STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP712

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEVON DION JACKSON,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING
POSTCONVICTION RELIEF, ENTERED IN
THE MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE DAVID A. HANSHER, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Is it unconstitutional to sentence a 16-year-old juvenile who executed a woman in front of her daughter to life-with-parole at age 93?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication is appropriate. This case will either clarify or develop the law regarding an Eighth Amendment as-applied challenge to a juvenile-life-with-parole sentence.

INTRODUCTION

Jevon Dion Jackson executed a woman with a sawed-off shotgun because he did not like her attitude. He blew her head apart in front of her 10-year-old daughter. The point-blank shot strewed pieces of her face, her scalp, and her brain across a Popeye's Chicken parking lot. It was one of the worst juvenile gun crimes the sentencing court had ever seen.

The sentencing court was required to sentence Jackson to life in prison for the crime of first-degree intentional homicide, but had discretion to set a parole eligibility date. The court exercised that discretion and set the date for 2070, when Jackson will be 93.

Relying on dicta in the Supreme Court's recent decision in *Montgomery v. Louisiana,*[1] Jackson claims his sentence is cruel and unusual and that he is entitled to

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[1] *Montgomery v. Louisiana,* 136 S. Ct. 718, 736 (2016)

resentencing. He asserts that he is bringing an as-applied challenge, but argues that any de facto juvenile-life-without-parole sentence is *categorically* cruel and unusual unless a court makes a specific finding during the sentencing hearing. That is not an as-applied challenge and there is no such rule of law. He is attempting to avoid the burden for establishing that a sentencing scheme is unconstitutional, the binding precedential authority establishing that Wisconsin's discretionary scheme *is* constitutional, and the deferential standard of review of sentencing decisions. This Court should reject Jackson's claim. His sentencing is undeniably harsh, but not disproportionately so.

SUPPLEMENTAL STATEMENT OF THE CASE

At 16 years of age, Jackson executed a woman in the parking lot of a fast food restaurant while her child looked on. (R. 48:14.) He was charged with and convicted of four counts: first-degree intentional homicide, attempted armed robbery, armed robbery, and possession of a short barreled shotgun. (R. 2; 13.)

Jackson confessed. (R. 21.) He told the police that he was with his friend, L.C. and had a sawed-off shotgun that belonged to L.C.'s father. (R. 21:1.) They had planned to commit several hold-ups with the gun, but previously backed down because they did not have bullets. (R. 21:1.) It was not a spur of the moment, impetuous decision. Rather, they devised a plan to target white people because they believed it safer for them. (R. 21:2.) It was less likely that a white person would be armed. (R. 21:2.)

On the day of the murder, L.C. came to Jackson's home after school. (R. 21:1.) The two left Jackson's house and went to L.C.'s house to get the sawed-off shotgun. (R. 21:1.) This time was different: they had bullets. (R. 21:1–2.) They got the gun, walked to an alley, and loaded it. (R. 21:1–2.) Jackson said he took the gun and put it in his

coat. (R. 21:2.) He claimed that he began to worry that the gun would go off as they were walking around, so he took the gun out of his coat, unloaded it, and then gave the gun back to L.C. (R. 21:2.) According to Jackson, L.C. put the gun in his pants. (R. 21:2.)

Jackson and L.C. walked to a McDonalds. (R. 21:2.) They stopped to talk to some girls and Jackson claimed that L.C. told Jackson that he was reloading the gun. (R. 21:2.) Jackson was concerned that the gun was visible in L.C.'s pants, so he took the gun back to conceal it in his coat. (R. 21:2.) Jackson and L.C. then walked to Popeye's Chicken to look for someone to rob. (R. 21:2.) They thought about robbing a black woman in the parking lot, but decided, again, it would be safer to target a white person. (R. 21:2.) They had seen the victim, a white woman, and her young daughter. (R. 21:2–3.) They decided rob her when she came back out from the restaurant. (R. 21:2.)

Jackson and L.C. sat down on a bench and waited. (R. 21:3.) About ten minutes later, the woman and her daughter came out of the restaurant. (R. 21:3.) Jackson took the sawed-off shotgun out of his coat. (R. 21:3.) He and L.C. approached. (R. 21:3.) Jackson ordered the girl to give him the chicken, which L.C. took from her. (R. 21:3.) Jackson stood behind the woman, ordered her to her knees, and demanded money. (R. 21:3.) The woman got down on both knees and put her hands up in the air. (R. 21:3.)

Jackson told the police that the woman then gave him attitude. (R. 21:3.) She turned her head, looked at Jackson out of the corner of her eye, and told him that she did not have any money. (R. 21:3.) Jackson became angry. (R. 21:3.) He thought the woman was not taking him seriously. (R. 21:3.) He thought to himself: "I'm the big man, I've got the gun, why does she have this attitude." (R. 21:3.)

Jackson told the police that he forgot the gun was loaded, but added that he "didn't care" if it was because he was mad. (R. 21:3.) He decided to scare the woman by cocking the gun. (R. 21:3.) When the woman did not respond, he became very angry. (R. 21:3.) Jackson heard L.C. say "don't do it man," but he pulled the trigger anyway. (R. 21:3.) Jackson shot her in the head at near point-blank range. (R. 21:3.)

Jackson and L.C. ran away to Jackson's house. (R. 21:4.) On the way, they dumped the sawed-off shotgun and chicken in a garbage can in the alley behind his home. (R. 21:4.)

L.C. testified at trial and gave an account similar, but not identical, to Jackson's confession. L.C. testified that he and Jackson were friends. (R. 47:106.) They had decided to rob someone for money because they knew of someone who had done it and gotten away with it. (R. 47:107.) The idea was mostly L.C.'s. (R. 47:138.) They had twice before gone out with L.C.'s father's sawed-off shotgun looking for a victim, but had not gone through with it. (R. 47:107–09.)

On the night of the murder, L.C. was at Jackson's home and they again talked about committing a robbery. (R. 47:109.) By this time, the two shared the idea and L.C. did not have to "like jack him up to go do it or nothing." (R. 47:139.) They went to L.C.'s home to get the gun. (R. 47:110.) Jackson waited outside while L.C. went in and took the gun and two shells from his father's dresser. (R. 47:110, 137.) When L.C. came back out from the house, he and Jackson walked to the alley and loaded the gun. (R. 47:113.) L.C. then put the gun in his pants. (R. 47:114.)

The two walked to Wendy's looking for someone to rob. (R. 47:114.) They had discussed targeting a white person because it was less likely that a white person would have a gun. (R. 47:121.) They did not see any "good targets" at

Wendy's. (R. 47:115.) L.C. decided to give Jackson the gun because L.C.'s pants were too big. (R. 47:115.) Jackson put the gun in his coat and they walked to McDonalds to look for a victim. (R. 47:115–17.) They did not see anyone to rob, and talked to two girls outside of McDonalds before leaving to head to Popeye's. (R. 47:117–18.) Jackson still had the gun, and it was never unloaded. (R. 47:123.)

They walked to Popeye's and sat down in the outside seating area. (R. 47:118–19.) L.C. saw a woman with a young child that they thought would be a good person to rob. (R. 47:122, 141.) When the woman and girl came out of the restaurant, Jackson got up and pulled out the gun. (R. 47:122.)

