APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 19-2596

RICO SANDERS,

Petitioner-Appellant,

v.

SCOTT ECKSTEIN,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:11-cv-868 — **Lynn Adelman**, *Judge*.

ARGUED SEPTEMBER 23, 2020 — DECIDED NOVEMBER 30, 2020

Before HAMILTON, SCUDDER, and ST. EVE, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Rico Sanders received a 140-year sentence for raping four women. He was 15 at the time of the sexual assaults, and his offense conduct was heinous and cruel in the extreme. Now 40 years old, Sanders will first become eligible for parole under Wisconsin law in 2030. He sought post-

conviction relief in state court, arguing that Wisconsin's precluding him from any meaningful opportunity of parole before 2030 offends the Supreme Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010). Sanders later added a claim that the sentencing court's failure to meaningfully consider his youth and prospect of rehabilitation when imposing the 140-year sentence runs afoul *Miller v. Alabama*, 567 U.S. 460 (2012). After the Wisconsin courts rejected these claims, Sanders invoked 28 U.S.C. § 2254 and sought relief in federal court. The district court denied the application, and we now affirm.

I

A

Between May and September 1995, Rico Sanders committed a series of sexual assaults. He forcibly entered his victims' homes while they slept, suffocated and raped them, and then robbed them of cash, food stamps, or whatever else he could find. The youngest victim was living in a foster home. Another victim had given birth only a few weeks prior to Sanders's assault. Sanders admitted that he committed his crimes near the first of the month on the belief the victims would have just received public assistance checks.

Fingerprints recovered from three homes led the police to Sanders. Wisconsin authorities then charged him as an adult with five counts of sexual assault and one count of armed robbery. Rather than proceed to trial, Sanders entered an *Alford* plea in the Milwaukee County Circuit Court. See *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (allowing the defendant to plead guilty while maintaining his innocence). Sentencing ensued and the state recommended 50 to 70 years.

The Milwaukee court concluded that the recommended sentence was insufficient to protect the community and to punish Sanders, and instead imposed consecutive terms of imprisonment amounting to 140 years' incarceration. The sentencing judge noted that, while he had handled "hundreds of sexual assaults over the last three years," Sanders's crimes were "some of the most horrific and horrible sexual assaults that [he had] seen,"—"just beyond belief." The judge also remarked that he did not "even know if [Sanders was] grown up [enough], to commit crimes so violent at the age of 17." (Sanders was 17 at the time of sentencing but only 15 at the time of the offenses.)

Sanders challenged his plea without success on direct appeal in the Wisconsin courts. Wisconsin circuit and appellate courts rejected the argument that his *Alford* plea was not knowing, intelligent, and voluntary, and the Wisconsin Supreme Court denied his petition for review. Sanders then sought post-conviction relief in the Wisconsin courts, alleging that his counsel on direct appeal was ineffective. After the circuit court denied his motion and the court of appeals affirmed, the Wisconsin Supreme Court again declined review.

In 2011, Sanders turned to federal court, invoking 28 U.S.C. § 2254 and seeking relief in the Eastern District of Wisconsin. Beyond reviving his challenge to his *Alford* plea, Sanders claimed that his sentence did not conform with the Supreme Court's holding in *Graham v. Florida*, which requires that states give juvenile nonhomicide offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. 48, 75 (2010).

The district court stayed Sanders's proceeding to give him an opportunity to exhaust this *Graham*-related claim in state court, as required by 28 U.S.C. § 2254(b)(1)(A). With his federal proceeding stayed, Sanders amended his petition to include a claim for relief under *Miller v. Alabama*, contending that the Wisconsin sentencing court violated his Eighth Amendment rights by not considering his youth in sentencing him to 140 years. See 567 U.S. 460, 479 (2012) (holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders").

B

With these two claims in hand—one *Graham*-related and the other *Miller*-related—Sanders returned to the Wisconsin courts. The Milwaukee County Circuit Court denied relief, and the Wisconsin Court of Appeals affirmed. The court of appeals assumed that both *Graham* and *Miller* applied retroactively to Sanders's case but nonetheless concluded that he was not entitled to sentencing relief. In the face of competing evidence, the court accepted Sanders's assertion that his projected life expectancy was 63.2 years. The court then reasoned that the rule announced in *Graham* did not apply because Sanders is serving a term of years and not a life sentence without the possibility of parole. Reading *Graham* to afford a juvenile offender (not convicted of homicide) a "meaningful opportunity to obtain release" before his natural life expectancy, the court noted that Sanders is first eligible for parole in his early 50s—well before his asserted life expectancy of 63.2 years.

From there the Wisconsin Court of Appeals did not provide an extended analysis of *Miller*, observing only that it was "not directly on point, as it concerned juveniles who committed homicides and were given mandatory sentences of life without parole." Sanders was a nonhomicide juvenile offender who would have the opportunity for parole under Wisconsin law, and therefore *Miller* did not entitle him to any sentencing relief. The Wisconsin Supreme Court again declined review.

C

Following these proceedings in state court, the federal district court in Wisconsin lifted the stay on Sanders's § 2254 petition. Sanders then renewed not only his challenge to his *Alford* plea, but also his contentions that his sentence neither affords him a meaningful opportunity to obtain release as required by *Graham* nor complies with *Miller*'s directive that the sentencing court consider his youth.

The district court denied relief. The court concluded that the state court did not act unreasonably in concluding that Sanders's *Alford* plea was valid. The district court declined to grant a certificate of appealability on this question, and the issue forms no part of Sanders's appeal.

The district court also determined that the Wisconsin Court of Appeals' decision that Sanders's sentence affords him a meaningful opportunity to obtain release because he will be eligible for parole at age 51 with a life expectancy of 63.2 years did not reflect an unreasonable application of *Graham*. In reaching this conclusion, the district court declined to consider statistics Sanders presented from an

American Civil Liberties Union analysis showing that the average life expectancy for a juvenile sentenced to life in prison is 50.6 years. Having never presented the statistics to the Wisconsin courts, Sanders could not rely upon the information as a basis for obtaining federal habeas relief.

Finally, the district court read *Miller* to bar only "mandatory life without parole sentences for juvenile offenders." Because Sanders did not receive a life sentence, the district court determined that the Wisconsin Court of Appeals reasonably concluded that the principles espoused in *Miller* do not apply to Sanders's sentence.

In denying relief, the district court granted Sanders a certificate of appealability on two questions: whether his sentence affords him a meaningful opportunity for parole in accordance with *Graham*, and, separately, whether the sentencing court failed to consider his youth as a mitigating factor under *Miller*.

II

A

The Supreme Court's decisions in *Graham* and *Miller* frame the issues before us on appeal. The Court decided *Graham* five years after *Roper v. Simmons*, 543 U.S. 551, 578 (2005). In *Roper*, the Court held that the Eighth Amendment prohibits the imposition of the death penalty upon offenders who were under the age of 18 when they committed their crimes. See 543 U.S. at 578. Capital punishment is disproportionate for this class, the Court reasoned, because "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders." *Id.* at 572. The Court's holding was

categorical: the execution of a juvenile is repugnant to the Eighth Amendment regardless of the offense the juvenile committed. *Id.* at 578.

Graham followed in 2010 and presented the question whether the principles animating *Roper* apply to juvenile offenders sentenced to life imprisonment without the possibility of parole for a crime other than a homicide. See 560 U.S. at 52. Terrance Jamar Graham received a life sentence for an armed burglary he committed as a juvenile in Florida—a state that had abolished parole. See *id.* at 57. Graham's only chance for release was through the distant possibility of executive clemency. See *id.* The Court concluded that "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Id.* at 74. To be sure, a state need not promise early release to this class of offenders. *Id.* at 75. But the Eighth Amendment compels the lesser measure of affording "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

Two years later, in *Miller v. Alabama*, the Court held that mandatory life-without-parole sentences for juvenile offenders convicted of homicide violate the Eighth Amendment. See 567 U.S. at 489. States are not prohibited from sentencing "the rare juvenile offender whose crime reflects irreparable corruption" to life in prison. *Id.* at 479–80 (quoting *Roper*, 543 U.S. at 573). But before imposing a life sentence for homicide, the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

The Court has continued to underscore *Miller*'s direction that life sentences should be imposed sparingly. Even in cases where a court considers the child's age before sentencing him to a lifetime in prison, "that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Miller*, 567 U.S. at 479). Applying the teachings of *Miller*, we have held that the Eighth Amendment prohibits not only *de jure* life sentences, but also *de facto* life sentences—a term of years so long as to equate for all practical purposes to a life sentence. See *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016).

Roper, *Graham*, *Miller*, and *Montgomery* will not be the Supreme Court's last word on the Eighth Amendment's application to juvenile sentencing. Indeed, this term the Court will consider whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. See *Jones v. State*, No. 2015-CT-00899-SCT, 2018 WL 10700848 (Miss. Nov. 29, 2018), *cert. granted sub nom. Jones v. Mississippi*, 140 S. Ct. 1293 (2020) (No. 18-1259). That *Graham* and *Miller* do not purport to answer every question sure to arise in their wake is the legal reality that defeats Sanders's request for federal habeas relief.

B

We begin as we must with the decision of the last state court to consider Sanders's claim on the merits: the Wisconsin Court of Appeals. See *Williams v. Jackson*, 964 F.3d 621, 628 (7th Cir. 2020). That court

concluded that Sanders, who was assumed to have a life expectancy of 63.2 years and will be eligible for parole in his early 50s, has not been denied a meaningful opportunity for release under the rule announced by the Supreme Court in *Graham*.

Our review proceeds under 28 U.S.C. § 2254. Relief is proper only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)–(2). The Supreme Court has instructed that under § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). To prevail, Sanders must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

Sanders invokes § 2254(d)(2) and contends that the Wisconsin court's determination that his life expectancy was 63.2 years was based on an unreasonable determination of fact. He grounds this contention in an ACLU report indicating that his life expectancy is only 50.6 years. See ACLU of MICHIGAN, MICHIGAN LIFE EXPECTANCY DATA FOR YOUTH SERVING NATURAL LIFE SENTENCES, at 2, available at http://www.lb7.uscourts.gov/documents/17-12441.pdf. Because his first and earliest hope of parole will arrive at age 51, Sanders contends that his sentence equates

to life without a meaningful opportunity to obtain release in violation of *Graham*'s core holding. See 560 U.S. at 75.

The district court was right to conclude that Sanders waived this argument by not presenting it to the Wisconsin courts. The only information Sanders presented in state court about his life expectancy came in his reply brief in support of his petition for post-conviction relief, where he asserted that his life expectancy is 63.2 years—a figure he said came from the United States Department of Health and Human Services. The state court reasonably accepted this assertion.

Sanders cannot base a request for federal habeas relief on information not presented to the state court in the first instance. Indeed, evidence introduced for the first time in federal court "has no bearing" on review under § 2254(d)(1). *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). As the Supreme Court emphasized in *Pinholster*, "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id.* at 182–83. The ACLU report accordingly cannot aid Sanders in his pursuit of federal habeas relief.

With our review limited to the record before the Wisconsin Court of Appeals, we consider whether that court's denial of relief constituted an unreasonable application of the Supreme Court's holding in *Graham*. We cannot answer that question in Sanders's favor.

The Wisconsin Court of Appeals determined Sanders's chance of parole at age 51—twelve years

before his expected end of life at 63—respects *Graham*'s requirement of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75. Nothing about that conclusion reflects an unreasonable application of *Graham*. In time the Supreme Court may give more definition to what constitutes a "meaningful opportunity" for early release. For now, however, the Wisconsin court's conclusion that Sanders will have his first chance at parole at the age of 51 is by no means unreasonable.

C

Sanders fares no better by rooting his request for relief in *Miller*. Recall that in *Miller* the Supreme Court held that it is unconstitutional to subject a juvenile offender convicted of homicide to "a sentencing scheme that mandates life in prison without possibility of parole." 567 U.S. at 479. But, as the Wisconsin Court of Appeals recognized, Sanders neither committed a homicide nor received a mandatory life sentence. He was convicted of nonhomicide offenses, his 140-year sentence was discretionary rather than mandatory, and his sentence provides for the possibility of parole.

Our holding in *McKinley v. Butler* does not compel a different conclusion. See 809 F.3d 908 (7th Cir. 2016). Benard McKinley committed murder at the age of 16 and was sentenced to 100 years' imprisonment with no good time credit or chance for early release. See *id.* at 909. We recognized that *Miller* plays a role where juveniles are subject to "discretionary life sentences and *de facto* life sentences," and we noted that the "children are different" language of *Miller* "implies

that the sentencing court must *always* consider the age of the defendant in deciding what sentence (within the statutory limits) to impose on a juvenile." *Id.* at 911, 914.

Importantly, though, we made this statement in the context of McKinley's sentence, which provided no possibility for parole and was therefore effectively a life sentence. Sanders's sentence does not fall within that category. Absent controlling Supreme Court authority that *Miller* requires a sentencing judge to consider a juvenile offender's youth and its attendant circumstances before imposing a sentence other than a *de jure* or *de facto* life-without-parole sentence, we cannot say that the Wisconsin court's decision resulted in an unreasonable application of federal law. See 28 U.S.C. § 2254(d)(1).

III

We close with two interrelated observations. No doubt the law will continue to evolve in this area. Future cases will likely test what it means for a person to have a meaningful opportunity for release under the teachings of *Graham*. So, too, may future cases make clear the outer limits of a sentencing judge's discretion to punish juvenile offenders under *Miller*. But lower federal courts do not enjoy the benefit of foresight—particularly so within § 2254 review. We decide this appeal strictly within the confines of today's clearly established federal law as determined by the Supreme Court.

In doing so, we offer a brief reaction to Sanders's belief that Wisconsin is certain to deny his request for parole in 2030. He anchors that view in an analysis of outcomes of initial parole eligibility determinations for

offenders serving life sentences. Put most simply, Sanders is convinced the deck is stacked against his receiving parole in 2030. Now is not the time for Sanders to advance this argument, however, as any assessment of the point would immerse us in Wisconsin's parole standards, procedures, past results, and projected outcomes—a task well beyond deciding whether the Wisconsin Court of Appeals unreasonably applied *Graham* and *Miller* in denying Sanders post-conviction relief.

To its credit, and with appreciated candor, the Warden's counsel, on behalf of Wisconsin's Attorney General, acknowledged during oral argument that Sanders, if he is denied parole in 2030, will have a future opportunity to challenge that outcome in state court, including by raising claims grounded in *Graham*, *Miller*, or another Supreme Court precedent that may enter the U.S. Reports in the intervening years.

For these reasons, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICO SANDERS,
Petitioner,

v. **Case No. 11-CV-868**

SCOTT ECKSTEIN,
Respondent.

ORDER

On August 8, 2019, I denied Rico Sanders' petition for a writ of habeas corpus. On August 19, 2019, petitioner filed a notice of appeal of such denial.

Before a habeas petitioner may take an appeal to the Seventh Circuit, I must consider whether to grant him a certificate of appealability pursuant to 28 U.S.C. § 2253(c). Fed. R. App. P. 22(b). The certificate of appealability may issue only if the applicant makes a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). The standard for making a "substantial showing" is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). If

the court issues a certificate of appealability it must indicate on which specific issue or issues the petitioner has satisfied the "substantial showing" requirement. *See* 28 U.S.C. § 2253(c)(3).

Where a district court has rejected a petitioner's constitutional claims on the merits, as in petitioner's case, "the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

In denying the present petition, I found that the state court had reasonably determined that petitioner's *Alford* plea was knowing and voluntary. Further, I found that the state court of appeals reasonably applied Supreme Court law when it found that petitioner's sentence afforded him a meaningful opportunity for parole. Finally, I found that the state court of appeals reasonably applied Supreme Court law when it concluded that the trial court had not erred by failing to consider petitioner's youth as a mitigating factor at sentencing. While the first of these conclusions could not be reasonably debated, the second and third conclusions could be debated. Both involve interpretations of the Supreme Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010). Regarding the second conclusion, reasonable jurists could conclude that *Graham*'s requirement that a juvenile non-homicide offender be sentenced in a manner that affords him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" is not satisfied when the offender will become eligible for parole just a few years before his natural life expectancy. A jurist who so concludes

might then reasonably conclude with respect to the third conclusion that the principle from *Graham* that youth is to be considered as a mitigating factor before a court applies particularly severe sentence properly applies to the petitioner's case, such that the trial court erred in not treating petitioner's youth as a mitigator. I will certify these two issues for appeal.

Therefore**, IT IS ORDERED** that a certificate of appealability is **GRANTED**.

Dated at Milwaukee, Wisconsin, this 2nd day of October, 2019.

s/Lynn Adelman
LYNN ADELMAN
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICO SANDERS,
Petitioner,

v. **Case No. 11-CV-868**

SCOTT ECKSTEIN, Warden,
Green Bay Correctional Institution,
Respondent.

ORDER

Rico Sanders petitions for a writ of habeas corpus under 28 U.S.C. § 2254.

I. BACKGROUND

A. Charges, Plea and Sentencing

The charges against Sanders stemmed from four incidents, dating between May and September, 1995, when he broke into homes and sexually assaulted the women who lived there. After his arrest, he confessed to the crimes and provided police with details that corroborated the victims' statements. Sanders was 15 years old at the time of the assaults.

After a waiver from juvenile court, Sanders was charged in adult court in Milwaukee County with several counts of sexual assault, armed robbery, and burglary. While the case was pending, his defense attorneys repeatedly raised the question of Sanders'

competency to stand trial. He was evaluated by two psychiatrists and spent time at the Mendota Mental Health Institute for evaluation. Ultimately, the trial court found him competent but below average intelligence.

Eventually, pursuant to a negotiated plea agreement, Sanders entered Alford pleas in Milwaukee Circuit Court to five counts of sexual assault and one of armed robbery, with the burglary charges dismissed and read in. Prior to the plea colloquy, Sanders reviewed a plea questionnaire with his attorney and signed it. At the plea colloquy, the court recited the elements of the offenses and Sanders pled guilty to each under the *Alford* decision. The court then asked Sanders several questions about his age, his level of education, the fact that he'd been psychologically evaluated, whether he understood that by entering his plea he was giving up certain constitutional rights, and whether anyone had made threats or promises to him to get him to enter the plea agreement. Sanders generally gave one-word responses to these questions. For example, the court asked the following questions:

> THE COURT: Okay. So do you understand, and I just discussed with you what you're charged with and I read it to you, what the penalties are, your attorney told you that, we'll go through that, why you've been charged and the elements of each of these offenses. Is that correct?
>
> DEFENDANT: Right.
>
> THE COURT: And counsel, you discussed with him what the elements would be, what the state

> would have to prove in each count in order to convict him?
>
> MR. LOVE: I did, Your Honor.

Id. at 13–14. The court also asked Sanders whether he understood that the court would not be bound by the prosecutor's sentencing recommendations and Sanders responded that he did understand. *Id.* at 15. Sanders was 17 years old at the time of the plea hearing.

The court held a sentencing hearing several weeks after Sanders entered his pleas. Based on the counts to which Sanders had pleaded, his maximum exposure was 210 years. However, consistent with the negotiated plea agreement, the state recommended a sentence of 50 to 70 years total on the sexual assault charges; with regard to the armed robbery charge, the state recommended that Sanders be sentenced, that the prison portion of the sentence be stayed, and that he receive a lengthy consecutive period of probation. ECF # 20-31 at 12.

Despite the state's recommendation, the court determined that a longer prison term was warranted and imposed consecutive sentences totaling 140 years: 30 for each of the four first-degree sexual assaults, and 10 each for the second degree sexual assault and the armed robbery. *Id.* at 58–59. The court discussed various factors influencing its sentencing decision, including the violent nature of the crimes, Sanders' prior criminal record, and the need to protect the community. The court also included the following statements in its analysis:

> And counsel again argues that [Sanders is] a product of his environment. There are hundreds

> if not thousands of children who have the same problems in the inner city, but hundreds and not thousands of children grow up to be 17, I don't even know if he's grown up, to commit crimes so violent at the age of 17. If that's true, we would have thousands of 17-year-olds in here. So I don't think his background makes him a serial rapist, and that's what he is, a serial rapist.

Id. at 56–57. This was the court's only mention of Sanders's age during its discussion of the sentencing factors.

As noted, Sanders was 17 at the time of his sentencing. Based on his sentence and the application of Wis. Stat. § 304.06(1)(b), Sanders will be eligible for parole after serving 35 years in prison, when he is roughly 51 years old.

B. Appellate Litigation Re Adequacy of Plea Colloquy.

Sanders did not immediately challenge his conviction or sentence. However, nine years later, in 2006, he filed a petition for habeas corpus in state court challenging the effectiveness of his appellate counsel, which resulted in the state court of appeals reinstating his appellate rights.

Sanders then filed a postconviction motion seeking to withdraw his Alford pleas on grounds that his plea was not entered knowingly, intelligently and voluntarily. He pointed out that at the time of his sentencing he was a 17-year-old who had not completed eighth grade, had been in special education for a learning disability, read and wrote at an elementary school level, and had mental health issues. He alleged that the trial court "never summarized the

elements of the crimes by reading from jury instructions, did not ask counsel to summarize the extent of his explanation of the charges, and did not ask Rico whether he understood the nature of the charge based upon the criminal complaint." ECF # 20-3 at 12. He further alleged that, "[a]t the time he entered his pleas, Rico did not understand the nature of the charges against him. He did not understand the elements of the multiple charges against him. The types of words used to describe the crimes were beyond his vocabulary, including such concepts as 'first degree' and 'article used or fashioned in a manner to lead the victim to reasonably believe it's a dangerous weapon.'" *Id.* at 12–13.

On the basis of these allegations, Sanders argued that the plea colloquy did not meet the standards of Wis. Stat. § 971.08, which requires a trial court to address a defendant personally and determine that his plea is voluntary before accepting it, and *State v. Bangert*, 131 Wis.2d 246, 266–72 (1986), which imposes on the trial court a duty to inform the defendant of the charges against him before accepting his plea. The trial court found that Sanders had not made out a prima facie case that the plea colloquy was defective, and thus summarily denied his petition without holding an evidentiary hearing. See *Bangert*, 131 Wis. 2d at 274 (holding that a defendant seeking to withdraw a plea based on an inadequate plea colloquy "must make a *prima facie* showing that his plea was accepted without the trial court's conformance with § 971.08 or other mandatory procedures").

Sanders appealed this decision, the question on appeal being whether the trial court had erred in

denying Sanders an evidentiary hearing. In a decision dated September 9, 2008, the court of appeals affirmed the trial court's conclusion that the plea colloquy had been adequate. In support of this conclusion, the court of appeals noted that for the first three of the four first-degree sexual assault charges, the trial court recited each charge individually, stating the date and address where each assault occurred, and included language descriptive of each of the elements necessary to prove first-degree sexual assault. The court acknowledged that the trial court did not complete its recitation of all the elements of the fourth assault, but concluded that this did not render the colloquy inadequate because the court had recited those elements for each of the other first-degree sexual assaults. The court of appeals similarly found that the trial court had identified the other charged offenses by date, location, and name of victim, and had adequately recited the elements of each charge. The court of appeals also noted that the trial court had explained the implications of an Alford plea, and had confirmed with defense counsel that there was no question about Sanders's competency on that day. The court of appeals concluded that Sanders had not made a *prima facie* case that the colloquy had failed to meet the standards of § 971.08 and *Bangert*; therefore, the court declined to consider Sanders' allegations that he did not understand the charges to which he'd pled.

