**Appeal Nos. 2016AP1058**
**2016AP2098**

**Cir. Ct. Nos. 1994CF944079**
**1999CF523**

**WISCONSIN COURT OF APPEALS**
**DISTRICTS I and III**

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**NO. 2016AP1058**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CURTIS L. WALKER,**

**DEFENDANT-APPELLANT.**

**FILED**

**Mar. 6, 2018**

Sheila T. Reiff
Clerk of Supreme Court

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**NO. 2016AP2098**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**OMER NINHAM,**

**DEFENDANT-APPELLANT.**

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Before Stark, P.J., Hruz and Seidl, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2015-16), these appeals are certified to the Wisconsin Supreme Court for its review and determination.

We certify these appeals to determine whether Wisconsin case law regarding life sentences without parole for juvenile murderers comports with recent pronouncements from the United States Supreme Court, and whether the

sentencing courts in these cases adequately considered the mitigating effect of the defendants' youth in accord with those Supreme Court pronouncements.

## BACKGROUND RELATING TO CURTIS WALKER

In 1994, six weeks before his eighteenth birthday, Curtis Walker and an accomplice shot and killed a Milwaukee police officer. Inspired by the lyrics of a rap song, Walker planned an ambush of a randomly selected officer the day before the shooting. On the day of the shooting, he waited forty minutes until his accomplice signaled that a squad car was approaching. Walker shot the officer using a rifle equipped with a scope.

After a conviction following a jury trial, the sentencing court considered the presentence investigation report (PSI), a sentencing memorandum submitted by the defense, and a psychological evaluation of Walker prepared in conjunction with a juvenile action. According to these records, Walker had been referred to Children's Court in connection with at least seventeen delinquency matters. He had been adjudicated delinquent for multiple counts that would be felonies if committed by an adult. At the time of the shooting, he had pending charges associated with possession of a dangerous weapon and possession of a controlled substance. Walker had a past history of placements outside the home and counseling in the juvenile system.

Walker contended the shooting was not intentional and expressed remorse. The defense argued that the plan related to a gang war and was not designed to ambush police. The defense stressed the nonviolent nature of Walker's juvenile record, Walker's neglectful and violent upbringing, and progress he made toward rehabilitation while awaiting trial. The defense noted the

psychological analysis and diagnosis showed Walker suffered from posttraumatic stress disorder.

The sentencing court recognized Walker's potential ability to change and grow, but noted "you need an awful lot of work to be done within yourself." Stressing the gravity of the offense, and finding Walker was "currently dangerous," the court imposed a sentence of life in prison with parole eligibility in seventy-five years when Walker will be ninety-five years old. The sentencing court expressed a need to send a message to the community about the value of human life.

In 1996, Walker filed a postconviction motion and an appeal (1996AP2239-CR) raising issues that did not include the propriety of his sentence. This court affirmed the judgment of conviction and the order denying postconviction relief, and the petition for review was denied. In 1999, Walker filed a motion under WIS. STAT. § 974.06, again raising issues other than the propriety of his sentence (1999AP945). This court affirmed the circuit court's order denying the motion, and the petition for review was denied.

In his present postconviction motion and on appeal, Walker and the University of Wisconsin Law School, Frank J. Remington Center as amicus curiae, argue that Walker's sentence is excessive and disproportionate, and is inconsistent with ***Miller v. Alabama***, 567 U.S. 460 (2012), and ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016). They contend the circuit court failed to consider the mitigating effects of Walker's youth before imposing the harshest possible penalty, and it failed to take into account how children are constitutionally different from adults due to their "unfortunate yet transient immaturity."

The State contends ***Miller*** and ***Montgomery*** provide no basis for relief because those decisions do not apply to situations where, like here, the sentencing court had discretion to determine parole eligibility. The State also argues that a de facto life sentence without parole does not fall within the purview of ***Miller*** and ***Montgomery***. Finally, the State contends the sentencing court adequately considered Walker's youth, but it reasonably chose to accentuate other legitimate sentencing goals.

## BACKGROUND RELATING TO OMER NINHAM

In 2000, Omer Ninham was sentenced to life without parole for a first-degree intentional homicide he committed when he was fourteen years old. At the suggestion of another juvenile to "mess with" the thirteen-year-old victim as he approached on his bicycle, Ninham and four other juveniles stopped the victim, took away his bicycle, and Ninham punched him to the ground. The victim fled into a parking ramp, pursued by the five perpetrators. When they reached the fifth story of the parking ramp, Ninham and an accomplice punched the victim, lifted him from his feet, swung him back and forth over the parking ramp wall, and dropped him forty-five feet to his death. Ninham was arrested for this murder nine months later, six months after he began treatment for alcoholism at a group home. Ninham denied participating in the murder.