L.C. testified that Jackson said "Give me your money." (R. 47:125.) L.C. then heard the woman say: "I don't have any money." (R. 47:125.) Jackson then told the woman to get on her knees, which she did. (R. 47:125.) Jackson had the gun only six inches from the woman's head. (R. 47:126–27.) L.C. testified that he was standing behind Jackson and said "Let's go." (R. 47:127.) Jackson turned and looked at L.C., and L.C. saw that Jackson was mad. (R. 47:128.) L.C. told Jackson: "Don't shoot her." (R. 47:128.) Jackson said nothing and shot the woman in the head. (R. 47:128, 147.) The woman fell to the ground. (R. 47:128.)

L.C. knew the woman was dead because her head had shattered. (R. 47:128–29.) They stood there for about 30 seconds and then turned and ran. (R. 47:129.) L.C. asked Jackson for the gun and he threw the gun and the chicken in a garbage. (R. 47:130–31.) The two went to Jackson's home and did not tell anyone about what they had just done. (R. 47:132.)

The 10-year-old victim, 12 years old at the time of trial, testified that she had gone with her mother to pick up dinner for their family at Popeye's. (R. 47:28–29.) She was

carrying the chicken as they left the restaurant and walked through the parking lot. (R. 47:30.) She saw two boys sitting at a table outside of the restaurant. (R. 47:31.) The boys got up and walked towards her mother. (R. 47:32.) The boy with the gun, Jackson, did all the talking. (R. 47:33.) He pointed the gun at her mother and said "Give me all your money." (R. 47:33–34.)

She remembered that her mom said she had no money, and that her mom threw her keys and wallet out in front of her. (R. 47:34.) She remembered Jackson facing her mother when he said: "Get on your knees." (R. 47:34–35.)

Jackson told her to put the chicken down. (R. 47:35.) She did, afraid that she and her mother were going to be shot. (R. 47:36.) She then heard L.C. say "[l]et's go" and Jackson say "[w]ait a minute." (R. 47:36.) Jackson then shot her mother, right in front of her. (R. 47:36.)

Linda Jones, the African American woman that Jackson and L.C. decided not to rob, testified that when she arrived at Popeye's, she saw two boys sitting at an outside table. (R. 47:39.) She thought it odd, since it was rather cold out. (R. 47:39.) She walked passed the boys as she entered the restaurant and heard them saying: "Not that one. Not that one." (R. 47:40–41.) When Jones was inside waiting for her order, she heard a "big loud noise." (R. 47:41.) A little girl then ran into the store screaming: "Somebody help me, somebody help me." (R. 47:41.)

Jones went over to the crying little girl and asked her what was wrong. (R. 47:41.) The girl said: "They shot my mother. They shot my mother." (R. 47:41.) Jones looked out the window and saw a woman lying on the ground. (R. 47:42.) She went outside with two employees to see if they could do anything, but "of course [they] couldn't." (R. 47:42.)

Officer Theodore Puente testified that he was one of the first officers on the scene. (R. 47:49–51.) When he arrived, he saw a woman lying in a pool of blood. (R. 47:52.) Her head was split down the middle, severed by the gunshot. (R. 47:53.) Her face completely blown apart. (R. 47:54.) Officer Puente went into the restaurant to interview witnesses. (R. 47:55.) There he met with the victim's young daughter who asked if her mother was dead. (R. 47:55.)

Homicide detective Keith Balash testified "there were numerous pieces of hair, human flesh, bone matter, cartilage, scalp, and brain matter scattered throughout the whole parking lot area as far as 80 feet 4 inches." (R. 47:64.)

Officer Carl Safford testified that he was dispatched to the scene and recovered a coin purse and key ring near the victim's body. (R. 47:84.) The coin purse contained credit cards and $34.78. (R. 47:85–86.)

Jackson also testified at trial. That portion of the trial transcript is not a part of the record. Only the first day of testimony is available.

A presentence investigation was done. Jackson told the PSI writer that he told the victim to get on her knees because he had "a fear from the way she walked that she knew some type of martial arts." (R. 50:4.) He said that after the woman told him that she did not have any money, he looked to L.C. to see what he should do. (R. 50:4.) When L.C. did not say anything, Jackson cocked the gun to scare the woman but the gun did not make the noise he thought it would. (R. 50:4.) Jackson said that as he was pulling the trigger, he heard L.C. say: "Don't do it." (R. 50:4.) Jackson claimed he was confused and scared before the murder. (R. 50:4.) When asked why he did not just leave, he said: "I couldn't back down, I was there to help my friend." (R. 50:4.)

Jackson also told the PSI writer that "he did not know that the gun was loaded because he did not see [L.C.] load

it." (R. 50:5.) Jackson said that L.C. asked him why he shot the victim, but Jackson just shook his head. (R. 50:5.) He told the PSI writer: "I wasn't thinking right. I wasn't thinking like I usually think." (R. 50:5.) "When he did think about the offense he thought that it was a dream, that this could not have happened." (R. 50:5.)

Jackson admitted that he told a friend the day after the murder: "I think I blew her head off." (R. 50:5.) Jackson denied that he made the statement "I'm the big man, I've got the gun, why does she have this attitude." (R. 50:5.) He also denied that he confessed in a "matter-of-fact" manner. (R. 50:5.) He told the PSI writer that he was not "hysterical" but he did cry during his confession. (R. 50:5.)

Jackson admitted at first that they were carrying the gun to commit robberies, but then said he had the gun for protection because his neighborhood had been shot up. (R. 50:6.) Jackson said he was sorry for what he had done, but believed that he should be paroled after 13 years. (R. 50:6.) He had read about someone who had three life sentences but was released after 13 years because of an insanity plea. (R. 50:6.)

The victim's sister-in-law was interviewed by the PSI writer. (R. 50:7.) She saw the defendant "stoned-face" during the trial, and noted that Jackson only cried when he thought about what *he* saw. (R. 50:8.) She said that if Jackson was really a child of potential, he would not have murdered her sister-in-law and bragged about it by telling a friend that he blew her head off. (R. 50:8.) She asked that Jackson stay in prison for "what life means" and not be released early. (R. 50:8.)

The PSI writer noted that Jackson had been involved in a battery on September 28, 1993. (R. 50:8.) Jackson said a kid at school bumped into him in an intimidating way. (R. 50:8.) When the kid turned away, Jackson began to hit

him. (R. 50:8.) Jackson said he continued to hit the kid after he fell to the ground. (R. 50:8.) According to police reports, a witness saw Jackson come up from behind the victim and punch the victim in the head with no provocation. (R. 50:8.) The victim fell and hit his head on a shelf and Jackson continued to kick him. (R. 50:8.) Jackson had told the police that the victim was staring at him and giving him a look like he was going to hit him. (R. 50:8.) Jackson also told police that he was having problems at home and thought he went "a little crazy for [a]while." (R. 50:8–9.) When the PSI writer asked Jackson what he thought the disposition was in that case, Jackson "half-laughed and responded that he had served enough time for that offense." (R. 50:9.)

Two days before trial, in July of 1995, Jackson was involved in an altercation with another inmate. (R. 50:9.) Jackson said someone was playing tricks on that inmate and the inmate became upset and confronted Jackson twice. (R. 50:9.) Jackson said the first time he just walked away, but the second time Jackson thought the inmate was going to hit him based on a look. (R. 50:9.) Jackson struck the inmate in the jaw with his fist. (R. 50:9.) Jackson hit him one more time before he was ordered to his cell by an officer. (R. 50:9.)

The PSI writer noted positives in Jackson's life. Jackson had a good relationship with his mother and he characterized his childhood as happy and stable even though his father was not in his life. (R. 50:9–10.) Jackson said that he started having conflicts with his mother when he was 16 years old, but it was short lived. (R. 50:10.)

