STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP000712

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEVON DION JACKSON,

Defendant-Appellant.

On Appeal From an Order Denying Motion for
Postconviction Relief
Entered in Milwaukee County,
the Honorable David A. Hansher, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

MARTHA K. ASKINS
State Bar No. 1008032

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 890-3541
martha.askins@wisc.edu

Attorney for Defendant-Appellant

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ISSUE PRESENTED

Must Jevon Jackson be resentenced because his *de facto* life-without-parole sentence for crimes he committed while a juvenile is unconstitutional?

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Jackson would welcome oral argument should the court find it helpful. Publication is warranted to develop the law in Wisconsin concerning the constitutionality of life-without-parole sentences imposed on offenders who were juveniles at the time of their crimes.

STATEMENT OF THE CASE

On July 26, 1995, Jevon Jackson was convicted by a jury in Milwaukee County, the Honorable David A. Hansher presiding, of first degree intentional homicide, armed robbery, attempted armed robbery, and possession of a short-barreled shotgun, all as party to the crime. (14). For the homicide conviction, the court sentenced Jackson to a life sentence with parole eligibility in the year 2070. (13). The court also imposed consecutive sentences totaling 32 years for the remaining convictions. (13). Under the court's sentences, Jackson will be parole eligible at age 101.

Jackson appealed, raising a single issue: whether the trial court erred in the exercise of its discretion when it gave an exhibit to the jury. The court of appeals affirmed his

conviction in 1997, and the supreme court denied his petition for review.

In January of 2017, Jackson filed a motion for postconviction relief pursuant to Wis. Stat. § 974.06. (36). He argued he should be resentenced in light of recent United States Supreme Court decisions which fundamentally changed the way courts must sentence juveniles. He argued that pursuant to ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455 (2012), and ***Montgomery v. Louisiana***, __U.S.__, 136 S. Ct. 718 (2016), his sentence, imposed for crimes committed while a juvenile, violates the Eighth Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution, and thus is unconstitutional. He also asked the court to modify his sentence based on a new factor.

Judge Hansher denied the motion in a written decision. (40; App. 113-119). The court concluded that the Supreme Court decisions in ***Miller*** and ***Montgomery*** apply only to those jurisdictions where state law *requires* life-without-parole sentences, and thus do not control Jackson's case. (40:6-7; App. 118-119).

Jackson now appeals.

STATEMENT OF FACTS

Jevon Jackson grew up in Milwaukee, the son of Donald Jackson, whom he does not recall ever meeting, and his mother, Rosetta Taylor. (50:10). Jackson's young life was marked by instability. His mother and her boyfriend, whom Jackson viewed like a father, separated when Jackson was 13. In his sixteen years before his incarceration for this case, Jackson lived in eight different residences. (50:15). On

one occasion, he and his mother were evicted for failure to pay rent. (50:15). In 1992 and 1993, he and his mother lived with his mother's cousin and her children and a grandchild. (50:15). After Jackson's mother was convicted of "welfare fraud" and placed on probation, requiring her to serve six months in the House of Corrections, Jackson lived in the basement of a relative's home. (50:10). While on probation, Jackson's mother was jailed for probation violations, including shoplifting and threatening a boyfriend with a knife.

While Jackson clearly loved his mother, there were problems at home. Jackson told the presentence writer he had not been abused as a child, but he also repoted his mother whipped him for discipline. (50:10). Dr. Itzhak Matusiak, who evaluated him in the juvenile court proceedings stemming from this case, stated he felt Jackson was protective of his mother and minimized the violence he had experienced at home through corporal punishment. (50: 14).

In 1992, Jackson spoke of his living situation to a teacher, resulting in a referral to DSS. (50:10). There was also a concern that Jackson had become suicidal as Jackson had told his mother he thought about killing himself, that he was disillusioned, and his life had no purpose. (50:10). By the time DSS interviewed Jackson, he said he no longer had those feelings. (50:10-11). He then moved in with his cousin's family where he set his own curfew, made his own meals and got himself to school. (50:11).

In that same year, he was the victim of an assault by another student. On December 2, 1992, he was severely beaten and treated at St. Michael's Hospital. (50:14). Jackson's mother reported she felt he had changed as a result of this beating. (50:11).

Family conflicts led to Jackson running away on at least two occasions. In August of 1993, just a few months before the crimes in this case, Jackson's mother hit him repeatedly after finding condoms in his possession. Jackson ran away for three days. (50:10). In another incident, he ran away from his aunt's residence, believing his aunt had turned against him. (Id.).

There were some positives in his life as well, however. In the three years before Jackson's offenses and incarceration, he had had three summer jobs though the Milwaukee "Step Up Program." (50:12). In 1991 he worked for the City Sanitation Department picking up trash and cleaning vacant lots. In 1992, he worked at the Atkinson Library, shelving and repairing books and reading to younger children. In the summer of 1993 he worked full-time for the Forestry Bureau. (*Id*.). He told the presentence writer his favorite job was babysitting his cousins' children. (*Id.*). He resisted the pressure to join a gang, and had no gang affiliations. (50:13).

Dr. Matusiak's evaluation concluded Jackson showed no oppositional disorder, conduct disorder or psychopathology. (50:13). The evaluation also showed Jackson's IQ as average. (*Id*.). While in jail, he studied for his GED. (50:12). Jackson told the presentence writer he wanted to be either a computer programmer or an electrical engineer someday. (*Id*.).

On September 28, 1993, two months before the crimes in this case, Jackson was referred to Milwaukee County Children's Court following an arrest for battery at his high school. (50:8). That case was still pending at the time of the crimes in this case. (*Id.*). Jackson stated the victim in the battery had bumped him in an intimidating way and he had reacted by hitting him repeatedly. (*Id*.). Jackson said it was

the victim's friend who had severely beaten him the previous year. (*Id*.). He also told the police he was having some problems at home and was upset. (*Id*.).

The crimes in this case occurred on November 16, 1993. Jackson, then 16-years-old, and his friend Larry Chesser, also a juvenile, had started talking about robbing someone about a week earlier. (2:3). Larry evidently knew of someone who had committed an armed robbery and had not been caught. (50:3). On at least one prior occasion, the boys took Larry's father's sawed-off shotgun and walked around looking for a victim. (2:3). Jackson said that at this time the boys did not have bullets for the gun. (2:3).

