STATE OF WISCONSIN
COURT OF APPEALS
District I

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OF WISCONSIN

CURTIS L. WALKER,

Appellant,

-v-

Case No: 2016AP1058

Circuit Court Case No.:
1994CF944079

STATE OF WISCONSIN,
Respondent.

APPELLANT'S BRIEF

ON APPEAL FROM DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF CHALLENGING THE SENTENCE IMPOSED ON JANUARY 22, 1996 (BY THE HONORABLE STANLEY MILLER, SENTENCING JUDGE), THE HONORABLE JONATHAN D. WATTS ENTERING DECISION AND ORDER DENYING POSTIONCONVICTION MOTION ON MAY 4, 2016

Submitted by:
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ISSUES PRESENTED

A. Whether a parole eligibility date set in the year 2071 violate the 8th Amendment of the U.S. Constitution's prohibition on cruel and unusual punishment where a juvenile offender is concerned.
Answer: Yes.

B. Whether the sentencing court erred in its application of Wis. Stats. §973.014 (1993-94).
Answer: Yes.

C. Whether the circuit court should have granted a hearing on on appellant's motion for postconviction relief.
Answer: Yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary in this case as the briefs submitted will fully develop the theories and legal authorities so that oral argument should not be necessary.

With respect to publication, I maintain that it would be beneficial in this case as this appeal seeks to clarify an existing rule of law pursuant to §809.23(1)(a)1, Wis. Stats.

STATEMENT OF THE CASE

At the age of 17 I was arrested in relation to the above-captioned matter, on September 8, 1994. A petition for waiver into adult court was filed in Children's Court and ultimately the Children's Court waived its jurisdiction on October 20, 1994. I was charged with first degree intentional homicide, while armed, contrary to secs. 940.01(1) and 939.63(1)(A)2, Stats., respectively. I was represented by attorney Ann Bowe. At the preliminary hearing held on July 3, 1995 the court found probable cause to bind over for trial. A plea of not guilty was entered. the trial commenced on December 4, 1995, the Honorable Stanley Miller presiding. On December 7, 1995 the

jury returned a verdict of guilty on the charge of 1st degree intentional homicide and also on the while armed enhancer. Sentencing was held on January 22, 1996, at which time Judge Miller imposed the mandatory sentence of life imprisonment, and set a parole eligibility date in the year 2071. A motion for postconviction was filed by attorney Peter Vetter on July 19, 1996 challenging the admission of statements made to police investigators into trial, which was denied by decision and order of the trial court, dated July 19, 1996. An appeal from that decision was taken in the Court of Appeals with the court denying relief on May 20, 1998. A petition for review was filed in the state Supreme Court with a decision denying the petition being released on July 24, 1998.

A pro se motion for postconviction relief pursuant to §974.06 was filed in Marched 1999 challenging representation of postconviction counsel, and on March 15, 1999 the circuit court denied the pro se motion. An appeal from that decision was pursued, concluding with a summary dismissal by the Court of Appeals on July 28, 2000 and the denial of a petition for review in the state Supreme Court on February 7, 2001.

A pro se motion for postconviction relief was filed on April 26, 2016 challenging the January 22, 1996 sentencing by the trial court. The motion was denied by circuit court judge the honorable Jonathan D. Watts on May 4, 2016. A timely notice of appeal was filed on May 17, 2016, bringing the matter to this court presently.

STATEMENT OF THE FACTS

[A] At the time of the commission of the offense and my arrest I was 17 years old, causing me to be waived from Children's Court into adult court. (R:8:1). I was charged with 1st degree intentional homicide while armed stemming from a shot fired from a distance of 183 feet (R:39:65), striking the victim in the side, killing him.

After trial by jury I was found guilty of 1st degree intentional homicide while armed. At sentencing, the state requested that the court set parole eligibility in the year 2086, an eligibility date that the state I would not reach in my lifetime. (R:41:1). The state asserted that the aggravating factors that should justify such an eligibility date were: premeditation; the loss of life (R:41:5); the need to send a message to the community (R:41:9); and that there is no chance for my rehabilitation (R:41:10).

The defense offered mitigating factors: that the shooting was not intentional, but rather a wild shot which happened to strike someone; my expression of remorse (R:41:15); My neglectful and violent upbringing (R:41:17-18); A psychological evaluation by a psychologist (R:41:27); my development during the sixteen months between my arrest and trial (R:41:18, 19) and my ability to be rehabilitated; and a sentencing memorandum detailing my upbringing and non-violent juvenile delinquent past (R:41:26).