Jackson had twice run away from home for short periods of time, believing he was treated unfairly by family members. (R. 50:10.) He was suicidal for a short period of time in 1992, but by the time he was interviewed by the Department of Social Services he no longer had those feelings. (R. 50:10.)

Jackson characterized his life as very good compared to others, and he believe that he just made "a very bad decision." (R. 50:11.)

Jackson's mother was interviewed and characterized Jackson as a good child. (R. 50:11.) She noted that Jackson was college bound and had been accepted into a Milwaukee School of Engineering program to take college classes during his senior year of high school. (R. 50:11.)

Jackson's mother believed that Jackson had changed after he was badly beaten at school in 1992. (R. 50:11.) She believed he lacked trust of anyone and that was why Jackson had beaten that boy in school in September of 1993. (R. 50:11.)

The PSI writer noted that Jackson had worked summer jobs through the Step Up Program. (R. 50:12.) He had worked full-time for the Forestry Bureau in 1993, part-time at the Atkinson Library reading to children in 1992, and for the City Sanitation Department in 1991. (R. 50:12.) Jackson said his favorite job was babysitting for cousins' children who were 7, 5, and 3-years-old. (R. 50:12.)

Jackson was evaluated by Dr. Itzhak Matusiak when he was in juvenile detention for this offense. (R. 50:13.) Dr. Matusiak believed Jackson's problems were situational and that Jackson did not have psychopathy, social apathy, oppositional disorder, or conduct disorder. (R. 50:13.) However, Jackson's psychological functioning was inordinately complex. (R. 50:13.) Dr. Matusiak noted that when Jackson was stressed he would experience emotional confusion, but would primarily respond in a non-aggressive manner. (R. 50:13.)

The PSI writer characterized Jackson's crime as an execution and noted that was "disturbing" to listen to Jackson's account of him beating the boy at school. (R. 50:16.) The writer found Jackson's voiced remorse for the

murder to lack sincerity and depth, and urged that the community must be protected from Jackson. (R. 50:16.) She noted that "[t]o live free, individuals m[u]st have control over their own behaviors and respect for the rights and health and safety of others." (R. 50:16.)

At the sentencing hearing, the court found Jackson's crime to be "probably the cruelest and most cold-blooded murder in recent Milwaukee history." (R. 48:28.) It was an "execution" that outraged the community. (R. 48:28.) However, the court was mindful that it could not sentence Jackson on outrage. (R. 48:28.)

The court found it difficult to comprehend Jackson's actions that night, and was particularly shocked that Jackson seemed relatively unaffected by his actions. (R. 48:29–30.) The court characterized Jackson's crime as a "premediated, cold-blooded murder." (R. 48:30.) It found that "the facts were overwhelming that [Jackson] knew the gun was loaded." (R. 48:30.) He was "[a]n animal who was stalking his prey on November 16th, 1993." (R. 48:31.) While juvenile gun violence "sicken[ed]" the court, "nothing has been more shocking than this case." (R. 48:32.) And the court opined that it "may never see a more shocking one again." (R. 48:35.)

The court then noted that approximately two months before the murder, Jackson, unprovoked, had severely beaten a school-mate because Jackson did not like the way the school-mate looked at him. (R. 48:30.) The court found that consistent with Jackson's statement for this crime that he did not like the victim's attitude. (R. 48:30.) The court also noted Jackson's recent altercation in jail with another inmate. (R. 48:30–31.) The court agreed with the presentence writer's assessment that Jackson's remorse was superficial. (R. 48:32.) The court concluded: "there's a lot of anger still in Jevon." (R. 48:30–32.)

The sentencing court did consider Jackson's age. (R. 48:33.) While the court was shocked that a 16-year-old could commit such "a vicious and aggravated and unprovoked murder," the court took into consideration Jackson's youthfulness for the purposes of setting a parole eligibility date. (R. 48:33.) The court noted, however, that it also had to consider the needs of the public, and that the need to protect the community was strong. (R. 48:33.)

The court considered that Jackson had led a relatively crime free life until he was 16 years old. (R. 48:36.) The court also considered Jackson's demeanor at trial and his remorse, "be it truthful or not." (R. 48:36.)

The court opined that life imprisonment was not sufficient for Jackson:

> 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.

(R. 48:37.) Retribution was clearly a part of the sentencing goal, but it is also clear that the court considered the other relevant sentencing factors.

For the crime of first-degree intentional homicide, the court sentenced Jackson to life imprisonment with a parole eligibility date of 2070. (R. 48:37.) The court ordered consecutive sentences for the other crimes for a total of 32 years. (R. 48:37–38.) The sentence was fashioned knowing that Jackson's earliest parole eligibility date would be when Jackson was 101 years old. (R. 48:38.)

When the circuit court sentenced Jackson, it could not sentence him to life without parole. *See* Wis. Stat. § 973.014 (1993–94). It could, however, set a parole eligibility date beyond his expected lifetime. *State v. Setagord*, 211 Wis. 2d 397, 414, 565 N.W.2d 506 (1997). The Legislature did not provide circuit courts with the option of imposing a true life-without-parole sentence until after Jackson's offense. *See* Wis. Stat. § 973.014(1)(c) (1995–96) (life-without-parole applicable only for a crime committed on or after August 31, 1995).

Jackson had a direct appeal in Case No. 1996AP0382-CR, and he collaterally attacked his conviction in Case No. 1998AP2397. (R. 25; 33.) Until now, he has not challenged his sentence.

This case stems from the denial of Jackson's successive Wis. Stat. § 974.06 motion, in which he asked for resentencing or sentence modification. (R. 36.) He argued that his sentence, which he claims is a de facto juvenile-life-without-parole sentence, violates the Eighth Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution. (R. 36:1.) In Jackson's view, the sentencing court was required, pursuant to *Miller v. Alabama*[2] and *Montgomery*, to consider how children differ from adults and to determine whether Jackson was a juvenile offender whose crime reflected "unfortunate yet transient immaturity" or was the "rare juvenile offender whose crime reflected irreparable corruption." (R. 36:6, 8.) Jackson claimed that the sentencing court did not view his youth as a mitigating factor and instead treated it as an aggravating factor. (R. 36:8–9.)

[2] *Miller v. Alabama,* 567 U.S. 460 (2012).

The circuit court denied Jackson's motion. The court rejected Jackson's claim that the court viewed his young age as an aggravating factor. (R. 40:3 n.1.) The court explained that it "duly considered the defense sentencing comments about the talent demonstrated by the defendant in school, how he had a lot of potential, and heard how he was good with electronics." (R. 40:3 n.1.) The court also considered that Jackson did not come from a "deprived home" and that Jackson had little prior history with crime or violence. (R. 40:3 n.1.) "Clearly, this court took both mitigating and aggravating factors into account with regard to the defendant's youth, his accomplishments at that age, and his *particular character* which allowed him to blast a woman in the head with a shotgun over some chicken and a little money." (R. 40:3 n.1 (emphasis added).)

The court then rejected Jackson's reading of *Miller* and *Montgomery*. The court concluded that both *Miller* and *Montgomery* were limited to mandatory life-without-parole sentences. (R. 40:3–4.) The United States Supreme Court has not found a juvenile-life-without-parole sentence for first-degree intentional homicide unconstitutional. (R. 40:4.) The circuit court reasoned that the United States Supreme Court had only invalidated mandatory sentencing schemes, which Wisconsin does not have. (R. 40:4, 6–7.)