On November 16, Larry again took his father's shotgun and met Jackson. (2:3). This time, Larry had two bullets for the shotgun. (2:4). The boys took the gun into an alley where Larry loaded it. (*Id*.). The boys walked to Wendy's and McDonald's to look for potential robbery victims. (2;3). Eventually they walked to a Popeye's where the two friends saw C.S. and her young daughter going in to a Popeye's Chicken restaurant.[1] When C.S. and her daughter came out of the restaurant carrying food, the boys approached them in the parking lot. (2:4). C.S. told the boys she did not have any money. Jackson told her to get on her knees. Jackson shot C.S. in the head, killing her. Jackson told the police he forgot the gun was loaded, that the victim made him angry, and that he cocked the weapon to scare the victim. (2:4). The boys ran, throwing away the gun and the food C.S. had been carrying. (2:4). Jackson would later tell the

[1] Wis. Stat. § 809.86 provides that victims are to be identified by initial or other appropriate pseudonym except in homicide cases. This is a homicide case, and as such, the victim could be identified by name. However, the victim was with her daughter at the time of the crime. Therefore, the appellant elects to use the victim's initials.

presentence writer that he had smoked marijuana three times that day. (50:14).

The state charged Jackson with multiple crimes, including first degree intentional homicide as party to the crime. (2). Following a contested hearing, Jackson was waived into adult court. Because of the waiver proceedings, his trial did not take place until 1995. A jury convicted Jackson of each of the charges. (14).

At sentencing, the state recommended that the court impose a parole eligibility date of 2060 with respect to Jackson's life sentence for the homicide. (48: 16). The defense asked the court to grant parole eligibility after 30 years. (48:20). The court, the Honorable David A. Hansher presiding, rejected both recommendations and set a parole eligibility date for the homicide at 2070. (48:37; App. 111). The court also imposed consecutive sentences for the remaining charges (48:38; App. 112). All totaled, Jackson will be parole eligible in 2078, when he is 101 years old.

In its sentencing comments, the court said in part:

> Life imprisonment is probably an insufficient sentence for you in this case. I think a death penalty would be insufficient penalty for you in this case because you're not going to suffer. You say you suffer, but life imprisonment may deprive you of freedom but it's not going to have you suffer, and I think there should be a good deal of suffering. I only pray that after you die, be it in prison or out of prison, that somehow you have to endure some personal hell for eternity for what you did.

(48: 37; App. 111).

Jackson filed a direct appeal pursuant to Wis. Stat. § 809.30. (22). He argued a single issue: whether the court

misused its discretion when it gave the jury, during its deliberations, a police report which the state had highlighted to emphasize certain parts of Jackson's statement. (25). The court of appeals affirmed, and the supreme court denied his petition for review. (25; 26).

In January of 2017, Jackson filed a motion for resentencing pursuant to Wis. Stat. § 974.06, arguing his sentence is unconstitutional under both the United States and Wisconsin Constitutions in light of United States Supreme Court decisions. (36). In the alternative, he moved for sentence modification, arguing the change in the law constituted a new factor. Judge Hansher, who heard the trial and sentenced Jackson in 1995, denied the motion, concluding that ***Miller*** and ***Montgomery*** do not apply to sentences imposed under Wisconsin's statutory scheme. (40; App. 113-119).

Jackson is now 39-years-old. He has spent 23 years of his life in jail or prison.

ARGUMENT

Jevon Jackson Must Be Resentenced Because His *De Facto* Life-without-parole Sentence for Crimes He Committed While a Juvenile is Unconstitutional.

A. Introduction and summary of argument.

Jevon Jackson, convicted of homicide committed when he was 16-years-old, seeks a new sentencing hearing in light of recent United States Supreme Court decisions. He does not seek a new trial, nor does he renew his sentence modification claim. He argues below that Supreme Court decisions interpreting the Eighth Amendment as it relates to

sentencing juveniles require a new sentencing hearing in his case.

The Eighth Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution protect against cruel and unusual punishments. ***Graham v. Florida***, 560 U.S. 48, 130 S. Ct. 2011, 2021 (2010); ***State v. Ninham***, 2011 WI 33, ¶45, 333 Wis. 2d 335, 797 N.W.2d 451. The two constitutional provisions are substantively identical in language. As such, the courts of this state are largely guided by the Supreme Court's Eighth Amendment jurisprudence. ***Id.***

Jevon Jackson was sentenced in 1995 to life in prison without the possibility of parole until the year 2078 when he would be 101 years old. More than a decade after Jackson's sentencing, the United States Supreme Court began to decide a series of cases which have fundamentally changed the way juveniles are sentenced in homicide and other serious felony cases.

Now, a life sentence without the possibility of parole for a juvenile must be exceedingly rare. Such a sentence may lawfully be imposed only if the juvenile offender is utterly incorrigible and irredeemable, and only if the crime was not the result of the "unfortunate yet transient immaturity" characteristic of all juveniles. ***Miller v. Alabama***, 567 U.S. 460, 479, 132 S. Ct. 2455 (2012).

Before the sentencing court can lawfully impose life-without-parole, that court must first find there is no possibility that the juvenile could ever be released safely to the community, no matter how much time he spends in prison, no matter how many treatment and rehabilitation programs he completes, and no matter how much the

offender's youth and immaturity played a role in the crimes committed.

Because the court in this case sentenced Jevon Jackson long before the Supreme Court began its fundamental change regarding juvenile sentencing, the sentencing court did not consider what is now required before sentencing a juvenile to life-without-parole. Consequently, Jackson's sentence violates the Eighth Amendment to the United States Constitution and Article I, Section 6 of the Wisconsin Constitution, and he must be resentenced.

Jackson's argument has five sections. First, Jackson discusses the applicable standard of review. Second, he discusses the United States Supreme Court decisions which have fundamentally altered the sentencing landscape for juvenile offenders. Third, he argues why the Supreme Court decisions apply to Wisconsin's sentencing scheme. Fourth, he argues that previous Wisconsin cases, ***Ninham*** and ***State v. Barbeau***, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520, do not apply to his case. And finally, he argues that the court's sentencing comments did not meet the standards now required by the Supreme Court's decisions.

B. Standard of review.

Jackson seeks a new sentencing hearing because his life-without-parole sentence violates the Eighth Amendment. Constitutional interpretations are questions of law which this court reviews *de novo*. ***State v. Berquist***, 2002 WI App 39, ¶6, 250 Wis. 2d 792, 641 N.W.2d 179. This court must review the constitutionality of Jackson's life-without-parole sentence pursuant to a *de novo* standard.