Sanders petitioned the Wisconsin Supreme Court for review of the Court of Appeals' decision. On December 15, 2008, the Supreme Court summarily denied his petition.

On December 7, 2009, Sanders filed a pro se motion for postconviction relief under Wis. Stat. § 974.06,

alleging that his post-conviction counsel had provided ineffective assistance by failing to raise on direct appeal the question of the plea hearing's adequacy—specifically, whether the court had sufficiently informed Sanders of the constitutional rights his plea would waive, and whether it had ascertained that he understood those rights. The circuit court summarily denied the motion. On March 15, 2011, the Wisconsin Court of Appeals summarily affirmed the circuit court's decision, on grounds that the colloquy had been adequate on the face of the transcript, that Sanders had not alleged what counsel did wrong, and Sanders had not alleged that he had told post-conviction counsel that he did not understand his rights. In June 15, 2011, the Wisconsin Supreme Court summarily denied Sanders' petition for review of this decision.

C. Appellate Litigation Re Sentencing

In May, 2012, Sanders filed another pro se Wis. Stat. § 974.06 motion, raising two issues. First, he asserted that because he would not be eligible for parole until he was fifty years old, his sentence was contrary to the United States Supreme Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010), that states must afford juvenile offenders convicted of nonhomicide crimes "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. Second, he argued that his sentence was "unduly harsh and excessive" and that, consistent with the principles underlying *Graham*, the trial court should have taken Sanders's youth into consideration as a mitigating factor at sentencing. The trial court concluded that Sanders's motion was procedurally barred under *State v. Escalona-Naranjo*, 185 Wis.2d 168 (1994), because Sanders failed to raise

the issues in his previous § 974.06 motion. Sanders moved to reconsider, and the trial court denied his motion.

Sanders appealed. For purposes of resolving his appeal, the Court of Appeals made two assumptions: first, that Sanders's motion was not procedurally barred by *Escalona-Naranjo*; and, second, that the Supreme Court's decisions in *Graham* and *Miller v. Alabama*, 567 U.S. 460 (2012), applied retroactively and could form the basis for Sanders challenge to his sentence. ECF # 20-19 at 5. The court further recognized that some courts had extended *Graham* to bar consecutive sentences for juvenile offenders under which the first eligibility for parole would arise after the offender's natural life expectancy. *Id.* at 7. Still, the court concluded that Sanders was not entitled to relief on this theory, because Sanders would first become eligible for parole in his early 50s and his life expectancy, as he had acknowledged in his reply brief, was 63. *Id.* at 7. On these grounds, the Court of Appeals affirmed the circuit court's denial of Sanders' postconviction motion. The Court of Appeals did not directly address Sanders' argument that because the sentencing court had not considered his age and reduced culpability as mitigating factors, his sentence violated a policy of rehabilitative sentencing for juveniles underlying *Graham* and *Miller*.

Sanders petitioned the Wisconsin Supreme Court for review of this decision. The Wisconsin Supreme Court summarily denied his petition.

II. STANDARD OF REVIEW

Sanders's petition presents three potential grounds for habeas relief. First, he argues that he entered his

plea without fully understanding the charges against him, and that the trial court failed to adequately ascertain that his plea was knowing and knowing and voluntary. Second, he argues that his sentence does not provide him a meaningful opportunity for parole. Third, he argues that his sentence violates the Eighth Amendment because the sentencing court failed to consider his youth as a mitigating factor.

The parties agree that Sanders has exhausted each of these claims in state court. To the extent that the state courts resolved these claims on the merits, the standard of review in 28 U.S.C. § 2254 applies. At first blush, it's not obvious that the state court resolved each of these three claims on the merits, because in resolving Sanders's 2012 postconviction motion the Wisconsin Court of Appeals focused on the claim that Sanders's sentence did not allow him a meaningful opportunity for parole, and did not directly address Sander's claim that he was entitled to have his youth considered as a mitigating factor at sentencing.

However, the Seventh Circuit has explained that AEDPA's "adjudication on the merits requirement" sets a very low bar: it requires only that the state court's disposition of the case was substantive as opposed to procedural, without regard to whether the disposition was well-reasoned, correct, or even supported by any explicit reasoning at all. *Muth v. Frank*, 412 F.3d 808, 815–16 (2005)("In fact, several circuits have held that a state court need not offer *any* reasons and summarily dispose of a petitioners claim and that summary disposition would be an adjudication on the merits."). Though the Court of Appeals provided no reasoning directly addressed to Sanders's claimed entitlement to mitigation on the

basis of youth, it did acknowledge that Sanders's motion had raised the claim, and its disposition of the claim was not on procedural grounds.

Thus I'm satisfied that each of the three claims was adjudicated on the merits in state court within the meaning of AEDPA, such that the standard of review set forth in 28 U.S.C. § 2254(d) applies. Under this standard, I may grant relief only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

A state court's decision is "contrary to . . . clearly established Federal law as established by the United State Supreme Court" if it is "substantially different from relevant [Supreme Court] precedent." *Williams v.* Taylor, 529 U.S. 362, 405 (2000). The Seventh Circuit has recognized the narrow application of the "contrary to" clause: "Under the 'contrary to' clause of § 2254(d)(1), [a district court] could grant a writ of habeas corpus . . . where the state court applied a rule that contradicts the governing law as expounded in Supreme Court cases or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result." *Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000).

In contrast, the "unreasonable application of" clause is somewhat broader and "allows a federal habeas court to grant habeas relief whenever the state court 'unreasonably applied [a clearly established] principle

to the facts of the prisoner's case." *Id.* To be unreasonable, a state court ruling must be more than simply "erroneous." *Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir. 1997). "Unreasonableness is judged by an objective standard, and under the unreasonable application clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Morgan v. Krenke*, 232 F.3d 562, 565–66 (7th Cir. 2000). Thus, before I may issue a writ of habeas corpus, I must determine that the state court decision was both incorrect and unreasonable. *Washington*, 219 F.3d at 627.

III. DISCUSSION

A. Knowing, Intelligent and Voluntary Plea

Sanders first claims that his conviction is not constitutional because his Alford pleas were not entered knowingly, intelligently and voluntarily as due process requires. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. *Henderson v. Morgan*, 426 U.S. 637, 645 n. 13 (1976). Wisconsin has established certain procedural requirements for trial judges to follow to ensure that guilty pleas conform with the constitutional standards. See Wis. Stat. § 971.08(1)(a) (before a court accepts a guilty plea, it must "[a]ddress the defendant personally and determine that the plea

is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted"); *State v. Bangert*, 131 Wis.2d 246, 267 (1986)(trial courts have a duty to "inform a defendant of the nature of the charge, or, alternatively, to . . . ascertain that the defendant possesses accurate information about the nature of a charge" before ascertaining the knowingness and voluntariness of the defendant's plea).

In rejecting Sanders's challenge to the validity of his plea, the Wisconsin Court of Appeals relied heavily on the plea colloquy's conformity with the requirements of § 971.08 and *Bangert*. Sanders now concedes that, at least on its face, the transcript of his plea colloquy does meet the state procedural requirements; he asserts, though, that the judge should have taken into account his limited education and cognitive ability and required more from him than simple yes-or-no answers in order to ascertain that he truly understood the charges against him and the rights he was waiving. On this basis he argues that the Court of Appeals' determination that the plea colloquy was involved an unreasonable application of the rule that a court's inquiry into a defendant's understanding must take account of all relevant circumstances, including the defendant's mental capacity. *See Brady v. U.S.*, 397 U.S. 742, 749 (1970).

Sanders's argument fails. The Wisconsin Court of Appeals decision indicates that it did consider Sanders's cognitive ability but found that it was outweighed by other factors, including the thoroughness of the trial court's explanations of the charges and consequences of the plea, the fact that Sanders had signed a plea questionnaire that he

acknowledged he'd discussed with his attorney, and Sanders's several affirmations during the colloquy that he understood what was being said and had no questions of defense counsel or the trial court. ECF # 20-6 at 6–7. What Sanders now asks for is a re-weighing of these factors, but AEDPA does not allow me to undertake that sort of review. I may consider only whether the Court of Appeals treatment of these factors was unreasonable, and it plainly was not. I cannot grant habeas relief to Sanders on his claim of an invalid plea.

B. Meaningful Opportunity for Parole

Sanders's second claim is that his sentence violates the holding of *Graham v. Florida*, 560 U.S. 48 (2010), that under the Eighth Amendment states must afford juveniles convicted of non-homicide offenses a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. When Sanders first raised this issue by post-conviction motion, he asserted that his life expectancy was 63 and argued that his parole eligibility at roughly age 51 did not afford him a "meaningful opportunity" for release. The Court of Appeals rejected his argument. Though it acknowledged that some courts had extended *Graham* to bar not only actual life without parole sentences but also consecutive term-of-years sentences under which a juvenile would first become eligible for parole at a date beyond his life expectancy, it concluded that because Sanders's parole eligibility date fell *before* his alleged life expectancy, his sentence was not the sort of *de facto* life sentence to which *Graham* might arguably apply. ECF # 20-19 at 6–7.

Sanders's position has changed. He now presents statistics compiled by the ACLU of Michigan which suggest that the average life expectancy for a juvenile sentenced to life in prison is 50.5 years, which is almost exactly the age at which Sanders will first become eligible for parole. These statistics might support an argument that Sanders's sentence is, in fact, a *de facto* life sentence. However, I cannot consider them. AEDPA deferemce requires that I consider only evidence that was before the state court at the time it adjudicated the claim on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). On the evidence before it, the Wisconsin Court of Appeals decision that sentence under which Sanders would become eligible for parole at age 51 allowed him a meaningful opportunity for release was not an unreasonable application of federal law.

C. Cruel and Unusual Sentence

Sanders's final claim is that his sentence violates the Eighth Amendment because the sentencing court did not consider his youth as a mitigating factor when imposing it. He argues that this violates a principle articulated in *Graham* and in *Miller v. Alabama*, 567 U.S. 460 (2012), that because children have diminished culpability and greater potential rehabilitation they are entitled to differential treatment at sentencing. Though the Wisconsin Court of Appeals acknowledged that Sanders had made this claim, its decision does not directly address it; as discussed above, the decision turns on Sanders's sentence not being a de facto life sentence. Nevertheless, because the issue was raised in state court and disposed of on non-procedural grounds, I

must treat the Court of Appeals decision as one on the merits and apply AEDPA deference.

Though both *Graham* and *Miller* use expansive statements about developmental differences between children to justify and explain their holdings, the holdings themselves are capable of a narrower construction that renders them inapplicable to Sanders's case. Narrowly, *Graham* holds that the Eighth Amendment bars life without parole sentences for juveniles convicted of non-homicide offenses. But Sanders's sentence is not life without parole, nor even (as the Court of Appeals not-unreasonably concluded) *de facto* life without parole. *Miller* is even farther removed. Narrowly, it bars mandatory life without parole sentences for juvenile offenders. But, again, Sanders's sentence is not life without parole, let alone *mandatory* life without parole. Thus, though Sanders makes at least a colorable argument that the sentencing judge's treatment of his age violated a principle that youth ought to be considered as a mitigator, the Court of Appeals would not have been unreasonable in finding Sanders's case so far removed from the facts of *Graham* and *Miller* that the principles espoused in those cases did not apply. *Cf. McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (reasoning that a 100-year sentence is a *de facto* life sentence "and so the logic of *Miller* applies").

IV. CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that Rico Sanders's petition for a writ of habeas corpus is **DENIED** and this case is **DISMISSED**. The clerk of court shall enter final judgment accordingly.

Dated at Milwaukee, Wisconsin this 8th day of August, 2019.

s/Lynn Adelman
LYNN ADELMAN
District Judge

APPENDIX D

COURT OF APPEALS DECISION
DATED AND FILED

August 5, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and Rule 809.62.

Appeal No. 2012AP1517 | **Cir. Ct. No. 1995CF954600**

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICO SANDERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Rico Sanders, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2011–12) motion for postconviction relief.[1] He seeks relief from his sentence based on ***Graham v. Florida*,** 560 U.S. 48 (2010), and ***Miller v. Alabama*,** ___ U.S. ___ 132 S. Ct. 2455 (2012).[2] We affirm.

BACKGROUND

¶2 In 1995, Sanders was charged with breaking into the homes of four women, sexually assaulting each woman, and taking property from the homes. Sanders was fifteen years old when the crimes were committed. The criminal complaint indicates that Sanders gave an interview to the police during which he admitted the crimes and offered details about them.

¶3 In 1997, Sanders reached a plea bargain with the State pursuant to which he entered ***Alford*** pleas to four counts of first-degree sexual assault, one count of second-degree sexual assault, and one count of armed robbery with use of force, contrary to WIS. STAT.

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[1] The Honorable David A. Hansher accepted Sanders's pleas, sentenced him, denied the 2009 WIS. STAT. § 974.06 motion, and denied the 2012 § 974.06 motion that is at issue in this appeal.

All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

[2] Sanders's motion asked the trial court to "[v]acate, modify, or set aside [his] sentence."

§§ 940.225(1)(b) and (2)(a) and 943.32(2) (1995–96).[3] Sanders's exposure for those six crimes was two hundred and ten years. The State agreed to recommend a total sentence of fifty to seventy years of imprisonment for the sexual assault charges, plus a lengthy imposed and stayed sentence with probation for the armed robbery charge. Two counts of armed robbery and two counts of aggravated battery—which would have subjected Sanders to an additional one hundred years of imprisonment—were dismissed and read in.

¶4 The trial court said that Sanders's crimes were "some of the most horrific and horrible sexual assaults that [it had] seen" and concluded that the State's sentencing recommendation was "insufficient to protect the community and ... punish the defendant." The trial court sentenced Sanders to a total of 140 years of imprisonment, with 595 days of presentence credit. Sanders will be eligible for parole after serving thirty-five years in prison.

¶5 Sanders did not immediately pursue a direct appeal. His direct appeal rights were reinstated in 2006. In 2007, represented by a lawyer, he filed a motion to withdraw his ***Alford*** pleas. The trial court denied his motion and we affirmed.[4] *See* ***State v. Sanders,*** No. 2007AP1469, unpublished slip op. (WI App Sept. 9, 2008).

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[3] When a defendant enters an ***Alford*** plea, the defendant maintains his or her innocence but accepts the consequences of the charged offense. *See* ***North Carolina v. Alford,*** 400 U.S. 25 (1970).

[4] The Honorable Jeffrey A. Wagner denied Sanders's 2007 postconviction motion.

¶6 In 2009, Sanders filed a *pro se* WIS. STAT. § 974.06 motion, asserting that his postconviction lawyer had provided constitutionally deficient representation with respect to moving for plea withdrawal. The trial court denied the motion and we affirmed. *See* ***State v. Sanders***, No. 2009AP3190, unpublished slip order (WI App Mar. 16, 2011).

¶7 In May 2012, Sanders filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. Sanders's motion raised two issues, both of which were based on ***Graham***, which held that the United States "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." ***Id.***, 560 U.S. at 82. ***Graham*** explained: "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." ***Id.*** at 75.

¶8 Sanders's motion asserted that because he would not be eligible for parole until he was fifty years of age, he was being denied a "meaningful opportunity for parole," which was contrary to ***Graham***.[5] Sanders's motion also argued that his sentence was "unduly harsh and excessive" and that, under ***Graham***, the trial court should have taken Sanders's "age and youthfulness into consideration" at sentencing.

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[5] The State asserts that Sanders will be eligible for parole when he is fifty-one or fifty-two years old. Our analysis in this case is the same whether Sanders is eligible for parole at age fifty, fifty-one, or fifty-two.

¶9 The trial court concluded that Sanders's motion was procedurally barred under ***Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Sanders failed to raise the issues in his previous WIS. STAT. § 974.06 motion. Sanders filed a motion for reconsideration, arguing that he should not be procedurally barred from raising issues based on ***Graham*** because the case had not yet been decided when Sanders filed his first § 974.06 motion. The trial court denied the motion, but in doing so, it briefly addressed the merits of Sanders's § 974.06 motion. The trial court concluded:

> ***Graham*** is inapplicable here. The ***Graham*** court held that the Eighth Amendment does not permit a juvenile to be imprisoned for life without parole. Because Florida had abolished its parole system, [Graham] had no meaningful opportunity for parole in that state. Wisconsin has not abolished its parole system, and [Sanders] is eligible for parole in September of 2030. He is not serving a life sentence without parole as in ***Graham***.

(Underlining omitted; bolding and italics added.)

DISCUSSION

¶10 Sanders presents three issues on appeal. First, he argues that the trial court erroneously exercised its discretion when it concluded that Sanders's motion was procedurally barred by ***Escalona-Naranjo***. Second, he questions whether the structure of his sentence "affords him a meaningful opportunity for parole." (Bolding and capitalization omitted.) Third, Sanders asserts that his sentence "is cruel and unusual [as] guided by the principles set forth in

Graham and echoed in ***Miller***." (Bolding and italics added.)

¶11 For purposes of this appeal, we will assume that Sanders's motion was not procedurally barred by ***Escalona-Naranjo*** and will instead focus on whether Sanders is entitled to relief based on ***Graham*** and ***Miller***. Even if we further assume that ***Graham*** and ***Miller*** apply retroactively and could form the basis for Sanders's challenge to his sentence, we are not convinced that those cases entitle Sanders to relief from his sentence.

¶12 Sanders concedes that he is not serving a life sentence without the possibility of parole and that his case is "therefore not controlled by ***Graham***." (Bolding and italics added.) Further, it is clear that ***Miller***, which was released after Sanders filed his postconviction motion, is also not directly on point, as it concerned juveniles who committed homicides and were given mandatory sentences of life without parole. *See* ***Miller***, ___ U.S. at ___, 132 S. Ct. at 2460 ("[M]andatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"). Nonetheless, Sanders suggests that the principles discussed in both cases support his claim that his sentence "is cruel and unusual."

¶13 As noted, ***Graham*** held that a defendant must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See* ***id.***, 560 U.S. at 75. The State acknowledges that some courts have "extended ***Graham*** to ... consecutive sentences under which the defendant was first eligible for parole at a date beyond his life expectancy."

(Bolding added.) For example, in ***People v. Caballero***, 282 P.3d 291 (Cal. 2012), the California Supreme Court considered the case of a juvenile who was given consecutive sentences that did not make him eligible for parole for "over 100 years." *See* ***id***. at 293, 295. Citing ***Graham***, the court concluded "that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." ***Caballero***, 282 P.3d at 295.

¶14 We need not decide whether Wisconsin would follow ***Caballero***'s reasoning or cases holding that ***Graham*** prohibits only the imposition of a sentence of life imprisonment without the possibility of parole for a juvenile who commits a non-homicide offense, because even under Caballero's reasoning, Sanders is not entitled to relief. As the State points out, "Sanders does not assert, much less prove, that his parole eligibility date exceeds his natural life expectancy." Indeed, Sanders admits in his reply brief that his eligibility for parole is within his life expectancy, which he asserts is 63.2 years.[6]

¶15 Further, Sanders has not provided any case law holding that where a defendant is eligible for parole in his early fifties, he is nonetheless being denied the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" that is

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[6] The State contends that Sanders's life expectancy is 70.6 years. We need not determine which life expectancy figure is accurate, because using either figure, Sanders's life expectancy is years beyond his parole eligibility date.

referenced in ***Graham***. *See* ***id.***, 560 U.S. at 75. Sanders faults the State for not developing an argument concerning the definition of "meaningful opportunity," but the burden is on Sanders to show that he is entitled to relief. Sanders's motion asserted that juveniles should be eligible for parole in their late twenties, when their minds are "fully matured," but he has not demonstrated that ***Graham*** or other cases have held that the United States Constitution requires such an early parole eligibility date for juveniles convicted of non-homicide crimes.

¶16 In summary, Sanders has not shown that he is entitled to relief from his sentence based on the United States Supreme Court's holdings in ***Graham*** and ***Miller***. We affirm the trial court's order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX E

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 42	MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. F-954600

RICO SANDERS,

Defendant.

FILED CRIMINAL DIVISION JUN 26 1997

SENTENCING

April 25, 1997

Hon. David A. Hansher
Circuit Judge, Presiding

CHARGES/DISPOSITION

Ct. 1 – First Degree Sexual Assault – 30 YEARS, WISCONSIN STATE PRISON
Ct. 3 – Armed Robbery – 10 YEARS, WISCONSIN STATE PRISON, CONSECUTIVE TO COUNT 1
Ct. 4 – Second degree Sexual Assault – 10 YEARS, WISCONSIN STATE PRISON, CONSECUTIVE TO COUNT 3
Ct. 6 – First Degree Sexual Assault – 30 YEARS, WISCONSIN STATE PRISON, CONSECUTIVE TO COUNT 4

Ct. 8 – First Degree Sexual Assault – 30 YEARS,
WISCONSIN STATE PRISON,
CONSECUTIVE TO COUNT 6

Ct. 9 – First Degree Sexual Assault – 30 YEARS,
WISCONSIN STATE PRISON,
CONSECUTIVE TO COUNT 8

APPEARANCES:

MIRIAM FALK, Assistant District Attorney, appearing on behalf of the State.

MARTIN LOVE, Attorney at Law, appearing on behalf of the Defendant.

DEFENDANT present in Court.

Beth J. Fringer – Court Reporter

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TRANSCRIPT OF PROCEEDINGS

CLERK: State of Wisconsin verses Rico Sanders. Case No. F-954600. Appearances, please.

MS. FALK: The State is appearing by Assistant D.A. Miriam Falk.

MR. LOVE: Martin Love for and with Mr. Sanders, Your Honor.

THE COURT: Okay, we're here for sentencing. The court has in front of it a presentence report. Any additions or corrections from the state?

MS. FALK: Well yes, Your Honor, there are just a few things that I wanted to correct or note for the record.

THE COURT: And there's also a social study that's attached also, I should add.

MS. FALK: Your Honor, there are a number of references in the presentence report that are different than information that I have. On page 4, underneath "Academic and Vocational Skills," it indicates that the defendant is saying he was LD classes because, quote, "They said I was slow functioning." I would refer the court, however, to the 2/9/96 report that is attached to the presentence report. It's one of the, let me see where I have this here. Tell you exactly what it is. I think it's one of the competency things. Yes, it's the

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report that was submitted to Diane Sykes on—dated February 9th of 1996. That was authored by Dr. Palermo, and in getting the history at that time, Mr. Sanders—

MR. LOVE: What was, I'm sorry, counsel, what was the date there?

MS. FALK: February 9th of 1996, it's right on the first page where Mr.—Dr. Palermo is talking about the relevant history, the defendant told him that he had attended Park Manor School in Chicago up to the eighth grade in regular classes. And that he was kicked out "because someone was going to kill me." That part, that last sentence is consistent with what the defendant is saying.