Jackson appealed. On appeal, he argues only that the court erred in denying his claim for resentencing.

STANDARD OF REVIEW

Whether a criminal sentence violates the Eighth Amendment is a question of law reviewed de novo. *See State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451.

ARGUMENT

Jackson's life sentence with a parole eligibility date after 75 years does not amount to cruel and unusual punishment.

A. Principles of law relating to cruel and unusual challenges to a criminal sentence.

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Wisconsin Supreme Court has interpreted article I, section 6 of the Wisconsin Constitution in a manner consistent with the United States Supreme Court's interpretation of the Eighth Amendment. *Ninham*, 333 Wis. 2d 335, ¶ 45.

The Supreme Court in *Graham* explained that there are two types of Eighth Amendment challenges applicable to criminal sentences. First, there is a type of "as-applied" challenge, which challenges the length of a term-of-years sentence as disproportionate "given all the circumstances in a particular case." *Graham v. Florida*, 560 U.S. 48, 59 (2010). Second, there is a categorical challenge, which challenges an entire class of sentences as disproportionate based on either "the nature of the offense" or "the characteristics of the offender." *Id.* at 59–60.

An as-applied challenge is *not* a challenge to the court's exercise of sentencing discretion. Rather it is aimed at achieving uniformity in the interpretation and application of constitutional law. "The test for whether a sentence violates the Eighth Amendment and whether a sentence [i]s excessive are virtually identical in Wisconsin." *State v. Davis*, 2005 WI App 98, ¶ 21, 281 Wis. 2d 118, 698 N.W.2d 823. Wisconsin has articulated the test as a determination that the sentence is "so excessive and unusual, and so

disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Id.* (quoting *State v. Pratt*, 36 Wis. 2d 312, 322, 153 N.W.2d 18 (1967)).

The reviewing court does not independently weigh sentencing factors in an as-applied challenge. Whether a sentencing court properly exercised its discretion is a discrete question, which is reviewed for an erroneous exercise of discretion. *See State v. Gallion,* 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197.

The United States Supreme Court has explained "we do not adopt or imply approval of a general rule of appellate review of sentences." *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983). "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of *a particular sentence*; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is *within constitutional limits*." *Id.* (emphasis added). There is "substantial deference that must be accorded to legislatures and sentencing courts." *Id.* As such, "a reviewing court rarely will be required to engage in an extended analysis to determine that a sentence is not constitutionally disproportionate." *Id.* The Wisconsin Supreme Court has taken heed of that cautionary instruction. *See State v. Paske*, 163 Wis. 2d 52, 70, 471 N.W.2d 55 (1991).

Of particular relevance, in *Ninham*, the Wisconsin Supreme Court concluded that a juvenile-life-without-parole sentence was not unconstitutional as-applied. The court explained the proper analysis: "'[W]hat constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless *clearly* cruel and unusual." *Ninham*, 333 Wis. 2d 335, ¶ 85 (emphasis added) (quoting

Hayes v. United States, 238 F.2d 318, 322 (10th Cir. 1956)) (additional citations omitted). "A sentence is *clearly* cruel and unusual *only if* the sentence is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Id.* (emphasis added) (internal quotation marks omitted) (citations omitted).

The court concluded that "[t]here is no question that Ninham's punishment is severe, but it is not disproportionately so." *Ninham*, 333 Wis. 2d 335, ¶ 86. Ninham's crime, like Jackson's, was horrific and senseless. *Id.* The court weighed that against Ninham's young age and concluded Ninham's youth did not "automatically remove his punishment out of the realm of proportionate." *Id.* The court refused to "interfere" with the circuit court's sentencing discretion because the circuit court imposed a sentence "well within its statutory authority." *Id.*

B. Jackson's as-applied challenge was expressly rejected in *Ninham*, and this Court is bound by our supreme court's decision that a juvenile's age does not automatically remove life-without-parole from the realm of constitutionally proportionate sentences.

The question presented in this case is whether the holding in *Ninham*, that a juvenile offender's age does not "automatically remove his punishment out of the realm of proportionate," remains true in light of *Montgomery*. Jackson does not address that portion of the *Ninham* decision, but argues "a life-without-parole sentence imposed on a juvenile offender is *presumed* unconstitutional as violative of the Eighth Amendment." (Jackson's Br. 26 (emphasis added).) He asserts that a juvenile-life-without-parole sentence can be constitutional only if the sentencing

court made specific findings about the juvenile offender's youth to determine whether the crime reflected "unfortunate yet transient immaturity" and whether the juvenile offender was the "rare juvenile . . . whose crime reflected irreparable corruption." (Jackson's Br. 27–35.)

Jackson's as-applied argument is flawed. Again, an as-applied challenge is not a challenge to the court's exercise of sentencing discretion. "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of *a particular sentence*; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is *within constitutional limits*." *Helm*, 463 U.S. at 290 n.16 (emphasis added). Even if *Miller* and *Montgomery* undermine the rationale for the court's decision in *Ninham,* those cases expressly refused to place juvenile-life-without-parole sentences outside of constitutional limits.

Respectfully, this Court is bound by *Ninham* and lacks the authority to "overrule, modify or withdraw language" from prior supreme court decisions or its own decisions. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). Only the supreme court has the power to overrule, modify, or withdraw language from prior Wisconsin cases. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 54, 324 Wis. 2d 325, 782 N.W.2d 682. There is no way around *Ninham*, and if this Court believes that *Ninham* was wrongly decided or that the reasoning was flawed, it may certify the case to the supreme court or "decide the appeal, adhering to a prior case but stating its belief that the prior case was wrongly decided." *Cook*, 208 Wis. 2d at 190. What this Court cannot do is adopt Jackson's position his sentence is unconstitutional as applied.

C. *Miller, Montgomery* and subsequent decisions related to juvenile-life-without-parole sentences for the crime of homicide are not as expansive as Jackson suggests.

If this Court disagrees that *Ninham* controls, the Court should nonetheless reject Jackson's expansive reading of *Miller* and *Montgomery*. Neither decision requires that Jackson be resentenced. Jackson was not sentenced to a mandatory juvenile-life-without-parole sentence, and *Miller* and *Montgomery* do not require a specific exercise of sentencing discretion for a juvenile sentenced under a discretionary life-with-parole scheme.

1. *Miller v. Alabama* and Wisconsin's response in *State v. Barbeau*.

The United States Supreme Court held in *Miller* 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 v. Alabama,* 567 U.S. 460, 479 (2012) (emphasis added). However, the Court did *not* hold that a sentence must guarantee release before the conclusion of a life sentence. *Id*. at 479 (citing *Graham*, 560 U.S. at 75).

The *Miller* Court looked at whether the sentencing scheme deprived a sentencing court of the *discretion* to sentence a juvenile to any sentence other than a life sentence without the possibility of parole. *Miller*, 567 U.S. at 465, 489. The Court discussed four age related factors that a sentencing court lacked the power to consider in a mandatory scheme: (1) "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment" that a juvenile normally cannot escape; (3) "the circumstances of the homicide offense, including the extent of [the defendant's] participation in the conduct and

the way familial and peer pressures may have affected him"; and (4) "the possibility of rehabilitation." *Id.* at 477–78.

The Court concluded that a mandatory scheme "runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id.* at 465. *Miller* requires a sentencing court 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.

