STATE OF WISCONSIN

IN SUPREME COURT

No. 2016AP1058

STATE OF WISCONSIN,

Defendant-Respondent,

v.

CURTIS L. WALKER,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
latorracadv@doj.state.wi.us

INTRODUCTION

The State of Wisconsin opposes Curtis L. Walker's petition for review of the court of appeals' summary disposition order denying his Wis. Stat. § 974.06 motion. *State v. Curtis L. Walker*, No. 2016AP1058 (Wis. Ct. App. January 25, 2022) (unpublished). The court of appeals rejected Walker's argument that the circuit court's imposition of a life sentence with a 2071 parole eligibility date violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Walker*, slip op. at 1–6.

As a 17-year-old, Walker shot and killed a policer officer whom he and a coconspirator randomly selected. *Walker*, slip op. at 2. A jury later found Walker guilty of first-degree intentional homicide. *Id.* The sentencing court sentenced Walker to a life sentence, setting his parole eligibility date in 2071, 75 years after his sentencing date. *Id.*

Relying on *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), Walker filed a postconviction motion seeking resentencing. *Walker*, slip op. at 2. Walker argued that his sentence was unconstitutional because the sentencing court failed to consider his youth, including how he differed from a juvenile offender and whether he was beyond rehabilitation. *Id.*

The court of appeals assumed, without deciding, that Walker's sentence constituted a "de facto life-without-parole sentence that implicates *Miller* and *Montgomery*." *Walker*, slip op. at 4. Based on *Jones v. Mississippi*, 593 U.S. ___, 141 S.Ct. 1307 (2021), the court of appeals determined that *Miller* and *Montgomery* did not require a sentencing court to make a separate finding of permanent incorrigibility. *Walker*, slip op. at 4. By reference to the sentencing court's comments, the court of appeals rejected Walker's argument that the sentencing court failed to consider his youth and its attendant

circumstances as a mitigating factor before it sentenced him and set his parole eligibility date. *Walker,* slip op. at 4–5.

CRITERIA FOR GRANTING REVIEW

Walker asks this Court to grant review for two reasons. First, he contends that his case presents a real and significant question of federal and state constitutional law. (Pet. 4.) Second, he asserts that this Court's decision will help develop, clarify, and harmonize the law, and that the question he presents is a novel one and that the court of appeals' decision conflicts with the United States Supreme Court's opinions. (Pet. 4.). Walker's case does not warrant this Court's review.

Walker's sentence was not unconstitutional because it was not contrary *Miller* and *Montgomery*. In *Miller*, the Supreme Court held 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*, 567 U.S. at 479 However, the Supreme Court expressly recognized the continued discretionary authority of sentencing courts to sentence a juvenile to a life-without-parole sentence when the crime reflects "irreparable corruption." *Id.* at 479–80. In *Montgomery*, another case where state sentencing law mandated a non-parolable life sentence, the Supreme Court declared that "*Miller* announced a substantive rule of constitutional law" and, therefore, a defendant could benefit from its retroactive application on collateral review. *Montgomery*, 577 U.S. at 208–09.

In *Jones*, the Supreme Court held that a discretionary juvenile life sentence is constitutional because for Eighth Amendment purposes, "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." *Jones*, 141 S. Ct. at 1313. *Jones* clarified that the Court's

previous decisions in *Miller* and *Montgomery*, together required "a discretionary sentencing procedure" for sentencing juveniles to life imprisonment, because mandatory life-without-parole sentences for offenders under 18 "pose[d] too great a risk of disproportionate punishment." *Jones,* 141 S. Ct. at 1317. (citation omitted).

The Supreme Court concluded that when a sentencing court exercises its discretion to impose a juvenile life sentence, it is *not required* to make either an explicit or implicit factual finding of the juvenile's "permanent incorrigibility." *Jones*, 141 S. Ct. at 1317–18. Such a finding is not necessary based on applicable precedents nor is it "necessary to make life-without parole sentences for juvenile offenders relatively rare" or to "ensure that a sentencer considers a defendant's youth." *Id.* At 1318–19. The Court described that the "key assumption" of *Miller* and Montgomery "was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Jones*, 141 S. Ct. at 1318. Moreover, the Court explained that its opinion was consistent with and did not overrule or unduly narrow the holdings in *Miller* and *Montgomery* "that a State may not impose a mandatory life-without-parole sentence on a murderer under 18." *Id.* at 1321

The key takeaways from *Jones* are that (1) so long as a state does not have a mandatory life sentence statute but rather, like Wisconsin, has a discretionary sentencing system that allows the court to consider the offender's youth, a juvenile life sentence is constitutional; (2) a court exercising its sentencing discretion to impose a juvenile life sentence need not make an explicit or implicit finding that the offender is permanently incorrigible; and (3) discretionary sentencing necessarily allows the sentencer to consider the offender's youth and ensures that a court will impose a juvenile, life-

without-parole sentence only where appropriate and not disproportionate.