Judge Miller imposed the mandatory life sentence required by state statute §973.014, and set parole eligibility in the

year 2071, citing his reason for his decision as the gravity of the offense and the need to send a message to the community (R:41:31); and that I was currently dangerous (R:41:29).

[B] In deciding my motion for postconviction relief on May 4, 2016, challenging the constitutionality of my sentencing in the light of recent federal court decisions issued after my sentencing, Judge Watts denied the motion because I am not serving a sentence without the possibility of parole (R:57:1). The motion raised grounds for relief as: the sentencing court fail to take into account how my youth was relevant to my culpability; how the prospects for reform from youth to adulthood lessened the case for the harshest sentence; and the general and specific characteristics of youth making juveniles different for the purpose of sentencing (R:56:1), and that the parole eligibility given was a de facto without parole sentence implicating the principles set forth in Miller v. Alabama, 567 U.S. 2455 (2012) (R:56:4,5).

ARGUMENT

I. A parole eligibility set in the year 2071 violates 8th Amendment of the U.S. Constitution's prohibition on cruel and unusual punishment.

The life sentence with the parole eligibility set in the year 2071 that I was given for an offense committed when I was a juvenile violates the 8th Amendment prohibition against cruel and unusual punishment. The U.S. Supreme Court decided in Miller

v. Alabama, 567 U.S. 2455, 2469 (2012), that sentencing courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." With a parole eligibility date which would be when I am 95 years old, beyond my life expectancy (R:41:3), my sentence stands as a sentencing scheme which would mandate my imprisonment for a lifetime. Although the sentencing court had the discretion to set my eligibility, and could by a liberal interpretation of §973.014, set it beyond my life expectancy, Miller v. Alabama counseled against this very thing unless there was a determination made by the sentencing court that I was, as a juvenile offender, incorrigible, permanently corrupt, and the "rare juvenile offender whose crime reflects irreparable corruption." Miller at 2469.

Miller's "categorical ban is limited to life sentences made mandatory by legislatures, but its concerns that courts should consider in sentencing that 'children are different' extends to discretionary life sentences and de facto life sentences, as in this case." Miller v. Butler, 809 F.3d 908, 913 (2016). So though my parole eligibility setting was discretionary, the length of the eligibility made it a de facto life without the possibility of parole sentence, "and so the logic of Miller applies." McKinley v. Butler, at 911.

The sentencing court did not take into account how I was different than an adult for the purpose of sentencing and made no determination that I was beyond rehabilitation, or that I irrevocably corrupt (R:41:26-32). "A life without parole sentence

improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the 8th Amendment's rule against disproportionate sentences be nullified." Graham v. Florida, 130 S.Ct. 2011, 2029.

The sentencing judge, Judge Miller, did not make a finding, or imply that he believed that I was that rare juvenile offender who would forever be a danger to society. To the contrary, the sentencing court made clear that it thought that I was capable of reform because it said this as it pronounced sentence:

> "Being incarcerated doesn't stop your ability to grow, doesn't stop you ability to find a way to make a meaningful contribution despite the difficulties that you had and the horror of your act." (R:41:30)

The court went on to say:

> "If you choose to be a different person, live a different life, you will have to turn your back on everything that you have known. That is a big challenge for you, and the court wishes you well in that regard." (R:41:31)

This indicates that the position of the court was that I had that potential for change with time and life experience, and that I was not beyond hope in that regard. these sentiments were not reflected in the sentence itself. The sentencing court, in the end, indicated that its reason for the denial of parole eligibility through the length of the parole eligibility rested primarily on the gravity of the offense (R:41:31-32). The sentencing court also wished to make a statement to the community about the value of human life. (R:41:31). The supreme court spoke toward this as well: "...[w]hether viewed as an attempt

to express the community's outrage or as an attempt to right the balance of the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." Roper v. Simmons, 543 U.S. 551 (2005). "nor can deterrence do the work in this context because 'the same characteristics that render juveniles less culpable than adults' - their immaturity, recklessness, and impetuosity--make them less likely to consider potential punishment. Graham, 560 U.S., at__(slip op., at 21) (quoting Roper, 543 U.S., at 571). Similarly, incapacitation could not support the life-without-parole sentence in Graham: deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'--but 'incorrigibility is inconsistent with youth.'" Miller at 2465.

The sentencing made a reference to the fact that I was a young male who had a difficult upbringing (R:41:27). The record does not show or indicate that the sentencing court considered the corresponding characteristics of my youth, nor were those factors reflected in the sentence itself, as Miller says should be the case, "The characteristics of youth, and the way [that] they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." Miller, at 2466. The fact that the court referred to my youth in passing does not satisfy Miller's requirements because "even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the 8th Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"

Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016).

