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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

The first 14 pages of the state's brief consists of an introduction and restatement of the case. The brief's vivid and gruesome opening illustrates what the United States Supreme Court feared in ***Roper v. Simmons***, 543 U.S. 551, 573, 125 S. Ct. 1183 (2005): that the brutality of a juvenile's case would be so abhorrent to the sentencer as to overpower any mitigation of youth. It is perhaps human nature to respond more viscerally to a juvenile's terrible crime than the same crime committed by an adult. But it is precisely that visceral reaction which requires a court to take particular care in the sentencing of juveniles who have committed heinous offenses. And it is that visceral reaction, in part, that led the United States Supreme Court to declare that children are different from adults in the context of sentencing just as they are different in other spheres of life.

Despite the state's objection to Jackson's request for resentencing, the parties appear to agree on much. The state appears to agree that the Supreme Court held in ***Miller v. Alabama,*** 567 U.S. 460 (2012), and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), that the Constitution bars a life-without-parole sentence for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. (State's brief at 21-22). The state agrees that whether a criminal sentence violates the Eighth Amendment is a question of law reviewed *de novo*. (State's brief at 14). And, the state does not dispute that Jackson's sentence is a *de facto* life-without-parole sentence. (State's brief at 33). Factually,

the state does not dispute that this homicide was not premeditated. Nor does the state dispute that the sentencing court's passing reference to Jackson's age failed to meet ***Miller*** standards or constituted an acknowledgement that children are constitutionally different from adults. Significantly, the state appears to concede that Jackson's sentence deprives him of a meaningful opportunity for release based on demonstrated maturity and rehabilitation as it asks this court to deny relief "even if it is assumed that Jackson's sentence for first-degree intentional homicide does not provide for a meaningful opportunity for release." (State's brief at 33).

With these concessions, it would appear that the state agrees with Jackson that his sentence denies him a meaningful opportunity for release, and that his sentence is unconstitutional if he is not one of those rare juveniles whose crimes reflect permanent incorrigibility. Rather than agree, however, the state pivots, arguing that Jackson had every opportunity at his sentencing in 1995 to show his crime did not reflect irreparable corruption, and so his sentence does not "run afoul" of the Court's interpretation of the Eighth Amendment in ***Miller*** and ***Montgomery***. (State's brief at 36).

Respectfully, the state's argument defies common sense because it requires that not only Jackson, in 1995, could foresee the Supreme Court's decisions in ***Miller*** and ***Montgomery***, but further, that the sentencing court could foresee those cases and apply the standards articulated therein. As the court observed in ***McKinley v. Butler***, 809 F.3d 908, 914 (7th Cir. 2016), ***Miller*** could not have had any bearing on the sentencing in this case because the sentencing predated the Supreme Court's juvenile sentencing decisions.

The state advances several arguments opposing Jackson's request for resentencing which Jackson addresses below.

A. This court is not bound by ***Ninham***.

The state first argues this court is bound by ***State v. Ninham***, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451. Citing ***Cook v. Cook***, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), which bars this court from overruling, modifying or withdrawing any language from prior supreme court or court of appeals decisions, the state contends ***Ninham*** bars relief for Jackson. (State's brief at 18). Jackson's claim, however, does not run afoul of ***Cook*** because the Supreme Court's post-***Ninham*** decisions directly conflict with ***Ninham***. "[T]he Supremacy Clause of the United States Constitution governs the outcome of any direct conflict between state and federal supreme court precedent on a matter of federal law…." ***State v. Jennings***, 2002 WI 44, ¶18, 252 Wis. 2d 228, 647 N.W.2d 142 (footnote omitted). "All states, of course, are bound by the decisions of the United States Supreme Court on matters of federal law." ***Id***. (citations omitted).

Jackson's claim is based on the Supreme Court's interpretations of the Eighth Amendment to the United States Constitution, and ***Ninham*** is in direct conflict with the Court's decisions. As a result, this court is not bound by ***Ninham***. As Jackson explained in his brief-in-chief, page 26, ***Miller*** expressly refuted ***Ninham***'s distinction between homicides and non-homicides. Accordingly, ***Ninham*** is in direct conflict with a decision of the Supreme Court.