Previous Wisconsin cases challenging life-without-parole sentences are inapposite to Jackson's challenge. In

Ninham, the defendant mounted a categorical challenge to the constitutionality of a life-without-parole sentence for *all* 14-year-olds. As such, Ninham had the "heavy burden" to demonstrate that the statute was unconstitutional beyond a reasonable doubt. ***Ninham*** at ¶44.

Similarly, in ***Barbeau***, the defendant argued the Wisconsin statutory scheme for sentencing all juveniles for a first-degree homicide violated the state and federal Constitutions prohibition against cruel and unusual punishment. ***Barbeau***, 370 Wis. 2d at 755,¶ 23. A facial constitutional challenge requires the challenger to prove unconstitutionality beyond a reasonable doubt. "Every presumption to sustain the law if at all possible will be indulged, and if any doubt exists about the constitutionality of a statute, that doubt will be resolved in favor of constitutionality." ***Id.*** at ¶29, citing ***Ninham*** at ¶44.

Unlike ***Ninham*** and ***Barbeau***, Jackson's challenge is to *his* sentence. He argues that his sentence is unconstitutional because the sentencing court did not apply the legal standards which are now a prerequisite to a life-without-parole sentence. As such, his claim is analogous to that raised in ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. There, the court observed that because a defendant has a constitutional right to be sentenced upon accurate information, whether the defendant has been denied that due process right is a constitutional issue the appellate court reviews *de novo*. ***Id***. at ¶9.

C. ***Roper***, ***Graham***, ***Miller*** and ***Montgomery*** fundamentally altered the sentencing of juveniles. Now, a life-without-parole sentence for a juvenile is constitutional only under extremely limited circumstances.

The Eighth Amendment prohibits cruel and unusual punishment. ***Graham***, 560 U.S. at 58. To determine whether a punishment is cruel and unusual, courts look beyond historical conceptions of punishment and look to the "evolving standards of decency that mark the progress of a maturing society." ***Id.***, *quoting* ***Estelle v. Gamble***, 429 U.S. 97, 102 (1976). While the prohibition against cruel and unusual punishment remains the same, its applicability changes with time as the "basic mores of society change." ***Graham***, 130 S. Ct. at 58.

In general, the key inquiry is whether the punishment is disproportionate to the crime. "The concept of proportionality is central to the Eighth Amendment." ***Id.*** at 59. In the cases discussed below, the Court concluded that life-without-parole sentences, imposed on juveniles, were disproportionate and violative of the Eighth Amendment because juveniles are constitutionally different from adults.

1. ***Roper v. Simmons.***

The United States Supreme Court's change in approach to sentencing juvenile offenders began with ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183 (2005). In ***Roper***, 17-year-old Christopher Simmons planned and committed a horrific murder. "In chilling, callous terms he talked about his plan," discussing it with two younger friends. ***Id.*** at 556. "Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the

victim off a bridge. Simmons assured his friends they could 'get away with it' because they were minors." ***Id.*** The boys did just that, entering the victim's home, blindfolding her and binding her hands with duct tape and throwing her off a bridge to drown in the waters below. ***Id.*** at 556-557. Simmons later bragged about the killing, "telling friends he had killed a woman 'because the bitch seen my face.'" ***Id.*** at 557.

Despite Simmons' pre-planning of the crimes, his boasts after the murder, and the particular cruelty of the crimes, the Supreme Court ruled that the state could not execute Simmons because he committed the crimes as a juvenile. The Court held that the Eighth and Fourteenth Amendments to the Constitution prohibit the execution of individuals who were under the age of 18 at the time of their capital crimes. ***Id.*** at 578.

In reaching this decision, the Court drew from previous cases and applicable research to note three distinct differences between juvenile and adult offenders. First, a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." ***Id.*** at 569, *quoting* ***Johnson v. Texas***, 509 U.S. 350, 367 (1993). Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." ***Id***. Third, the juvenile's character is not as well formed as that of an adult. ***Id.*** at 570. These differences between juveniles and adults "render suspect any conclusion that a juvenile falls among the worst offenders." ***Id***. The Court said:

> The reality that juveniles still struggle to define their identity means it is less supportable to conclude that

> even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id..

With respect to the death penalty, the Court ruled that "the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults." ***Id.*** at 571. Retribution, deterrence and incapacitation all fall away given the differences between children and adults. Because juveniles are less culpable, retribution is not as justifiable. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity". ***Id.*** And, because juveniles do not do a "cost-benefit analysis" before acting, deterrence does not justify the harshest punishment. ***Id.*** at 572.

2. ***Graham v. Florida***.

Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010), came next. In ***Graham***, the sentencing court imposed a life-without-parole sentence for a series of non-homicide offenses. On review of the sentence, the Supreme Court held that the Eighth Amendment categorically forbids a life-without-parole sentence for juveniles convicted of non-homicide offenses. ***Id***. at 74.

The Court reiterated and reinforced ***Roper's*** discussion of the differences between juvenile and adult offenders. It observed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." ***Id***. at 68. Relying on ***Roper***, the Court

recognized that juveniles are more capable of change than are adults, and "their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." ***Id***. (*quoting* ***Roper***, 543 U.S. at 570, 125 S. Ct. 1183). As a result, it is "misguided to equate the failings of a minor with those of an adult." ***Id***.

In reaching its decision, the Court recognized that life-without-parole is the second most severe penalty permitted by law, and that such a sentence is a particularly harsh punishment for a juvenile. ***Id***. at 70. Life-without-parole sentences "share some characteristics with death sentences that are shared with no other sentences." ***Id.*** at 69. A life-without-parole sentence means that good behavior and character improvement are irrelevant and immaterial, and the offender has no hope to ever be released. ***Id.*** at 70. A life-without-parole sentence for a juvenile means that offender will serve more years and a greater percentage of his life in prison than an adult offender. ***Id.*** at 70. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." ***Id.***

The Court reiterated ***Roper*** in observing that the penological goals of a life-without-parole sentence do not make sense with juvenile offenders. The Court concluded that the state is not required to guarantee eventual freedom to a juvenile nonhomicide offender. "What the State must do, however" is give that offender "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." ***Id.*** at 75.

3. ***Miller v. Alabama***.