At the sentencing hearing, the circuit court considered PSIs presented by the State and the defense. Ninham told the author of the State's PSI he had consumed a twelve-pack of beer, a liter of brandy, and two forty-ounce bottles of malt liquor on the day of the murder. He continued to deny involvement. The State's PSI described Ninham as a new type of youth capable of casual killing. It noted Ninham's conduct reports in jail for sharpening a weapon

and attempted escape as well as a suicide attempt. Ninham also threatened a judge and the other juveniles who took responsibility for their acts. He threatened to rape a woman, kill her, and "make sure it's a slow death." Ninham said he would kill any person in prison who "hassled him." He also acknowledged association with gang members since he was ten years old.

The defense stressed Ninham's tumultuous childhood, which included his parents striking each other and their children with closed fists, bottles, and two-by-four boards. Ninham used alcohol to alleviate his depression, and he frequently drank to the point of unconsciousness. The defense noted Ninham's "significant progress" in the group home, guided by Native American spirituality. The defense characterized Ninham's threats as the adolescent bluster of a frightened child, and it described him as a follower.

The sentencing court stated it was aware of Ninham's background, but it could not allow that to become an excuse for his behavior. The court noted both Ninham's failure to admit his involvement and his lack of remorse. It described Ninham as a "kid of the street who knew what he was doing." It based the sentence on the horrific nature of the crime, and it described Ninham's conduct as that of a "ruthless young man" rather than a frightened child. The court conceded "for the sake of discussion" that Ninham was a child, but it found he was a "child beyond description to this court." The court considered Ninham's prospect for rehabilitation and expressed a hope that Ninham would change over the course of his life. Based on the seriousness of the offense, Ninham's character, and the need to protect the public, the court denied Ninham the possibility of parole.

Ninham filed a postconviction motion and subsequent appeal (2001AP716-CR) raising issues unrelated to his sentence. In 2007, he filed a postconviction motion under WIS. STAT. § 974.06 and a subsequent appeal, arguing that his sentence violated the Eighth and Fourteenth Amendments to the United States Constitution. The Wisconsin Supreme Court ultimately affirmed Ninham's sentence, concluding that a life sentence without parole for a fourteen year old does not categorically constitute cruel and unusual punishment. ***State v. Ninham***, 2011 WI 33, ¶83, 333 Wis. 2d 335, 797 N.W.2d 451. It also rejected Ninham's claim that his sentence was unduly harsh and excessive. ***Id.***, ¶86. Four days after issuing its decision in ***Miller***, the United States Supreme Court denied Ninham's petition for certiorari review of his sentence. ***Ninham v. Wisconsin***, 567 U.S. 952 (2012).

Ninham was examined by a neuropsychologist in 2007 when he was twenty-three years old. The psychologist concluded Ninham no longer suffers from severe behavioral dyscontrol that dominated his young teenage years, and he has grown into a thoughtful young man with a very good prognosis for successful re-entry into the community.

In his present postconviction motion and on appeal, Ninham contends his sentence violates the standards set forth in ***Miller*** and ***Montgomery*** because the sentencing court did not adequately consider the mitigating factor of his youth. The circuit court denied the motion, concluding ***Miller*** did not apply to Ninham's case because his sentence of life in prison without parole was discretionary, not mandatory. The circuit court also held the sentencing court sufficiently considered Ninham's youth when it sentenced him.

## DISCUSSION

In ***Miller***, the Supreme Court held that the Eighth Amendment prohibition against cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. ***Miller***, 567 U.S. at 479. However, the Court expressly recognized the continued discretionary authority of sentencing courts to sentence a juvenile to life without parole when the crime reflects "irreparable corruption." ***Id.*** at 479-80. The sentencing court is required to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. ***Id.*** The Court identified five factors that a mandatory life sentence without parole impermissibly discounts: (1) it precludes consideration of the juvenile's age and its hallmark features including immaturity, impetuosity, and failure to appreciate risks and consequences; (2) it prevents taking into account the family and home environment that surrounds the juvenile, and from which he or she cannot usually escape no matter how brutal or dysfunctional; (3) it neglects the circumstances of the homicide offense, including the extent of the juvenile's participation in the conduct and the way familial and peer pressures may have affected him or her; (4) it ignores that he or she might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth; and (5) it disregards the possibility of rehabilitation. ***Id.*** at 477. The Court noted that a juvenile will spend more years and a greater percentage of his or her life in prison than an adult, inherently resulting in a disproportionate sentence. ***Id.*** at 474.