Unlike in *Miller* and *Montgomery*, Walker was not sentenced under a sentencing scheme that mandated that he serve a life-sentence following his conviction for first-degree intentional homicide. Rather, Wis. Stat. § 973.014(1) (1993-94) provided that the sentencing court had the discretion to either (a) not specify a parole eligibility date, in which case Walker would have been eligible for parole after he served at least 20 years, or (b) exercise its discretion and set Walker's parole eligibility date later than the 20-year minimum. *See* Wis. Stat. §§ 304.06(1) and 973.014(1); *State v. Borrell*, 167 Wis. 2d 749, 767, 482 N.W.2d 883 (1992). Further, in setting a parole eligibility date, the sentencing court was required to follow this Court's precedent guiding the exercise of its sentencing discretion: "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 the rehabilitative needs of the convicted defendant." *Borrell*, 167 Wis. 2d at 764, citing *McCleary v. State*, 49 Wis.2d 263, 276, 182 N.W.2d 512 (1971). Thus, whereas state law mandated the sentencing courts in *Miller* and *Montgomery* to impose a mandatory life sentence, this Court's precedents required the circuit court to set Walker's parole eligibility date consistent with its duty to impose the minimum amount of confinement, considering the need for public protection, the gravity of Walker's offense, and his rehabilitative needs.

The court of appeals assumed, without deciding that Walker's life sentence implicated *Miller* and *Montgomery*. *Walker*, slip op. at 4. Based on its review of the record, the court of appeal determined that the sentencing court considered "Walker's youth and its attendant circumstances as a mitigating factor before imposing [Walker's] sentence." *Id.* But in the end, the sentencing court placed greater weight

on other factors, including the gravity of the offense and Walker's role, than his age and its attendant circumstances. *Walker*, slip op. at 5.

The record supports the court of appeals' decision. Walker's crime was not the product of character traits easily influenced by outside pressures or impulsivity that often drive juvenile misconduct. *See Miller*, 132 S. Ct. at 2464. Rather, the officer's death was the product of Walker's and his co-conspirator's careful planning, including their scheme to shoot a police officer, Walker's role as the shooter, Walker's choice of weapon—a .308 rifle with a scope that allowed him to shoot from a distance, Walker's selection of a location to execute his crime as he awaited his co-conspirator's signal, and Walker's waiting patiently before his opportunity arose. (R. 39:24, 39–40.) The premeditated nature of his crime made Walker's crime particularly serious, undermining any claim that it was the product of outside pressure or youthful impulsivity.

The sentencing court was aware of Walker's youth when it assessed his character and rehabilitative needs. The court considered Walker's history of placements and counseling that Walker had received in the juvenile justice system. (R. 41:29.) It recognized the challenges of finding "refined methods for helping people who are as you are in your circumstances[,]" young males who have committed "very serious crimes at very, very early ages, and we are not able to spout th[is] flow." (R. 41:28-29.) The circuit court observed that the tools available for helping someone in Walker's situation "have not worked" and that Walker is "dangerous" as a result. (R. 41:29.) It recognized that the prospects for rehabilitative change were limited and long-term in Walker's case. "[W]e have limited methods [to change people]. You need an awful lot of work to be done within yourself." To make meaningful change, Walker would need to "turn [his] back on everything that you have known. That is a big challenge for

you." (R. 41:31.) On this record, the court of appeals could reasonably conclude that the sentencing court did not ignore Walker's age and attendant circumstances, but that, in the exercise of its discretion, it placed greater weight on other factors, including the severity of the homicide and Walker's role committing it. *Walker*, slip op. at 5.