I would also note for the record that in the public defender prepared social study that is the last document that is attached, at page, the third page under the "Education" section, again it indicates that Mr. Sanders is considered to be in the ninth grade, the last school that he attended was Park Manor Grammar School and that he has always been in regular classes. In fact it goes on to indicate that according to the principal of that school, Rico's mother did not want her son screened for any kind of special classes.

So there is a dispute in the documentation itself as to what exactly it is that Mr. Sanders was

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doing when he was in school. I would suggest to the court that he was in regular classes based on the plethora of information that we got before this particular presentence was prepared.

The rest of the—the differences, Your Honor, I will simply just raise by referring the court to various documents in the course of my arguments. They're just things that people are saying now that are different than what people had said in other places

and to other people, and I will simply refer the court to those other contradictions, but I felt that the educational level, since it is one of the specific things that the court needs to consider related to the character and rehabilitative needs of the defendant, should be pointed out to the court in advance.

THE COURT: Counsel? Any additions or corrections or comment—

MR. LOVE: Yes, Your Honor. Just to comment on that point, unfortunately the references that are—are made here are made to third parties and they're hearsay representations as to Mr. Sanders' background. Fortunately on that point, and I really can't personally illuminate it, his family is here. There—his mother is here. I—I just asked Rico if in fact he did take special classes. He told me he did. His mother's here,

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she can indicate whether or not Rico took special classes, and even if that is not the case, the record is replete with documentation of the special needs of Rico, and—and that there is a special—there is a circumstance of—of if not retardation, that the impression has been—has been shared by many of the people who have talked to Rico and who have investigated this background, that he has some sort of disability in that area. So that's my comment on that. If Miss—if Mrs. Sanders wants to, if his mother wants to make a statement and I know that she's—she's—she's concerned about that, she's nervous and apprehensive, but I—we can find out from their point of view whether or not he had those special training.

Now with respect to various I think scrivener errors in the—in the presentence, on page 3, paragraph 1, and it's just a typo, paragraph 1, line 12, we believe 27th Street should be 47th Street as I think it refers to the location of a—of an act, of an incident.

On page 6, there's a reference to Rico's chronological place in the family. Rico is the youngest of the children, and the—his brother Charles is between, occurs between Jackie and Jill.

On page 7, Paragraph 4, it should be clear

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that it's Rico's father who passed away. His father died. And Rodney was the brother who was a profound influence and to whom Rico looked up to and lived with Rodney and his mother. Rodney was killed, was murdered. Paragraph 5. "Brother," I've got a—a reference to and I believe that's the next paragraph on page 7—

MS. FALK. Right, it's the last sentence there of the word "offender," should be "brother," the second last time it says—

MR. LOVE: Yeah, the "brother" does not believe. Now those are the only corrections that we have, Judge, and as a threshold matter, if—if I may, maybe I—I have—I request to make of the court with regard to the process of sentencing, it's—if I could speak to it now, I'd be happy to. If the court wants—

THE COURT: Just ask her and just report back to me what she says. You want to go ask her?

MR. LOVE: Oh, okay. She says yes. He took learning disability classes.

THE COURT: Okay.

MR. LOVE: The other thing is, Judge, was the manner in which this proceeding would take place. I advised the court at the suggestion of—of counsel, Mrs. Falk, that I—I wanted to have this matter adjourned and I had spoken to Miss—Mrs. Falk about

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that and we discussed that, the propriety of doing that. She indicated to me that there were several reasons why she would object, and I don't mean to speak for her, but I understood that—

THE COURT: Could you move the microphone closer to you?

MR. LOVE: Sure. Is that better, Judge?

THE COURT: Yes, thank you.

MR. LOVE: I understood that Mrs. Falk anticipates taking some leave and that this is a copious file, and she didn't want to be really putting that responsibility in somebody else's hand who weren't adequately—who wasn't adequately prepared, and that she wanted closure for the victims in this case. That they have been living with this for a considerable period of time, and that whatever opportunity they had to make their positions known to the court would be consummated and they could go about repairing their lives as best they could, this would be behind them. And I don't disagree with those reasons, Judge, I think they're valid.

On the other hand, my request for the adjournment was based on the needs of my client as I perceive them. The court has a view of his history. You know, there's—there's substantial—there's

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substantial data that gives you background on Rico, and so much so that some of it's been attached to the presentence report. It's his wish that family members, even though he has some support here, there's some particular family members to whom he's very attached, would have the opportunity to be here. One is an aunt from Tennessee, his mother's sister, who—to whom he has very close ties and is not able to come here today.

I would like some time to consider an element of—of qualifying a principle that I want to enunciate to the court in the course of my argument or my—my—my statement to the court in his behalf. Recently we—the court will recall that this was an Alford plea. And the Alford—the aspect of it really centered on the sexual assaults. The court will also recall that when we presented that plea, that Mrs. Falk told you on that issue where we had centered on—on DNA testing and—and blood typing with respect to certain specimens that were drawn, and that some of them didn't compare to Rico. She told you that yes, there was a—there were incidents with some of these victims where they had recently had sex—sexual intercourse with—other people, people that they were involved with, and that was an explanation for these disparities.

Rico had taken the position that although he

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was present at each of these homes when the burglaries occurred, that there was another actor, that actor was named, and that it was he who had conducted these assaults. The—it's come to my attention—and I don't know if there's any

confirmation of this—but yesterday in this community there were reported assaults of this type wherein the actor apparently followed the same method that's attributed to the defendant in this case. Those are post—those are—as far as I can tell, those are—those are post-conviction issues.

But I would like and I would suggest to the court that we bifurcate this proceeding today. We allow the state to make its statement. We allow the victims if they wish to make theirs. We allow for closure for them, and we put this matter off for just a couple weeks. See if I can get the brother, if I can get—and I'm just talking about our part of it. That will relieve Mrs. Falk of her anxiety, that will permit closure for the victims, and certainly the disposition that the court levels here will be communicated to the victims anyway. So I don't see that as—

THE COURT: The reason you want it adjourned is again for what reason?

MR. LOVE: Well, there are members of the family—

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THE COURT: Okay, the aunt from Tennessee.

MR. LOVE: Yeah.

THE COURT: And who else?

MR. LOVE: Yeah. There's a brother, too, who's—who's presently involved in Chicago, can't get out of the—can't get out of the community in Chicago right now, but we hope that he'll be out and available for us within a few—within a week or so.

THE COURT: Is this the one who's interviewed in the presentence?

MR. LOVE: No.

THE COURT: Another brother.

MR. LOVE: Yeah. And I want the opportunity to try to present to the court some information that think is important that I haven't been able to get yet. And it—it's technical information and that's all.

THE COURT: What information?

MR. LOVE: Well. I want to deal with—tell the court—I want to deal with some of the issues of Mr. Sanders' drug experience, and I haven't had an opportunity to—to determine that.

THE COURT: Well I think it's something you can argue to the court. I'm not going to adjourn a case just to get an aunt from Tennessee here and his brother. If it was so important to his brother, he should have

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made arrangements to be here. I adjourned this from last week on my own motion, and they at least had a week's warning and some relatives could make it, and who knows if the brother or aunt could even make the next date because I wouldn't put this over for a long period of time, he's sitting in the County Jail which we all know is overcrowded, and I don't think it's fair to him or fair to the system or fair to the state, and the court is going to deny your motion. Anything else as to additions or corrections to the presentence?

MR. LOVE: Not by the defense, no.

THE COURT: State's recommendation.

MS. FALK: Your Honor, this was a negotiated plea, and I will restate those conditions for the record so the court has them. Mr. Sanders entered pleas to the following counts. Count 1, which is first degree assault, the victim was Yolanda Washington. Count 3,

armed robbery with the use of force. The victim was also Yolanda Washington. Count 4, second degree sexual assault, the victim in that case was Tracy Robinson. Count 6, first degree sexual assault, the victim in that case was a juvenile named Yvonne Redmond. Count 8, first degree sexual assault, penis to mouth, the victim in that case was Poincianna Sprewell. Ana count 9, first degree sexual assault, penis to vagina, the victim

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in that case was also Poincianna Sprewell.

The state moved to dismiss and read in count 2, which was an armed burglary, the victim was Miss Washington. Count 5, which was an aggravated burglary. The victim in that case was Miss Robinson. Count 7, which was another aggravated burglary, the victim was Miss Redmond, and count 10, which was an armed burglary. The victim in that case was Poincianna Sprewell.

To the plea that was entered by Mr. Sanders, the state was requesting a presentence and was recommending at the option that was chosen by Mr. Sanders that he be incarcerated for a period of 50 to 70 years on the sexual assault charges, and that with respect to the armed robbery charge, that Mr. Sanders be sentenced and that that sentence in prison be stayed and that he receive a lengthy consecutive period of probation on the armed robbery charge. The robbery charge, Your Honor, was the count 2 that he pled to—I'm sorry, count 3. I have provided to the court the—

THE COURT: Wait. So it's count 1, 3, 4, 6, 8 and 9?

MS. FALK: Yes.

THE COURT: And you're recommending 50 to 70 years total—

MS. FALK: Fifty to 70 years total.

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THE COURT: —on all the sexual assaults with an imposed and stayed sentence on the armed robbery, consecutive.

MS. FALK: Yes, and consecutive lengthy probation on that charge.

THE COURT: Is that your understanding, counsel?

MR. LOVE: I understand that's their recommendation, Your Honor, yes.

THE COURT: And you're free to argue for less.

MR. LOVE: I am.

THE COURT: Okay. State's recommendation.

MS. FALK: Your Honor, I did give to the court today the victim impact statement that had been filled out by Miss Washington at the time that this was first being considered in juvenile court, and I will just highlight some of the things from that, and then I also have notations that were made by the victims when this case was first issued related to the impact that this was having on them. I do this since the presentence writer apparently did not have any personal contact with these victims like I have had.

Miss Washington indicated that this has had a tremendous result on her. She describes that she gets an upset stomach thinking about it. She doesn't sleep

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well. She tosses and turns. She sees a counselor even though it's very hard for her to talk about what it is

that happened to her. She considered moving out of her apartment but could not afford to do so because she couldn't afford—couldn't financially afford to do it. She says that this crime has had an effect on her everyday life by causing her to be always fearful for her life and her children's lives. She doesn't like to go outside much anymore. She says that now she gets sick a lot and is easily stressed She said that knowing—because after she was assaulted Mr. Sanders was out on the street for quite a number of months, knowing that he was still out on the streets gave her a huge sense of insecurity. They're fearful now of even doing simple things like leaving their windows up in the heat of the summer, leaving lights off, and they react to every unrecognized sound that they hear.

Her friends and her relatives are outraged by this, and I remember talking with her about how difficult it was, even though she understood that they were very angry for her, to talk about this with them because it was such a disgusting and embarrassing thing for her to have experienced.

Those kinds of sentiments were also expressed by Miss Robinson. She spent a great deal of time

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actually living somewhere else because of what had happened. She was able to move in with somebody else for a short period of time. She told the victim advocate that she was very traumatized and that the most difficult times are between 8 o'clock in the evening and midnight. That is when she is the most frightened because that is when she was assaulted. She says that it will take her a long time to recover

from this, and that she was also going to be seeking counseling, which she did.

Miss Sprewell indicated that she stayed at a girlfriend's home since this offense had occurred for quite a long time, and after she had gone to the hospital, although when she left she felt okay, by the time she got home she began what she described as the beginning of three very difficult days following this assault, and that she felt almost suicidal, that she didn't really quite know how to cope with what had happened to her.

Miss Robinson, Miss Washington and Miss Sprewell also had the additional burden of having children with them at the time that the assaults had happened, and all three of those women indicated to me that they felt that they needed to be strong for their children, and a lot of their decisions and what happened

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reflected the fact that they were very concerned about their children both during the course of the assault and afterward, that their children not be traumatized just because the moms were traumatized by this. And I will talk about each of the—of the cases specifically since this court has not had the opportunity to hear all the facts because Mr. Sanders took advantage of the fact that there were children in the rooms when he was making his threats to gain compliance to what he was asking them to do.

With respect to Miss Washington who was the first victim, this occurred in May of 1995, so we are almost two years now from the time that this happened. She was at home and she was in her bed when she was awakened because somebody was inside of her

bedroom. Mr. Sanders put the covers over her face and she was finding it very difficult to breathe because he was pressing down. He then whispered to her, she described it as a menacing whisper, "Give me those rings, take them off." She was saying she couldn't breathe and she was struggling with him, and that he told her if you don't cooperate, I'm going to shoot you. He also repeated throughout the course of his crime with her, "Don't look at me, don't look at me, don't look 'cause I'm going to hurt you." He was trying to remove the

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rings that were on her hand and he was unable to do so, so he ordered her to take them off.

She was then feeling that he was straddling over her and telling her not to move. And he asked her whether she had any more property, and she was directing him to different places in the room. He told her to keep her face covered, and he then removed the covers and put a pillow on to her face and she had to struggle again because it was very hard to breathe, and he continued to repeat to her, "Don't look at me."

Now this—this aspect of the crime, the fact that he was essentially smothering these women during the course of what was happening, also served to help conceal his identity from them, and even though these weren't charged as concealing identity, clearly this is an aspect of the crime that the court needs to consider.

He twisted Miss Washington around and told her, "I'm going to hurt you. You don't want me to shoot you, do you." And as he was saying this, she was feeling small areas of pressure, he would move some object that was cold and hard on different points on her head

and was telling her to just be still. She said that she continued to struggle and to wiggle as he was doing this because she was having such a hard time breathing.

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He then told her to open your legs, asked her if she was a virgin, and asked her when was the last time that she had sex. He pulled up her shirt, revealing her breasts, took off the lower part of her clothing that she was wearing. She said that she was not only struggling at this point but was crying and very afraid, and she was afraid for her life. He then had an act of penis to vagina intercourse with her that lasted, she said, a very short period of time, probably three minutes, and that he was also fondling her breasts while he was doing this.

After he was finished, he then asked her whether she had any more jewelry around and whether she had money. He asked whether she had got a gun, and he told her in her—with respect to her responses that she was telling him no, she didn't, that she better not be lying because if he found something, and he left that threat dangling.

She could hear him opening her drawers, and then he turned to her and he asked her if she was scared. And she said yes, that she was. And she says that he kind of chuckled at that. He continued to rummage around the room, and then he started asking her questions about her children, which she found very frightening because she knew at that point that he knew

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that she had children and that they were asleep in the house.

Mr. Sanders' activities in Miss Washington's house were interrupted by the return of Miss Washington's boyfriend. Mr. Washington (sic) had to make a very quick exit out of the bedroom window, and it was during this time when he was struggling with the window to get out that she was able to see him quite well because the light was shining in from the street on the window, They called 911 right away and ultimately they were able to locate the rings that he had stolen.

He told the police that he had given them to a person named Ann, and they located this person named Ann who in fact had the rings of Miss Washington, she identified them, and Ann identified Mr. Sanders whom she knew very well because he pawned quite a few things to her in the past, and she knew who he was and had agreed to buy these because Mr. Sanders assured her that they were not his mother's property.

Mr. Sanders made a statement—and I'll give a copy of Mr. Sanders' statement to the court so that the court can follow along if it wants to—about this. At the time that he was arrested. Now I'm offering this to the court because Mr. Sanders is now arguing that he did not do the sexual assaults, that it was somebody else.

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The court will note that this is a very lengthy and detailed statement that he made to Detective Rozinski, and that throughout this entire statement he never mentions any other co-actor, he never mentions a person named Reginald Hart, and it is my belief based

on all the facts in this case that I will give you that Mr. Sanders is making this up now because he doesn't want to admit to the worst of the things that happened.

What he did say about the case involving Miss Washington is that he entered the building through the back door that was unlocked. As he proceeded through the house, he saw a baby on a couch and then went to a bedroom and saw the lady on the bed. When he saw her, he felt like doing something. He covered her mouth with his hand and told her to take her clothes off. He then forced sex on her. He went through the dresser drawers. From on top of the dresser from a heart-shaped bowl he took two rings. He heard someone coming, opened the bedroom window, and went out. Those are the facts that Miss Washington would also indicate.

I specifically asked her what kinds of things she kept her jewelry in and she described, among other things, the heart-shaped bowl which he would have not have been able to know if he hadn't been in the bedroom. Which makes it absolutely incredible that some other

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person could have been raping this woman while he stood there and went through the heart-shaped bowl without knowing it. He also wouldn't have known what he did in the room either, and I doubt that he would have admitted that he felt like doing something when he saw her on the bed if that in fact had not been the case.

The next victim was Miss Robinson. Miss Robinson was laying in the living room with her children at the time that Mr. Sanders entered her home. He grabbed

a pillow and put it on her face and told her, "Don't look at me, I don't want you to see my face. I want you to tell me where the money is at, bitch." She told him she didn't have any because she had not gotten her check, and then he told her well, then you're going to have to give me some pussy.

At this point the baby who was on the same couch with Miss Robinson started to cry, and Miss Robinson started to struggle with Mr. Sanders. They even at one point were actually standing up, and at this point when she was face-to-face with Mr. Sanders she saw him quite clearly.

She said that he forced her back on to the couch which is again where this baby was, and this child grabbed on to Mr. Sanders' shoulders, apparently in this pathetic attempt to fight off this attacker of his

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mother. He pushed the baby back and the baby fell back on to the couch, and he said to Miss Robinson, "I'll kill the baby if it's not quiet. I'll kill the little fucker if you don't do what I tell you." He had something in his hand but she couldn't see what it was, and he put it on the floor. He then pushed the pillow back on to her face very hard and was telling her to lay down and then the baby would lay down, too. "Just lay still and I won't have to hurt you." Miss Robinson says that she was absolutely terrified for her life and for her child's life.

Mr. Sanders then got on top of Miss Robinson and had an act of penis to vagina intercourse while he kept this pillow on her face. As he was getting up, she could hear him rummaging around the room. She heard him near the television set. She could hear him opening up

her purse. She didn't know what he was taking at that point, and then he announced to her he was going out the front door.

When she got up and locked the front door, she saw that he had taken all of her food stamps which she would have used to feed her family and the $12 in cash that she had as well. As in the case of Miss Washington, Miss Robinson noticed that apparently Mr. Sanders had been throughout portions of her house

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because the lights that they had left on were now turned off.

Mr. Sanders talked about this incident as well, and he said that he got into Miss Robinson's house through an already open back window. He went and he looked around and he saw the woman on the couch with a baby. He saw some food stamps on top of the TV and he took them. His stuff got hard and he wanted some. He went to her and put his hand over her mouth. He asked her if she had any money, and she said she had some food stamps. She had a nightgown and panties on. He got on top of her and forced sex on her, and then he left out the front door. He had to unlock the front door in order to get out. Again, it is just not credible to believe that Mr. Sanders was not the person who committed this sexual assault as well.

The third victim was a child. This child was living in a foster home because her life has already been somewhat bad at that point. Miss Redmond, who I met recently, is doing better now than she had been at the time that this was happening only because I think she is a very remarkable person. She was awakened

because there was a fan, a window fan in her room that fell on to her arm. It fell because Mr. Sanders was crawling in through that window. He then placed a

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pillow on her head and forced her back down on the bed. She had sat up at this point because she—somebody was climbing into the window and she was screaming. He said to her, "Shut up, or I'll blow your head off." He finished climbing in through the window as he was saying this and continued to hold this pillow over her head. He told her, "If you scream or make any noise, I'll blow your head off," and just like Miss Washington, she could feel something cold and hard pressed against the side of her head. He forced an act of penis to vagina sexual intercourse with this 14-year-old girl and asked her if she had any money, to which she responded no, and taking advantage of this child's age, and it's very interesting to me that Mr. Sanders used the particular threats he did with the particular victims because I think that it evidences some pretty sophisticated criminal thinking on his part. To this child victim he told her, "If you tell, I'll blow up the house." It was very interesting because he did not make any kind of statement about telling or anything like that with any of the adult victims, he only chose to do that with this child victim. He then climbed out of the window and she ran out of the room screaming.

Mr. Sanders remembered this incident as well. He said he went to the side of this house and pushed the

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fan in and climbed into the window. He told Detective Rozinski that at first he didn't see her, but then he came back to her room after going through the house

and saw—she saw him and started to yell, so he covered her face with a pillow. He got on top of her and he forced sex, and after the sex he then went out window that he had entered. He even remembered the shoes that he was wearing when he committed that particular assault, and I suspect that the officer was asking him because there was a—a footprint with an Adidas tennis shoe that had been left outside the window.

The last victim, Miss Sprewell, had had a baby a few weeks before the sexual assault had occurred and she was sleeping in her bedroom with her two children, one of whom was this infant, when she was awakened by the defendant who was armed with some sort of a dark handgun, although she did not get a very good look at it. She was awakened because he told her, "Bitch, if you scream, I'll kill you." And as he was saying this to her, she was feeling this gun next to her right temple. He then shoved a green silk shirt into her mouth and held it over her mouth and pushed it down her throat so that she could not scream. He told her to get down on her knees. There was a small mattress that was

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on the floor next to the bed, and that's what she knelt down on.

He then asked her what valuable things she had and she told him to take the TV. She also told him that all the money she had was in the top drawer. Mr. Sanders said, "Well, I have to have something. I've got to have some pussy." Miss Sprewell begged with him. She said don't you see my kids, don't you see my newborn. And he said well then you've got to

suck my dick. She didn't want to do that. She was telling him no, and he said then I'll kill you.

He then pushed her head on to his penis saying make me—I'm sorry, she said making me suck and deep throat—and that he was pushing her so far down into her throat that she gagged. She begged him please don't do this, you're making me gag, and he got very angry with her and he told her, "I got to have me some pussy then." He forced her to lay down, pulled off her underpants and threw them on the floor, and then had an act of penis to vagina intercourse with her.

During this time he had laid the gun that he had in his hand down on the floor next to him, and once he was finished with the sex act, he began to feel under the mattress looking for something. She suspected it was money. He then said to her, "Well, I guess I've got

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to kill you." He continued to ask her questions like what have you got, do you got money, do you got a pager, and she again repeated to him that she had some money in the top drawer. He continued to tell her that he was going to kill her and ask her whether she was going to call the police. And she says that she was so very afraid because she believed that he would.

Mr. Sanders said of this particular assault that he had seen the lights on at the back part of the house and thought there was no one home. He tried to open up some windows and found one that had a wooden screen part way pushed out. Mr. Sanders had to work very hard to get into Miss Sprewell's apartment because the—the police found that virtually every window on the house had been pried or tampered with before Mr. Sanders was eventually able to make his

way in. He used an orange milk crate to get in which he told the officers about, and in fact there was an orange milk crate that was underneath the window that was ultimately opened by Mr. Sanders.