The sentencing court made clear that it considered the seriousness of the crime, but it did not ask and answer correctly the question that Miller requires it to answer: "Whether petitioner's crimes reflected 'transient immaturity' or 'irreparable corruption.'" Adams v. Alabama, 136 S.Ct. 1796, 1799(2016). This may be because the sentencing court did not have the guidance of the decisions in Roper, Graham or Miller. Nor did the sentencing court have the benefit of the guidance offered by the 7th Circuit Court of Appeals, where they said that in assessing the juvenile offender "A competent judicial analysis would require expert psychological analysis of the murderer and his milieu." McKinley v. Butler, 809 F.3d at 913. Without that guidance the sentencing court erroneously exercised its discretion in disproportionately relying on the gravity of the offense committed while I was a juvenile and the need to make a statement to the public.

In this case the sentencing court did have at its disposal an expert psychological analysis of myself and my milieu in the form of a psychological analysis and diagnosis of me by Dr. Ingrid D. Hicks (R:27) and a sentencing memorandum submitted by Julie Paasch-Anderson, sentencing and dispositional specialist (R:56:[appd A]). The findings and conclusions of those two reports should have been taken into account and reflected in the sentence, by the sentencing court, as mitigating factors. As Dr. Hicks concluded: "Curtis Walker is a complicated and new breed of client in the treatment of post-truamatic stress

disorder. His volatile upbringing and other factors have led him to the crime in question." (R:27:15). The sentencing memorandum concluded: "I think Curtis is an example of what happens to children when they are exposed to extreme neglect, abuse, emotional deprivation, violence and absence of meaningful support systems. At the same time, I don't believe that this makes Curtis a lost cause...I have found that Curtis has the ability to develop emotional bonds and positive relationships with others." (R:56[appx A:13]). The U.S. Supreme Court considered these factors in Eddings v. Oklahoma: "...it is not disputed that he [Eddings] was a juvenile with serious emotional problems, and has been raised in a neglectful, sometimes even violent, family background"; "All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." Eddings, 455 U.S. 104, 166(1982). With these analysis of my background the sentencing court should have duly considered this as mitigating and constitutionally significant, and reflected it in its sentencing of me. " In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and severe emotional disturbance

is particularly relevant." Eddings, 455 U.S., at 115. (R:27:) (R:56:1-8).

Without evidence of an "irretrievably depraved character" and considering my youth, in full measure, I "must be given the opportunity to show their crime did not reflect irreparable corruption ; and, if it did not, their hope of some years of life outside prison walls must be restored. Montgomery v. Louisiana, at 622. If rehabilitation was one of the sentencing court's aims as is suggested by its comments at sentencing -

> "There has been references to rehabilitation efforts. I think it's helpful from Ms. Paasch-Anderson about her personal relationship with you that suggest two things. It suggest, one, the absence of firm and personal relationships in your life, which is detrimental and harmful to all of us, but it also suggests perhaps a new start for you, and you can develop meaningful relationships that may some day help you to live differently to live a better life." (R:41:30)

- the court should have considered the fact that when a juvenile is sentenced to a no-parole sentence, that it causes the department of Corrections to confine the offender to maximum security prisons where the most violence and prison-social pressure are the norm and reduces the chances for reform.

"The factors that a sentencing court considers are well-established in Wisconsin law. The primary factors that a sentencing court considers are (1) the gravity of the offense, (2) the character of the offender, and (3) the need to protect the public." State v. Borrell, 167 Wis. 2d 749, 773(1992). If the sentencing court relied primarily on these three factors, on its face, its sentence still should not stand as

constitutional since the court did not make the determination that I was beyond redemption or rehabilitation. "Nor could the use of flawless sentencing procedures legitimate a punishment where the constitution immunizes the defendant from the sentence imposed." Montgomery, 577 U.S, at 615.