The *Miller* Court cautioned that its "decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper*[3] or *Graham*." *Miller,* 567 U.S. at 483. Rather, the Court "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.*

After *Miller*, Wisconsin began to see more challenges to juvenile-life-without-parole sentences. In 2016, this Court decided *State v. Barbeau*, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520, *review denied*, 2016 WI 98, 372 Wis. 2d 275, 891 N.W.2d 408, *and cert. denied*, 137 S. Ct. 821 (2017). This Court reasoned that "the United States Supreme Court did 'not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.'" *Id.* ¶ 32 (citing *Miller*, 567 U.S. at 479). The *Barbeau* court concluded that *Miller* did not invalidate Wisconsin's scheme because our scheme is discretionary and "what the United States Supreme Court in *Miller* found unconstitutional was a statutory scheme that mandates a punishment of life imprisonment without the possibility of parole for a juvenile

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[3] *Roper v. Simmons*, 543 U.S. 551 (2005).

convicted of intentional homicide." *Barbeau*, 370 Wis. 2d 736, ¶ 33. The Supreme Court denied the petition for certiorari in *Barbeau* without comment. *Barbeau v. Wisconsin,* 137 S. Ct. 821 (2017).[4]

2. *Montgomery v. Louisiana* and Wisconsin's response in *State v. Paape.*

In *Montgomery*, the U.S. Supreme Court clarified that *Miller* announced a substantive rule of constitutional law and a defendant may benefit from its retroactive application on collateral review. *Montgomery v. Louisiana,* 136 S. Ct. 718, 736 (2016). Contrary to the *Miller* decision, the *Montgomery* Court concluded that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734.[5] The Court recognized that "*Miller* . . . did not bar a punishment for *all juvenile offenders*, as the Court did in *Roper* or *Graham*." *Montgomery*, 136 S. Ct. at 734 (emphasis added). The Court concluded, however, that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734.

The *Montgomery* Court clarified that "*Miller's* substantive holding [is] that life without parole is an excessive sentence for children whose crimes reflect

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[4] While *Barbeau* was decided by our supreme court shortly after the decision in *Montgomery* issued, the U.S. Supreme Court's denial of certiorari in *Barbeau* took place well after.

[5] In a dissenting opinion, Justice Scalia wrote "[i]t is plain as day that the majority is not applying *Miller*, but rewriting it." *Montgomery*, 136 S. Ct. at 743.

transient immaturity." *Montgomery*, 136 S. Ct. at 735. In order for a juvenile-life-without-parole sentence to pass constitutional muster, "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery*, 136 S. Ct. at 734. "A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id.* at 735 (emphasis added) (quoting *Miller*, 567 U.S. at 465).

The *Montgomery* decision *did not* invalidate discretionary juvenile-life-without-parole sentences. Nor did it render juvenile-life-without-parole sentences presumptively unconstitutional. Rather, the Court held that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* at 734.

Neither *Miller* nor *Montgomery* requires that the sentencing court make a specific finding or exercise its discretion a particular way. *Montgomery*, 136 S. Ct. at 735. *Miller* "speaks only to the degree of procedure . . . mandated in order to implement its substantive guarantee." *Montgomery*, 136 S. Ct. at 735. "In light of what this Court has said in *Roper, Graham,* and *Miller* about how children are constitutionally different from adults in their level of culpability, however, [a defendant] must be given *the opportunity* to show their crime did not reflect irreparable corruption. . . ." *Montgomery*, 136 S. Ct. at 736–37 (emphasis added).

In *State v. Paape*, No. 2015AP2462-CR, 2017 WL 2791576 (Ct. App. June 28, 2017) (unpublished) (R-App. 101–05), this Court recognized *Montgomery*'s characterization of *Miller* "as requiring a sentencing court to

consider a juvenile offender's youth before imposing a sentence of life imprisonment without parole, *as well as* restricting such a sentence to the 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Paape*, 2017 WL 2791576, ¶ 14 (citing *Montgomery*, 136 S. Ct. at 732–36). (R-App. 103.) This Court implicitly rejected the argument that that holding required the sentencing court to make a specific type of finding, and concluded that there was no *Miller* violation where the sentencing court "explicitly considered the influence of Paape's immaturity on his commission of the crime." *Paape*, 2017 WL 2791576, ¶ 15. (R-App. 103.)[6]

3. The Supreme Court's disagreement on the effect of *Montgomery* in decisions to grant, vacate, and remand.

After *Montgomery*, the U.S. Supreme Court issued numerous grant, vacate, and remand orders. In two of those orders, addressed below, members of the Court wrote concurring opinions that highlighted the Court's disagreement as to how *Montgomery* should be interpreted and applied by the states. While the State is including these orders here, it cautions that these orders are not final determinations on the merits and carry no precedential weight. *Gonzalez v. Justices of Mun. Court of Boston*, 420 F.3d 5, 7 (1st Cir. 2005)*; see also Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013).

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[6] The State recognizes that the sentencing court's consideration of age and its attendant characteristics in *Paape* was different from what occurred in this case. *See State v. Paape*, No. 2015AP2462-CR, 2017 WL 2791576, ¶ 3 (Ct. App. June 28, 2017). (R-App. 101.)

a. *Adams v. Alabama* (May 2016).

In *Adams*, the Court granted certiorari, vacated, and remanded a set of cases involving defendants that had been originally sentenced to death for crimes committed when they were juveniles. *Adams v. Alabama,* 136 S. Ct. 1796, 1799 (2016). "Juries in all capital cases were required at the penalty phase to consider 'all relevant mitigating evidence' including 'the chronological age of a minor' and a youthful defendant's 'mental and emotional development.'" *Id.* at 1797 (citation omitted). After *Roper*, juvenile death sentences in Alabama were commuted to life-without-parole sentences. *Adams*, 136 S. Ct. at 1798.

Justice Alito, joined by Justice Thomas, wrote that "it can be argued that the original sentencing jury fulfilled the individualized sentencing requirement that *Miller* subsequently imposed," *Adams*, 136 S. Ct. at 1798, and that "courts are free on remand to evaluate whether any further individualized consideration is required." *Id.* at 1799.

In a separate concurring opinion joined by Justice Ginsburg, Justice Sotomayor wrote that *Miller* "did not merely impose an 'individualized sentencing requirement'; it imposed a substantive rule that life without parole is only an appropriate punishment for 'the rare juvenile offender whose crime reflects irreparable corruption.'" *Adams* 136 S. Ct. at 1799 (citing *Montgomery*, 136 S. Ct. at 735). In Justice Sotomayor's view, "[t]here is no indication that, when the factfinders in these cases considered petitioners' youth, they even asked the question *Miller* required them not only to answer, but to answer correctly: whether petitioners' crime reflected 'transient immaturity' or 'irreparable corruption.'" *Adams,* 136 S. Ct. at 1800 (citing *Montgomery*, 136 S. Ct. at 734).

Justice Sotomayor also characterized *Miller* and *Montgomery* as a prohibition on weighing the severity of the

crime against the offenders' youth. "[T]he gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: '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.'" *Adams*, 136 S. Ct. at 1800 (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). "[A]fter *Miller*, we know that youth is the dispositive consideration for 'all but the rarest of children.'" *Adams,* 136 S. Ct. at 1800.

b. *Tatum v. Arizona* (October 2016)

In *Tatum*, the Supreme Court granted certiorari, vacated, and remanded a set of cases involving juveniles sentenced to life-without-parole after *Miller* but before *Montgomery*. *Tatum v. Arizona*, 137 S. Ct. 11, 13 (2016). Justice Sotomayor, joined by no other Justice, wrote that in the cases at issue, "the sentencing judge merely noted age as a mitigating circumstance without further discussion," and "[i]t is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole." *Tatum*, 137 S. Ct. at 13. She went on to write: "It requires that a sentencer decide whether the juvenile offender before it is a child 'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption' for whom a life without parole sentence may be appropriate." *Id.* (citation omitted).