He went in to a bedroom, went through that room, looked around the rest of the house and then he went into a room that had lot of toys in it but he didn't see anything that he wanted to take. He then went into a bedroom. This is perhaps the most chilling

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statement that he makes here. And he saw a woman on the bed sleeping. She was wearing a silk nightgown and he could see her pubic hair. She had two children in bed with her. He shook her and asked her if she had anything worth money. She was going to yell, so he put a green shirt into her mouth. He—she told him to take the TV and was struggling with her. He then told her that he would shoot her. She asked him not to hurt her baby. There was a small mattress on the floor and he told her to get on it. He did not want to wake the baby. He told her he wanted to have sex with her, and she told him that she could not have sex because she had just had a baby. She then did oral sex on him. She was not doing it right and he pulled out of her. He then got on top of her and forced sex. She told him she had seven dollars. He asked her where, and she then described that—where it was. He left out the window, and he referred to "sex," what he means by sex as penis to vagina intercourse.

Mr. Sanders was caught because he was becoming more careless. He had left his fingerprints on the inside and outside of the windows at Miss Sprewell's house, and he had left his fingerprints on windows

that were just down the street from her when he attempted to commit two burglaries that were two days before this

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particular sexual assault.

Mr. Sanders was positively identified as an individual who attempted to get into the home of a woman named Katherine Wright who described to the victim advocates that she just felt very lucky knowing what else he had done that she was not victimized by him in the way that these other women had. Mr. Sanders apparently abandoned that burglary when he was unable to get in, and went next door and he was able to get in there. Again, not only leaving his screwdriver behind, but also leaving his fingerprints behind, and so the police were able to match up his fingerprints with those of this particular burglary.

The victims, some of them were able to also positively identify Mr. Sanders, and of course Mr. Sanders agreed that he was in fact the culprit in all of these crimes.

I don't think that I need to point out to the court in great detail that these are horrific crimes. These were planned, premeditated crimes that are the worst kind of crimes people can commit short of homicide. They are the kind of crimes that will visit these women over and over again throughout their lives. Everybody would like to feel safe inside of their own home, and Mr. Sanders repeatedly and routinely for him

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terrorized people inside the sanctity of their own home and used against them the kinds of things that

normally bring joy to a person's life, like the lives of their children. I will be surprised if these women ever completely recover from this because in my experience and in the studying that I have done, this is the kind of crime that stays with you pretty much forever.

The things that Miss Washington and Miss Sprewell and Miss Robinson described as to how they felt during and after these assaults are very typical and classic kinds of reactions. The security that you felt in your own home is completely robbed from you, and you are vulnerable forever with those feelings that you are never completely safe anywhere.

You also have to deal with the fact that you were violated in a humiliating way. It is very clear here that Mr. Sanders made a quick decision in each occasion to sexually assault these women, and the way that he describes it is so frightening because to them he was—to him, they were merely receptacles for his need that apparently arose in a flash. He victimized a juvenile as part—as one of his victims here, and he did these horrible crimes in front of the children of these other women.

Mr. Sanders started out each of these cases

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what he claims as a burglary, that he was planning specifically to do these kinds of crimes around the 1st of the month because he knew that people got their checks then, and he was trying to support his drug habit. So he needed to get money.

That—this is ruthless. He is just absolutely ruthless, and he is the kind of person that people look at and would describe very accurately as a predator. He's the kind of person from whom the community has

a great fear. There is absolutely no empathy for the victims that is described in his statement that the court has in front of it, and there is no empathy for the victims that appears in his presentence investigation either.

Now he is hiding behind this Alford plea and this foolish story that somebody else did it, which makes him a continued gigantic risk in this community in terms of his character and his rehabilitative needs.

Now Mr. Sanders has what can only fairly be described as a pretty bleak life. He has experienced much violence in his own life, both at the hands of his father and also because of what he has seen within his family in terms of his brother being killed. The reason that he came here to Milwaukee was supposedly to escape the violence of Chicago. He had gotten involved with

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people and now his life was at risk. That's why he had to leave that school at this young age of 14 so that he could come up here and perhaps live out a better life.

But when Mr. Jennings was talking with the police, he said that—he confirmed that that was in fact the reason or one of the reasons that he had moved here. He said that Rico moved here in January of 1995. Well as the court can see, it took him less than five months to get hooked up with the bad kinds of activities that he was hooked up with in Chicago, and he was committing heinous, heinous crimes.

The court should know that I did contact the city of Chicago department that is responsible for this report that was generated regarding all of these 1994 and 1995 contacts that he has with their juvenile justice

system. Every single one of those is in a bench warrant status. These are not convictions, only because Mr. Sanders has never appeared in court with respect to being held accountable. These were not dismissed, they are all still open cases in the city of Chicago. And as the court can see, his behaviors there were already related to a lot of the same kinds of behavior that he was doing up here within the few short months that he was here. He was using drugs, he was stealing things, he was going into houses and places where he had no

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business going, and he was even dealing drugs. All of those things are very serious for a person as young as Mr. Sanders, and I find it disingenuous to believe that he had any intention of changing his ways.

Mr. Jennings also indicated that he kicked Mr. Sanders out when he was talking with the police. Because Mr. Sanders was hanging out with bad guys, that he was hanging out with gang members in this first five months when he was here. Now I understand that Mr. Jennings has a good deal of feeling for his brother, and that's quite obvious. I think it takes a lot to—to bring a teenager into your house with the expectation that you're going to be the supervisor, you're going to be the person who is going to be responsible for a kid who's pretty much of a handful.

I think that Mr. Jennings' statements to the police when he was talking with them as they were looking for Mr. Sanders in August of 19—or September of 1995 are—are interestingly different from the statements that he makes now. The family members in their statements to, even—even to the reporters that are

contained in the back of this report are very different from the picture that they're trying to paint of Mr. Sanders now. They do say that he was a very confused kid, and they attribute that to the problems

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that he had with his brother being killed and with the issues related to his father.

I would take issue with the characterization, however, that he's close to his mother. The woman who was living with Mr. Jennings, I don't know if she still is or not, says they didn't even know how to get in touch with Miss Sanders once Rico get—excuse me, began living here. And that he was staying with them because the mom had her own drug and alcohol problems to deal with. Mr. Sanders made comments to people at Children's Court that he actually kind of enjoyed living with his mom because when she would become drunk or high, then he could steal money from her more easily. So that's really a rather callous attitude that he takes, and it belies the statement that he—he's so close to his mom or that his mom is able to really control him.

Miss Bush (sic) also indicated that during the time period that Mr. Sanders was living with them, she was unsure of when he would come and go, so it appears that Mr. Sanders was sort of doing what he wanted to do no matter where it is that he lived.

He—he did hang around with the gang members that were called Gangster Disciples. There are some other references in the juvenile records also to his

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gang affiliations, and I would agree with the agent's assessment here as well that when we look at all the different documents that we have regarding Mr. Sanders, he does show very little emotion or affect about any of these things that he has done. He even denies sexually assaulting these people, and it's frightening that a person of Mr. Sanders' age could be so cold. What that indicates to me is that it will be very unlikely that he will positively respond to treatment. We can hope that he will.

He also has what can only be described as a very substantial drug and alcohol problem. This young man is heavily involved not only into using but in selling so that he can support his own habit, and in addition to doing that he has chosen this very criminal lifestyle and this—criminal people when he has had other options.

His brother strikes me as a person who was very interested in helping his little brother out. His brother seems to be a more stable person, has a job, has—has opened or had opened his home to his little brother, and what he got in return was Mr. Sanders abusing that privilege and instead roaming the streets, climbing into people's homes at night, stealing things from them and using drugs.

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THE COURT: I'd ask you to please summarize.

MS. FALK: Uh-huh. Finally there are the interests of the community in protection and punishment. This is—this is the kind of crime that people are just completely outraged about, and these are the people that the community is very scared of. Mr. Sanders

represents the face of—of what everybody would consider to be a menace to this community.

Mr. Sanders' treatment needs are huge, and his motivation, his insight into this seem to be very minimal. One of the things that I would want to remind the court of is that Mr. Sanders, I believe, based on everything that we have about Mr. Sanders including his behavior over the course of all these various competency hearings, is actually a very clever person who plays the game really well.

Mr. Sanders successfully escaped from Children's Court when he was there on these charges. Mr. Sanders, I believe, played a game with the courts about his competency issues. The court can see that while he was trying to persuade people that he was a very stupid individual who could do just about nothing, didn't really know what his game was or what his age was or money or anything like that, when in the living circumstances where apparently he was unaware that he

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was being very carefully watched was exactly the opposite of that.

Mr. Sanders is a dangerous person because of that. He is willing to manipulate and to change and to play these kinds of games for his own ends. I consider his statements now that there was this other person, this other actor as part of this, to be again an effort on his part to try to deflect the attention for the really bad things from him where the attention belongs to somebody else. All of those things indicate that Mr. Sanders is a very dangerous man and he needs to be incarcerated for a long period of time. That is why

the state is recommending this range of 50 to 70 years. Mr. Sanders has so many treatment needs and he is such a dangerous person that the community deserves to have the assurance that Mr. Sanders will not be available as a menace to this community for a very long period of time. This also will enable Mr. Sanders within the prison system to obtain the help that he very, very much needs.

I'm not even sure where they're going to start with Mr. Sanders. He has his substance abuse needs, he has vocational needs. He has sex offender needs. He has criminal thinking needs. Mr. Sanders has many, many needs, and it will take a very long time to address those needs.

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I also feel that due to his age, there is the need to have extra protection for the community once he will be paroled, and that will be in the form of a very lengthy period of probation so that he can be very closely supervised, and if he does not succeed in the community, that there is a heavy hammer hanging over his head such that he would go back to the state of incarceration should he not follow through with the demands of his parole and his probation officer. I think that is the only way to protect this community from somebody like Mr. Sanders and the only assurance that we have that he will not offend in the future.

THE COURT: Okay. Mr. Love.

MR. LOVE: Thank you, Your Honor. Judge, I'm going to ask you to make certain assumptions. In this case. Assume that the people who make reports and submit them to you do not provide you with precise

and consistently accurate information because that information is filtered through their perceptions and through their analysis, through their disciplines and through their biases. I've seen that in this case.

Some of those things that were addressed by Mrs. Falk I think are valid. Some of the representations that she makes to you I think are accurate. I take exception to some of them as well. Wasn't too many

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months ago that this court had to sentence a young man for murder, for an execution type murder, and that young man went away for a long, long time. That man that this court imposed that sentence on had a background that was 180 degrees different than that of Mr. Sanders. He had opportunity. He had support and family. And he had personal resources that were strong, and his performance in the community had up until that time been almost exemplary, and this court had to interpose a harsh and severe sentence.

While Mr. Sanders is accused and has pled to lesser crimes in the scale of offenses that are promulgated in this state, I agree with Mrs. Falk that they are horrendous. The question I think is, I think simply what is to be done to Mr. Sanders. Is this a knee jerk reflex that we're—we're all engaging in here when we have a young man with this history and these offenses. Are we simply crossing the "T"s and dotting the "I"s when we know that no matter what I say, no matter what his family says, that in view of the facts of these offenses, that there's no hope for him, that he's going to be warehoused for the rest of his practical life, just

on the basis of these offenses and facts. I would hope not. I can't tell you what my expectation is.

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I noted when I received this case, I am the third lawyer in this case, Judge. That Mr. Sanders was waived from juvenile or from Children's Court. The Mental Health Complex on June 7th, 1996, submitted a report to Judge Sykes and listed date of birth for Rico Sanders as November 10th, 1978. His family tells me that that's not his date of birth. His date of birth is 11/10/79. That meant that when he was waived, he was waived on the assumption that he was 17-and-a-half when he was 16-and-a-half. I don't know and I suspect that it doesn't have any jurisdictional significance with respect to the waiver. It may factually in that had that been raised, the court would have taken that into account in its determination for waiver. That is a post-conviction issue. But I want you to know that the young man that sits before you today was 16 and a few months when these crimes were committed—

MS. FALK: Excuse me, I hate to interrupt. I just want the court to know we did get a certified copy of his birth certificate before we did the waiver hearing and I did have a copy of it, so the court was aware of that at the time was November 10th, 1979.

THE COURT: Thank you, just move the microphone closer.

MR. LOVE: That's information I did not have.

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THE COURT: Okay.

MR. LOVE: All right.

THE COURT: Let's move on, past that.

MR. LOVE: All right, Judge, I'll move on. The point is, Judge, for the majority of Rico Sanders' life, he has been assaulted by his environment. We live in Milwaukee that is a microcosm of what's going on in Chicago. I don't think anybody here in this courtroom who has not lived in the ghetto has any idea, has any idea of what Rico Sanders experienced as a child and how that affects the person and how that has created the person that sits next to me.

These victims of these cases experienced horrendous events, horrendous. But they were isolated. Rico Sanders had to live with an environment like that continually. It wasn't—they weren't isolated incidents. He bears the scars on his head now of being beaten brutally near death when he was a child. He was shot several times when he was a child. And that was in his environment. That was in his community. That was a day-by-day atmosphere that he had to deal with.

If we're to believe that his family had problems, that they were dysfunctional, that was his environment. If we're to believe that in fact that he had disabilities, mental disabilities, that was his

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environment. That's the—the—the—the basic clay that was presented to be molded in this environment. It was flawed. It needed expensive and consistent and—and—and in-depth attention. It was unrealistic to ever expect something like that to happen for Rico.

He had made attachments in his family and they were taken away from him. Now how does—how does a young man and a boy, if you will, respond to the

murder of his brother, the death of his father, being attacked by his peers in his community, beaten and shot, and then uprooted and coming to a community where all he really knows is to survive, and he's reduced to a fairly low creature. He has been. To disregard those factors is to turn a blind eye to reality.

Nothing that I'm trying to—I'm saying here in any way is—is—is to suggest that there's an excuse and an enablement, a license, for Rico to act as it is claimed that he has acted. I have seen the statements that are attributed to Rico Sanders in the discovery material provided me by the state. As it was recited to this court, it is interspersed with other facts. These statements were embellished by other data that the district attorney had and incorporated into the account of what happened. These statements were not the written product of Rico Sanders. These are the

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statements that had been provided by the police officers after his investigation or her investigation of the facts in this case and her confron—their confrontation of Rico in custody. Those issues about the reliability of those statements are—gone for us at this hearing. We can't deal with those. Rico has elected to enter his pleas.

One of the things that I've been primarily concerned with, Judge, is the degree to which Rico I believe has been affected by the drugs that he's ingested. Taking hallucinogen, LSD, which is an insidious drug, and as I understand it can affect a person long after the initial intake. It's not uncommon for people to have flashbacks and disabilities and hallucinations far into the future after using these drugs.

If you take a look at the account given in this case by the report of the Probation Department, Rico had, and it's acknowledged by the state, tremendous substance abuse problems. I would submit to the court that those—those problems—those needs were so substantial that they affected Rico who committed these crimes in the course of satisfying those needs. Nobody disputes that.

What happened to these women, to these

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children, is unconscionable. If the only thing that we can do here is warehouse Rico for the rest of his practical natural life, then there's very little hope for this system in my view, and there's very little meaning to these sentencing procedures.

What I would ask the court to do here is to fashion a sentence that will give Rico the chance to have some of his life left when he gets out of—when he gets out of an institution. I believe he has abilities.

I think that it's impressive and significant that the presentence writer when he encountered Rico in the jail encountered a person he didn't expect to meet. Based on everything that that person had read, he believed that Rico would be withdrawn, uncommunicative, perhaps act in bizarre fashion. That wasn't the case. And I can tell you that hasn't been my experience either. I think that Rico has finally become clean. I think that Rico no longer is disabled or affected by the drugs that he's been taking. I think that those drugs would affect him and I think they phased. I think that there were times when he was more affected than not. I think they were in his

system and intermittently they would surface and make things difficult for him.

Now notwithstanding those statements that are

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attributed to Rico, it is my understanding that there is a history in this case that does reflect on another individual. That that individual was named to the prosecution by previous counsel, and that a request or at least an inquiry was made as to whether or not there was any interest in pursuing that. As I understand it, the state was not interested and maybe for good reason. I don't know what the dynamics were of that transaction, but I just—it's my understanding, at my late entry into this case, that that was some of the history.

Nevertheless, Mr. Sanders is here to be sentenced. He's going to be gone for a long time no matter what kind of sentence the court imposes. I'm just asking that if this clay can be remolded, if there's that possibility that somebody imprint on it something positive and that—that the man that comes out of this prison is not the risk that we all fear, is not the same person that we're putting in, that that chance be given to him.

I don't know how long it will take for him to be rehabilitated or that if he can be rehabilitated. Sometimes just the passage of time provides for that. I hope and pray that it will happen for Rico. He was 16 years old when these crimes happened. They are terrible. But the man who is 30 will not be the boy who

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was 16 who committed these crimes, just by virtue of the passage of time. If we can overlay that passage of time with some positive treatment—I don't know if it's realistic to expect that in the institution—but if it's there and Rico's motivated to make use of it, then I would hope that that could combine with his freedom.

I'm asking the court to consider some concurrency in these sentences. I'm asking the court not to warehouse him for 50 years. I'm asking the court for a sentence that it must objectively fashion that will give this person a chance to realize a positive and—and hopefully a chance to—to be a rehabilitated or at least a person who has—has paid his price and allow him to do that with some life left for him. Something positive, and something at least meaningful.

He has family here today who are deeply concerned, but they live in the same—the mother lies in that environment that—that war zone in Chicago. In speaking to me, they can articulate their feelings and their surprise. They don't believe that Rico did these things. They don't want to believe that he did these things. But they know the hard life that he's had, they know how he's been impacted, they know he' been near death on two occasions, and they're here in the hope that there will be some mercy shown to their

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son and to their brother. And I think that can be done.

And I'm asking the court to do that without diminishing the seriousness of these offenses, without disregarding the needs and—and the impact of these victims. I'm just asking the court to at least consider the youth of this young man, his background, and the

fact that whatever sentence that is imposed is an opportunity for him, to give him that chance even though we don't know that the quality of—of treatment and care is going to effectuate that, at least give him that chance.

Now I have a letter that I've shown to counsel. It's—it's a brief letter from a pastor in Chicago, the family asked me to give that to you. I concluded my remarks. It may be that members of the family would like to say something on Mr. Sanders' behalf. Anybody here would like to say something for Rico? His mother would. If that's all right with the court.

THE COURT: Yeah, I'll permit up to two members of the family to make a statement. They'll step forward here. One at a time. Okay, I'll limit it to two.

CLERK: Would you state your name, please.

MS. SANDERS: My name is Pearline Mahomes

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Sanders.

CLERK: Pearlie is spelled how?

MS. SANDERS: P-e-a-r-l-i-n-e.

CLERK: Okay.

MS. SANDERS: L-i-n-e. Mahomes spelled M-a-h-o-m-e-s. Sanders is S-a-n-d-e-r-s.

CLERK: Thank you.

THE COURT: You're the mother of the defendant?

MS. SANDERS: Yes, sir.

THE COURT: And what do you want to say regarding his sentence?

MS. SANDERS: It's kind of hard for me to say anything. Your Honor, I've had—I've lost one—one son in death. And look like to me I'll lose another one. I don't know whether you're a parent or not, but this have been really, really hard on me. I will make it very short. Just want my child to have a second chance at life because he didn't have any kind of—he haven't had any kind of life. I didn't get him the help he needed when he lost his brother. His brother was a father figure for him, and it's just been a really bad, bad life for my child. So I'm asking you to have mercy on him, please. I just don't want to lose another son. That's all I needed to say.

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THE COURT: Thank you.

MS. SANDERS: And if he did these crimes, I apologize to the ladies that it happened to. I thank you.

CLERK: Would you tell us your name, please.

MS. RHYMES: Good morning, Your Honor. My name is Eloise Rhymes. E-l-o-i-s-e. R-h-y-m-e-s.

CLERK: Thank you.

THE COURT: How are you related to the defendant?

MS. RHYMES: I'm Rico's aunt.

THE COURT: And what do you want to say on his behalf.

MS. RHYMES: First of all, I would like to say that I'm sorry to the families of the victims and to the victims. I've known Rico all his life. There is no excuse for any kind of crime. I know Rico has been into some trouble, but never, none of the trouble that some of this is I've heard, and I've heard quite a lot and read quite

a lot. But Rico is a young man that has had problems, and I know sentences must be imposed, and on behalf of my family, we're asking for a little mercy and little leniency.

THE COURT: Thank you.

MS. RHYMES: And we are also asking that Rico

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get some counseling because he does need counseling. And I truly hope that he did not commit most of these acts. I'm sorry if he committed any, but some of these acts I'm—I was just truly surprised to hear. And I thank you, Your Honor.

THE COURT: Thank you very much. Mr. Sanders, is there anything you want to say prior to sentencing?

DEFENDANT: Sorry for the victims. I apologize to the victims. That's about it.

THE COURT: Okay. Well for sentencing, I have to consider the nature of these crimes, and I've been assigned to the Homicide/Sexual Assault Unit on two occasions, which means I've handled hundreds of sexual assaults over the last three years, in the high hundreds. So nothing should shock me nowadays, but comparing these sexual assaults with others, these are some of the most horrific and horrible sexual assaults that I've seen, and I think maybe that word is sometimes overused, "horrific," but I'm not sitting here seeing my fourth and fifth sexual assault sentencing. I'm seeing, as I indicated, one of several hundred. So I can compare each, and these sexual assaults are just beyond belief.

The state has gone into detail as to each one. I'm going to briefly summarize them because I have to

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consider the nature of the offense. I will take in consideration the specific facts as set forth by the state and the specific facts set forth in the criminal complaint including the defendant's admission as to count 1, the sexual assault of Yolanda Washington, which was on May 1st, 1995. And as the state pointed out, was shortly after he moved to Milwaukee and was wanted on warrants in Chicago.

He broke into a home, and I'm going to consider these are home invasions which I think is an aggravating factor. Got jewelry, and the court will consider the armed—burglaries and armed burglaries that were dismissed and read in for sentencing purposes, and the court will consider the burglaries also only for sentencing purposes. Obviously he can't be sentenced on each count.

But as to Miss Washington, he threatened to kill her by putting a gun to her head. You can imagine what she thought at that point even prior to the sexual assault, put a pillow on her face and forced her to have sex.

On August 2nd as to Tracy Robinson, which is count 4, and I should add I have to consider that—going back to Yolanda Washington, there is an armed burglary which he is to be sentenced for. He threatened

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the imminent use of force against her and robbed her of her valuables, and the state—specifically her jewelry.

As to count 4, as to Tracy Robinson, as the presentence said, he followed the same modus

operandi with the above victim breaking into the home. This was even—this one was even more aggravating than the first one in the sense there was a baby there, pushed the baby off and told the victim, keep the baby quiet or he'd kill the baby. And then went along with—and he also robbed the offender of $551 in food stamps.

As to count 6, the first degree sexual assault of Yvonne Redmond, that happened on August 2nd, 1995, and she's the one who state pointed out suddenly felt a fan fall on top of her and she observed offender coming through the window, another home invasion. He put a pillow on the victim's face as he did in the first incident, threatened to kill her and blow up the house. The defendant sexually assaulted her.

CLERK: Was that August 9th, Your Honor?

THE COURT: The presentence says August 2nd, the criminal complaint says August 9th. Which date is correct? I assume the criminal complaint.

MS. FALK: August 9th is the date.

THE COURT: Okay, the presentence then is

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wrong. It would be August 9th.