Two years after ***Graham***, the Court considered the proportionality of life-without-parole sentences for juveniles convicted of homicide offenses in ***Miller v. Alabama***, 567

U.S. 460, 132 S. Ct. 2455 (2012). Evan Miller, along with another boy, smoked marijuana and played drinking games in his adult neighbor's home. When the neighbor passed out, Miller stole his wallet. ***Id.*** at 468. The man woke up and grabbed Miller by the throat. Both boys hit the neighbor with a bat, and Miller placed a sheet over the neighbor's head, saying "I am God, I've come to take your life," and hit him again. ***Id.*** The boys then set fire to the neighbor's home. The neighbor died of smoke inhalation and his injuries. ***Id.*** Miller was convicted of murder in the course of arson which carried a mandatory life-without-parole sentence. ***Id.*** at 469

On review, the Court built on ***Graham***, noting that the concept of proportionality is central to the Eighth Amendment. ***Id.*** at 469. It discussed its two strands of proportionate punishment cases. ***Id***. at 470. The first strand is the categorical ban on sentencing practices based on "mismatches between the culpability of a class of offenders and the severity" of the punishment. ***Id***. One such categorical ban is ***Graham***'s ban on life-without-parole for nonhomicide juvenile offenders. Another is the ban on capital punishment for juveniles (***Roper***) and mentally retarded persons. ***Atkins v Virginia***, 536 U.S. 304, 122 S. Ct. 2242 (2002). ***Id.***

The Court said that as a category, "children are constitutionally different from adults for purposes of sentencing." ***Id***. at 471. Their differences stem from the juvenile's lack of maturity, underdeveloped sense of responsibility, recklessness, impulsivity, "heedless risk-taking;" their vulnerability to negative influences and outside pressures; and their less "well formed" and "less fixed" character. ***Id***. "***Roper*** and ***Graham*** emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile

offenders, even when they commit terrible crimes." ***Id***. at 472.

The second strand is the Court's demand for individualized sentencing. ***Id***. at 475. Mandatory life-without-parole sentences, the law's second most severe punishment, precludes a sentencing court from taking into consideration the offender's youth and other characteristics. ***Id***.

The Court concluded that given all it had said in previous decisions about "children's diminished culpability and heightened capacity for change," the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." ***Id.*** at 479. This is particularly true, the Court said, in light of the "great difficulty" of distinguishing between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." ***Id***. In sum, the sentencing court is "*require[ed*] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." ***Id***.at 480 (emphasis added).

4. ***Montgomery v. Louisiana***.

In 2016, the Supreme Court held in ***Montgomery*** that ***Miller*** announced a substantive rule which has retroactive effect. ***Montgomery v. Louisiana***, 136 S. Ct. 718, 736 (2016). The Court explained that ***Miller*** did more than require the sentencing court to consider a juvenile offender's youth before imposing a life-without-parole sentence. ***Id.*** at 734. ***Miller*** "established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" ***Id***., *quoting* ***Miller***, 132 S. Ct. at 2469. Because it is the "rare juvenile offender" whose crime reflects

"irreparable corruption," life without parole for other juvenile offenders is excessive and unconstitutional. ***Montgomery***, 136 S. Ct. at 734. The ***Miller*** rule is retroactive, the Court said, because of the significant risk that the vast majority of juvenile offenders with a life-without-parole sentence are not irreparably corrupt. ***Id***. "***Miller's*** conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raised a grave risk that many are being held in violation of the Constitution." ***Id***. at 736.

D. Because ***Roper*** and its progeny apply in Wisconsin, Jackson must be resentenced.

Before addressing whether ***Miller*** and ***Montgomery*** apply to Wisconsin's statutory sentencing scheme, Jackson notes that his sentence is not a "true" life-without-parole sentence in that the court did set a parole eligibility date. That parole eligibility date, however, constitutes a *de facto* life-without-parole sentence. At Jackson's sentencing in 1995, the court set parole eligibility on the homicide at the year 2070, and then imposed consecutive sentences which move Jackson's parole eligibility date to 2078, when he will be 101 years old. Given that Jackson's life expectancy is far short of 101 years, his sentence is the equivalent of a true life-without-parole sentence. "The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence." ***State v. Zuber***, 227 N.J. 422, 429, 152 A.3d 197 (N.J. 2017).

Other states have also considered whether very lengthy prison sentences constitute *de facto* life sentences subject to ***Miller*** and ***Montgomery***. In ***Bear Cloud v. State***, 2014 WY 113, 334 P.3d 132 (Wy. 2014), the Wyoming Supreme Court concluded that an aggregate sentence of just over 45 years triggers the Eighth Amendment protections in ***Miller***. ***Id.*** at

141-142. In ***Casiano v. Commissioner of Correction***, 317 Conn. 52, 79, 115 A.3d 1031 (Conn. 2015), the Supreme Court of Connecticut held that the imposition of a 50-year sentence without the possibility of parole for a juvenile offender is subject to the sentencing procedures in ***Miller***. In reaching that conclusion, the court observed that government statistics estimate the average life expectancy for a male in the United States is seventy-six years. ***Id.*** at 76. (The court also noted statistics which indicate the life expectancy for prison inmates is much shorter. One study concluded that Michigan juveniles sentenced to "natural life" sentences have an average life expectancy of 50.6 years). ***Id.***

In ***People v. Reyes***, 2016 IL 119271, 407 Ill. Dec. 452, 63 N.E.3d 884 (2016), the Supreme Court of Illinois held that an 89-year minimum release date constituted a *de facto* life-without-parole sentence. A "mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison." ***Id***. at ¶9. The court continued: "***Miller*** makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation." ***Id***.[2]

Nor does it matter that Jackson's *de facto* life-without-parole sentence is an aggregate of consecutive sentences.

[2] For other cases where the court found lengthy sentences to be *de facto* life sentences, *see* ***Brown v. State***, 10 N.E.3d 1 (Ind. 2014); ***Henry v. State***, 175 So. 3d 675 (Florida S. Ct. 2015); ***Parker v. State***, 119 So.3d 987 (Mississippi Sup. Ct. 2013); ***People v. Caballero***, 55 Cal. 4th 262, 282 P.3d 291 (2012); ***State v. Boston***, 363 P.3d 453 (Nev. S. Ct. 2015); ***State v. Null***, 836 N.W.2d 41 (Iowa, 2013); ***State v. Ragland***, 836 N.W.2d 107 (Iowa, 2013).

Jackson was convicted of homicide, attempted armed robbery, armed robbery and possession of a short-barreled shotgun. On the homicide, the court imposed parole eligibility in 2070, 75 years after the date of sentencing. The 75-year parole eligibility sentence alone is a *de facto* life-without-parole sentence as Jackson would be 93-years-old before even seeing the parole board. The court then imposed additional consecutive sentences totaling 32 years for the other counts, adding eight years to his parole eligibility. Accordingly, Jackson will not be parole eligible until he is 101 years old.

