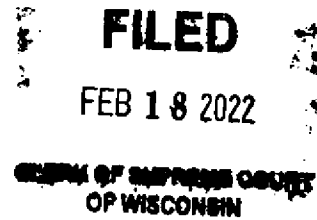


CURTIS L. WALKER,
Petitioner,

vs.

STATE OF WISCONSIN,
Respondent.



PETITION FOR REVIEW TO THE SUPREME COURT OF WISCONSIN

This is a Petition For Review pursuant to Wis. Stat. §809.62 seeking review of a final Opinion and Order of the Wisconsin Court of Appeals in appeal No.: 2016AP1058.

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APPENDIX

A. Decision and Order Denying Motion for Postconviction Relief, Milwaukee County Circuit Court, dated May 4, 2016.

B. Portion of Appellant Brief in appeal No.: 2016AP1058, pages 6-7.

C. Opinion and Order of Wisconsin Court of Appeals in appeal No.: 2016AP1058.

Statement Of The Issues

Issue Presented: Whether the petitioner's, Curtis L. Walker ("Walker", "Petitioner"), sentence of life with a parole eligibility date of 75 years is in violation of the 8th Amendment of the U.S. Constitution if the sentencing court made a finding that he was capable of being reformed, rather than being incorrigible, entitling him to relief?

Walker initially filed a postconviction motion pursuant to Wis. Stat. §974.06 in the Milwaukee County Circuit Court on April 26, 2016 challenging the constitutionality of his prison sentence. That motion was denied by the Honorable J.D. Watts on May 4, 2016. Walker appealed pursuant to §809.10. The Court of Appeals summarily affirmed the circuit court's decision on January 25, 2022. Walker now petitions this Court for review pursuant to §809.62(1m).

Statement Of The Criteria

This Court should grant this petition because:

- 1) It presents a real and significant question of federal and state constitutional law;
- 2) A decision by the Supreme Court will help develop, clarify and harmonize the law, and;

a. The question presented is a novel one, the resolution of which will have statewide impact;

b. The Court of Appeals decision is in conflict with controlling opinions of the U.S. Supreme Court.

Statement Of The Case

Walker was convicted of 1st Degree Intentional Homicide,

While Armed, contrary to §940.01 and 939.63(1)(A)2 on December 7, 1995 in Milwaukee County (case No. 1994CF044079). He was sentenced on January 22, 1996 by the Honorable Stanley Miller to a mandatory life sentence, with a discretionary parole eligibility date set at 75 years.

In 1996 Walker filed a postconviction motion pursuant to §974.02 raising issues other than the propriety of his sentence. The motion was denied and Walker appealed (1996AP2239). On May 20, 1998 the Court of Appeals affirmed the judgment of conviction and the order denying postconviction relief. Walker then filed a petition for review to this court which was denied on July 24, 1998.

In 1999 Walker filed a postconviction motion pursuant to §974.06 in the circuit court, again challenging issues other than the propriety of his sentence. That motion was denied on March 15, 1999. Walker appealed (1999AP0945). The Court of Appeals affirmed the circuit court's ruling. Walker filed a petition for review to this court. That petition was denied on February 2, 2001.

On April 26, 2016 Walker filed a postconviction motion pursuant to §974.06 arguing that in light of the decisions of the U.S. Supreme Court in **Miller v. Alabama**, 567 U.S. 2455 (2012) and **Montgomery v. Louisiana**, 136 S.Ct. 718 (2016), that his sentence was unconstitutional. Walker argued that not only had the sentencing not found him to be incorrigible, but that the sentencing court made a finding that he could be reformed which

invokes the principles and proscriptions of **Miller** and **Montgomery**. The Honorable J.D. Watts denied postconviction relief on May 4, 2016, ruling that because Walker's sentence has a parole eligibility date that the sentence does not fall under the cruel and unusual punishment provisions of the 8th Amendment. Walker appealed (2016AP1058).

The Court of Appeals summarily affirmed the circuit court's decision, assuming that in light of the U.S. Supreme Court's decision in **Jones v. Mississippi**, 141 S.Ct. 1307(2021), that the issue of Walker's appeal was whether the sentencing court had discretion at the time of the sentencing was constitutionally sufficient under the 8th Amendment. This left unaddressed Walker's argument that the sentencing court made a finding that Walker was capable of being reformed and still imposed a sentence which was contrary to the holdings of **Miller** and **Montgomery**.

Argument

Walker's sentence is in violation of the 8th Amendment because the sentencing court found him to be capable of reform while issuing a lifetime sentence, which demonstrates that sufficient consideration was not giving to his youth as required by **Miller** and **Montgomery**, entitling him to relief.

Walker argued in his postconviction motion (R:56:7(labeled pg #5)) and on appeal (appx B) that the sentencing court made an on-the-record finding that he could be reformed (and therefore not incorrigible), then proceeded to sentence Walker to a lifetime prison sentence which leaves the sentence in violation of the 8th Amendment according to the holdings of **Miller** and

Montgomery. The circuit court ignored this argument, ruling instead that since Walker had a parole eligibility date that he was not entitled to relief. (R:57)

The Court of Appeals chose to view Walker's argument only as a claim that the sentencing court simply had not made an on-the-record finding of incorrigibility. (appx C pg 2) This view by the Court of Appeals assumes that Walker believes that he is entitled to a determination of whether or not he is incorrigible. The Court of Appeals viewed its interpretation of Walker's argument through the lens of **Jones**, ruling that Walker's claim fails because his sentence was impose under a discretionary sentencing system. (appx C pg 4). "**Miller** did not require the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence." **Jones** at 1316. If Walker's issue was the necessity of the sentencer having discretion or of the necessity of the sentencer making an on-the-record finding then the Court of Appeals opinion would be correct. Left unaddressed in their opinion is the question: what happens when, as here in Walker's case, the sentencer decides to make an on-the record finding that he is capable of being reformed but still issues a lifetime sentence?