As to count 8, September 5th, 1995, sexual assault of Miss Sprewell and again this is another home invasion. 3:00 a.m. he had a gun—he put a gun to her head and the victim screamed, he threatened to kill her. He shoved her shirt in her mouth. The offender ordered the victim to give him her valuables and demanded to have sex. And again the state went into details how she said she just had a baby, she couldn't have sex. He forced her to have oral sex. When that

wasn't satisfying, he proceeded to sexually assault her, penis to vagina, which was count 9. So all these sexual assaults were violent.

The armed burglary as to count 3 were violent involving guns, some involving close to the head, two involving threatening to kill young children. As I indicated, compared to hundreds of others I've seen, this is one of the worst if not the worst sexual assault I've seen.

I also should—counsel brought up the fact that defendant is a product of the inner city and has been traumatized. The victims in this case were living, I will say in the inner city. They weren't suburbanites. This happened at 50th and Center, almost in the same area, every single one, an area where I grew

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up in. So this is someone who, violence begets violence, he committed upon his fellow members of the inner city.

As to the defendant's prior record and character, as we discussed, he was arrested in Illinois, Chicago. Possession of stolen autos on January 5th, 1994. Juvenile arrest warrant issued, JAW, which is still out. April 15th, '95, possession of controlled substance, juvenile arrest warrant. August 9th, 1994, possession of stolen auto. Criminal trespass to vehicle. Ethnic intimidation, whatever that means. Theft of auto again, a juvenile arrest warrant issued. Burglary to auto, attempted theft of auto, criminal trespass to vehicle. Criminal damage to property on November 29th, 1994, again a juvenile arrest warrant. December 20th, '94, possession of controlled substance and

delivery of controlled substance. Again a juvenile arrest warrant.

One could argue that he came to Milwaukee not to escape Chicago, that can be a reasonable inference, or the violence of Chicago, because we have our own violence here, but to avoid prosecution in Illinois, specifically Chicago. I have to consider the defendant's character, and one of the things I can consider for character is the fact he was an absconder

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from Illinois.

I also can consider the violent nature of these offenses. It shows someone who's willing and might have killed these women if they didn't consent. It's also frightening when you consider character when in the presentence report as pointed out by defense counsel, the presentence writer expected to see someone who would act more bizarre, but she was struck or he was struck—it's a male—that he expected to be—the offender to behave in a bizarre fashion. "Quite frankly, this agent was surprised the offender behaved like any other offender this agent has interviewed. As a matter of fact, had the agent not read the psychological reports, this agent would have thought the offender was like any other offender this agent had interviewed." Defense saying well, this indicates the fact he's off drugs and alcohol, and this is the type of individual he is.

I think I might feel more comfortable if I know there was an underlying psychological problem that could be handled, but if this is the type of individual he is, someone who appears normal when interviewed, it's frightening what he could do when released back into

the community, and that's why the state made its recommendation.

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I have to consider the community's needs and his needs. The community's needs basically is to be protected. We—the community holds the courts up to the standard of protecting them from violent offenders. And also I have to consider the defendant's needs and he has needs, be it—and the court will accept the fact he has learning disability problems. I will accept the defense version, it's probably consistent, and there might be drug and alcohol problems. There is delivery and possession in his past in juvenile record. But even assuming he was taking drugs or alcohol when he committed these offenses, it shows a complete lack of self-control. And again, we don't know if he committed these offenses while under the influence of alcohol or drugs. So I have to weigh all these factors in here.

The victims in this case have been traumatized. The state says outside of homicide this is—these are the most shocking cases, the most traumatizing. Some of these women I think are going to be traumatized themselves, I know it will affect them the rest of their lives, and I think some sexual assaults can be equated to homicide cases because you rob people of their souls, of their self-respect, and I think this is what happened in this case.

And counsel again argues that he's a product

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of his environment. There are hundreds if not thousands of children who have the same problems in the inner city, but hundreds and not thousands of children grow up to be 17, I don't even know if he's

grown up, to commit crimes so violent at the age of 17. If that's true, we would have thousands of 17-year-olds in here. So I don't think his background makes him a serial rapist, and that's what he is, a serial rapist.

So what we have here is violent offenses, violent sexual assaults, home invasions, threats to kill victims and their babies, pillows used on faces, all this indicates to me that the defendant is a great risk to this community if not other communities if released after a short period of time.

The state has made a recommendation, the defense has countered. I believe the state's recommendation is insufficient, and I try to give great deference to the state recommendation, but it's insufficient to protect the community and is insufficient to punish the defendant.

He has pled or entered Alford pleas so there's somewhat an acceptance of responsibility. And he has avoided forcing the victims to testify, and I will take that in consideration. When given the chance to speak today, he just said he feels sorry for the victims.

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Again, very little if any acceptance of responsibility if one wants to interpret that. But the violence of the offenses and the defendant's prior record is more aggravating and is more of a consideration than the fact that he barely accepts responsibility.

Based upon all these facts and circumstances, the court's going to impose the following sentences. As to count 1, the court is to sentence the defendant to 30 years in Wisconsin State Prison. As to count—that's the first degree sexual assault.

As to count 2, the armed robbery—

MS. FALK: That's count 3.

THE COURT: I'm sorry, count 3, just a second here. The court's going to sentence the defendant to ten years in Wisconsin State Prison, consecutive.

As to count 4, the court's going to sentence the defendant, that is a second degree sexual assault and that's a Class B felony, too?

MS. FALK: No, Your Honor, that would be a class, I think it's a class C. I'm just going to pull my file and make sure. It should be a 10 year felony. I think it's a 10 year felony, but let me just make sure. Yes, it is a ten year felony.

THE COURT: The court's going to sentence the defendant to ten years in the Wisconsin State Prison,

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consecutive to count 3.

As to count 6, the court's going to sentence the defendant to 30 years, again a first degree sexual assault, in Wisconsin State Prison, consecutive to count 4.

As to count 8, the court's going to sentence the defendant to 30 years in Wisconsin State Prison, consecutive to count 6.

As to count 9, the court's going to sentence the defendant to 30 years in the Wisconsin State Prison, consecutive to count 8.

The court feels a longer prison sentence than the state's recommending is needed to protect the community. That probation at the end is not needed due to the length of the court's sentence. I feel that he

needs, counsel says to be warehoused. I think—I view it to be put in prison to protect the community. If it's warehousing, so be it.

Every sentence, as I indicated, to be consecutive. The defendant is a convicted felon, he cannot possess a firearm. He has 20 days to appeal this decision. What are your calculations? That would be, consecutive, would be a total—

MR. LOVE: It's 140 years.

THE COURT: One hundred forty years. That's

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mine. He has 20 days to appeal this decision. What's the sentencing credit?

MR. LOVE: He's been in since—

CLERK: The delinquency petition is dated September 8th. If we compute from September 8th of 1995 to today's date, it's 594 days, but I don't know how long he was in custody before that.

MS. FALK: Before the delinquency petition?

CLERK: Yes.

MS. FALK: Let me see if I can find the date of arrest.

MR. LOVE: The date of the—

MS. FALK: Your Honor, also I think that there are requirements with respect to submitting a blood sample.

THE COURT: The defendant will, it's DNA—he'll commit—submit a sample of saliva, I don't think it's blood, for the DNA bank. It says saliva rather than blood. Also as a convicted felon of first degree sexual assault, if he's ever paroled, he cannot be employed in

any job where children are present or be a volunteer where children are present.

MS. FALK: His arrest date was September 7th of 1995.

THE COURT: Okay, I'll give him credit from

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September 7th.

CLERK: That's 595 days.

THE COURT: I'll award 595 days.

CLERK: As to count 1.

THE COURT: And he has 20 days to appeal this decision.

CLERK: And the mandatory surcharges are ordered imposed?

THE COURT: Seventy dollars as to each count.

CLERK: Thank you.

* * * * *

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STATE OF WISCONSIN)
) ss
MILWAUKEE COUNTY)

I, Beth J. Fringer, Official Reporter, certify that I reported the foregoing proceedings and this transcript is true and correct in accordance with my original machine shorthand notes taken in said proceedings.

Dated: May 19, 1997

s/ Beth J. Fringer,

APPENDIX F

STATE OF WISCONSIN	:	CIRCUIT COURT BRANCH 43	:	MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. F-954600

RICO SANDERS,

Defendant.

TRANSCRIPT OF PROCEEDINGS

CHARGES: First Degree Sexual Assault (4 Counts)
Armed Burglary (2 Counts)
Armed Robbery
Second Degree Sexual Assault
Aggravated Burglary (2 Counts)

ADJOURNMENT

June 11, 1996 THE HONORABLE DIANE S. SYKES
Circuit Judge, Presiding

A P P E A R A N C E S

MIRIAM FALK, Assistant District Attorney, appearing on behalf of the state.

EDWARD LITTLE, Attorney at Law, appearing on behalf of the defendant.

E. DUKE McNEIL, Attorney at Law, appearing on behalf of the defendant.

Defendant present in court.

MARY K. POVLICK – Official Reporter

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P R O C E E D I N G S

THE CLERK: State of Wisconsin versus Rico Sanders, F-954600, first degree sexual assault four counts, armed burglary, two counts, armed robbery, second degree sexual assault and aggravated burglary, two counts.

MS. FALK: The state is appearing by assistant D.A. Miriam Falk.

MR. LITTLE: Edward Little along with E. Duke McNeil appears on behalf of Rico Sanders who is now present.

THE COURT: All right. The case is scheduled for trial today. At the last court appearance, however, due to some bizarre behavior the defendant was exhibiting in court, I ordered a competency reevaluation be conducted by Dr. Palermo who did an initial competency evaluation of the defendant sometime ago and found him at that time competent to proceed.

Dr. Palermo has returned to me a report based on his reevaluation of the defendant which occurred on

June 6 of this year and has indicated in that report his opinion that the defendant is not now competent to stand trial to a reasonable degree of medical certainty. He cannot offer a specific diagnosis that underlies that opinion that he is offering to the court. He said it

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could be one of a number of different things, including Ganser's syndrome which he indicates is prison psychosis. It could also include schizophrenia, catatonic type, and he says it could also be malingering.

So based on his opinion that he is offering that the defendant is not now competent to stand trial but the diagnosis at this time being uncertain due to the limitations of the evaluation that he performed, he recommends that the defendant be transferred to the Winnebago Mental Health Institute for further observation for at least about a month for diagnostic purposes to further diagnose whether the defendant is competent or not and arrive at a specific psychological or psychiatric diagnosis and possible treatment to competency based upon the results of the inpatient evaluation.

The doctor does not offer an opinion about competence to refuse medications at this point, I suppose based on the fact that he can't really offer an opinion about what the explicit diagnosis is at this point. In any event, that's a summary of the doctor's report at this time.

What's the state's position for the record on Dr. Palermo's new report?

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MS. FALK: Your Honor, the state would be challenging the finding or the conclusion of competence, and I would be requesting that the court appoint Dr. Stephen Emiley to do an evaluation and return that report within the next week and a half.

THE COURT: All right. And the defendant's position?

MR. LITTLE: The defense's position is trying to understand. As I understand the scenario, there was an evaluation. There is a subsequent evaluation ordered by the state and the court. That evaluation comes in, and is the state taking the position—can they just willy-nilly say we don't want to accept that one? I don't know where they are.

THE COURT: Well, either party has the option of challenging a psychiatric report on the issue of competency, and then there is a certain burden of proof that goes along with that if we get to the point of having to have a hearing on this, and so the state as well as the defense would have a right to ask for the appointment of an additional doctor if there is disagreement with the conclusions of the doctor who was originally appointed. And at this point the state is indicating that challenge or objection to the doctor's conclusions and is asking for another expert to be

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appointed.

We were in basically the opposite situation with Dr. Palermo's first report. He was reporting that the defendant was competent because he perceived his behavior to be characteristic of malingering, and then

there was a request for a defense expert which you were gonna hire rather than have the court appoint, as I recall the scenario, and then we ultimately came back with Dr. Palermo's report being the one that stood as far as the defendant's competence was concerned.

Now we're in the opposite position. Dr. Palermo has revised his opinion, and as I summarized previously, the state has a right to have their doctor appointed for a second opinion, and depending upon the results of that opinion, will either withdraw its objection or persist in its objection and we'd have a hearing, and the parties can take whatever position they are going to take at that point in time. Go ahead.

MR. LITTLE: Is the court disposed toward following any of the, quote, recommendations of Dr. Palermo, to wit, that he go to Winnebago for a period and have inpatient evaluation?

THE COURT: Well, at this point that's the only opinion that I'm being offered at this time, so I would be inclined to following his recommendation in the

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absence of any objection or countervailing opinion. The state has asked for an opportunity to have another doctor appointed to have a second opinion and further develop the record on this issue, and they have a right to do that, so I'm not going to send him off to Winnebago anticipatorily. That would not be appropriate.

So at this point I will permit the state to maintain its objection. It has a right to do that. I will at the state's request appoint Dr. Emiley to perform a second evaluation of the defendant and will schedule the

matter for a hearing. He said he could do it in the next week and a half?

MS. FALK: Yes.

THE COURT: Let's schedule a hearing for early next week then, and if you would like to subpoena Dr. Palermo to court for that hearing to have him come to court and testify and flesh out his report a little bit, you are certainly free to do that in anticipation of what Dr. Emiley's position might or might not be, we'll see.

MS. FALK: I could do it next week Wednesday.

MR. McNEIL: Judge, a week and a half, you're talking next Wednesday. How is that week and a half for preparing a report?

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THE COURT: Is that how much time he was requesting? He was going to go do some testing.

MS. FALK: Right. He felt he would do the testing this week. And I said I would be willing to convey those results back. I think we can do it on Wednesday.

THE COURT: All right. Is there a problem with that date?

MR. McNEIL: What number date is that?

THE CLERK: That's June 19th.

THE COURT: You're here on Wednesday?

MS. FALK: I'm here on Wednesday. I don't leave until Wednesday after work.

MR. McNEIL: Because we were preparing for trial, we didn't bring our schedules.

MR. LITTLE: We were committed here for the week.

THE COURT: Needless to say, the trial is suspended and the proceedings will remain on suspended status pending the outcome of this evaluation and hearing. Why don't we set the hearing on Wednesday. If there is a problem with it, you can get back to me.

MR. LITTLE: All right.

THE COURT: I hope there isn't because the prosecutor is then out of town on Thursday and Friday,

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so hopefully that date will be acceptable.

MR. McNEIL: When is she back?

MS. FALK: I could do it again on Monday, the 24th.

MR. McNEIL: So those are our two options, the 19th or 24th.

THE COURT: I would rather do it sooner than later. The defendant has been sitting a long time on this case. This case is getting very old. I would like a closure to this case one way or another as soon as possible. Let's set it for the 19th and hope that that date works out for everyone.

MR. LITTLE: For my own edification, what's the name of the new psychologist being appointed?

THE COURT: Dr. Stephen Emiley. He is not in the present forensic unit. He is a private doctor. Dr. Emiley.

MR. LITTLE: Stephen Emiley.

THE COURT: Correct.

MR. LITTLE: Counsel, you will provide us with a curriculum vitae and that type of thing?

MS. FALK: Sure.

THE COURT: Anything else at this point?

MS. FALK: Not from the state.

THE COURT: All right.

Page 9

MR. LITTLE: Is that at 8:30?

THE COURT: 8:30. Thank you. This is pursuant to section 971.14 sub. (2)(a).

(End of Proceedings)

Page 10

STATE OF WISCONSIN)
) ss CERTIFICATE
MILWAUKEE COUNTY)

I, Mary K. Povlick, Registered Professional Reporter, do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of 10 pages, has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated at Milwaukee, Wisconsin, this 30th day July, 1997.

s/Mary K. Povlick
Mary K. Povlick
Registered Professional Reporter

APPENDIX G

DEPARTMENT OF CORRECTIONS **WISCONSIN**
Division of Adult Institutions
DOC-3473 (Rev. 6/04)

PSYCHOLOGICAL SERVICES
CLINICAL CONTACT

OFFENDER NAME Sanders, Rico	SOURCES OF INFORMATION
DOC NUMBER 331049	☒ Clinical Interview ☒ PSU file
INSTITUTION GBCI	☒ Social Services File ☐ HSU chart
DATE 10/5/04	☐ Psychological Testing ☐ Other

REASON FOR CONTACT

Inmate request, indicating Mr. Sanders has been double celled, is not "getting along" with his cellmate, and that Mr. Sanders believes his cellmate is "continuously spying on me and making fun of me to his friends."

RELEVANT HISTORY

The inmate is serving a total sentence of 140 years on a 1997 conviction for 1st Degree Sexual Assault, Armed Robbery, and 2nd Degree Sexual Assault. He has a PED of 9/7/2030 and MR of 2089. He began

reporting auditory hallucinations in May 1997. He has received a variety of mental health diagnoses, including History of Schizophrenia (Chronic, Undifferentiated), History of Hallucinogen-Induced Persistent Perceptual Disorder, and PTSD, and has been treated with antipsychotic and sleep-enhancing medications.

OFFENDER'S REPORT

Mr. Sanders complained of being unable to sleep or defecate in the presence of his cellmate, feels "uncomfortable" and "uneasy," and worries that his cellmate may "come after me" if he is on the toilet. He described himself as "not trusting" and "fearful." Mr. Sanders requested that he be placed again in a single cell. At that point, I suggested that his continued reports of paranoia, auditory hallucinations, and aggressive impulses stronly indicate that he is in need of more treatment than is available to him here at GBCI. He initially objected to this strongly, stating "I don't think I'm crazy...I'm misunderstood...I'm just a regular person." After a lengthy discussion of his symptoms, treatment needs and treatment history (especially his perception of the treatment he received at Mendota Mental Health Institute in 1996), Mr. Sanders expressed agreement with a recommendation of a referral to WRC for assessment and programming that would be aimed at helping him cope more effectively with his problems and with the stresses of incarceration.

MENTAL STATUS

Alert, oriented, no unusual psychomotor behavior observed. Affect was limited in scope range and continues to reflect dysphoric/irritable mood. No thought disorder characteristics were observed. Mr. Sanders continues to report distress associated with the "voices" that he hears. He denied active intent or plan to harm himself or others.

DIAGNOSES

Axis I PTSD, by History; Substance-Induced Persistent Hallucinosis, by History

Axis II Antisocial PD, by history

Axis III (If Relevant) **Deferred to HSU**

TREATMENT PLAN/FOLLOW-UP

I will recommend Mr. Sanders be placed again on Red Tag status and will complete a referral for WRC. In the interim, he will be followed to assess stability and acceptance of this referral.

☐ MH code has changed ☒ MH code has not changed

☐ **MH-0** No MH need	☐ **MH-1** MH need (not *SMI)
☒ **MH-2** Diagnostic SMI or Functional SMI	☐ **MH-3** Mental Retardation

CLINICIAN SIGNATURE	DATE SIGNED
Steven Schmidt, Ph.D. s/ Steven Schmidt, Ph.D.	10/6/04

DEPARTMENT OF CORRECTIONS **WISCONSIN**
Division of Adult Institutions
DOC-3473 (Rev. 6/04)

**PSYCHOLOGICAL SERVICES
CLINICAL CONTACT**

OFFENDER NAME Sanders, Rico	SOURCES OF INFORMATION
DOC NUMBER 331049 INSTITUTION GBCI DATE 10/5/04	☒ Clinical Interview ☒ PSU file ☒ Social Services File ☐ HSU chart ☐ Psychological Testing ☐ Other

SUPERVISOR'S SIGNATURE (If Needed)	DATE SIGNED

* SMI – Serious Mental Illness

DISTRIBUTION: Original – PSU Record (DOC-3370A); Copy – HSU (file in DOC-3370); Copy – Social Services File Confidential Section; Copy – CRU

APPENDIX H

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PSYCHIATRIC REPORT

SANDERS, RICO 331049-A GBCI
07-21-97

IDENTIFYING INFORMATION: This patient is an 18-year-old Afro-American male who is serving 140-year sentence. He had been at Dodge Correctional Institution for two months and has been here at GB Correctional Institute since July 1, 1997.

PRESENTING PROBLEM: He had been hearing auditory hallucinations. He would hear voices which would tell him something with reference to all the people in the world. He also had delusions he felt that people were talking about him. He also, in the past when he took LSD, would see trees moving and snipers shooting at him. He has had many suicidal thoughts in the past but not at present. When he was 14 years old, he attempted suicide by hanging himself from a tree. Presently, he does not feel depressed.

PAST PSYCHIATRIC HISTORY: He had been in Mendota Mental Health Institute for a period of one-half year; that was when he was 17 years old. When

he was discharged from there, he was on Navane, Artane and Ritalin. At one time, he was diagnosed as having attention deficit/hyperactivity disorder but does not have those symptoms at this time.

He used LSD on a daily basis from the ages of 14 to 16 years of age. He would have hallucinations as mentioned above; that is seeing trees move and snipers shooting at him. He occasionally has had flashbacks of this. He does have a startle response. He used cannabis from the age of 12 until the age of 16 on a daily basis. He would become intoxicated with some alcoholic beverage approximately three times a week from the age of 12. He would smoke approximately a package of cigarettes daily. He began smoking at the age of 13 years.

FAMILY HISTORY: He was the youngest of seven children. When asked about his formative years, he relates his mother was good to him. He felt close to her emotionally and could talk to her. When asked about his father, he relates his father sexually molested him when he was 5 or 6 years old. To his knowledge, it was never reported. His father died when the patient

* * *

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PSYCHIATRIC REPORT

SANDERS, RICO 331049-A
07-21-97
Page 3

DIAGNOSIS:

AXIS I. Schizophrenia, chronic undifferentiated type.
Post-hallucinogenic perceptive disorder (LSD).
Past history of cannabis abuse.
Past history of depressive disorder, at times major, presently not depressed.
Past history of attention deficit/hyperactivity disorder, now asymptomatic.

AXIS II. None identified.

AXIS III. Apparent good physical health.

AXIS IV. Psychosocial stressors and environmental conditions have been rather severe, being sexually molested when he was very young, no real father figure throughout the years and now a long incarceration.

AXIS V. Global assessment of functioning the past year has been in the realm of Code 40.

TREATMENT PLAN: He will be seen in approximately one month for follow-up.

s/John Gehring, M.D.
John Gehring, M.D.
Consulting Psychiatrist
Bureau of Health Services

JG/cls, T: 7/27/97, cc: CS, SS, Agent
OM/VKaj025.N/27

APPENDIX I

TYRONE CARTER, Ph.D.
CONSULTING PSYCHOLOGIST

NATIONALLY LISTED HEALTH SERVICE PROVIDER IN PSYCHOLOGY

1840 N. FARWELL AVENUE SUITE 300
MILWAUKEE, WISCONSIN 53202

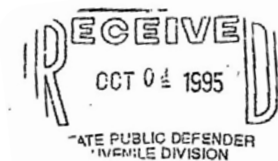
TELEPHONE 276-8381
FACSIMILE 276-8386

PSYCHOLOGICAL EVALUATION

October 2, 1995

To: Attorney Pat Devitt,
Assistant State Public Defender
10930 Potter Road, Suite D
Wauwatosa, Wisconsin 53226-3424

Re: Rico Sanders
Court Case #: 03270180



INTRODUCTION

Rico Sanders is a fifteen year old male who was referred for psychological evaluation subsequent being charged with eleven counts of illegal transgression which relates to sexual assault and burglary charges. Because of the seriousness of those charges, the

Milwaukee County District Attorney's Office is petitioning that the client's jurisdiction be waived from the Children's Division of Circuit Court to the Adult Division of Circuit Court. Psychological evaluation was requested in order to assist in determining the most appropriate venue and disposition of the case. Thus, the young man was initially seen and subsequently evaluated by this psychologist on September 19, 1995.