In the dissenting opinion joined by Justice Thomas, Justice Alito wrote that *Montgomery* "has no bearing whatsoever on the decisions that the Court now vacates." *Tatum*, 137 S. Ct. at 13. He went on to write: "the Arizona decisions at issue are fully consistent with *Miller*'s central holding, namely, that *mandatory* life without parole for juvenile offenders is unconstitutional." *Tatum*, 137 S. Ct. at

13 (emphasis added). "A sentence of life without parole was imposed in each of these cases, not because Arizona law dictated such a sentence, but because a court, after taking the defendant's youth into account, found that life without parole was appropriate in light of the nature of the offense and the offender." *Id.* "It is not clear why this Court is insisting on a do-over, or why it expects the results to be any different the second time around." *Id.* at 14.

4. Federal Circuit Court interpretations of *Montgomery*'s impact on a discretionary juvenile-life-without-parole sentence for a homicide offense.

Most federal circuit courts of appeal have rejected the expansive reading and application of *Miller* and *Montgomery* that Jackson advocates for. Most circuits have refused to conclude that *Miller* and *Montgomery* did anything but invalidate mandatory life-without-parole sentencing schemes. And no circuit court has concluded, as Jackson alleges, that *Miller* and *Montgomery* require a particularized exercise with specific findings and conclusions.

The Second Circuit refused to "disturb" the judgment of a sentencing court that sentenced a defendant to life imprisonment after *Miller* but before *Montgomery*. *United States v. Garcia*, 666 Fed. Appx. 74, at *78 (2d Cir. Dec. 15, 2016) (unpublished). (R-App. 109.) The Second Circuit reasoned that "[a]lthough mandatory life sentences may not be imposed on juvenile offenders . . . discretionary life sentences are permitted if the court adequately considers the appropriate factors with respect to the particular juvenile defendant before it." *Garcia*, 666 Fed. Appx. at *77 (citing *Miller,* 567 U.S. at 479–80). (R-App. 108.) The court looked to *Miller*'s four age related factors and concluded that the defendant did "not point to any factor that the district court overlooked or 'any one factor' on which the district court

unjustifiably relied." *Garcia*, 666 Fed. Appx. at *78 (citation omitted). (R-App. 108.) That was the end of the analysis.

The Fourth Circuit has concluded that *Miller* applies to mandatory life sentences. *Contreras v. Davis,* Nos. 17-6307 and 17-6351, 2017 WL 6539214, at *2 (4th Cir. Dec. 21, 2017) (unpublished). (R-App. 111.) *Miller* only requires an individualized sentence under a discretionary scheme. *Contreras*, 2017 WL 6539214, at *2. (R-App. 111.)

The Sixth Circuit has likewise concluded that "*Miller* and *Montgomery* apply, by their own terms, only to mandatory sentences of life without parole." *In re Harrell*, No. 16-1048, 2016 WL 4708184, at *2 (6th Cir. Sept. 8, 2016). (R-App. 114.) The court concluded the alleged rule, even in a discretionary scheme, "that the functional equivalent of life without parole is unconstitutional—is not the rule established in *Miller* and made retroactive in *Montgomery*." *Harrell*, 2016 WL 4708184, at *2. (R-App. 114.)

The Ninth Circuit narrowed the issue and concluded that *Miller* applies only to true life-without-parole sentences. *Demirdjian v. Gipson*, 832 F.3d 1060, 1076 (9th Cir. 2016). Only a true life-without-parole sentence is akin to the death penalty in severity, thus a sentence with a lengthy period of incarceration before the juvenile is eligible for parole "does not necessarily trigger *Miller*'s requirements." *Id.* at 1077.

The Tenth Circuit has not squarely addressed *Montgomery*'s impact on discretionary sentences, but noted that it was "skeptical of any suggestion that *Montgomery* extended rather than simply explained *Miller*'s holding. After all, the only issue in *Montgomery* was whether *Miller*'s holding applies retroactively." *Cardoso v. McCollum*, 660 Fed. Appx. 678, at *681 n.2 (10th Cir. Sept. 16, 2016) (unpublished). (R-App. 118.)

The Seventh Circuit, conversely, assumed *Miller* applied to a discretionary life-with-parole sentence in *Kelly v. Brown*, 851 F.3d 686 (7th Cir. 2017).[7] The majority concluded that the consideration of age as a sentencing factor was all that a defendant was entitled to under *Miller*. *Kelly*, 851 F.3d at 687–88. Judge Posner dissented. His assessment of the impact of *Montgomery* was that a cursory mention of age by the sentencing court is "not evidence [of] the deliberate reflection on [a youthful offender's] character that would be necessary to conclude that he is 'irretrievably depraved' and his 'rehabilitation is impossible.'" *Id*. at 689.

5. State interpretations of *Montgomery*'s impact on a discretionary juvenile-life-without parole sentence for a homicide offense.

State courts outside Wisconsin that have addressed *Montgomery* have come to differing interpretations as to the reach and application of *Montgomery*. This Court should reject Jackson's request that the Court accept an interpretation like Georgia's or Pennsylvania's that results in the most expansive reach and application. Rather, this Court should conclude consistent with Virginia that *Montgomery* did nothing more than it said, which was to clarify that *Miller* was retroactive. Alternatively, this Court should conclude consistently with Arizona that if *Montgomery* requires a finding that a crime not be the product of transient immaturity, that the procedure to

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[7] The Seventh Circuit also reaffirmed its prior holding that "*Miller* applies not just to sentences of natural life, but also to sentences so long that, although set out as a term of years, they are in reality a life sentence." *Kelly v. Brown*, 851 F.3d 686, 687 (7th Cir. 2017) (citing *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016)).

challenge a pre-*Miller* or *Montgomery* sentence includes an evidentiary hearing in which the defendant must first prove that his crime is the result of transient immaturity.

The Georgia Supreme Court concluded that *Montgomery* expanded *Miller* and a sentencing court is required to make a "distinct determination on the record that [the offender] is irreparably corrupt or permanently incorrigible." *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016). The decision in *Veal* seems to be in direct conflict with *Montgomery*, which recognized that *Miller* did *not* require that the sentencing court "make a finding of fact regarding a child's incorrigibility." *Montgomery*, 136 S. Ct. at 735.

Pennsylvania has concluded that "[t]he United States Supreme Court decisions that control in this matter unambiguously permit the imposition of a life-without-parole sentence upon a juvenile offender *only* if the crime committed is indicative of the offender's permanent incorrigibility; that the crime was not the result of the 'unfortunate yet transient immaturity' endemic of all juveniles." *Commonwealth v. Batts*, 163 A.3d 410, 435 (Pa. 2017) (citations omitted). "[F]or a sentence of life without parole to be proportional as applied to a juvenile murderer, the sentencing court must first find, based on competent evidence, that the offender is entirely unable to change." *Id.*

According to *Batts*, "[u]nder *Miller* and *Montgomery*, a sentencing court has no discretion to sentence a juvenile offender to life without parole unless it finds that the defendant is one of the 'rare' and 'uncommon' children'" that "exhibit[ ] such irretrievable depravity that rehabilitation is impossible." *Batts,* 163 A.3d at 435 (quoting *Montgomery*, 136 S. Ct. at 726, 733). "Thus, in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will forever be incorrigible, without any hope for rehabilitation, a life-

without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose." *Id.*

Virginia has disagreed that *Montgomery* requires any such procedures under a discretionary sentencing regime. After a grant, vacate, and remand order from the Supreme Court, the Virginia Supreme Court issued an opinion in *Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017) *certiorari denied*, 138 S. Ct. 81 (2017). The *Jones* court concluded that *Miller* and *Montgomery* apply only to mandatory penalties. *Jones*, 795 S.E.2d at 709. It is the "legal preclusion" of considering youth and all that accompanies it "that *Miller* and *Montgomery* deemed unconstitutional." *Jones*, 795 S.E.2d at 709.