The State argues the Court's choice of language in its ***Miller*** decision—e.g., "precludes," "prevents," "neglects," "ignores," and "disregards"—shows that the Court was only concerned with statutorily mandated life sentences

without parole. The State contends ***Miller*** provides no basis of relief for Walker or Ninham because they were both sentenced by courts that had discretionary authority regarding parole. This court reached the same conclusion in ***State v. Barbeau***, 2016 WI App 51, 270 Wis. 2d 736, 833 N.W.2d 522, *review denied*, 2016 WI 98, 372 Wis. 2d 275, 891 N.W.2d 408, *cert. denied*, 137 S. Ct. 821 (2017).

Other jurisdictions are split on the question of whether ***Miller*** applies only to mandatory life sentences,[1] and the Supreme Court remanded cases for reconsideration after ***Miller*** even though the sentences were discretionary.[2] This court construed ***Miller*** as holding that a judge must be able to make an individualized sentencing determination, allowing for consideration of the juvenile's age. ***Barbeau***, 270 Wis. 2d 736, ¶41.

The Court's further clarification in ***Montgomery*** has been construed by other jurisdictions to apply the ***Miller*** factors to discretionary life sentences as well.[3] In ***Montgomery***, the Court made ***Miller*** retroactive and further developed

[1] Examples of jurisdictions applying ***Miller*** only to nondiscretionary sentences include: ***Davis v. McCollum***, 798 F.3d 1317 (10th Cir. 2015); ***Martinez v. United States***, 803 F.3d 878 (7th Cir. 2015), cert. denied, 136 S. Ct. 1230 (2016); ***Bell v. Uribe***, 748 F.3d 857 (9th Cir. 2014); ); ***Croft v. Williams***, 773 F.3d 170 (7th Cir. 2014); ***Jones v. Commonwealth***, 795 S.E.2d 705 (Va. 2017); and ***State v. Ali***, 855 N.W.2d 234 (Minn. 2014).

Jurisdictions that apply ***Miller*** to discretionary sentences include: ***McKinley v. Butler***, 809 F.3d 908 (7th Cir. 2016); ***State v. Sweet***, 879 N.W.2d 811 (Iowa 2016); ***State v. Riley***, 110 A.3d 1205 (Conn. 2015); ***State v. Seats*** 865 N.W.2d 545 (Iowa 2015); ***People v. Gutierrez***, 324 P.3d 245 (Cal. 2014); ***State v. Long***, 8 N.E. 890 (Ohio 2014); ***Aiken v. Byars***, 765 S.E.2d 572 (S.C. 2014); and ***Bear Cloud v. State***, 334 P.3d 132 (Wyo. 2014).

[2] ***Blackwell v. California***, 133 S. Ct. 837 (2013); ***Mauricio v. California***, 133 S. Ct. 524 (2012); and ***Guillen v. California***, 133 S. Ct. 69 (2012).

[3] ***State v. Zuber***, 152 A.3d 197 (N.J. 2017); ***State v. Valencia***, 386 P.3d 392 (Ariz. 2016); ***Landrum v. State***, 192 So.3d 459 (Fla. 2016); ***Veal v. State***, 784 S.E.2d 403 (Ga. 2016); and ***Luna v. Oklahoma***, 387 P.3d 956 (Okla. 2016).

its analysis of juvenile sentences. It noted the penological justifications for sentences without parole—such as deterrence and incapacitation—do not apply with equal force to juveniles. ***Montgomery***, 136 S. Ct. at 734. The Court held that, under ***Miller***, even if a sentencing court considers a child's age, the sentence violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity." ***Id.*** The Court further concluded that ***Miller*** barred the sentence of life without parole for all but the rarest of youth, where the child is so irreparably corrupt that rehabilitation is impossible. ***Id.*** at 733-34.

Following its opinion in ***Montgomery***, the Supreme Court remanded cases to Arizona and California for further consideration in light of ***Montgomery***, even though the juveniles in those cases were not sentenced under a statutory scheme mandating a life sentence without parole.[4] While those orders have no precedential value and do not impact the merits of unrelated cases, *see* ***Diaz v. Stephens***, 731 F.3d 370, 378 (5th Cir. 2013), those cases underscore the evolving nature of the issues regarding parole eligibility for juveniles.