BACKGROUND INFORMATION

Rico Sanders has been detained at the Milwaukee County Children's Court Center since September 7, 1995. Prior to that time, he had resided in Milwaukee with a brother, the brother's girlfriend, and several other relatives, but Rico actually ran-away from his brother's home in August 1995. Thus, he was basically transient at the time of his detainment.

Information provided to this psychologist by Ms. Mary Webber, Client Service Specialist, includes extensive background information regarding this client's family, educational, and social background. Included are records which indicate that this client has been historically subjected to extremely traumatic and dysfunctional family circumstances, including the tragic death of his older brother Rodney. It is also indicated that Rodney was "a very stable force in the family. He especially looked out for Rico and Tonya." Further, it is indicated that the older brother served as a positive adult role model, and that Rico's problems intensified subsequent to his brother's death. The client had also been previously devastated subsequent to the death of his biological father as well. It is also indicated that Rico himself, had been subjected to

death threats and severe assaults from rival gang members.

The information provided also includes an interview with the client's mother, Ms. Pearline Sanders. Ms. Sanders' interview revealed the fact that Rico has a long history of suicidal attempts; indicating that "Rico tried to kill himself every summer since he was about eight years old." It is also indicated that the young man is claustrophobic; has historically engaged in negative attention-seeking behaviors; has attempted to mutilate other siblings; has a history of chronic alcohol/substance dependency; and a history of chronic runaway behaviors. However, in spite of this record of dysfunctionality, the client has never participated in any structured rehabilitative treatment programs.

The information provided also revealed that Rico had sustained a gunshot wound through gang-related activity. The mother also states that he has a history of severe learning difficulties, but has never participated in special education programming. She apparently feels that Chicago Public Schools and the criminal justice system in that city, had failed to provide adequate services for her son. Because of this apparent history of depravity, Ms. Sanders is said to have described her son as "the kind of kid that talked about his own funeral since he was eight years old."

Additional information reveals that Rico last attended the Park Manor Grammar School in Chicago, Illinois. That information describes Rico as "a troubled child" with a history of behavior problems, absenteeism, and poor scholastic performance. It is also indicated that Rico was frequently involved in gang-related activity

as well. Reportedly, gang members had severely beaten him on the occasion of his grammar school graduation, he was "beat-up so bad that he was not able to walk across the stage to receive his diploma." Death threats from gang members reportedly prompted Rico to move to Milwaukee.

Information provided by the girlfriend of the brother with whom he most recently resided, indicated that Rico "does not seem to know right from wrong." That person also agrees that Rico and his whole family have been quite devastated and traumatized because of the death of their brother. She also feels that Ms. Sanders has "done her best" to care for her son, but feels that "Rico needs real serious help." It is also indicated that he has needed help for a long-time, and that he has had a hard time adjusting to the city of Milwaukee. She also indicates that he is prone to temper-tantrums and pouting. Finally, the girlfriend reportedly intimated the following irrational behaviors; "he washed his face with household bleach one day because that is how he thought you bleach your skin, he also ate hair grease thinking it was jam, …he dangled her nine month baby out of a window two stories up."

Finally, the information provided reveals a history of prior illegal transgressions while the young man resided in Chicago, Illinois. Specifically, between January 5, 1994 and August 3, 1994, he was involved in five offenses which related to vehicle and substance possession violations.

MENTAL STATUS EXAMINATION AND CLINICAL INTERVIEW

Rico Sanders presents as a quite slim African-American male of average height and medium-brown complexion, who appears his stated age of fifteen years. Although, slightly unkempt in appearance, he was nonetheless adequately groomed and appropriately dressed in casual attire. No visual or audiological impairment was evident. Further, Rico's speech appeared fluent, coherent and appropriate in content. He did appear quite dysphoric in mood, although he exhibited no psychotic symptoms and appeared oriented in all spheres.

The client proceeded to verbalize in a clear and unrestricted manner as he responded to all questions that were presented to him. Specifically, Rico confirmed the current allegations against him. Rico states that he burglarized his victims because of the fact that he was destitute and had no place to live since he had runaway from his brother's home. He states that he ran-away subsequent to violating the family curfew, which he suspected would result in severe punishment. During this time, Rico states that he often slept in cars, vacant buildings, or with "friends if I could."

The young man proceeded to admit that he had committed the sexual assaults after the initial break-ins. He states that he usually became sexually aroused after observing his victims in bed or partially clothed. That stimuli, in turn, triggered his sexual urges and resulted in the subsequent assaults. Rico appeared extremely remorseful because of his misdeeds, and especially because of his sexual

misconduct. He also willingly accepted full responsibility for his behaviors, but indicated "every time I did it I was drunk."

The client continued to confirm a history of chronic alcohol and marijuana use. He states that he began using marijuana and alcohol about three years ago and that he used extensive amounts on a regular basis until his detainment. He states, in fact, that the motivation for his burglaries was to provide himself with the money to obtain marijuana.

Previous information provided to this psychologist had indicated that Rico smoked "ten to twenty blunts" a day. It is also indicated that he drank alcohol every three days and usually drank a pint at a time. He also drank alcohol just before his detainment as well. Further, information reveals that the young boy had frequently been experienced blackouts, tremors, excessive perspiration and had developed an increased tolerance for alcohol and marijuana through the years. He also is said to have exhibited hallucinations, memory loss, paranoia, and severe cravings when he does not have access to alcohol or marijuana. The young boy confirmed the accuracy of these statements and also volunteered, that he "definitely feels out of control when using."

This client continued to admit to an asthmatic disorder which requires occasional "over-the-counter" medication. He also admitted that he had sustained a gunshot wound to his right leg which resulted from gang involvement. At this time, Rico confirmed that he had indeed moved to Milwaukee in an effort to escape gang threats to his life. The client also intimated a history of suicidal ideations and attempts,

including one suicidal attempt since his recent detainment. He also admitted to a history of severe learning difficulties as well. However, in spite of these multiple problems, the young man confirmed that he had never participated in any structured rehabilitative treatment programs. When granted three hypothetical wishes, the client responded as follows:

1. I wish for forgiveness.
2. I wish I could get up out of here.
3. I wish my life could be better.

DIAGNOSTIC ASSESSMENT

In order to determine Rico's current intellectual functioning, the Revised Edition of the Wechsler Intelligence Scale for Children was administered. Results generated by that instrument are as follows:

WISCH-R

VERBAL SUBTESTS		PERFORMANCE SUBTESTS		IQ PRODUCTIONS	
Information	6	Picture Completion	8	Verbal IQ	65
Vocabulary	5	Picture Arrangement	9	Performance IQ	84
Arithmetic	4	Block Design	8	Full Scale IQ	72
Comprehension	4	Object Assembly	7		
Similarities	3	Coding	6		

Thus Rico Sanders obtained a full scale quotient of 72 on the Wechsler Intelligence Scale for Children. That production was based on a verbal quotient of 65 and a performance quotient of 84. This particular profile is indicative of one who may present with specific learning disabilities. However, similar profiles are also quite prevalent among those who may have been culturally isolated or who have significantly higher potential within mechanical areas as opposed to social/cultural areas. An analysis of Rico's subtest patterns indicates that he exhibited highest ability on a task requiring skill in ascertaining and sizing up a total social relationship. That particular subtest measured in the low-average range. His lowest measured subtest fell in the mental deficient range, and involved a task requiring verbal concept formation. All other measured subtests were in the borderline or low-average ranges as well.

The Revised Edition of the Wide Range Achievement Test was also administered in order to determine this

client's current academic capabilities. Those results are as follows:

WRAT-R

SUBJECT	STANDARD SCORE	PER-CENTILE	GRADE EQUIV-ALENT
Reading	59	.7%	-3
Spelling	64	1%	-3
Arithmetic	70	2%	5E

This client's current academic skills are drastically low and his reading/spelling deficiencies would categorize him as extremely illiterate. It is suggested that specific learning disabilities, as well as, environmental and emotional factors account for the client's severe academic deficiencies. It is also suggested that he might improve his skills somewhat, if he is properly motivated, controlled, and instructed.

The Bender Visual-Motor Gestalt Test was also administered in an effort to determine if Rico might present with significant visual/perceptual or other organic impairment. His performance resulted in several angulation errors and thus, substantiates the possibility of such difficulty.

In an effort to determine this client's current personality profile, the Incomplete Sentences Blank, House-Tree-Person Projective, Bender Visual-Motor Gestalt Test, the MMPI-A, social/court records, and clinical interview were utilized. That assessment reveals a quite despondent and extremely ineffectual person with a long history of dysfunctional family circumstances, highlighted by traumatic family experiences. It is also suggested that Rico has been historically exposed to extremely negative social,

environmental, and peer influences as well. Additionally, he presents with a history of severe learning deficiencies and behavioral disorders. In his futile effort to escape negative aspects of this reality, this young man may have resorted to fantasy and other escapist behaviors which contributed to subsequent alcohol/marijuana dependency. This young man also appears quite emotionally fragile, impulsive, and seems to have many unfulfilled affectional needs. Subsequently, it is suggested that he is quite vulnerable, and may have frequently engaged in illegal/asocial activity in his effort to earn respect and esteem from others. However, his attitudes failed to accomplish that objective; rather contributing to even more severe despondency which has resulted in apparent suicidal ideations and attempts.

The administration of the MMPI-A proved invalid because of the young man's tendency to itemize items as true regardless to their content. Nonetheless, that administration revealed significant critical items which would strongly substantiate the possibility of alcohol/substance dependence, suicidal behaviors, and family problems. All of these factors, in turn, appears to have contributed to a very substantial degree of generalized depression.

Throughout the diagnostic evaluation, Rico continued cooperative and seemed interested in all tasks that were administered to him. Because he appears to have made a good effort to complete all tasks to the best of his ability, all results are considered valid.

SUMMARY, DIAGNOSIS, AND RECOMMENDATIONS

Rico Sanders is a fifteen year old adolescent male who is currently functioning within the borderline range of intelligence. However, it is strongly suspected that his overall intellectual/academic performance may have been adversely effected by specific learning disabilities as well as environmental and emotional factors. Visual/perceptual functioning appears immature as well. Personality assessment suggests a quite despondent and dysphoric person with strong feelings of rejection, dysfunctional family circumstances, negative environmental/peer influences, family trauma, learning problems and depression.

Diagnosis DSM III-R Classification

Axis I	312.90	Conduct Disorder, Undifferentiated Type
	304.30	Cannabis Dependence;
	303.90	Alcohol Dependence;
	296.3	Major Depression, Recurrent
Axis II	V40.00	Borderline Intellectual Functioning
	315.50	Mixed Specific Development Disorder (DSM III Classification)
Axis III		Asthma; Gunshot Injury to Right Leg
Axis IV		Psychosocial Stressors: Dysfunctional Family Circumstances; Family Trauma; Negative Environmental/Peer Influences; Drug-Cravings; Learning Problems

	Severity 4: Severe (Predominately Enduring Circumstances)	
Axis V	Current GAF:	40
	Highest GAF Past Year:	45

Thus, in summary, Rico Sanders presents as a young man with severe intellectual, academic, emotional and substance abuse difficulties which relates primarily to dysfunctional family circumstances, negative environmental/peer influences, and possible organic learning difficulties. It is suggested that these difficulties, in symphony, have accounted for severe attitudinal and behavior disorders; including the illegal transgressions for which he is presently charged. This psychologist considers it amazing that he has never participated in rehabilitative treatment programs to address any of his numerous needs. Nonetheless, this young man might prove quite responsive to positive treatment programs which are available to the Children's Division of Circuit Court. It is also suggested that sufficient time remains within that venue to effect positive attitudinal and behavior change. Thus, the preceding recommendations are suggested:

Because of the extremely heinous nature of the alleged transgressions, it is suggested that incarceration is necessary in order to assure the safety and well-being of others, and also to provide a punitive aspect to the client's overall rehabilitation program. However, that facility should provide for inpatient psychiatric care and alcohol/substance abuse treatment as well. Rico appears to have chronic severe needs in these areas, and appears quite amenable to participating in

appropriate treatment programs. His particular disorders have also proven to be quite treatable as well. Because of this fact, his motivation, and the lack of previous treatment, this psychologist speculates that treatment might prove quite successful at this time.

It is also suggested that the receiving institution provide for the client's educational needs as well. As previously stated, he presents with severe intellectual/academic deficiencies including specific learning disabilities within the areas of reading and spelling. Thus, it is suggested that his educational program and curriculum be adjusted in such a manner as to accommodate his apparent disabilities. Improved academic facility may also serve to further enhance his self-concept as well.

This young man also appears in dire need of positive adult and peer role models and may prove receptive to any educational, recreational, or social service programs providing such figures. Thus, all such programs available to his receiving correctional facility should be considered as well.

Finally, it should be reiterated that this psychologist feels that sufficient time remains for rehabilitation during the time that this client is eligible for juvenile incarceration. This opinion is based primarily on the fact that the client appears quite motivated for change at this time, and there is no record of previous treatments which would suggest non-compliance. It should also be mentioned that this client's affective and dependency disorders can be successfully treated within a relatively short period of time. However, if significant positive attitudinal and behavior change

has not been evidenced by the time the client has reached the age of eighteen, any necessary extensions should be employed in order to assure continued incarceration and extended treatment. Such a safeguard appears quite imperative in order to assure that other people will not be subjected to similar threat and danger.

If I may be of any further assistance regarding this client, please do not hesitate to contact me.

Very truly yours,

s/ Tyrone Carter, Ph.D.
Tyrone Carter, Ph.D.
Consulting Psychologist

msm

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

RICO SANDERS,

Petitioner,

v. Case No. 11-cv-868

SCOTT ECKSTEIN,

Respondent.

BRIEF IN SUPPORT OF PETITION

Rico Sanders,
Pro se'
s/ Rico Sanders
Rico Sanders 331049
P.O. BOX 19033
Green Bay, WI 54307-9033

JURISDICTION, VENUE, AND PARTIES

Rico Sanders files this brief in support of his petition for writ of habeas corpus pursuant to 28 U.S.C. §2241 and §2254. Mr. Sanders is currently in the custody of the respondent, the warden of Green Bay Correctional Institution in Green Bay, Wisconsin, "in violation of the constitution or laws or treaties of the United States." Id. §2241(c)(a), §2254(a). Venue is proper in this Court as Mr. Sanders was convicted in the circuit court of Milwaukee County, within this federal district. Id. §2241.

PROCEDURAL POSTURE AND EXHAUSTION

Following a waiver from juvenile court, fifteen year old Rico Sanders was charged in adult court with three counts of First Degree Sexual Assault, three counts of Armed Burglary, one count of Armed Robbery (use of force), one count of Second Degree Sexual Assault, and two counts of Aggravated burglary. While the case was pending, the petitioner's competence was questioned multiple times, resulting in a stay for the petitioner diagnosis at the Mendota Mental Health Institute. See Respondent's answer Ex. BB and CC. Ultimately, the trial court, the Honorable David A. Hansher presiding, found the petitioner competent. Id.

On March 11, 1997, the petitioner, represented by Martin Love, entered Alford pleas before the Honorable David A. Hansher of the Milwaukee County trial court, to 4 counts of First Degree Sexual Assault, 1 count of Second Sexual Assault, and 1 count of Armed Robbery (use of force). The trial court, Honorable David A. Hansher, sentenced the petitioner to an aggregated sentence of 140 years in prison.

On March 15, 2006, the petitioner filed a Petition for a Writ of Habeas Corpus pursuant to *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992) in the Wisconsin Court of Appeals. The petition sought reinstatement of his appellate rights. The Wisconsin Court of Appeals granted that petition on September 8, 2006. see Respondent's answer Ex. B.

On February 28, 2007, the petitioner filed a Postconviction Motion pursuant to sec. § 809.30, stats., seeking to withdraw his Alford pleas on the grounds that they were not knowingly, voluntarily, and intelligently entered because he did not understand the elements of the offense and did not understand the terms of the agreement. On June 11, 2007, the Honorable Jeffery A. Wagner presiding, entered an order denying the Postconviction Relief in the circuit court for Milwaukee County.

On October 10, 2007, the petitioner appealed the circuit court decision on the grounds that his pleas was not knowingly, voluntarily, or intelligently entered because he did not understand the elements of the plea agreement, to the Wisconsin Court of Appeals. On September 9, 2008, the Wisconsin Court of Appeals affirmed the Circuit Courts decision. See Respondent's answer Ex. C.

On September 24, 2008, the petitioner petitioned the Wisconsin Supreme Court for review on the grounds of whether a guilty plea is knowing, intelligent, and voluntary is a real and significant question of State and Federal constitutional law. see Respondent's answer Ex. G. On December 15, 2008, the Wisconsin Supreme Court denied the petitioner's petition for review. See Respondent's answer Ex. I.

On December 7, 2009, the petitioner filed a Motion for Postconviction relief pursuant to section §974.06, stats., in Milwaukee County Circuit Court on the grounds of ineffective assistance of postconviction counsel for failing to raise and, or, argue a number of constitutional issues including failing to raise and properly argue the petitioner's mental deficiencies with psychological evidence that would have explained why he lacked understanding of some of the courts proceedings; and failing to raise and argue the petitioner did not know or understand that he was waiving the constitutional right to have the state prove that he committed each element of the crimes charged. On December 15, 2009, an order denying the petitioner's Motion for Postconviction Relief was entered by the Honorable David A. Hansher.

On May 11, 2010, the petitioner appealed the circuit court decision to the Wisconsin Court of Appeals on grounds of Ineffective Assistance of postconviction Counsel for failing to properly argue on direct appeal trial courts failure to properly inform him of his constitutional rights, and whether he understood those rights he was waiving by entering his pleas. see Respondent's answer Ex. J. On March 15, 2011, an unanimous three-panel judge affirmed the circuit court decision. see Respondent's answer Ex. K.

On March 21, 2011, the petitioner filed a petition for review in Wisconsin Supreme Court on the grounds that his Postconviction counsel was ineffective for failing to raise and argue trial court's failure to inform him of his constitutional rights he was waiving and his understanding of them. see Respondent'd answer Ex. N. On June 15, 2011, the Wisconsin Supreme Court

denied the petitioner's petition for review. See Respondent's answer Ex. O.

On September 14, 2011, the petitioner filed his original application for Writ of Habeas Corpus under 28 U.S.C. § 2254, which was a mixed petition raising: 1). thiat his conviction and sentence were imposed in violation of the state and federal constitution; and 2). Requested a stay and abeyance while he raised his unexhausted issues on the state level.

On may 1, 2012, the petitioner filed a motion for postconviction relief pursuant to sec. 974.06, stats., in the trial court raising: 1). Whether his current sentence affords him a meaningful opportunity for parole under Graham's ruling; and 2). The petitioner is entitled to a sentence modification on the grounds that sentencing him to 140 years in prison as a juvenile constitute cruel and unusual punishment in violation of the Eigtht Amendment and Article I, Section 6 of the Wisconsin constitution. On May 15, 2012, the honorable David A, Hansher presiding, denied the petitioner's motion for postconviction relief.

On March 31, 2013, the petitioner argued in the Wisconsin Court of Appeals whether his sentence affords him a meaningful opportunity for parole; and that his sentence was unduly harsh and excessive in violation of the U.S. constitution. See respondent's answer Ex. P. On August 5, 2014, the Court of Appeals affirmed the trial court decision. See Respondent's answer Ex. S.

On October 1, 2014, the petitioner filed a petition for review in the Wisconsin Supreme Court that he was entitled to relief because 1). The question of whether his current sentence affords him a meaningful

opportunity for parole is a significant constitutional question; and 2). Sentencing the petitioner to 140 years in prison as a juvenile without considering mitigating factors such as age and culpability is unduly harsh and excessive because (a). it was disproportionate to his age; and (b). his sentence was disproportionate to his individual culpability. See. Respondent's answer Ex. T. On November 17, 2014, the Wisconsin Supreme Court denied the petitioner's petition for review. See respondent's answer Ex. U.

On December 5, 2016, the petitioner filed an amended petition in this court raising: 1). His Alford pleas was unconstitutional and in violation of his fundamental due process under the Fourteenth Amendment given that it was not entered knowingly, intelligently, or voluntarily because trial court failed to comply with Wisconsin §971.08 (1)(a) and other mandatory duties and he failed to understand the elements of the crimes to which he was pleading guilty; 2). Whether his current sentence afford him a meaningful opportunity for parole under Graham's ruling; and 3). His sentence is unduly harsh and excessive in violation of the Eighth Amendment of the U.S. Constitution.

FACTUAL BACKGROUND

Prior to the entry of the pleas in this case, original defense attorneys Edward Little and E. Duke McNeil questioned the petitioner's competency on several occasions. The trial court, the Honorable Diane Sykes, held the first competency hearing on March 15, 1996. At that hearing, George Palermo, a forensic psychiatrist, found the petitioner to be of low average intelligence, noted that he has been administered medications, and further stated that he did not

personally observe the petitioner's interactions with people at the jail. He noted that the petitioner reported hallucinating visions of a monkey and a dog, and that use of drugs and alcohol can sometimes produce auditory and visual hallucinations. Nevertheless, Dr. Palermo testified that he believed that the petitioner was competent, and the trial court adopted his opinion.

On June 5, 1996, at was supposed to be the final pretrial hearing in this case, the petitioner began getting up, whistling and snapping his fingers as though calling a dog. See Respondent answer Ex. W. Based upon his behavior, defense counsel requested, and was granted a reevaluation of the petitioner's competency. See id. Dr. Palermo then reevaluated the petitioner and reached the conclusion that he was not competent. Dr. Palermo recommended transferring the petitioner to Winnebago Mental Health Institute for diagnostic purposes. See Respondent's answer Ex. X. The Prosecutor hired their own doctor to evaluate the petitioner. The prosecutor hired Dr. Stephen Emily, who also concluded that the petitioner was incompetent. See id. The Court then ordered that the petitioner be sent to Mendota Mental Health Institute. Id.

Another competency hearing was held on December 19, 1996. See Respondent's answer Ex. Y. Dr. Molli Rolli, a psychiatrist, testified that she believed that the petitioner was competent. See id. She noted that his mother had indicated that he had been tested in the past and had a third grade reading level. See id. She noted that she did not test his reading and that she believed, based upon comments from his teacher there, that he had approximately a junior high reading

level. See id. She believed that he had an average to low average intelligence. Id. The trial court then found the petitioner competent.