The **Jones'** Court took the opportunity to say that "**Montgomery** was clear 'A hearing where youth and its attendant characteristics are necessary to separate those juveniles who may be sentenced to life without parole from those who may not."

Id. at 1317-18 (quoting **Montgomery**) The "those who may not" be sentenced to a lifetime in prison are those who the sentencer decides are capable of reform. "Even 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 reflect 'unfortunate yet transient immaturity.'" **Montgomery** at 735 (quoting **Roper v. Simmons**, 543 U.S., at 537)

Jones would allow a reviewing court to assume that because a sentencer, operating under a discretionary sentencing system, necessarily considers the youth of a juvenile convicted of homicide, as required by **Miller**, because "it would be all but impossible for a sentencer to avoid considering that mitigating factor." **Jones** at 1320. The **Jones** Court presumably imagined that if a sentencer considered youth as a factor but still imposed a lifetime sentence on a juvenile, then that sentence itself is evidence that the sentencer has concluded that the juvenile is incorrigible. "And appellate courts do not necessarily reverse merely because the sentencer could have said more about mitigating circumstances. See **Campbell** 477; 22A Cal. Jur. 3d Criminal Law: ('[U]nless the record affirmatively reflects otherwise, the trial court will be deemed to have considered the relevant criteria, such as mitigating circumstances, enumerated in the sentencing rules.')" **Jones** at 1321

Here, in **Walker's** case, there is no need to assume or infer as to what the sentencer thought or concluded as **Jones** would allow in the absence of an affirmative reflection in the record

because the sentencing court chose to make its finding on the record, though it was not required to do so. During sentencing Judge Miller said:

"You need an awful lot of work to be done within yourself. You still have many, many decisions to make, and you are going to a place where--first of all, you go to the prison system with a certain status because of your act, which is unfortunate, so you have to live with that. If you chose 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)

The sentencing court did not declare that Walker would be reformed or when, only that it was possible. This necessarily invokes the principles and proscription set forth in **Miller**, **Montgomery** and **Jones** because a conflict exist between the sentencing court's opinion that Walker was not incorrigible and the lifetime prison sentence imposed. Those three decisions make clear that a discretionary sentencing system should not be able to produce a lifetime prison sentence when a sentencer has made the finding which Judge Miller has, as **Jones** summed up at 1317-18. "Although we do not foreclose a sentencer's ability to make that judgment [of incorrigibility] in homicide cases, we require it to take into account how children are different, and how those difference counsel against irrevocably sentencing them to a lifetime in prison." **Miller** at 2469. "That **Miller** did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary,

Miller established that this punishment is disproportionate under the Eighth Amendment." **Montgomery** at 735.

The Court of Appeals concluded that Walker's sentence is not contrary to **Miller** and **Montgomery** because the sentencing court, after considering his youth, chose to give more weight to other factors such as culpability, the gravity of the offense and that Walker was dangerous. (Appx C pg 5) But the sentencing court did not assume that Walker would be forever dangerous, only that he was currently dangerous as a result of not having the tools necessary to help him. "Some day we will find help for human beings to get over this and become productive citizens, but today all we have are the tools available, and these tools have not worked, and you are dangerous as a result." (41:29) The sentencing court believed that Walker's dangerousness to be something that could be transient, something which could be reformed. (R:41:31) "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. And for the same reason, rehabilitation could not justify that sentence. Life without parole 'forswears altogether the rehabilitative ideal.'" **Miller** at 2465

Neither can the gravity of the offense be a justification for a lifetime prison sentence as the sentencing court suggested (R:41:31-32) and the Court of Appeal affirmed. "**Roper** and **Graham** emphasized that the distinctive attributes of youth diminish

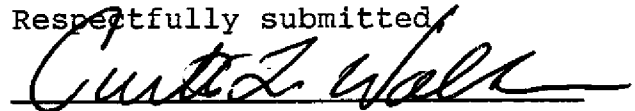
the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." **Miller** at 2465

What is the purpose of mandating a discretionary sentencing system in regards to juveniles in **Miller, Montgomery** and **Jones** if not to ensure that certain juveniles would not receive those lifetime sentences?"**Miller**, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapses in light of 'the distinctive attributes of youth.'" **Montgomery** at 734

The petitioner request that this petition be granted to resolve the conflict between the sentencing court's opinion on the record that he was not incorrigible and the lifetime prison sentence.

Dated this 15th day of February, 2022.


Respectfully submitted,



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I hereby certify that this petition conforms to the rules contained in §809.62(4)(a) for a petition with a monospaced font, double-spaced with 1 inch margins. This petition is 21 pages, including a 9 page appendix.

Dated at New Lisbon, WI on February 15, 2022.


Curtis L. Walker, pro se