In ***Zuber***, the New Jersey Supreme Court held that a potential release date after five or six decades of incarceration implicates the principles of ***Graham*** and ***Miller***. ***Zuber***, 227 N.J. at 448. In ***McKinley v. Butler***, 809 F.3d 908, 911 (7th Cir. 2016), the juvenile defendant's aggregate sentences of two consecutive fifty-year terms (fifty for homicide and fifty for the use of a firearm) constituted a *de facto* life sentence implicating ***Miller***.

Likewise, in ***People v. Nieto***, 402 Ill.Dec. 521, 52 N.E.3d 442, the Illinois Supreme Court concluded that consecutive sentences totaling 78 years was a *de facto* life sentence for the 17-year-old juvenile offender. "Given that defendant will not be released from prison until he is 94 years old, we find that he effectively received a sentence of natural life without parole." ***Id.*** at 452.

1. ***Miller*** and ***Montgomery*** apply to discretionary life-without-parole sentences.

The trial court denied Jackson's motion for resentencing by concluding that ***Miller*** and ***Montgomery*** apply only to mandatory life-without-parole sentences. (40:6-7; App. 118-119). Because Wisconsin's statutory scheme does not *mandate* a "true" or "natural" life-without-parole sentence, the trial court concluded ***Miller*** and ***Montgomery*** have no force in Wisconsin. (*Id*.). Instead, the court concluded that ***Ninham***, decided before the Supreme Court's decision in ***Montgomery***, control. (40:6; App. 118). Respectfully, the trial court was wrong.

Montgomery must be read to hold that ***Miller*** applies to discretionary sentencing schemes as well as mandatory schemes. "***Miller***, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole." ***Montgomery***, 136 S. Ct. at 734. ***Miller*** "established that the penological justification for life without parole collapse in light of 'the distinctive attributes of youth.'" ***Id.***, *quoting* ***Miller*** at 132 S. Ct. 2469.

The Court wrote that "[b]efore ***Miller***, every juvenile convicted of a homicide offense could be sentenced to life without parole. After ***Miller***, it will be the rare juvenile offender who can receive that same sentence." ***Montgomery***, 136 S. Ct. at 734. Nowhere did the Court limit its holding to states which mandate life-without-parole sentences. If such a sentence is to be "rare," ***Miller*** and ***Montgomery*** must apply to all states, regardless of its sentencing scheme.

The Court's juvenile sentencing cases focus on the unique qualities of youth, not on whether the state's statutory

scheme is mandatory or discretionary. ***Roper*** and its progeny require the sentencing court to recognize that a child is constitutionally different from an adult. Children, the Court said, simply cannot reliably be classified among the worst offenders. ***Roper***, 543 U.S. at 569-570. The Court in ***Graham*** referred to the "dilemma of *juvenile* sentencing." ***Graham***, 560 U.S. at 77 (emphasis added).

Miller and ***Montgomery*** also focus on the status of the child as child, not on the sentencing statute. The Court's reasoning is founded on the basic fact that children are constitutionally different from adults. While the Court's decisions were in the context of mandatory life-without-parole sentences, the decisions turned on what makes children different from adults. It is those differences, discussed above, that mean a life-without-parole sentence is disproportionate and unconstitutional for a juvenile who is neither irredeemable nor incorrigible. It is the fact of being a juvenile that sets these offenders apart, not the different sentencing schemes.

If there was any doubt that the Court's cases must apply to discretionary sentencing schemes such as Wisconsin's, the Court put that to rest in its order in ***Tatum v. Arizona***, 137 S. Ct. 11 (Mem), 196 L.Ed. 284 (2016). Late last year, the Court vacated the judgments and remanded for resentencing the cases of five petitioners sentenced to life-without-parole under Arizona's discretionary sentencing scheme. Justice Sotomayor explained that the petitioners had been sentenced to life-without-parole for crimes they committed before they turned 18-year-old. She wrote that a "grant, vacate, and remand of these cases in light of ***Montgomery*** permits the lower courts to consider whether these petitioners' sentences comply with the substantive rule

governing the imposition of a sentence of life without parole on a juvenile offender." ***Id***. at 12.

Similar to the trial court's decision here, the Arizona Court of Appeals had held that ***Miller*** did not apply to Arizona's life-without-parole penalty scheme because its statute allowed for parole upon completion of a minimum sentence. ***State v. Tatum***, 2015 WL 728080, ¶5 (Ariz. Ct. App. Feb. 18, 2015), *review denied* (Jan. 5, 2016). The Supreme Court's order for new sentencing hearings demonstrates that whether the state's sentencing scheme is mandatory or not, what matters is whether the sentencing judges addressed the question ***Miller*** and ***Montgomery*** require the sentencer to ask: whether the juvenile is among the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.

Other courts have concluded that ***Miller*** and ***Montgomery*** apply to life-without-parole sentences imposed in the sentencing court's discretion. In ***McKinley v. Butler***, 809 F.3d 908 (7th Cir. 2016), the Seventh Circuit held that the relevance to sentencing of the "children are different" language in ***Miller*** and ***Roper*** "cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary sentences must be guided by consideration of age-relevant factors." ***Id***. at 911.

Citing to ***McKinley***, the Illinois Appellate Court concluded in ***Nieto*** that ***Miller*** and ***Montgomery*** applied to the defendant's aggregate sentence of 78 years, imposed in the court's discretion. ***People v. Nieto***, 52 N.E.3d at 453. The court said that "[a]fter ***Montgomery***, ***Miller*** requires that a juvenile be given an opportunity to demonstrate that he belongs to the large population of juveniles not subject to

natural life in prison without parole, even where his life sentence resulted from the trial court's discretion." ***Id.***.

In ***Malvo v. Mathena***, __F.Supp. 3d__ , 2017 WL 2462188 (E.D. Va., 2017), the district court aptly stated: "In order to guarantee that only the few deserving juveniles receive a life-without-parole sentence, the ***Miller*** rule must be applicable to all states, not only the ones that employ a mandatory penalty scheme." In ***Malvo***, the juvenile's sentence of life-without-parole was part of a plea agreement in order to avoid the death penalty. Even though he had therefore arguably waived his right to challenge his sentence, the court ordered resentencing because a sentence judge must consider the ***Miller*** and ***Montgomery*** factors "every time a juvenile is sentenced to life imprisonment without parole."