"As *Montgomery* explained, the mandatory, life-without-parole sentence under Louisiana law violated *Miller* because it gave the juvenile defendant 'no *opportunity* to present mitigation evidence to justify a less severe sentence.'" *Jones*, 795 S.E.2d at 713 (citation omitted). "Jones was never denied this constitutionally required opportunity." *Id.*

The *Jones* majority rejected adopting the expansive dicta in *Montgomery* as a required sentencing procedure. *Jones*, 795 S.E.2d at 721. ""The main 'question' for decision in *Montgomery* was . . . 'whether *Miller's* prohibition on mandatory life without parole for juvenile offenders' should be applied retroactively.'" *Jones*, 795 S.E.2d at 721 (citing *Montgomery*, 136 S. Ct. at 732). Both *Miller* and *Montgomery* "addressed *mandatory* life sentences . . . [a] proposed expansion of these holding to *non-mandatory* life sentences—based entirely on dicta in *Montgomery*—requires attenuated reasoning uninfluenced by stare decisis." *Jones*, 795 S.E.2d at 721.

The *Jones* court reasoned that if the dicta in *Montgomery* were controlling, "*Montgomery* would,

ironically, not amplify *Miller* but reverse it." *Jones*, 795 S.E.2d at 722. This is so because "[a] mere future, potential opportunity to present mitigating evidence at a parole hearing (the remedy authorized by *Miller*) would never be enough to satisfy the Eighth Amendment" because the dicta in *Montgomery* suggests that "only the consideration of mitigation evidence at the time of sentencing or resentencing would suffice." *Jones*, 795 S.E.2d at 722.[8]

Arizona concluded that "*Miller*, as clarified by *Montgomery*, represents a 'clear break from the past'" and prohibits "a natural life sentence on a juvenile convicted of first degree murder without distinguishing crimes that reflected 'irreparable corruption' rather than the 'transient immaturity of youth.'" *State v. Valencia*, 386 P.3d 392, 395 (Ariz. 2016) *certiorari denied* 2017 WL 2424075 (2017). The *Valencia* court, however, rejected the notion that a defendant who received a juvenile-life-without-parole sentence is automatically entitled to resentencing if the trial court did not make that specific factual finding. *Valencia*, 386 P.3d at 395–96.

Under Arizona law, a defendant is entitled to an evidentiary hearing if the defendant makes a "colorable claim[ ] for relief based on *Miller*" as interpreted by *Montgomery*. *Valencia*, 386 P.3d at 396. The evidentiary hearing is necessary because whether a juvenile offender's

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[8] Shortly after *Jones*, the Eastern District of Virginia reached a different conclusion. As Jackson points out, in *Malvo v. Mathena*, the Eastern District concluded that it "need not determine whether Virginia's penalty scheme is mandatory or discretionary because . . . the rule announced in *Miller* applies to all situations in which juveniles receive a life-without-parole sentence." *Malvo v. Mathena*, 254 F. Supp. 3d 820, 827 (E.D. Va. 2017) *appeal filed*. (*See* Jackson's Br. 23). The Fourth Circuit is set to hear arguments on January 23, 2018.

crime reflected "transient immaturity" is a question of material fact. *Id.* at 395–96. At the hearing, a defendant will need to establish by the preponderance of the evidence that the defendant's crime "did not reflect irreparable corruption but instead transient immaturity." *Id.* at 396. "Only if they meet this burden will they establish that their natural life sentences are unconstitutional, thus entitling them to resentencing." *Id.* (citing *Montgomery*, 136 S. Ct. at 736–37.)

In a concurring opinion, two of Arizona's Justices "express[ed] serious concerns over the direction in which the Supreme Court appears to be headed." *Id.* Those justices felt that "the Court has effectively amended the Eighth Amendment to prohibit cruel *or* unusual punishment, rather than cruel *and* unusual punishment." *Id.* at 397. "But even more troubling from a practical standpoint is the Court's sweeping pronouncement that the 'vast majority' of juvenile offenders must be shielded from lifetime confinement." *Id.* at 398 (citation omitted). "[T]he Court trivialized the killer's actions and culpability . . . and '[t]ransient immaturity' . . . is not an apt rationalization for cold-blooded murder." *Id.*

The concurrence went on to suggest: "We should treat the Court's forecast that irreparable corruption will not be found in the 'vast majority' of cases as speculative and dictum." *Id.* "By being convicted of first-degree murder, juvenile offenders already have been proven 'uncommon' and outside of the 'vast majority' of young people who manage to avoid committing such heinous crimes." *Id.* "Our system's integrity and constitutionality depend not on whether the overall number of sentences of life without parole meted out to youthful murders are many or few. They depend primarily on whether justice is rendered in individual cases." *Id.*

D. This Court should conclude that *Miller* and *Montgomery* are not so expansive as to invalidate a discretionary juvenile-life-with-parole sentence for first-degree intentional homicide.

Jackson did not receive a true life-without-parole sentence. Rather, he received a discretionary sentence of life-*with*-parole and a parole eligibly date that likely exceeds his lifespan. The possibility that a juvenile may die behind prison walls does not itself render the sentence unconstitutional; the Supreme Court has never "foreclose[d] a sentencer's ability to make that judgment in homicide cases." *Miller*, 567 U.S. at 480.

Jackson makes a brief argument that this Court should look at his sentence in the aggregate and conclude that parole eligibility at 101 years of age is the functional equivalent of life-without-parole sentence. (Jackson's Br. 17–19.)[9] Because the issue of consecutive sentences is of no practical difference to Jackson,[10] it should not be resolved in this case. *See State v. Blalock,* 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible grounds."). Instead, this Court should look to Jackson's discretionary life-with-parole sentence and conclude that *Miller* and *Montgomery* do not invalidate Jackson's sentence even if it is assumed that Jackson's sentence for first-degree intentional homicide does not provide for a meaningful opportunity for release.

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[9] Other jurisdictions have addressed the issue, which has resulted in a split on how consecutive sentences should be analyzed. *See State v. Ali*, 895 N.W.2d 237, 244–45 (Minn. 2017), *petition for certiorari docketed* (collecting cases).

[10] *See* Jackson's Br. 18–19.

The Supreme Court's decision in *Miller* turned on whether the mandatory sentencing scheme prohibited a sentencing court from sentencing a juvenile to any sentence other than a life-without-parole. The Supreme Court reasoned that a statutorily mandated life-without-parole sentence was contrary to the constitutional "requirement of individualized sentencing for defendants facing the most serious penalties." *Miller*, 567 U.S at 480. The mandatory sentencing scheme forbade the sentencing court from "tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

Contrary to Jackson's assertion, the mandate in *Montgomery* was not that *Miller* did more than invalidate a mandatory sentencing scheme, but that *Miller* was retroactive. Like the Virginia supreme court and majority of circuit courts, this Court should reject the expansive dicta in *Montgomery* and conclude consistent with *Barbeau* that what the Supreme Court "found unconstitutional [in *Miller*] was a *statutory scheme* that *mandates* a punishment of life imprisonment without the possibility of parole for a juvenile convicted of intentional homicide." *Barbeau*, 370 Wis. 2d 736, ¶ 33 (emphasis added).