Thus, at the time of the plea, the petitioner was a mentally ill seventeen-year-old, of low average intelligence, who read at an elementary school level. He had been in special education classes for a learning disability and did not read or write well. The petitioner had been evaluated 17 months earlier and had been found to have an IQ of 72. See petitioner original petition Ex. C.

On March 11, 1997, that same day the petitioner was to enter his pleas, he met with his subsequent trial attorney, Martin Love, in the bullpen behind the courtroom. See Respondent's answer Ex. DD. Attorney Love read the petitioner at least some sections of the document designated as an "Alford *Guilty Plea Questionnaire and Waiver of Rights Form" and the petitioner signed it. See petitioner's original petition Ex. B. This form listed the names of offenses to which he was pleading and incorrectly listed the names of the offenses that were read-in. Id. The form did not give the elements of the crimes that were being charged and no jury instructions were attached. See id. Subsequently to this discussion, the petitioner was allowed to meet with his family at the jail to discuss whether to plead guilty See respondent's answer Ex. DD. Those discussions did not focus on the elements of the charges.

At the plea hearing, the petitioner entered his guilty pleas under *North Carolina v. Alford*, 400 U.S. 25 (1970). See id. The petitioner had to be prompted to enter his pleas properly under this decision. See id.

The Court then read off each charge and had the petitioner enter his plea, except for the charge in count 9. The court never finished reading off the full charge in count 9. Id. at 10–11. As for whether the petitioner understood the elements of these charges, the court asked only one confusing, multiple part question as follows:

> The Court: Okay. So do you understand, and I just discussed with you what you're charged with and I read it to you, what the penalties are, your attorney told you that, we'll go through that, why you've been charged, and the elements of each of these offenses. Is that correct?
>
> DEFENDANT: Right.

Id. at 13–14. The trial court then followed up with the trial attorney by asking only one question:

> THE COURT: And counsel, you discussed with him what the elements would be, what the state would have to prove in each count in order to convict him?
>
> MR. LOVE: I did, your Honor.

Id. at 14.

Subsequently, the state asked to "supplement the record." The state then noted that:

> First of all we have—there's a discrepancy in the terms that defense counsel and I used. The way that the complaint has count 5 and 10 enumerated is called aggravated burglary and it is a burglary that is aggravated by the committing of a battery. It is my hearing that on that sheet he has it listed as an aggravated battery. It doesn't make any difference in terms

> of the title, but just so that Mr. Sanders understand that count 5 and count 10 are, I'm sorry, count 5 and count 7 are, in the criminal complaint, are entitled "aggravated burglary" and that that relates to his entering a dwelling in each of those instances and then committing a battery upon a person who was lawfully therein.

Id. at 17–18. The trial court then did not ask the petitioner if he understood but instead asked the attorney:

> THE COURT: Is that your understanding counsel?
>
> MR. LOVE: Your Honor, I have, as a matter of fact, I have a copy that I drafted before the one that was submitted to this court, and I have referred to it as aggravated burglary. It's a misnomer if I have place the word "battery" instead, I'm sorry. But yes, we understand the circumstances and the elements.

Id. at 18.

The trial court never summarized the elements of the crimes by reading from jury instructions, did not ask counsel to summarize the extent of his explanation of the elements of the charges, and did not ask the petitioner whether he understood the nature of the charges based upon the criminal complaint. See Respondent's answer EX. DD.

The petitioner subsequently alleged in his postconviction motion that, at the time he entered his pleas, he did not understand the nature of the charges against him. See Respondent's answer Ex. C. He did not understand the elements of the multiple charges against him. Id. The type of words used to describe

the crimes were beyond his vocabulary, including such concepts as "first degree" and "article used for fashioned in a manner to lead the victim to reasonably believe it's a dangerous weapon" as well as the term, although not the concept, of "sexual intercourse." Id. The petitioner also maintain that he was not guilty of the charge and that "there was another individual who was involved in these break-ins" and who is guilty of these crimes. See Respondent's answer Ex. DD. In addition, there was some physical evidence that supported his contention. Id.

The trial court, the Honorable Jeffery A. Wagner presiding, denied the postconviction motion without an evidentiary hearing, holding that the plea colloquy was not deficient because the defendant had signed the plea questionnaire, the defendant said that the criminal complaint had been read to him, the court read the charges to him from the information, and counsel assured the court that he had gone over the elements of the crimes. The trial court further held that the petitioner's statement to police was sufficient to illustrate his understanding of the nature of the charges.

On appeal to the Court of Appeals, the Court of Appeals held that the trial court complied wit Bangert and the statutory requisites in reciting the elements of each offense, and describing each offense by date and address, and identifying each victim by first and last name. The court also held that, "Sanders has not made that prima facie showing; consequently, we do not consider his allegation that he did not understand the nature and elements of the offense to which he pled.

STANDARD OF REVIEW

To obtain habeas corpus relief, the Petitioner may allege that his confinement is the result of a violation of the United States Constitution. The Constitutional error must have had a substantial and injurious influence on the determination of guilt made by the jury. *Brecht v. Abraham*, 113, S.Ct. 1710 (1993)

Petitioner may also allege claims based on violations of state law if they resulted in fundamental unfairness, which consequently violated Petitioner's Fourteenth Amendment right to Due Process.

Under the AEDPA, habeas relief will not be granted for any claim adjudicated on the merits in state court unless the decision was contrary to, or involved an unreasonable application of "federal law clearly established by the Supreme Court", or "based upon unreasonable determination of facts." 28 U.S.C. §2254 (d)(2)

A decision is "contrary to" federal law when the state court applies a rule that "contradicts the governing law set forth by the Supreme Court," or when an issue before the state court "involves a set of facts materially indistinguishable from a Supreme Court case," but the state court rules in a different way. *Boss v. Piere*, 263 F.3d 734, 739 (7th Cir. 2001). "'A State Court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular petitioner's case qualifies as a decision involving an unreasonable application of clearly established federal law." Id. (quoting *Williams*, 529 U.S, at 407–08). An "unreasonable" state court decision is one that is" well outside the boundaries of permissible differences of

opinion." *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002)

ARGUMENT

I. PETITIONER'S PLEAS WAS UNCONSTITUTIONAL IN VIOLATION OF HIS FUNDAMENTAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THEY WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED.

A plea may be involuntary either because the accused does not understand the nature of the constitutional protection that he is waiving...or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 647 n. 13, 96 S.Ct. 2253, 49 L.ed.2d 108 (1976) (citation omitted). A guilty plea is intelligent and knowing when the defendant is competent, aware of the charges, and advised by competent counsel. *Brady v. United States*, 397 U.S, 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The record must demonstrate affirmatively that the defendant entered his plea understandably and voluntarily. *Boykins v. Alabama*a, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed,2d 274 (1969).

Wisconsin Court of Appeals decision resulted in an unreasonable application of clearly established federal law when it determined that the Petitioner's pleas was made voluntarily, knowingly, and intelligently as required by federal law.

In his postconviction motion, the Petitioner invoked *State v. Banger*t, 131 Wis.2d 246, 257, 389 N.W.2d 17

(1986), and alleged that his pleas was not entered knowingly, intelligently, and voluntarily because the trial court failed to comply with Wisconsin Statutes §971.08(1)(a) and violated his Due Process right, and he failed to understand the elelments of the crimes to which he was pleading guilty. See Respondent's answer Ex. DD. Petitioner noted that he was seventeen-years-old who had not completed eighth grade, who had been in special education classes for a learning disability, read and wrote at only an elementary school level and had mental health issues. He specifically alleged that

> [t]he trial court never summarized the elements of the crimes by reading from the jury instructions, did not ask counsel to summarize the extent of his explanation of the elements of the charges, and he did not ask Sanders whether he understood the nature of the charge based upon the criminal complaint.

See Respondent's Answer Ex. C. He further alleged that

> [a]t the time he entered his pleas, Sanders did not understand the nature of the charges against him. He did not understand the elements of the multiple charges against him. The type of words used to describe the crimes were beyond his vocabulary, including such concepts as "first degree" and "article used for fashioned in a manner to lead the victim to reasonably believe it's a dangerous weapon" as well as the term, although not the concept, of "sexual intercourse." Sanders maintains that he is not guilty of the charges and that "there was another individual

> who was involved in these break-ins" and who was guilty of these crimes. See Respondent's answer Ex. DD at 9. In addition, there was some physical evidence to support his contention.

See respondent's Answer Ex. C. Although these allegations were sufficient to require an evidentiary hearing, the Wisconsin Court of Appeals was wrong when it affirmed the trial court's denial of the Petitioner's motion without an evidentiary hearing. This Court therefore should vacate the order affirming the trial court decision to deny the Petitioner's motion and remand the matter with directions for the trial court to hold an evidentiary hearing on the issue.

The voluntariness of a plea depends on all of the relevant circumstances surrounding it. *Brady v. United State*s, 397 U.S. 742, 748, 90 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Merely asking a young defendant with clear mental health issues and an elementary school reading level whether he understood long paragraphs with high-level vocabulary in them does not establish understanding, (quoting *State v. boiling*, 224 Wis.2d 621, 630–31, 593 N.W.2d 67 (Ct. App. 1999)) but knowledge cannot establish understanding. Knowledge, for example, can be superficial and a matter of rote memory as when a child can say that 2x2=4 or when a defendant can tell the court that he has a right to remain silent. Understanding is a deeper grasp of the meaning as when a child can figure out from 2x2 that 2x3 must equal 6 or when a defendant grasp that his right to remain silent means that he cannot be required to testify at his trial. The defendant must not only want to plead guilty; he must have adequate knowledge of what that plea entails as well as the intelligence to bring that knowledge, along

with pertinent knowledge, to bear on his decision. *Stewart v. Peters*, 985 F.2d 1379 (1992). In a guilty plea hearing, the record must show an effective waiver of rights—one that appears to be deliberate, uncoerced, understanding, and intelligent. Id

In taking a plea, it is not enough that a defendant merely be informed of that which he is suppose to understand. A plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Henderson v. Morgan*, 426 U.S. at 645.

Although the Petitioner may have been competent, he was also mentally ill. Although questions of malingering had been raised, some of those questions are answered by the Petitioner's mental health history after his conviction. If all of his mental health problems were a matter of malingering, they should have disappeared once he was convicted and they were of no particular use to him. This mental illness, even if not severe enough to prevent all understanding, it reduced his understanding, especially when couple with his low average intelligence.

Sanders is entitled to an evidentiary hearing because he has identified deficiencies in plea colloquy, stated what he did not understand, and connected his lack of understanding to the deficiencies. See Respondent's answer Ex. C. He identified deficiencies in explaining the elements, he said that his lack of understanding of the elements arose in part from the vocabulary used (See Petitioner's original petition to this court (psychological Evaluation) Ex. C. In that psychological eval. it points out the Petitioner

"...lowest measured subtest fell in the mental deficient range, and involved a task requiring 'verbal concept formation'."), and he also contends that, in light of his claims of innocence, he would not have plead guilty if he had understood the elements. See Respondent's answer Ex. C. For a plea of guilty to be voluntary, the defendant must know the value to him of the right he is giving up, and in particular he must know what the state would have to prove if he insisted on his right to a trial. "...reviewing courts want to be sure that the defendant knows what he is doing when he gives them up. So they insist not only that the defendant made the plea without coercion but also that he appreciated its consequences—that is, that he understand the options he was surrendering..." *Morgan v. Israel*, 735 F.2d 1033, 1036 (1984) (citation omitted).

A federal habeas corpus Petitioner who make sufficiently credible allegations that his State guilty plea was involuntary is entitled to a hearing as to the truth of those allegations. *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed. 2d 473 (1962). This court therefore should vacate the Wisconsin Court of Appeals order affirming the trial court's order denying the Petitioner's postconviction motion and remand the matter to the trial court with the instructions to hold an evidentiary hearing on the motion.

II. WHETHER SANDERS CURRENT SENTENCE STRUCTURE AFFORDS HIM A MEANINGFUL OPPORTUNITY FOR PAROLE

The Eighth Amendment requires that states affords juveniles who commits nonhomicide crimes offenders a meaningful opportunity to obtain release based on

demonstrated maturity and rehabilitation. *Graham v. Florida*, ___ U.S.___, 130 S.Ct. 2011, 176 L.Ed.2d. 825.

Graham analysis does not focus on the precise sentence meted out. Instead, it holds that a state must provide a juvenile offender "with a meaningful opportunity to obtain release" from prison during his or her expected lifetime. Id.

The Petitioner was sentenced to a total of 140 years in prison. Under, then, Wisconsin sentencing scheme, that requires that the Petitioner serve one quarter of his sentence before he is eligible for parole. Petitioner will become eligible for parole for the first time in 2030, at which time he will be 50.8 years of age.

Although the Petitioner is not serving a LWOP sentence and is eligible for parole, however, the question remains whether his sentence affords him a meaningful opportunity to obtain release, especially in light of new evidence.

In his brief to the Wisconsin Court of Appeals, petitioner noted that his natural life expectancy was 63.2 years. However, in light of this new research, which was not readily available when he initially raised this issue in the Court of Appeals, the Petitioner now shifts his position and argues that his sentence does not affords him a meaningful opportunity for parole under *Graham*'s ruling.

The ACLU of Michigan reports that the average life expectancy of an inmate sentenced to life in prison is 58 years; for African Americans, like the Petitioner, the average life expectancy is 56; and for juveniles sentenced to life the average is 50.5. See ACLU of Michigan, "*Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*," April 2013,

http://fairsentencingofyouth/wp.content/ uploads/2010 /02/Michigan-Life_Expectancy-Data-Youth-Serving-Life.pdf. *Kelly v. Brown*, 2017 U.S. App. Lexis 4700 (Posner, Circuit Judge, dissenting).

Based on ACLU report, the Petitioner's sentence does not affords him a meaningful opportunity for parole. Therefore, his sentence does denies him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, as guaranteed under *Graham*'s ruling. *Graham v. Florid*a, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed,2d 825.

ACLU report shows that juveniles sentenced to life sentences have a life expectancy average of 50½ years which is exactly how old the petitioner will be when he first becomes eligible for parole under his current sentence.

Essentially, the Petitioner is serving a de facto life sentence in terms of years with a sentence of 140 years in prison (with parole). Under the analysis set out in *Graham*, the Eighth Amendment to the U.S. Constitution requires all juveniles who committed nonhomicide crimes to be afforded a meaningful opportunity to be considered for release. Being eligible for release at your exact life expectancy isn't what the High Court had in mind when they ruled in Graham that juvenile offenders who commit nonhomice crimes must be afforded a meaningful opportunity for parole. A state is not required to guarantee eventual freedom to a juvenile offender convicted of nonhomicide crimes. What a state must do however, is give defendants like Graham some meaningful opportunity to be released based on maturity and rehabilitation. *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d.

825. "It is for the state in the instances to explore the means and mechanism for compliance." Id.

In the State's reply brief, in the Wisconsin Court of Appeals, the state pointed out, "Sanders does not assert much less prove, that his parole eligibility date exceeds his natural life expectancy." See Respondent's answer Ex. K. Again, the position that the Petitioner argues now, in regard to his life expectancy, he was unable to raise initially because it wasn't in existence.

This Court should therefore, vacate the Petitioner's sentence and remand it back to the trial court for a resentencing

III. PETITIONER'S SENTENCE IS UNDULY HARSH AND EXCESSIVE IN VIOLATION TO THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 6 OF THE WISCONSIN CONSTITUTION

The Eighth Amendment prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S, 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1. That right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportion'" to both the offender and the offense. Id. The concept of proportionality is central to the Eighth Amendment. *Graham v. Florida*, 560 U.S., at ___ 130 S.Ct. 2011, 176 L.Ed.2d 825.

A sentencer must have the ability to consider mitigating qualities of youth. Youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness, and recklessness. It is a moment and condition of life when a person may

be most susceptible to influence and to psychological damage. "And its signature qualities" are all "transient." Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability. *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2012 L.Ed.2d

In the instant case, the trial court did not consider the Petitioner's age or diminished culpability at sentencing as a mitigating factor, therefore rendering his sentence unduly harsh and excessive because "children are constitutionally different from adults" and cannot be held to the same standard of culpability as adults in criminal sentencing'."

Petitioner was sentenced to 140 years in prison for crimes he was convicted of when he was fifteen-years-old. Petitioner's sentence is cruel and unusual in violation of the <u>Eighth Amendment</u> of the United States Constitution

More specifically, Petitioner contends that his sentence is unduly harsh and excessive because 1). It was disproportinate to his age; and 2). It was also disproportionate to his individual culpability.

The Wisconsin Court of Appeals decision was contrary to clearly established federal law, as determined by the Supreme Court of the United States when it affirmed the trial court decision denying the Petitioner's motion for postconviction relief citing:

> We are not convinced that those cases entitle Sanders to relief from his sentence.

See Respondent's answer Ex. S. The Court went on to say:

> Further, it is clear that Miler, which was released after Sanders filed his postconviction motion, is also not on point, as it concerned juveniles who committed homicides and were given mandatory sentences of life without parole

Id.

Thus, the juvenile offender's decreased culpability plays a role in the commission of both grievous and petty crimes. Notably even Chief Justice Robert's dissenting opinion sensed Miller's reasoning applies well beyond the context of homicide and calls into question a number of current practices, such as trying juveniles according to minimums. *Miller*, 132 S.Ct, at 2482, 183 L.Ed.2d at 437–38 (Roberts, C.J., dissenting) It may be natural to assume the stakes are simply lower regarding the latter category of crimes, but denying juveniles who commit lesser crimes the protections afforded in Miller, Graham, and Montgomery denies the their right under both the Eighth Amendment and the fourteenth Amendment of equal protection of the United States Constitution no less than denying a juvenile who commits a considerably more serious crime the very same protection. (quoting *State of Iowa v. Pearson*, 836 N.W.2d 88 (2013))

Furthermore, limiting the teachings and protections of these recent cases (*Graham*, *Miller*, and *montgomery*) to only the harshest penalties known to life is as illogical as it is unjust. Id. While this logic had been applied in the context of the death penalty, and life-without-parole sentences, it also applies perhaps more so, in the context of lesser penalties as well.

After all as the Court declared in *Miller*, nothing that Graham "said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Miller*, 567 U.S, at ___, 132 S.Ct. at 2465, 183 L.Ed2d at 420. Moreover, the 7th Circuit held that Miller applies not just to sentences of natural life, but also to sentences so long that, although set out as a term of years, they are in reality a life sentence. *McKinley v. Butle*r, 809 F.3d 908 (7th Cir. 2016). The "Children are different" passage that we quoted earlier from *Miller v. Alabama* cannot logically be limited to de jure life sentences, as distinct from sentences denominate in number of years yet highly likely to result in imprisonment for life. *McKinly v. Butler*, 809 F.3d 908 (7th Cir. 2016) (quoting *Cf. Moore v. bite*r, 725 F.3d 1184, 1191–92 (9th Cir. 2013)

a. age

Petitioner's age at the time these crimes were committed are highly relevant to the analysis, his youth is relevant because the harshness of the penalty must be evaluated in relation to the particular characteristics of the offender age. *Edmund v. Florid*a, 458 U.S. 782 (1982). The age of the offender and the nature of the crime each bears on the analysis. *Graham v. Florida* ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d. 825. Sentencing Court must consider all mitigating circumstances attendant a juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile was a direct perpetrator or an aide and abettor, and his or her physical and mental development. Id.

Trial court did not use the Petitioner's youth as a mitigating factor, "an offender age", we made clear in *Graham*, is relevant to the Eighth Amendment, "and so criminal procedure law that fails to take defendant youth into consideration would be flawed." *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2012 L.Ed.2d 2455 (quoting *Graham*, 130 S.Ct. 2011 176 L.Ed.2d 825).

In deciding on a sentence for a minor "we require [the sentencing judge] to take into account how children are different and how those differences counsel against irrevocably sentencing them to lifetime in prison." *McKinley v. Butler*, 809 F,3d 908 (7th Cir. 2016) (quoting *Miller*, *supra*, 132 S.Ct. at 2469 (footnote omitted)) The sentencing judge in this case, said nothing indicating the he considered the Petitioner's youth to the slightest relevance to decide how long to make the Petitioner's sentence. *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016)

In *McKinley*, the 7th Circuit made clear that, "sentencing Court must always consider the age of the defendant in deciding what sentence (within the statutory limits) to impose on a juvenile. *Mckinle*y, 809 F.3d 908. The Petitioner's age was used as a aggravating factor rather than a mitigating factor. See Respondent's answer Ex. EE at 57.

b. culpability

The Petitioner culpabilty was twice diminished because 1). his youth; and 2). he did not kill, and he had an undeveloped moral sense.

Children are Constitutionally different from adults for purpose of sentencing because juveniles have diminished culpabilty and greater prospect for reform...There are three significant gaps between

juveniles and adults. First, children have a lack of maturity and an undeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have a limited control over their own environment and lack the ability to extricate themselves from horrific crime producing setting. And third, a child's character is not as "well formed" as an adults, his traits are "less fixed" and his actions less likely to be evidence of irretriable depravity. *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2012 L.Ed.2d 2455.

The Court in the Petitioner's case used his background and environment as a aggravating factor. Petitioner lived in a horrific crime-producing environment; He bears the scars on his head from being brutally beaten with a baseball bat when he was a child. See Respondent's answer Ex. EE. He was shot multiple times when he was a child. Id. He was sexually molested as a child. ID. And all of this was in his environment and his background. This was the Petitioner's day-to-day atmosphere. The petitioner was raised in a dysfunctional family; Both of his parents had either, and or substance and alcohol problems. The Petitioner had developed a tremendous substance and alcohol dependence, id. At age eleven, the Petitioner witnessed his Brother Rodney get gun-down before his eyes. id. All of this warranted considerable weight in assessing the Petitioner's culpability.

How does a child respond to the murder of his brother, or the death of his father, or being sexually abused, or being attacked by his peers in his community, or being

beaten and shot? This was the life in which the Petitioner grew up in, and for a court to not consider these factors in their assessment of a juvenile offender lessened culpability at sentencing is, unconstitutionally disproportionate.

The Petitioner's sentence was based primarily on him being the worst offender and his culpability was held to that of an adult. The State recommended that the court sentence him to 50–70 years in prison; however, the Court felt a longer sentence was need:

> Court: The court feels that longer sentence than the State recommendation is need to protect the community…I feel that he need, Counsel says warehoused. I think—I view it to be put in prison to protect the community. If it's warehousing, so be it.

See Respondent's answer Ex. EE. The trial court was not interested in rehabilitation, but rather solely in incapacitation and retribution. Yet under *Graham*, *Miller*, and *Montgomery* rehabilitation is an important factor and to predict that a juvenile cannot be rehabilitated is very difficult. *Mille*r, 567 U.S. at ___, 132 S.Ct. 2469, 183 L.Ed.2d at 424; *Graham* 560 U.S. at ___, 132 S.Ct. at 2026, 2027, 176 L.Ed.2d at 841, 844; *Montgomer*y, 2016 U.S. Lexis 862 (2016).

The trial Court emphasized the nature of the crimes to the exclusion of the mitigating features of youth which are required to be considered under *Miller*, *graham*, and *Montgomery*.