The Oklahoma Court of Criminal Appeals reached the same conclusion in ***Luna v. State***, 387 P.3d 956 (Ok. 2016). The court rejected the state's argument that ***Miller*** and ***Montgomery*** did not apply under Oklahoma's sentencing scheme. The court said that while the "core issue" in ***Miller*** was the mandatory "natural life" sentence, ***Montgomery*** made it clear that a life-without-parole sentence is constitutionally impermissible, notwithstanding the sentencer's discretion to impose a lesser term, unless the sentencing court takes into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. ***Id.*** at ¶14, *quoting* ***Montgomery***, 136 S.Ct. at 733.

The Supreme Court of Florida held that "even in a discretionary sentencing scheme," the sentencing court's exercise of discretion before imposing a life sentence must be informed by the principles set forth in ***Miller*** and

Montgomery. ***Landrum v. State***, 192 So. 3d 459, 460 (Sup. Ct. Fla. 2016).

In ***Veal v. State***, 298 Ga. 691, 784 S.E.2d 403 (Sup. Ct. Ga. 2016), the Georgia Supreme Court vacated the life-without-parole sentence of the juvenile defendant, who at the age of 17-and-a half-years, committed murder and rape in the course of two armed robberies. The court said ***Montgomery*** clarified that ***Miller*** applies to both discretionary and mandatory sentences. ***Id.*** at 700-703. Looking at the progression of the Supreme Court's cases, the Georgia court said the Court "has now made it clear that LWOP sentences may be constitutionally imposed only on the worst-of-the-worst murderers, much like the Supreme Court has long directed that the death penalty may be imposed only on the worst-of-the-worst adult murderers." ***Id.*** at 702-03. And because the sentencing court had not made the determination that the juvenile offender was irreparably corrupt or permanently incorrigible such that he would fall into the narrow class of juvenile murderers for whom a life-without-parole is not excessive, the court remanded for resentencing. ***Id.*** at 703

Other state courts have reached the same conclusion: *See* ***State v. Riley***, 315 Conn. 637, 110 A.3d 1205 (Conn. 2015); ***State v. Seats***, 865 N.W.2d 545 (Iowa 2015); ***Aiken v. Byars***, 410 S.C. 534, 765 S.E.2d 572 (S.C. 2014); ***State v. Long***, 138 Ohio St. 3d 478, 8 N.E.3d 890 (Ohio 2014); ***People v. Guitierrez***, 58 Cal.4th 1354, 171 Cal. Rptr. 3d 421, 324 P.3d 245 (Cal. 2014); ***Bear Cloud v. State***, 2014 WY 113, 334 P.3d 132 (Wy. 2014).

In sum, the weight of authority proves the trial court's decision was wrong. ***Miller*** and ***Montgomery*** apply to all

juvenile offenders whether they were sentenced in states with mandatory or discretionary sentencing schemes.

2. Resentencing for Jackson is not barred by ***Ninham*** or ***Barbeau***.

The trial court relied on ***Ninham*** and ***Barbeau*** in denying Jackson's postconviction motion. The court's reliance on these cases was misplaced, for several reasons.

The first reason is timing. The development of the law on sentencing juveniles is recent and evolving. The Court heard arguments in ***Montgomery*** in October of 2015 and decided the case on January 25, 2016. ***Miller*** was decided in 2012. The supreme court decided ***Ninham*** in 2011 and thus did not have the benefit of either of these crucial cases. The court of appeals decided ***Barbeau*** in June of 2016, after the ***Montgomery*** decision. However, WSCCA case history for ***Barbeau*** shows the briefing was completed on November 16, 2015, before ***Montgomery***. Thus neither court had the benefit of argument in light of ***Montgomery***.

The second reason is that the supreme court's decision in ***Ninham*** was based on a reading of ***Graham*** that would later be rejected in ***Miller***.

As noted above, the Court's decision in ***Graham*** involved juveniles sentenced to life-without-parole in nonhomicide cases. Not surprisingly, the court in ***Ninham*** concluded the distinction between homicides and nonhomicides was critical. The ***Ninham*** court said:

> ***Graham*** does not, however, support the argument that juvenile offenders who commit homicide are categorically less deserving of life imprisonment without parole. *This is because juvenile offenders who commit homicide lack the second layer of diminished moral*

> *culpability on which the **Graham** Court based its conclusion. Simply stated, "[t]here is a line between homicide and other serious violent offenses against the individual*….Although an offense like robbery or rape is a serious crime deserving serious punishment, those crimes differ from homicide crimes in a moral sense. ***Id***.

Ninham at ¶76, emphasis added.

Miller refuted the ***Ninham*** court's distinction between homicides and nonhomicides, however. ***Miller*** explicitly said that the reasoning in ***Graham*** applies to *any* life-without-parole sentence imposed on a juvenile:

> ***Graham*** concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, ***Graham***'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. (Cite omitted). *But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific*. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. *So Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses*.

Miller at 2465 (emphasis added).

As such, ***Miller*** abrogated a critical underpinning of ***Ninham***. The arc of the Supreme Court cases is clear: a life-without-parole sentence imposed on a juvenile offender is presumed unconstitutional as violative of the Eighth Amendment. Juvenile offenders must have a meaningful opportunity for release. Only the rare offender who is truly

incorrigible can constitutionally be subjected to the second most severe criminal sanction of life-without-parole.

Third, ***Ninham***'s claim was broader than Jackson's. Ninham argued that sentencing *any* 14-year-old child to life-without-parole was unconstitutional. ***Ninham***, 333 Wis. 2d at 344, 357, ¶3, ¶41.

Jackson does not advance a categorical Eighth Amendment challenge, however. Rather, he argues that *his* sentence violates the Eighth Amendment because the sentencing court failed to consider the ***Miller*** and ***Montgomery*** factors. He argues that he is entitled to a new sentencing hearing at which the court would determine whether he was a juvenile whose crime reflected "unfortunate yet transient immaturity" and whether he was the "rare juvenile offender whose crime reflected irreparable corruption."[3]

Nor does ***Barbeau*** bar Jackson's claim. Like ***Ninham***, ***Barbeau*** advanced a categorical challenge rather than an "as applied" challenge. ***Barbeau***, 370 Wis. 2d at 755; ¶23. He argued that the statutory scheme for extended supervision eligibility for juveniles convicted of homicide is unconstitutional. ***Id***. The court clearly viewed Barbeau's claim as a categorical one, stating: "*In deciding a categorical challenge such as this*, a court will first consider 'objective indicia of society's standards….." ***Id***. at ¶28, *quoting* ***Ninham*** at ¶50, (emphasis added).