"As *Montgomery* explained, the mandatory, life-without-parole sentence under Louisiana law violated *Miller* because it gave the juvenile defendant '*no opportunity* to present mitigation evidence to justify a less severe sentence.'" *Jones*, 795 S.E.2d at 713 (citation omitted). In Wisconsin, juvenile defendants are not denied that constitutionally required opportunity.

A Wisconsin sentencing court must make an individualized sentencing determination when it exercises its sentencing discretion. In fact, "individualized sentencing is a *cornerstone* to Wisconsin's system of indeterminate sentencing." *State v. Lechner*, 217 Wis. 2d 392, 427, 576

N.W.2d 912 (1998) (emphasis added). This individualized sentencing requirement extends to the court's parole eligibility determination under Wis. Stat. § 973.014(1). *State v. Borrell*, 167 Wis. 2d 749, 774, 482 N.W.2d 883 (1992).

Our courts must impose sentences that "call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971) (citation omitted); *see also Gallion*, 270 Wis. 2d 535, ¶ 23. Courts also consider, among other things, "the defendant's personality, character and social traits"; "the degree of the defendant's culpability"; "the defendant's age, educational background and employment record"; and "the defendant's need for rehabilitative control." *Borrell*, 167 Wis. 2d at 773–74.

There is no mandate in Wisconsin, or even a presumption, that a circuit court will sentence a juvenile convicted of first-degree intentional homicide to a life-without-parole sentence. A juvenile defendant has every opportunity to present evidence during the sentencing hearing related to the mitigating effect of age and its attendant characteristics. And the sentencing court is permitted to give as much weight to that evidence as it believes appropriate. *Harris v. State*, 75 Wis. 2d 513, 520, 250 N.W.2d 7 (1977). While dicta from the Supreme Court suggests that some view youth as the primary sentencing factor, this Court is under no obligation to extend *Montgomery* beyond its holding.

Discretionary life sentences in Wisconsin differ significantly from the mandatory life-without-parole sentences at issue in both *Miller* and *Montgomery*. If the Supreme Court wished to bind the states to a particular type of discretionary scheme, it could have so held. The Supreme Court has never required that a sentencing court make a

specific finding before sentencing a juvenile to a life sentence. *Montgomery*, 136 S. Ct. at 735. Rather, *Miller* "speaks only to the degree of procedure . . . mandated in order to implement its substantive guarantee." *Montgomery*, 136 S. Ct. at 735. A juvenile defendant "must be given *the opportunity* to show their crime did not reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 736–37 (emphasis added). Jackson had every opportunity to do so.

As previously noted, this Court has declined to hold that *Miller*'s prohibition applies when a sentence is not a mandatory life sentence in the context of a categorical challenge. *Barbeau*, 370 Wis. 2d 736, ¶ 41. It should now do the same in the context of this as-applied challenge.

Jackson had every opportunity to present mitigating evidence related to youth and its attendant characteristics. The circuit court exercised its discretion and imposed a life sentence with the eligibility of parole after 75 years, not because it was mandated to do so, but because it exercised its discretion and concluded that such a sentence was appropriate in light of all of the circumstances of the case. As such, Jackson's sentence does not run afoul of the Eighth Amendment as interpreted in *Miller* and *Montgomery*.

E. Alternatively, if this Court concludes that Jackson's claim is not controlled by prior decisions, it should further conclude that an as-applied challenge does not automatically result in resentencing.

While he asserts the contrary, the State understands Jackson to be arguing that a de facto juvenile-life-without-parole sentence is *categorically* cruel and unusual unless a sentencing court weighs sentencing factors a particular way and makes specific findings during the sentencing hearing. That is a challenge to Wisconsin's discretionary sentencing scheme, which has been definitively addressed and rejected

in *Ninham* and *Barbeau*. Or possibly a challenge to the court's exercise of discretion.

Regardless of how the challenge is phrased, there is no such rule of law and no presumption that Jackson's sentence is unconstitutional.

Sentencing decisions are strongly presumed reasonable as the circuit court is in the best position to weigh the sentencing factors and to assess the character of the defendant. *Gallion,* 270 Wis. 2d 535, ¶ 18. Due to this presumption of reasonableness, the burden to prove an erroneous exercise of sentencing discretion is a heavy one and must be established by clear and convincing evidence. *State v. Harris*, 2010 WI 79, ¶¶ 30, 34, 326 Wis. 2d 685, 786 N.W.2d 409. When a defendant rephrases a sentencing discretion challenge as a constitutional challenge, there is no reason to suddenly presume that the sentence is unreasonable and disproportionate unless proven otherwise. *See Appling v. Walker*, 2014 WI 96, ¶ 17 n.21, 358 Wis. 2d 132, 853 N.W.2d 888 (citation omitted) ("[N]either the challenger nor the enforcer . . . face a presumption in an as-applied challenge.").

Rather, if this Court disagrees with the State and concludes both that prior Wisconsin cases do not preclude Jackson's interpretation of *Mill*er and *Montgomery*, and that those cases are so expansive as to call Jackson's sentence into question, the Court should also conclude that the Arizona Supreme Court got it right when it concluded that an as-applied Eighth Amendment challenge comes with a weighty burden. As our supreme court recognized in *Ninham*, there is a large difference between characteristics of particular offender and generalized research. *Ninham*, 333 Wis. 2d 335, ¶¶ 74–78. Recognizing that fact, the Arizona Supreme Court concluded that there is no reason to vacate a sentence unless and until the defendant proves that his or her individual sentence is unconstitutional.

As described by the Arizona Supreme Court, a challenge in this context would require proof of the material fact that the crime reflected "transient immaturity" at the time the crime was committed. *Valencia*, 386 P.3d at 395–96. The defendant would need to establish that fact before he received the benefit of resentencing, *not* at the resentencing hearing. Thus, if a *Miller* claim were sufficiently pled, a hearing would be granted at which a defendant must establish by clear and convincing evidence that the crime "did not reflect irreparable corruption but instead transient immaturity." *Id.* at 396. *See also Ninham*, 333 Wis. 2d 335, ¶ 85 (noting that an Eighth Amendment challenge requires that the challenger *clearly* establish that the sentence is cruel and unusual). Only after this burden has been met would the juvenile defendant be entitled to resentencing for the court to reconsider the parole eligibility date in light the defendant's youth and its attendant characteristics. *See Valencia*, 386 P.3d at 396 (citing *Montgomery*, 136 S. Ct. at 736–37).

In light of Wisconsin case law interpreting the holdings of *Miller* and *Montgomery* and the holdings of those cases, this Court need not embark on developing a procedure to implement dicta in *Montgomery*. Jackson was the rare juvenile willing to execute a woman in front of her ten-year-old daughter, and the circuit court's discretionary decision to sentence him to life with parole after 75 years did not violate the Eighth Amendment.

CONCLUSION

For the foregoing reasons this Court should deny Jackson's claim for resentencing.

Dated this 10th day of January, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,991 words.

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TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of January, 2018.

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TIFFANY M. WINTER
Assistant Attorney General

Appendix
State of Wisconsin v. Jevon Dion Jackson
Case No. 2017AP712

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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TIFFANY M. WINTER
Assistant Attorney General

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