B. Jackson must be resentenced.

The state alternatively argues that even if ***Ninham*** does not control, Jackson is still not entitled to "automatic"

resentencing. It argues that Jackson's argument is really a challenge to Wisconsin's discretionary scheme which was addressed in ***Ninham*** and ***State v. Barbeau***, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520. (State's brief at 36-37).

To clarify, Jackson's argument is that juveniles are categorically different; the Supreme Court has made that clear. And, the majority of juveniles, the Court has said, are not irreparably corrupt or irredeemable. It is only the rare few who can constitutionally be sentenced to life-without-parole. That "categorical" distinction—of irreparably corrupt or not—must be made in every case. Jackson must be granted an opportunity for the court to determine whether he is utterly irredeemable. That is, he must be resentenced with the "***Miller*** factors" in mind.

C. ***Miller*** and ***Montgomery*** apply to Jackson even though Wisconsin is not a mandatory life-without-parole state.

The state submits that ***Miller*** and ***Montgomery*** are not as "expansive" as Jackson argues. The state's position appears to be that in a discretionary state like Wisconsin, where the court has exercised its discretion at sentencing but has not articulated a rationale with ***Miller*** and ***Montgomery*** in mind, resentencing is barred because the offender was not completely deprived of an opportunity to present mitigating evidence.

This position renders the ***Montgomery*** line of cases meaningless. The Court has repeatedly stated that only the rare few truly incorrigible and irreparably corrupt juvenile defendants may be constitutionally sentenced to life-without-parole. Yes, the court must exercise its sentencing discretion, but it must also do so with ***Miller*** and ***Montgomery*** in mind so that before a judge sentences a juvenile to die in prison, that

judge must determine that that juvenile is truly incorrigible and irreparably corrupt.

The state asserts that "discretionary life sentences in Wisconsin differ significantly from the mandatory life-without-parole sentences at issue in both ***Miller*** and ***Montgomery***." (State's brief at 35). The only difference is the sentencing statute. If the offender is serving a life-without-parole sentence and that offender is not one of the rare few who are truly incorrigible, the sentence is illegal and violates the Eighth Amendment whether the offender is sentenced in Wisconsin or any other state.

The state goes so far as to argue this court should "reject the expansive dicta in ***Montgomery***…" (State's brief at 34). In so doing, the state urges the court to ignore all of what the Supreme Court said in ***Montgomery***. As Judge Brown stated in his concurrence in ***State v. Sanders***, 2007 WI App 174, ¶40, 304 Wis. 2d 159, 737 N.W.2d 44, (*affirmed* on other grounds, 2008 WI 85, 311 Wis. 2d 257, 752 N.W.2d 713), courts "do not write just to pass the time away." This court may not dismiss the Supreme Court's reasoning by labeling it dicta. *See* ***Zarder v. Humana Ins. Co***., 2010 WI 35, ¶¶ 57-58, 324 Wis. 2d 325, 782 N.W.2d 682.

The state next argues that the Supreme Court has not required a "specific exercise of sentencing discretion for a juvenile sentenced under a discretionary life-without-parole scheme." (State's brief at 19). Despite this assertion, the state says on the very next page of its brief that ***Miller*** did mandate a sentencer "follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." (State's brief at 20, *quoting* ***Miller***, 567 U.S. at 483). If ***Miller*** requires the sentencing court to follow a certain process, and to consider an offender's

youth and attendant characteristics, that "process" must apply to all juveniles in all states.

And while the Court has not articulated a script for a sentencing court when sentencing a juvenile offender, it has set the parameters. A life-without-parole sentence for a juvenile is constitutional *only* if the juvenile is irreparably corrupt. The sentencing court's discretion must be informed by its analysis of the ***Miller*** and ***Montgomery*** factors as applied to the particular case. If, as the Supreme Court has declared, only the rare few juveniles who commit homicide are truly incorrigible, the presumption must be that *most* juveniles are not truly incorrigible. Most juveniles must have a meaningful opportunity for release as they mature through age and rehabilitation.