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3 To the extent that ***Ninham*** does apply here, it is noteworthy that the Court demonstrated its suspicion of a case-by-case proportionality approach with juvenile offenders. The Court worried that the "brutality and cold-blooded nature of any particular crime would overpower mitigating arguments based on youth." ***Graham***, 560 U.S. at 77.

By contrast, Jackson argues *his* sentence is unconstitutional. He seeks what ***Miller*** and ***Montgomery*** now require: a sentencing hearing at which the sentencing court takes into consideration how, at age 16, he was constitutionally different from an adult, and how those differences counsel against irrevocably sentencing him to a lifetime in prison.

E. Because the trial court did not consider how Jackson, as a juvenile, was constitutionally different from an adult, Jackson must be resentenced.

As the Court recognized in ***Montgomery***, before ***Miller***, every juvenile convicted of homicide could be sentenced to life-without-parole. After ***Miller***, it will be the rare juvenile offender who can receive that sentence. ***Montgomery***, 136 S. Ct. at 734. Because the trial court in this case did not discuss and determine whether Jackson was one of those rare juvenile offenders who could lawfully be sentenced to life-without-parole, Jackson must be resentenced.

Unsurprisingly, Jackson's sentencing court did not follow the ***Miller*** cases at sentencing given that ***Miller*** would be decided some 17 years after Jackson's sentencing. As the Seventh Circuit observed in ***McKinley v. Butler***, ***Miller*** could not have had any bearing on the original sentencing because it had not yet been decided. ***McKinley***, 809 F.3d at 914.

A review of the court's sentencing comments shows it did not consider how Jackson, as a juvenile, was constitutionally different from an adult. Although the court's sentencing comments occupied some ten pages of transcript, it mentioned Jackson's age only once, noting he was sixteen-years-old at the time of the crimes. (48:33; App. 106).

A passing reference to the defendant's age is not a substitute for the in-depth consideration of age as constitutionally mitigating pursuant to ***Miller*** and ***Montgomery***. In ***Veal***, for example, the court said that the sentencing court's general consideration of the defendant's age was insufficient. The sentencing court was required to make a "distinct determination on the record" that the defendant was irreparably corrupt or permanently incorrigible in order to put him in the narrow class of juvenile murderers for whom a life-without-parole sentence was proportional under the Eighth Amendment. ***Veal v. State***, 784 S.E.2d at 412.

As discussed above, the Supreme Court identified several ways in which children are constitutionally different from adults. Children have diminished culpability and a greater prospect for reform. As a result, the penological objectives of retribution, incapacitation and deterrence fall away when sentencing juveniles.

The court's sentencing comments here, however, emphasized retribution and Jackson's culpability and minimized his prospect for reform. As such, this court cannot "tease out" a rationale for the trial court's sentencing that meets the requirements of ***Roper*** and its progeny.

Indeed, retribution emerges as a centerpiece of the court's sentencing rationale. For example, the court said it hoped Jackson would "suffer" for "eternity." The punishment of a lifetime in prison was not sufficient; the court wanted to exact an even greater punishment--to suffer in this life and for eternity:

> Life imprisonment is probably an insufficient sentence for you in this case. I think a death penalty would be insufficient penalty for you in this case because you're

> not going to suffer. You say you suffer, but life imprisonment may deprive you of freedom but it's not going to have you suffer, and I think there should be a good deal of suffering. I only pray that after you die, be it in prison or out of prison that somehow you have to endure some personal hell for eternity for what you did.

(48: 37; App. 111).

The court also dismissed any notion of forgiveness for Jackson. The court referenced a letter Jackson had sent to the juvenile court which had waived him into adult court. (48: 35; App. 109). Jackson evidently wrote he believed God had forgiven him, and he asked why society could not also forgive him. At sentencing Judge Hansher replied that God would not forgive Jackson: "I don't think God has forgiven you. You may think so, I do not. I don't know how God could forgive you for something such as this." (48: 36; App. 110).

The Nevada Supreme Court considered retribution in the context of sentencing a 13-year-old to life-without-parole in ***Naovarath v. State***, 105 Nev. 525, 779 P.2d 944 (Sup. Ct. Nev. 1989). Even before the ***Roper*** line of cases, the court there said that while "some" retribution against a "child murderer" might be appropriate, "almost anyone will be prompted to ask whether [the defendant] deserves the degree of retribution represented by the hopelessness of a life sentence without possibility of parole, even for the crime of murder." ***Id.*** at 530-31. The court questioned whether a 13-year-old could even "comprehend" a sixty-year sentence, and whether a lifetime in prison for a seventh-grader "measurably contributes" to the social purposes served by the most severe sentence next to the death penalty. ***Id***. at 530.

As for any idea of lessened culpability due to Jackson's age, not only did the sentencing court here fail to

consider age as reducing Jackson's culpability, it concluded that Jackson's crimes were "premeditated." The court said: "this was a premeditated, cold-blooded murder. There's no question about it." (48:30; App. 104).

Not even the prosecutor claimed this homicide was premeditated. In his opening statement to the jury, the prosecutor said the state would present evidence that Jackson "was part of a conspiracy, not to commit the homicide, but rather to commit an armed robbery that night." (47:11). The prosecutor said: "Now when you hear the evidence in this case, you will hear that the plan that night was to commit an armed robbery. There was not ever a plan to kill the victim of that armed robbery." (47:16).

Further, even if one assumes that a planned robbery would likely result in a homicide, the Court's ***Roper*** decision demonstrates that planning and premeditation simply do not make juveniles as culpable as adults. Christopher Simmons' planned his crimes out in detail. Despite his extensive planning, and despite the numerous opportunities Simmons had to reverse course in the commission of his crimes, the Supreme Court held that his status as a juvenile made him less culpable than an adult. The same is true for Jackson. His planning, if indeed there was any, is a far cry from that in ***Roper v. Simmons***.

Nor did the sentencing court demonstrate an awareness of Jackson's lesser culpability due to his age. On the contrary, the court characterized Jackson as completely culpable and even representative of a wave of young people committing crimes because it gives them "power over other people." (48: 32; App. 106). He called Jackson "an animal who was stalking his prey…." (48: 31; App. 105).