Walker asserts that the court of appeals failed to address "what happens when . . . the sentencer decides to make an on-the-record finding that he is capable of being reformed but still issues a lifetime sentence." (Pet. 7.) Walker's argument fails. First, the sentencing court did not sentence Walker to a life sentence without the possibility of parole; rather, it set his parole eligibility date as authorized under section 973.014(1) (1993-94), even if that date may have been beyond his life expectancy. Second, even if Walker were capable of being reformed, nothing in *Miller*, *Montgomery*, or *Jones* suggests that a sentencing court must weigh this factor greater than other factors, including the seriousness of the offense, when it exercises sentencing discretion. Indeed, the Supreme Court recognized that sentencing courts reviewing the same facts may weigh youth and, presumably, their related prospects for rehabilitation, differently—with one court concluding "that a defendant's youth supports a sentence less than life without parole" while another court deciding "that life without parole remains appropriate despite a defendant's youth." *Jones*, 141 S.Ct. 1319–20. Thus, nothing in *Miller*, *Montgomery*, or *Jones* suggests that Walker's prospects for reform trumped other commonly recognized sentencing factors or foreclosed the sentencing court from setting a parole eligibility date that limited his parole prospects.

Contrary to Walker's assertion, his case does not present a real and significant issue of constitutional law, nor has he demonstrated that it presents a novel issue, much less one that conflicts with prior precedent. His petition does not

demonstrate that the circuit court's sentence or the court of appeals' decision conflicted with *Miller*, *Montgomery,* or *Jones*. Nor has Walker suggested that a conflict exists between these decisions and Wisconsin precedent guiding the imposition of discretionary life sentences, including *State v. Ninham*, 2011 WI 33, ¶83, 333 Wis. 2d 335, 797 N.W.2d 451, *cert. denied* 567 U.S. 952 (2012) and *State v. Barbeau*, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520, *cert. denied*, 137 S. Ct. 821 (2017).

In *Ninham,* this Court rejected Ninham's as-applied challenge, to the constitutionality of his juvenile life-without-parole sentence, holding that under Wisconsin law, "[i]f the sentence is within the statutory limit, appellate courts will not interfere" with the court's discretion unless the sentence is "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." *Ninham*, 333 Wis. 2d 335, ¶ 85 (citations omitted). Ninham's youth did not "automatically remove his punishment out of the realm of proportionate" and, while his life-without-parole sentence was "severe," it was not cruel and unusual because it was proportionally based on the "horrific and senseless" nature of his crime. *Id.* ¶¶ 85–86.

Similarly, in *Barbeau*, the court of appeals held that because in Wisconsin, a court exercises its sentencing discretion to determine when a homicide offender is eligible for release, a juvenile life sentence is not unconstitutional when "the circumstances warrant it" and the court "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Barbeau,* 370 Wis. 2d 736, ¶ 32 (*citing Miller,* 567 U.S at 480). If anything, *Jones* reinforced the holdings in *Ninham* and *Barbeau* that discretionary, juvenile life sentences, where the court necessarily considers the

offender's youth as part of its exercise of discretion, are not disproportionate.

Walker's case does not present a real and significant question of the federal or state constitution. And a decision in his case will not develop, clarify, or harmonize the law because the question he presents is neither novel nor demonstrates that the court of appeals' decision conflicts with other precedent.

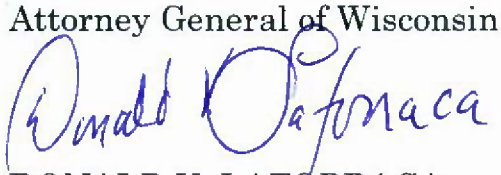
CONCLUSION

This Court should deny Walker's petition for review.

Dated this 4th day of March 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

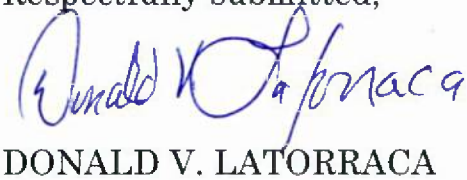
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
latorracadv@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,200 words.

Dated this 4th day of March 2022.

Respectfully submitted,



DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

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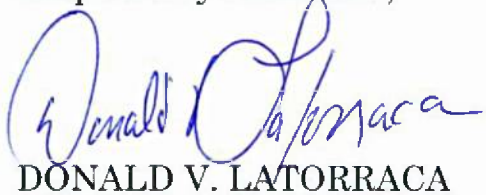
Dated this 4th day of March 2022.

Respectfully submitted,



DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251