The state next discusses this court's decisions in ***Barbeau*** and ***State v. Paape***, No. 2015 AP2462-CR, 2017 WL 2791576 (Ct. App. June 28, 2017)(R-App. 101-105). Jackson addressed ***Barbeau*** in his first brief and does not repeat those arguments here. The state argues that in ***Paape***, this court "implicitly rejected" the argument that the sentencing court must make a "specific type of finding" before imposing a life-without-parole sentence on a juvenile. The state's reliance on ***Paape*** is unfounded. First, Paape's sentence made him eligible for release after serving 30 years. Therefore, unlike Jackson, Paape would have a meaningful opportunity for release, and this court recognized that essential fact. ***Id***. at ¶15. This court held that a parole hearing for Paape was sufficient to comply with ***Montgomery***'s requirement for a meaningful opportunity for release. ***Id.*** at ¶16.

Second, this court did not "implicitly reject" Jackson's argument for an exercise of discretion in accordance with ***Miller*** and ***Montgomery***. Given that Paape was not serving a

life-without-parole sentence, the court spent little time addressing the trial court's sentencing comments. It made a passing reference that the sentencing court had explicitly considered Paape's immaturity. Then the court wrote: "*More to the point*, Paape's sentence is not, as he claims, a 'de facto life sentence,' because there is a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" ***Id***. at ¶15 (emphasis added). As such, the court's analysis focused on the essential fact that the court did not sentence Paape to life-without-parole.

The state next discusses two cases in which the Supreme Court granted certiorari, vacated sentences and remanded for further action: ***Adams v. Alabama***, 136 S.Ct. 1796 (2016), and ***Tatum v. Arizona***, 137 S. Ct. 11 (2016). Both cases, however, support Jackson's claim that he must be resentenced. Jackson discussed ***Tatum*** in his first brief. In ***Adams***, no justices dissented from the order to grant, vacate and remand.

Further, two justices in ***Adams*** wrote in concurrence that ***Montgomery*** imposes "exacting limits." "Today, we grant, vacate, and remand these cases in light of ***Montgomery***…for the lower courts to consider whether petitioner's sentences comport with the exacting limits the Eighth Amendment imposes on sentencing a juvenile offender to life without parole." ***Adams***, 136 S.Ct. at 1799. The justices wrote that there was "no indication" that the factfinders in those cases "even asked the question ***Miller*** *required* them to answer, but to answer correctly: whether the petitioners' crimes reflected 'transient immaturity' or 'irreparable corruption." ***Id.*** at 1800 (internal cite omitted; emphasis added).

The state next discusses federal and state decisions interpreting ***Montgomery***. The federal decisions have limited

value because they were largely decided in the context of the Antiterrorism and Effective Death Penalty Act (AEDPA) and that Act's deferential review. In addition, details in some of the decisions support Jackson's position.

For example, in ***United States v. Garcia***, 666 Fed. Appx. 74 (2d. Cir. Dec. 15, 2016), (R-App. 106-109), the sentencing court specifically discussed ***Miller***. (R-App. 107). On review, the court wrote that a discretionary life-without-parole sentence is permitted if the court adequately considers the appropriate factors, and then cites to ***Miller***'s four factors. (R-App. 108).

In the Fourth Circuit case discussed by the state, ***Contreras v. Davis***, 2017 WL 6539214 (4th Cir. 2017) (R-App. 110-112), the court did state that Contreras was not entitled to resentencing because his life-without-parole sentence was discretionary rather than mandatory. But there was a second important reason for its decision: Contreras would be eligible for release under Virginia's geriatric release program, meaning Contreras had a meaningful opportunity for release on parole. (R-App. 112). Unlike Contreras, Jackson will not have an opportunity for release under Wisconsin's geriatric/extraordinary health condition statute, Wisconsin Statute § 302.113(9g). That statute applies only to inmates serving bifurcated sentences. Jackson's only avenue for release is parole long after his life expectancy.

The Seventh Circuit's stance, as the state acknowledges, is that ***Miller*** and ***Montgomery*** apply to discretionary sentencing states. (State's brief at 28).