A child's lessened culpability is in part due to the greater risk-taking that is characteristic of juveniles, along with their bending to peer pressure. Here, Jackson had engaged in the risky behavior of smoking marijuana and walking around with his friend, alternately loading and unloading a sawed-off shotgun that the friend had taken from his father's bedroom. Yet the court never discussed whether these crimes would ever have occurred had Jackson been alone that day, or whether the boys were emboldened by each other and having smoked marijuana. The court did not consider whether once Jackson and his friend began a path towards an armed robbery, he saw no option for withdrawing from that path in the face of perceived peer pressure.

The court rejected any notion that Jackson's childhood circumstances might have lessened his culpability as well. Despite the presentence report which noted Jackson's mother whipped him for discipline, that she had been jailed for "welfare fraud," that Jackson had moved eight times in his 16 years, that he had lived in a relative's basement for a time, that he had been badly beaten at school, that he did not know his father and his father figure had left his life when he was a teenager, that he and his mother had been evicted for failure to pay rent, the judge concluded that he "had everything" in his childhood. (48: 31; App. 105). "He had everything when he was a child. I listened to his mother, she seemed like a very nice person." While the court had perhaps seen more tragic childhood histories, to say that Jackson "had everything" as a child defies the facts.

Contrary to the ***Roper*** line of cases, the court dismissed the idea that Jackson, as a child, was more susceptible to reform than an adult. Indeed, the court rejected the notion that Jackson should even have an opportunity to change, saying: "You said…I deserve a chance, a chance to

succeed, a chance to prosper, and a chance to make positive change. I don't think you deserve that chance." (48:34; App. 108). The court also said Jackson had "very limited rehabilitative needs," suggesting that Jackson's character was fully-formed and incapable of reform. (48: 33; App. 107).

The ***Roper*** line of cases and research also shed further light on relevant factors in the court's sentencing. For example, the court believed Jackson lacked remorse, crediting the presentence writer's view that Jackson's remorse was "superficial," and noted Jackson had reportedly slept well after these crimes. (48:29-30, 32; App. 103-104, 106). Remorse, which is difficult to determine in adults,, is even more difficult to accurately judge in juveniles.

Given that the "successful expression of remorse requires substantial verbal skills"4 the vast majority of juveniles will have difficulty demonstrating remorse, much less persuading a presentence writer or judge that he or she feels remorse for the crimes committed. "Not every offender will have the mental capacity to experience remorse or the intellectual capacity and language skills to convey remorse." K. Henning, "*What's Wrong With Victim's Rights in Juvenile Court? Retributive Versus Rehabilitative System*, 97 Cal L. Rev. 1107, 1149, August 2009 (footnotes omitted).

"A child who has limited life experiences or lacks the full capacity to reason may not have the same range of emotions as a more developed adult." *Id.*

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4 M. LaVigne and G. VanRybroek, "Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters," 15 U.C. Davis J. Juv. Law and Policy, 37, Winter 2011.

> Reliance on the child's emotions and reactions in the hours or days after an offense is particularly troubling in the juvenile justice context. Because remorse is a type of painful suffering, youth will sometimes "resort to defense mechanisms" of humor, denial, or apparent indifference to avoid it. Other developmental features of adolescence, including the rejections of child-like behaviors such as crying, may also block traditional expressions of grief and remorse. Similarly, youth culture, which often requires youth to hide their weaknesses and project a violent image, stifles guilt and other remorseful emotions.

Id., at 1150, footnotes omitted.

Roper noted the juvenile's vulnerability to outside pressures and still-developing identity. ***Roper***, 543 U.S. at 569. "A developing sense of identity plays a significant role in a juvenile's lack of expressed remorse. Cultural pressures discourage youth from showing signs of weakness," and often value a tough appearance. A. Saper, Note: "*Juvenile Remorselessness: An Unconstitutional Sentencing Consideration,"* 38 NYU Review of Law & Social Change 99, (2014). A juvenile who does not fully grasp the gravity of his crime is unlikely to react as would an adult immediately after the crime. *See id*. at 130. And a juvenile who by definition lacks the maturity of an adult will have difficulty demonstrating remorse in the formal setting of a presentence interview or the courtroom, especially if that juvenile lacks the verbal sophistication to express that remorse. Add to this the juvenile's fear of being perceived as weak while being held in an adult jail and about to be sentenced to an adult prison, one can readily see that the juvenile will be inhibited from demonstrating the sorrow and vulnerability that is required to demonstrate remorse. *See id.* at 128.

This botched robbery, in which Jackson shot and killed C.S., is tragically consistent with the rationale in the ***Roper*** line of cases. Juveniles who begin down a path have more difficulty than adults to extract themselves from the situation. Indeed, in ***Jackson v. Hobbs***, the companion case to ***Miller v. Alabama***, the defendant killed a store clerk in a robbery. ***Miller***, 567 U.S. at 466. The unique qualities of youth, such as their recklessness, are evidenced in crimes such as the botched robbery that turns into a murder. ***Id.*** at 473. The juvenile offender who sees an opportunity to make money through a robbery, and who knows someone who committed such a crime without detection, is extremely unlikely to foresee the possibility that the crime will result in a homicide.

The state's contention here that this homicide was not planned is inconsistent with the imposition of a *de facto* life-without-parole sentence. The most severe penalty in Wisconsin must not be imposed on a juvenile offender who did not plan to commit a homicide occuring in the context of an armed robbery.

The gravity of Jackson's crimes is obvious and beyond dispute. One understands and appreciates "that harm to a victim is not diluted by the age of the offender." ***State v. Lyle***, 854 N.W.2d 378, 398 (S. Ct. Iowa, 2014) (internal cite omitted). "Yet justice requires [the court] to consider the culpability of the offender in addition to the harm the offender caused." ***Id.*** "A constitutional framework that focused only on the harm the defendant caused would never have produced ***Roper***, which involved a profoundly heinous crime." ***Id.***, internal cites omitted.

CONCLUSION

In light of the above arguments, Jevon Jackson respectfully requests that the court vacate his sentences and remand the matter to the circuit court for resentencing.

Dated this 19th day of October, 2017.

Respectfully submitted,

MARTHA K. ASKINS
State Bar No. 1008032

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 890-3541
martha.askins@wisc.edu

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,103 words.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 19th day of October, 2017.

Signed:

_____

MARTHA K. ASKINS
State Bar No. 1008032

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 890-3541
martha.askins@wisc.edu

Attorney for Defendant-Appellant

A P P E N D I X

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I N D E X
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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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Signed:

MARTHA K. ASKINS
State Bar No. 1008032

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 890-3541
martha.askins@wisc.edu

Attorney for Defendant-Appellant