

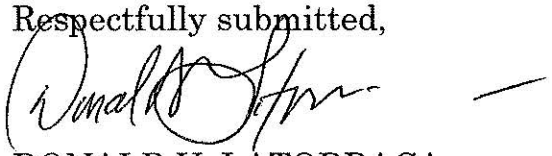
I further certify that:

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 1st day of April 2022.

Respectfully submitted,



DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251