In the Ninth Circuit, the court held in ***Demirdjian v. Gipson***, 832 F.3d 1060 (9th Cir. 2016), that ***Miller*** applies only to "true" life-without-parole cases. But that court's ruling was necessitated by AEDPA's deferential standard of review. The

court said Demirdjian had not shown that ***Miller***'s legal principles were clearly established at the time of his state court decision, and thus he could not prevail. In addition, Demirdgian would be eligible for parole at age 66. ***Id.*** at 1077. "Because fairminded jurists could disagree with Demirdjian that ***Miller***'s requirements applied to his sentence, [the court held] he is not entitled to habeas relief on his Eighth Amendment claim." ***Id.***

In the Tenth Circuit, the state points to ***Cardoso v. McCollum***, 660 Fed. Appx. 678 (10th Cir. 2016) (R-App. 116-118),, a case out of Oklahoma, and the court's statement in a footnote expressing skepticism that ***Montgomery*** did anything other than hold that ***Miller*** was retroactive. Just months later, the Oklahoma Court of Criminal Appeals decided ***Luna v. State***, 387 P.3d 956 (Okla. 2016). The jury in ***Luna*** had assessed punishment at life-without-parole. ***Id.*** at ¶1. Luna argued on appeal that the jury did not hear any evidence "on the attendant characteristics of youth or his potential for rehabilitation, and made no factual findings of permanent incorrigibility and irreparable corruption prior to imposing his sentence of life without parole." ***Id***. at ¶15. The court agreed, vacated Luna's sentence and remanded for resentencing. The court held that ***Miller*** requires a sentencing procedure in which the sentencer is "fully aware of the constitutional 'line between children whose crimes reflect transient immaturity and those *rare* children whose crimes reflect irreparable corruption.'" ***Id.*** at ¶21, (footnote omitted), (emphasis in the original).

The state next turns to State court decisions interpreting ***Miller*** and ***Montgomery***. (State's brief at 28-32). It urges the court to follow either Virginia or Arizona in their approach to juvenile life-without-parole cases. Different states have reached different decisions about whether ***Montgomery*** applies to discretionary sentencing schemes. For example, in

Jones v. Commonwealth, 795 S.E.2d 705 (Va. 2017), *certiorari denied*, 138 S. Ct. 81 (2017), the Virginia Supreme Court decided that ***Montgomery*** did nothing more than clarify that ***Miller*** was retroactive. ***Jones***, however, ignores the Supreme Court's extensive commentary about the diminished culpability of juvenile defendants. That extensive commentary, from ***Roper*** to ***Montgomery***, would be rendered meaningless if the Court's decisions are limited to mandatory life-without-parole sentences.

Justice Scalia's dissent in ***Montgomery*** also lends weight to Jackson's position. In a very pointed dissent, Justice Scalia wrote that the majority had "rewritten" ***Miller*** and extended it far beyond making it retroactive. ***Montgomery***, 136 S. Ct. at 743.

As state courts have reached different conclusions about the reach of ***Miller*** and the procedures courts must take, many state legislatures have responded, demonstrating a trend towards recognizing that children are constitutionally different from adults in sentencing decisions. The Campaign for the Fair Sentencing of Youth reports that nineteen states and the District of Columbia ban life without parole as a sentencing option for children.[1] Further, the American Bar Association passed a resolution in February of 2015, Resolution 107C, which urges federal, state, local, tribal and territorial governments to enact sentencing laws and rules of procedure that will eliminate life without the possibility of release or parole for youthful offenders, both prospectively and retroactively.[2]

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[1] *See* fairsentencingofyouth.org.

[2] American Bar Association, Criminal Justice Section, Report to the House of Delegates, Resolution 107C.

In sum, these developments, along with those many courts that have decided that ***Montgomery*** applies to juveniles in discretionary sentencing states like Wisconsin, support Jackson's position that he must be resentenced pursuant to ***Miller*** and ***Montgomery***.

CONCLUSION

For these reasons, Jevon Jackson respectfully requests that the court vacate his sentences and remand the matter to the circuit court for resentencing.

Dated this 12th day of February, 2018.

Respectfully submitted,

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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 2806 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 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 12th day of February, 2018.

Signed:

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