"A sentencing court must articulate the factors that it considered at sentencing and how they affected the sentence it imposed. State v. Harris(Denia), 119 Wis. 2d 612, 350 N.W. 2d 633(1984). It is through this articulation that we determine whether the circuit court exercised its discretion." State v. Loomis, 2016 Wisc. LEXIS 178, 55 (C.J. Roggenback concurring) (2016). Since the sentencing court did articulate its consideration of the youth factors as expressed in Miller, the sentence constitutes an erroneous exercise of discretion, and does not does not meet the constitutional standards of the 8th Amendment or the standards set by the Wisconsin Supreme court where it said: (1) "The sentence imposed in each case should recognize the minimum amount of custody or confinement that is consistent with the need to protect the public, the gravity of the offense and rehabilitative needs of the convicted defendant". State v. Borrell, 167 Wis. 2d at 764; (2)..."we mean that this court should review and reconsider an allegedly excessive sentence whenever it appears that no discretion was exercised in the imposition or discretion was exercised without the underpinnings of an explained judicial reasoning process." State v. McCleary, 49 Wis. 2d 263,280. In my case the sentencing court said that

"It's clear I think from the circumstances in this case at least in this case at least in this court that determines incarceration is going to be for a lengthy period of time." (R:41:30). This was the sentencing court's decision, based on the offense, that eligibility would be placed beyond reach without the sentence being affected by the factors of youth and its characteristics - at least no indication in the record of that being the case. "In the first place, there must be evidence that discretion was infact exercise. Discretion is not synonymous with decision making. Rather, the term comtemplates a process of reasoning. As we pointed out in State v. Hutnik (1968), 39 Wis. 2d 754, 764, 159 N.W. 2d 733, '...there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.'" State v. McCleary, 49 Wis. 2d at 278. Because discretion was erroneously exercised and the record does not hold evidence of the exercise of the sentencing court's exercise of discretion, a sentence was produced that was contrary to the 8th Amendment.

ARGUMENT

II. Whether the sentencing court erred in its application of Wis. Stats. §973.014 (1993-94).
Answer: Yes.

The sentencing erred in its application of state statutes governing life sentences where it concerns a juvenile offender. The offense of 1st degree intentional homicide, Wis. Stats.

§940.01(1)(1993-94), carries a mandatory sentence of life imprisonment pursuant to §973.014(1993-94), which directs a sentencing court to make a determination regarding parole eligibility for a defendant being sentenced to life. The court is given two options under §973.014:

(1) The person is eligible for parole under s.304.06(1);

(2) The person is eligible for Parole on a date set by the court under this subsection, the court may set any later date than that provided in s.304.06(1), but may not set a date that occurs before the earliest possible parole eligibility date as calculated under s.304.06(1).

§304.06(1) provides that "the parole commission may parole an inmate serving a life term when he or she has served 20 years."

§973,014 does not specify a maximum parole eligibility date, only a minimum under s.304.06(1). The legislature left the matter open for sentencing judges to decide where to set the maximum, however, they specifically chose not to grant authority to the sentencing court to deny parole eligibility altogether. My parole eligibility date set in the year 2071 effectively denies parole.

The legislature did later consider the issue again when it amended the statute to expressly give authority to the sentencing courts to deny parole eligibility in 1994-95, well after I was charged with homicide, leaving my case to be governed by the 93-94 version of the statute, mandating parole eligibility. If the legislature did not extend the authority to deny parole

eligibility then the sentencing court should not have exceeded what the legislature permitted.

Since the legislature could have initially allowed for the ability to deny parole eligibility in the earlier version of the statute as it did in the amended version of §973.014, the conclusion must be drawn that there was a different intent/ purpose between the two versions, and the plain language clarifies the intent. One allows for the denial of parole eligibility, while the other mandates it.

"If we are to give [the statute] real meaning, a sentencer cannot be permitted to evade the restrictions on one kind of sentence by imposing a substantially identical one with a slightly different name." U.S. v. Martin, 63 F.3d 1422, 1434. The sentencing court did evade the legislative intent and plain language of the statute by issuing a de facto life without the possibility of parole sentence.

The issue becomes more poignant in the light of the fact that I was a juvenile at the time of the offense which the sentence is based on. Even if a sentencing court would want to take the position that the denial of parole eligibility is authorized by a looser interpretation of the §973.014(1993-94), this would not address the issue of juvenile offenders being subjected the imposition of such an interpretation in the same manner which an adult would be, as if the the juvenile offender were an adult as well.

The same standard that sentencing decisions are reviewable by is the same standard which parole eligibility dates are

determined by. State v. Borrell, 167 Wis. 2d 749, 778 (1992). Therefore, the sentencing court must take into account the principles and logic of Roper, Miller and Graham with juveniles being less deserving than adults of the most severe punishment. Miller at 2458. If this holds true then statutes intended for adults must be interpreted with the principles of Miller in mind. Should a juvenile offender be subject to the same sanction as an adult? the 973.014 statute does not address this, it is blanketly applied to children and adults alike, contrary to the principles of law which separates the two for the purpose of sentencing. So the sentencing court has to use its discretion in interpreting and applying the statute, and when "in doubt concerning the severity of the penalty prescribed by the statute, the court will favor the milder penalty over the harsher one...", State v. Morris, 108 Wis 2d 282(1982).