This Court therefore, vacate the Petitioner's sentence and remand it back to the trial court for resentencing.

CONCLUSION

The Petitioner ask this Court, on argument I, that you remand it back down to trial court for an evidentiary hearing on the matter of the Petitioner's pleas; If this court find that the Petitioner is not entitled to relief on argument I., then the Petitioner ask that this Court set aside his sentence and remand it back down to trial court for resentencing on argument II.; If this Court finds that the Petitioner is not entitled to relief on either of the above two arguments, then the petitioner ask that this Court grant relief on Argument III, and remand it back down to the trial court for resentencing.

For the reasons set forth above. Petitioner respectfully request that the Court vacate his plea and/or grant him a hearing; vacate and set aside his sentence and remand it back to the trial court for resentencing.

Respectfully Submitted,

/S/

Rico Sanders -331049
P.O. Box 19033
Green Bay, WI 54307-9033

APPENDIX K

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2012AP001517-CR

RICO SANDERS,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID A. HANSHER PRESIDING, AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID A. HANSHER PRESIDING

BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT

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State v. Paske,·163 Wis.2d. 52, 69, 471 N.W. 2d 55 (1991)................................ 15, 16
State v. Pratt, 36 Wis.2d 312, 321–23, 153 N.W.2d 18 (1967)................................ 15, 16

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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2012AP001517-CR

RICO SANDERS,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID A. HANSHER PRESIDING, AND AN ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID A. HANSHER PRESIDING

BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT

ISSUE PRESENTED

Did the trial court erroneously abuse its discretion when it applied the Escalona-Naranjo procedural bar to Sanders's case which sought 1). To answer the question of whether his current sentence affords him meaningful opportunity for parole under Graham v. Florida, __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825 ruling; And 2). A sentence modification on the grounds that sentencing him to 140 years as a juvenile

constituted cruel and unusual in violation of the Eighth Amendment of the U.S. Constitution.

The trial court denied the motion without a hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested as the arguments of the appellant have merit and oral argument may help develop the theories and issues on appeal. See Wis. Stats. (Rule) 809.22. The opinion in this case should be published because it does meet the criteria for publishing under Rule 809.23 (1)(a).

STATEMENT OF THE CASE

Following a waiver from juvenile court, R5, Fifteen year old Sanders was charged in adult court with three counts of first degree sexual assault, two counts of armed burglary, one count of armed robbery (use of force), one count of second degree sexual assault, two counts of aggravated burglary, and one count of armed burglary. R6:1.

On March 11, 1997, Sanders entered Alford pleas on six counts in this case pursuant to a plea agreement. R39. The trial court, the Hansher presiding, sentenced him on April 25, 1997 to as follows: 140 years in prison on counts 1, 3, 4, 6, 8, & 9 and dismissing counts 257, & 10. id

On March 15, 2006, Sanders filed a petition for Writ of Habeas Corpus Pursuant to State v. Knight, 168 WIS.2d 509, 484, N.W.2d 545 (1992) in this. The petition sought reinstatement of his appellant rights. This Court granted his petition on August 2, 2006. R47.

On February 28, 2007, Sanders filed a postconviction motion in which he sought to withdraw his Alford pleas on the grounds that the trial court failed to comply with Wisconsin Statutes §971.08 (1)(a) and he failed to understand the elements of the crimes to which he was pleading guilty. R49. The trial court, the honorable Jeffery A. Wagner presiding, denied the postconviction motion without an evidentiary hearing on June 11, 2007. R56.

On October 10, 2007, Sanders argued on appeal that he was entitled to an evidentiary hearing because he made a prima facie showing under Bangert, the plea colloquy did not adequately establish his understanding of the nature of the charges and because he had sufficiently alleged that he did not understand the charges. On September 9, 2008, This Court concluded that Sanders was not entitled to an evidentiary hearing, because he failed to make a prima facie showing that trial court failed to comply with Wisconsin Statutes §971.08. R82.

On September 24, 2008, Sanders filed a petition for review to the Wisconsin Supreme Court asking did the trial court err in denying the defendant an evidentiary hearing on his postconviction motion. On December 8, 2008, Sanders petition for review was denied. R83.

On December 7, 2009, Sanders filed a Motion for Postconviction Relief pursuant to section 974.06, stats., in the trial court on the grounds of Ineffective Assistance of postconviction counsel for failing to raise and properly argue the following issues: 1). Failing to properly argue Sanders mental deficiencies with psychological evidence that would have explained why he lacked understanding of some of the court

proceedings; 2). Failing to raise and argue on direct appeal trial courts failure to inform him of the direct consequence of his pleas; 3). Failing to raise and argue Sanders did not know or understand that he was waiving his constitutional right to face his accuser; 4). Failing to raise and argue Sanders did not know or understand that he was waiving his right to remain silent and that his silence could not be used against him; And 5). Failing to raise and argue Sanders did not know or understand that he was waiving the constitutional right to have the state prove that he committed each element of the crimes charged. R86. On December 15, 2009, the trial court, honorable David A. Hansher presiding, denied the motion for postconviction relief without an evidentiary hearing. R.87.

On May 11, 2010, Sanders appealed the circuit court's decision to this court on the grounds of ineffective assistance of postconviction counsel for failing to raise and argue on direct appeal trial courts failure to properly inform him of his constitutional rights, and whether he understood those rights he was waiving by entering his pleas. On March 15, 2011, this Court in an unanimous three-panel judge summarily order affirmed the trial court decision. R91.

On March 21, 2011, Sanders filed a petition for review in the Wisconsin Supreme Court on the grounds that postconviction counsel was ineffective for failing to raise and argue trial court's failure to inform him of his constitutional rights he was waiving and his understanding of them. On June 15, 2011, the Wisconsin Supreme Court denied Sanders petition for review. R92.

On September 12, 2011, Sanders filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court of Wisconsin Eastern District on the grounds 1). That Sanders Alford pleas was unconstitutional and in violation of his fundamental due process under the 14th amendment given that it was not entered knowingly intelligently, and voluntarily because trial court failed to comply with Wisconsin Statutes §971.08 (1)(a) and he failed to understand the elements of the crimes to which he was pleading guilty; And 2). Sanders asked the Federal Court to stay his appeal in abeyance while he raises whether his sentence affords him a "meaningful opportunity for parole" in compliance with Graham v. Florida, __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825. On December 1, 2011, the United States District Court of Eastern Wisconsin granted Sanders motion to stay the proceedings while he exhaust his unexhausted constituitional issues on the state level.

On May 1, 2012, Sanders filed a Motion for Postconviction Relief pursuant to section 974.06, stats., in the trial court raising 1). Whether his current sentence affords him a meaningful opportunity for parole under the Graham ruling; And 2). Sanders is entitled to a sentence modification on the grounds that sentencing him to 140 years as a juvenile constitute cruel and unusual in violation of the eighth amendment of the U.S. Constitution and Article I Section 6 of Wisconsin Constitution. R95. On May 15, 2012, the trial court, Honorable David A, Hansher presiding, denied Sanders Motion for Postconviction Relief by procedurally barring him under State v. Escalona-Naranjo, 185 WIS.2d 169, 517 N.W.2d 157 (1994). R96. On June 1, 2012 Sanders filed a motion

for reconsideration arguing that Escalona-Naranjo should not be applied to his motion because the issues he now raises he was unable to raise than because the U.S. Supreme Court had not made their ruling in the graham case which the defendant's current §974.06 is based on. R97. On June 11, 2012, the Honorable David A. Hansher Presiding, denied the motion for reconsideration. R98.

Notice of appeal was timely filed on July 5, 2012. R99.

STATEMENT OF FACTS

Prior to Sanders arrest, he grew up in the inner city of Chicago, Illinois. He lived in a dysfunctional family and environment where he witnessed crime and violence on a daily basis. At the age of seven he was sexually abused by his Stepfather. At age 11, he witnesses his brother get fatally shot. At age 12, Sanders was involved with a street gang. By age 14, he was severely beaten with a baseball bat, kidnaped, and shot multiple times. R75: at pg 41–42.

In January 1995, at age 15, Sanders mom and he both thought that it would be best to leave Chicago, IL because there was a hit on his life, and also in search of a better life.

On September 7, 1995, at age 15, Sanders was arrested and charged with several felonies in juvenile Court. R3.

On September 11, 1995, A petition for wavier of jurisdiction and notice of hearing was filed in Milwaukee juvenile court. In preparation for the waiver hearing a psychologist, Dr. Carter, was called in to conduct some psychological testing. See R26. Dr. Carter concluded through a plethora of psychological

testing, that Sanders was extremely illiterate with learning disabilities and the I.Q. of 72. id.

On October 12, 1995, Sanders waived into adult Court. R5.

On April 25, Sanders was sentenced. At sentencing, the trial court failed to take into account the defendants age, youth, and culpability. The trial court subsequently sentenced Sanders to a total of 140 years in prison. R75.

Sanders subsequently alleged in his Motion for Postconviction Relief that his sentence was unduly harsh and excessive. R95:7. He specifically alleged that his sentence is unduly harsh and excessive because 1). The defendant age was not factored in at sentencing as a mitigating factor. Given Sanders was a juvenile and committed nonhomicide crimes, that twice diminished his moral culpability, which was a mitigating factor. id. Also, in light of the United States Supreme Court ruling in Miller v. Alabama, __ U.S. __, 132 S.Ct. 2012 L.Ed.2d 2455, Sanders further expand his claim of his sentence being unduly harsh and excessive in violation of the Eighth Amendment; And 2). Sanders also raised the question of whether his current sentence structure affords him a meaningful opportunity for parole.

The trial court, Honorable David A. Hansher presiding, denied the motion for postconviction relief without a hearing holding that the motion is barred by State v. Escalona-Naranjo, 185 Wis.2d 169, 517 N.W.2d 178 (1994), precluding him from pursuing the current motion for postconviction relief. R96. The trial court further held that Sanders had every opportunity to raise these claims previously and failed

to do so. Under the circumstance, they are considered waived. id.

Sanders filed a motion for reconsideration asking the court to reconsider his motion for postconviction relief, on the basis that at the time the defendant brought forth his previous 974.06 motion, the issues he now raises he was unable to raise than because the U.S. Supreme Court had not made a their ruling in the Graham case, which the defendant current 974.06 is based on. R97: 1–2. The trial court, the Honorable David A. Hansher presiding, denied the motion for reconsideration and held, Graham is inapplicable here. id. He is not serving a life sentence without parole as in Graham. id.

A R G U M E T

I. THE TRIAL COURT ERRONEOUSLY ABUSED ITS DISCRETION WHEN IT APPLIED THE ESCALONA-NARANJO PROCEDURAL BAR TO SANDERS CASE

In his motion for postconviction relief pursuant to 974.06, Sanders invoked State v. Howard, 199 Wis.2d 454, 544 N.W.2d 626 (Ct. app. 1996), Aff'd, 211 Wis.2d 269, 564 N.W.2d 753 (1997), and argued "the fact that he could not have foreseen the effect of subsequent decision at the time of his appeal, constituted a sufficient reason for not raising the issue in previous 974.06." id. In his 974.06 motion, Sanders raised whether his current sentence afforded him a meaningful opportunity for parole in light of the United States Supreme Court ruling in Graham v. Florida, __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825. As well as alleged that his sentence was unduly harsh and excessive in line with the U.S. Supreme Court

analysis in Graham. He specifically stated in his 974.06:

> A subsequent change in the law my be sufficient reason for alleging a new issue to be raised by section 974.06 motion State v. Howard, 199 Wis.2d 454, 544 N.W.2d 626 (Ct. app. 1996) Aff'd, 211 Wis.2d 269, 564 N.W.2d 753 (1997).
>
> On both issues raised, the defendant will rely on Graham v. Florida, __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825 to support his argument and it precedents the United States Supreme Court ruled on in the Graham case.
>
> R95. On May 17, 2010, Sanders was unable to raise the issues he now bring before this Court, pursuant to §974.06, because he was already in the process of going through his 974.06 on the state level at the time of Graham ruling.

R95 at 7. Sanders then further asserted:

> Therefore, he has shown "sufficient reason" to now raise these issues, and should not be procedurally barred under State v. Escalona-Naranjo, 185 Wis.2d 168, 181–82, 517 N.W.2d 157 (1997).

id. at 7. Although these claims were sufficient to require an evidentiary hearing, the trial court erroneously abused its discretion when it applied Escalona-Naranjo. This Court, therefore should vacate the order denying Sanders motion for postconviction relief and remand it back to trial court for resentencing.

Retroactivity only applies to certain new rules. A cases announces a new rule when it breaks new

ground or impose a new obligation on the state or federal government. New rules merit retroactive application on collateral review only in two instance. In the first instance, a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority proscribe. Second, a new rule should be applied retroactively if it requires observance of those procedures that are implicit in the concept and order of liberty. State v. Howard, 199 Wis.2d 454, 544 N.W.2d 626 (Ct. App. 1996) Aff'd 211 Wis.2d 269, 564 N.W.2d 753 (1997). In Graham, and later echoed in Miller (__ U.S. __, 132 S.Ct. 2012, 176 L.Ed.2d 2455), the high court has mandated that states and federal government sonsider mitigating factors of juvenile's as well as provide a meaningful opportunity for parole for nonhomicide juvenile offenders.

Here, however, because the trial court denied the defendant's motion for postconviction relief, the question before this court is whether Sanders sentence should be vacated. Instead, the issue is whether the court erroneously abused its discretion when it procedurally barred him under Escalona-Naranjo? It did.

II.

WHETHER SANDERS CURRENT SENTENCE STRUCTURE AFFORDS HIM A MEANINGFUL OPPORTUNITY FOR PAROLE

In Graham, the 16 year old defendant, Terrance Graham, committed burglary and attempted armed robbery, was sentence to probation, and subsequently violated the terms of his probation when he committed

other crimes. Graham v. Florida, __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825. The trial court revoked his probation and sentenced him to life in prison for burglary. id. Graham sentence amounted to a life without parole because Florida had abolished its parole system. id.

The high Court stated that nonhomicide crimes differ from homicide crimes in a "moral sense," and that a juvenile nonhomicide offender has a "twice diminished moral culpability" as opposed to an adult convicted of murder—both because of his crime and of his undeveloped moral sense. id.

The Court went on to say the Eighth Amendment requires that State afford juvenile offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. (Graham, Supra)

Graham analysis does not focus on the precise sentence meted out. Instead, it holds that a state must provide a juvenile offender "with a meaningful opportunity to obtain release" from prison during his or her expected lifetime. id.

In the instant case, Sanders was sentenced to a total of 140 years in prison. Under Wisconsin sentencing scheme that would require that he serve one qurter of his sentence before he is eligible for parole. Sanders current sentence affords him a parole eligibility 35 years from his arrest date, in which case he will be 50 years of age. Although Sanders is not serving a LWOP sentence and is eligible for parole, however, the question remains whether his sentence affords him a meaningful opportunity to obtain release? Perhaps the better question would be: Ho do you exactly define

a meaningful opportunity for a juvenile? When must this meaingful opportunity occur?

Under the analysis set out in Graham, __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825, the Eighth Amendment to the U.S. Constitution requires all juveniles who committed nonhomicide crimes to be afforded a meaningful opportunity to be considered for release. "a state is not required to guarantee eventual freedom to a juvenile offender convicted of nonhomicide crimes. What a state must do however, is give defendants like Graham some meaningful opportunity to be released based on maturity and rehabilitation." id. "It is for the state in the instances to explore the means and mechanisms for compliance." id.

III. SANDERS SENTENCE IS UNDULY HARSH AND EXCESSIVE

Standard of Review

To Determine whether a punishment is cruel and unusual in a particular case is the same under both federal and Wisconsin law. State v. Pratt, 36 Wis.2d 312, 321–23, 153 N.W.2d 18 (1967). "What constitute adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellant courts will not interfere unless clearly crul and unusual." id. A sentence is clearly cruel and unusual only if sentence is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning right and proper under the circumstance. State v. Paske, 163 Wis.2d 52, 69, 471 N.W.2d 55 (1991). (quoting Pratt, 36 Wis.2d at 322)

In Graham, The United States Supreme Court held that it's cruel and unusual to sentence a juvenile to life without the possibility of parole for nonhomicide crimes. Graham v. Florida, __ U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825. The Supreme Court based their reasoning in Graham on 1). The limited culpability of juvenile nonhomicide offender; 2). The severity of life without parole; and 3). The Court's determination that penological theory is inadequate to justify the punishment.

Sanders is not serving a LWOP sentence, and therefore not controlled by Graham. Nevertheless, Sanders claims that his sentence is cruel and unusual is guided by the principles set forth in Graham and echoed in Miller.

Sanders was sentenced to 140 years in prison for crimes committed when he was 15 years old. Sanders sentence is cruel and unusual in violation of the Eighth Amendment of The U.S. Constitution and Article I, Section 6 of Wisconsin Constitution. Sanders contends that his sentence is unduly harsh and excessive because 1). It was disproportionate to his age; And 2). His sentence was also disproportionate to his individual culpability.

In Wisconsin, the primary sentencing factors are the gravity of the offense, the character of the offender, and the need for protection of the public, (State v. Harris, 119 Wis.2d. 612, 622, 350 N.W.2d 633, 638 (1994)), no matter who the offender is. The Court however, in its discretion, may consider a variety of other factors. State v. Johnson, 150 Wis.2d 458 (Ct. App. 1990). Then other factors may be age, culpability, etc., and are generally secondary.

However, in the wake of such U.S. Supreme Court decisions, like Graham and Miller, those secondary factors became primary factors when sentencing juveniles. As the U.S. Supreme Court noted in Miller, Of special pertinence here...A sentence MUST have the ability to consider mitigating qualities of youth. Youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its "signature qualities" are all "transient." Just as the chronolgical age of a minor is itself a relevant mitigating factor of great weight, must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability. Miller v. Alabama, __U.S.__, 132 S.Ct. 2012 L.Ed.2d 2455.

In the present matter, the trial court did not consider the defendant's age or diminished culpability at sentencing as a mitigating factor, therefore, making his sentence unduly harsh and excessive because it is disproportinate to his age and culpability.

a. age

SAnders age at the time he committed these crimes are highly relevant to the analysis. His youth is relevant because the harshness of the penalty must be evaluated in relation to the particular characteristics of the offender. Edmund v. Florida, 458 U.S. 782 (1982). The age of the offender and the nature of the crime each bears on the analysis. Graham v. Florida, __ U.S. __ 130 S.Ct. 2011, 176 L.Ed.2d 825.

Under Graham's nonhomicide ruling, the Sentencing Court **MUST** consider all mitigating

circumstance attendant to juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile was a direct perpetrator or an aide and abettor, and his or her physical and mental development. Graham v. Florida, __ U.S. __ 130 S.Ct. 2011, 176 L.Ed.2d 825.

The Court did not use Sanders youth as a mitigating factor, "An offender age," we made clear in Graham, is releveant to the "Eighth Amendment," and so criminal procedure law that fails to take defendant youth into consideration would be flawed. Miller v. Alabama, __ U.S. __, 132 S.Ct. 2012 L.Ed.2d 2455 (quoting Graham, 130 S.Ct. 2011 176 L.Ed.2d 825).

Courts must look to mitigating factors that may justify a less harsh sentence whenever a child receives a sentence designed for an adult. A child whom would receive the same amount of time as adult, if not more, is cruel and unusual. Children cannot be viewed as miniature adults. J.D.V. v. North Carolina, 564 U.S. at __, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). They are essentially children in a way that constitutionally requires that we respect their child status.

Sanders "youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. Graham v. Florida, __ U.S. __, 130 S.Ct. 2011 176, L.Ed.2d 825.

b. Culpability

Sanders culpability was twice diminished because 1). His youth; and 2). He did not kill; and 3). His undeveloped moral sense.

Children are constitutionally different from adults for purpose of sentencing because juveniles have

diminished culpability and greater prospect for reform...There are three significant gaps between juveniles and adults. First, children have a lack of maturity and an undeveloped sense of responsibility, leading to recklessness, implusivity, and heedless risk taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have a limited control over their own environment and lack the ability to extricate themselves from horrific crime producing settings. And third, a child's character is not as "well formed" as an adults, his traits are "less fixed" and his actions less likely to be evidence of irretrivable depravity. Miller v. Alabama, __U.S.__, 132 S.Ct. 2012 L.Ed.2d 2455.

In the instant case, sanders lived in a horrific crime-producing environment; He bears the scars on his head now of being beaten brutally near death when he was a child. R75. He was shot several times when he was a child. id. He was sexually molested as a child. And all of that was in his environment. That was his community. That was a day-to-day atmosphere that he had to deal with. Sanders was raised in a dysfunctional family. His Mother and Father both had alcohol problems, Sanders himself had a tremendous substance and alcohol abuse problems; as well as disabilities, mental disabilities and that was his environment. R75. All of this warranted considerable weight in assessing his culpability.

How does a child respond to the murder of his brother, or the death of his father, or being sexually abused, being attacked by his peers in his community, or being beaten and shot? For a court to disregard theses factors in an assessment of a juvenile offender

lessened culpability at sentencing is unconstitutionally disproportionate. Again, it's necessary to reiterate the United States Supreme Court holding in Miller, 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 assessing his culpability. id. 132 S.Ct. 2012 L.Ed.2d.

Sanders sentence was based primarily on him being the worst offender and his culpability was held to that of an adult. The State recommended that the Court sentence him to 50–70 years in prison. However, the Court felt that a longer sentence was needed:

> COURT: The court feels that a longer sentence than the state recommendation is needed to protect the community... I feel that he need, Counsel says warehoused. I think—I view it to be put in prison to protect the community. If it's warehousing, so be it.

R75:55. Juveniles, having lessoned culpability as compared to adults, are less deserving of the most severe punishment since they lack maturity and have an undeveloped sense of responsibility, are more susceptible to negative influences and outside pressures, and cannot be classified among the worst offender as a greater possibility exist that a minor's character deficiencies will be reformed. Graham v. Florida, __ U.S. __, 130 S.Ct. 2011 176, L.Ed.2d 825.

After Graham, and in light of Miller, an assessment of traditional factors in aggravation and mitigation, as the trial court undertook in exercising its discretion

under 973.01 is not enough. Those factors, while still relevant cannot supplant the factors deemed paramount in Graham and later echoed in Millar. The juvenile's chronological age and its hallmark features—among them immaturity, impetuousity, and failure to appreciate risks and consequence, the family and home environment that surrounds him—from which he cannot usually extricate himself—no matter how brutally or dysfunctional, the possibility of rehabilitation. Miller v. Alabama, __ U.S. __, 132 S.Ct. 2012 LE.d. 2d 3455.

CONCLUSION

Because those and other characteristics discussed in Graham and Miller were not at the forefront of the factors considered by the trial court when exercising its discretion in the present case, Sanders is entitled to have the trial court reconsider its decision in light and Graham and Miller, and to be resentenced Accordingly.

This Court should therefore, remand the matter back to trial court vacating their order and to be resentenced.

Dated at Green Bay, Wisconsin, March 31, 2013

Respectfully Submitted,

s/ Rico Sanders
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