We submit these appeals are appropriate for review by the Wisconsin Supreme Court for several reasons. First, this court has no authority to disregard the holdings in ***Ninham*** and ***Barbeau*** regardless of advances in the science of adolescent brain development or other relevant research. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Moreover, it is unclear whether ***Miller*** and ***Montgomery*** require such undermining of the holdings in ***Ninham*** and ***Barbeau***.

[4] ***DeShaw v. Arizona***, 137 S. Ct. 370 (2016); ***Arias v. Arizona***, 137 S. Ct. 370 (2016); ***Purcell v. Arizona***, 137 S. Ct. 369 (2016); ***Najar v. Arizona***, 137 S. Ct. 369 (2016); and ***Tatum v. Arizona***, 137 S. Ct. 11 (2016).

Second, most jurisdictions that have considered the issue after ***Montgomery*** have concluded that ***Miller***'s holding also applies to discretionary sentences imposed by courts. Ninham's earlier appeal was decided before ***Miller*** and ***Montgomery***, and ***Barbeau*** did not consider whether ***Montgomery*** affected ***Miller***'s application to discretionary sentences. ***Ninham*** and ***Barbeau*** both raised broader challenges to the sentencing statutes than are presented here. Any analyses performed in these two current appeals that may compel distinguishing or modifying the holdings articulated in either ***Barbeau*** or the prior, pre-***Miller*** and pre-***Montgomery Ninham*** decision are properly for the Wisconsin Supreme Court to entertain, not the court of appeals. *See* ***Marks v. Houston Cas. Co.***, 2016 WI 53, ¶79, 369 Wis. 2d 547, 881 N.W.2d 309.

Third, in Walker's case, an issue is presented as to whether a de facto life sentence without parole is governed by the same rules,[5] raising a related question of how many years before parole eligibility should be construed as a de facto life sentence without parole.

[5] Other jurisdictions have split on the question of whether ***Miller v. Alabama***, 567 U.S. 460 (2012), applies to sentences that exceed the juvenile's life expectancy. Cases applying ***Miller*** to de facto life sentences include: ***McKinley v. Butler***, 809 F.3d 908 (7th Cir. 2016); ***Moore v. Biter***, 725 F.3d 1184 (9th Cir. 2013); ***State v. Ali***, 895 N.W.2d 237 (Minn. 2017), *cert denied sub nom.* ***Hassan Ali v. Minnesota***, No. 1705578, 2018 WL 311461 (U.S. Jan. 8, 2018)), *cert. denied*, ___ U.S. ___, 185 L.Ed.2d 865 (2013); ***People v. Caballero***, 282 P.3d 291 (Cal. 2012); ***Casiano v. Commissioner of Corrections***, 115 A.3d 1031 (Conn. 2015), *cert. denied*, 136 S. Ct. 1364 (2016); ***Henry v. State***, 175 So.3d 675 (Fla. 2015); ***Brown v. State***, 10 N.E.3d 1 (Ind. 2014); ***State v. Null***, 386 N.W.2d 41 (Iowa 2013); ***State v. Zuber***, 152 A.3d 197 (N. J. 2017); ***Cloud v. State***, 334 P.3d 132 (Wyo. 2014); and ***Bear Cloud v. State***, 334 P.3d 132 (Wyo. 2014).

Jurisdictions that limit ***Miller*** to literal life sentences without parole include: ***Adams v. State***, 707 S.E.2d 359 (Ga. 2011); ***State v. Brown***, 118 So.3d 332 (La. 2013); ***Vasquez v. Commonwealth***, 781 S.E.2d 920, *cert. denied*, 137 S. Ct. 568 (2016); ***Bunch v. Smith***, 685 F.3d 546 (6th Cir. 2012); and ***Hobbs v. Turner***, 431 S.W.3d 283 (Ark. 2014).

Fourth, we submit that sentencing courts would benefit greatly from definitive guidance on the degree to which they must review the factors identified in ***Miller***, and the extent to which, if any, the prospect for the juvenile's rehabilitation takes precedence over other legitimate sentencing considerations, such as general deterrence.

Finally, the issues of whether ***Miller*** applies to discretionary life sentences without parole and whether the sentences imposed in these cases satisfy the requirements of ***Miller*** and ***Montgomery*** are matters of considerable statewide importance and constitutional dimension, and they are likely to recur because ***Montgomery*** made ***Miller***'s holding retroactive.