ARGUMENT

III. Whether the circuit court should have granted a hearing on defendant's postconviction motion.
Answer: Yes.

The circuit court improperly denied my postconviction motion without a hearing. (R:57:1). The motion, files and records of the case do not conclusively show that I was not entitled to relief.

[A] STANDARD OF REVIEW.

A court must grant a prompt hearing on a motion if the motion, files and records of the case do not conclusively show

that the movant is entitled to no relief. "Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief, this is a question of law that we review de novo. Bentley, 201 Wis. 2d at 309-10. If the motion raises such facts, the circuit court must hold an evidentiary hearing. Id. at 310; Nelson v. State, 54 Wis. 2d 489, 49?, 195 N.W. 2d 629(1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or present only conlusory allegations, or if the record conclusively demonstrates that the defendant is not entitled relief, the circuit court has the discretion to grant or deny a hearing." State v. Allen, 274 Wis. 2d 568,576 (2004).

[B] My postconviction motion alleged that the sentencing court did not take into account how juveniles are different form adults for the purposes of sentencing at my sentencing, and cited the sentencing transcripts, a sentencing memorandum and a psychological analysis in support of the motion. (R:56:6-8). Also cited in the motion were Miller v. Alabama; McKinley v. Butler; Graham v. Florida; and Montgomery v. Louisiana, federal court decisions issued after my sentencing, having retroactive effect, defining new procedural and substantive constitutional rules regarding juvenile sentencing in relation to the 8th Amendment to the U.S. Constitution.

The circuit court's decision denying the motion said that "The defendant is not serving a sentence without the possibility of parole. He is eligible for parole in 2071 and does not fall under the cruel and unusual punishment provision of the 8th amendment ." (R:57:1). Although Miller v. Alabama was referring specifically to mandatory life sentences without parole, my motion argued to the circuit court that McKinley v. Butler makes clear that the "logic of Miller applies" even in cases where the sentencing court had some discretion and sentenced the juvenile offender to a lifetime of imprisonment. McKinley at 911.

"Courts deciding postconviction motions should attempt to address the merits of the motions with some specificity for the benefit to the defendants and to promote meaningful review of challenges to sentencing. State v. Hall, 225 Wis. 2d 662,648 N.W. 2d 41 (Justice Schudson J., concurring). The issue raised in the postconviction motion were not adequately addressed because whether the sentencing court considered that "children are different" was not explored and put on the record, either in the sentencing hearing itself or in the circuit court's denial of the motion at issue here. A hearing would have been the proper venue to examine the issue, because because if the facts that I alleged in the motion are true I would be entitled to relief. There was a need to ascertain additional facts, develop the record further, and determine the nature of the relief to be given, if any. "A hearing on a postconviction motion is required only when the movant states sufficient facts that, if true,

would entitle the defendant to relief." State v. Allen, 274 Wis. 2d 568, 580. "If a motion on its face alleges facts which would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. State v. Bentley, 548 N.W. 2d 50 (1996).

CONCLUSION

I respectfully request that 1) The sentence of life with the parole eligibility date in the year 2071 be vacated and that I be resentenced in the light of the decisions of Miller v. Alabama and McKinley v. Butler; 2) That my sentence be vacated and resentencing be done with the proper interpretation of Wis. stats. §973.014 being applied; 3) That a hearing be held in the circuit court to grant relief requested.

Dated at New Lisbon, Wisconsin, September 5, 2016.

Respectfully submitted by:

Curtis L. Walker

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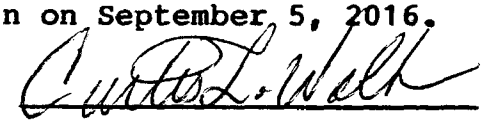
I hereby certify that this brief conforms to the rules contained in §809.19 for a brief with a monospaced font, double-spaced with 1 inch margins. The brief is 22 pages, including the cover page, Table of Contents and the Table of Authorities.

Dated at New Lisbon, Wisconsin on September 5, 2016.



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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that I am filing an appendix that complies with s.809.19(2)(a), containing: (1) the decision and order of Circuit Court Judge Jonathan D. Watts, denying motion for postconviction relief; and (2) a portion of the record essential to an understanding of the issues raised (a portion of the sentencing transcript covering the sentencing court's reasoning and judgment[Judge Stanley Miller presiding]).

Initially filed with my brief was the remainder of the appendix required by s.809.19(2)(a): the table of content.

Date: September 22, 2016

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