APPENDIX A

Supreme Court of Wisconsin

August 11, 2021 decided; August 12, 2021, filed.

Appeal No. 2017AP712

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEVON DION JACKSON,

DEFENDENT-APPELLANT

A petition for review of the court of appeals' decision of August 28, 2018, was filed by defendant-appellant-petitioner, Jevon Dion Jackson, pursuant to Wis. Stat. § 808.10. Pursuant to this court's order of January 15, 2019, a formal response to the petition was filed on behalf of the plaintiff-respondent, State of Wisconsin. In addition, a non-party memorandum in support of the petition for review was filed by Phillips Black, Inc. The petition was subsequently ordered to be held in abeyance pending two U.S. Supreme Court's decisions—first in Mathena v. Malvo, U.S. Case No. 18-217 (subsequently dismissed), and then in Jones v. Mississippi, U.S. Case No. 18-1259. The decision in Jones v. Mississippi was issued April 22, 2021. __ U.S. __, 141 S. Ct. 1307 (2021). By order dated April 27, 2021, this court ordered the parties to file supplemental letters/briefs that discussed the impact of the Jones decision, if any, on the issues raised in the petition for review. The court having considered all of the filings in this matter,

IT IS ORDERED that the petition for review is denied. No costs.

ANN WALSH BRADLEY, J., dissents.

APPENDIX B

Court of Appeals of Wisconsin, District One

August 28, 2018, decided; August 28, 2018, filed.

Appeal No. 2017AP712

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEVON DION JACKSON,

DEFENDENT-APPELLANT

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

Before Brennan, Brash and Dugan, JJ.

¶1 BRASH, J. Jevon Dion Jackson appeals the trial court's denial of his postconviction motion seeking resentencing. Jackson was a juvenile when he committed the crimes for which he seeks resentencing, which include first-degree intentional homicide. He argues that his sentence—life imprisonment with eligibility for parole when he is 101 years old—violates the Eighth Amendment of the United States Constitution as well as article I, section 6 of the Wisconsin Constitution, citing recent decisions of the United States Supreme Court regarding life sentences for juveniles.

¶2 The trial court rejected Jackson's argument. It agreed with the State that there are Wisconsin cases that have previously addressed this issue and are binding on the court.[1] We agree and affirm.

[1] While this appeal was pending, Jackson requested that we consider, on our own motion, certifying his case to the Wisconsin Supreme Court. He noted that this court had recently certified two similar cases, ***State v. Walker,*** 2016AP1058, and ***State v. Ninham,*** 2016AP2098

BACKGROUND

¶3 This case stems from the November 1993 murder of a woman in the parking lot of a fast food restaurant at 29th Street and Capitol Drive in Milwaukee. The victim was shot in the head at point-blank range, execution style, after being ordered to get down on her knees. This occurred in front of the victim's then-ten-year-old daughter.

¶4 Jackson, who was sixteen years old at the time, confessed to the crime. Jackson stated that on the day of the murder, he and his friend, L.C., had obtained a sawed-off shotgun from L.C.'s house and were planning to commit robberies. Jackson explained that he and L.C. had determined that they should target white people because they believed white people were less likely to be armed.

¶5 Jackson stated that he and L.C. walked to the fast food restaurant and observed the victim enter the restaurant with her daughter. Jackson and L.C. waited outside for about ten minutes until the victim and her

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We decline Jackson's request. We further note that our supreme court denied the petition for certification on *Walker* and *Ninham* on June 11, 2018.

daughter came out. Jackson and L.C. then approached them and Jackson pulled the loaded shotgun out from under his clothing where it had been concealed. They ordered the victim and her daughter to give them their food, which the daughter was carrying. Jackson then ordered the victim to get down on her knees and to give him her money. The victim replied that she did not have any money and looked back at Jackson out of the corner of her eye.

¶6 Jackson explained that he believed the victim "had a[n] attitude" and was not taking him seriously. He cocked the weapon to scare her, and heard L.C. say "[d]on't do it man." Jackson claimed that he had forgotten that the shotgun was loaded; however, he also said he "didn't care" whether the weapon was loaded or not because the victim had made him very angry with her "attitude." He then pulled the trigger and shot her in the head. Jackson and L.C. ran away, dumping the food and the shotgun in garbage cans in a nearby alley.

¶7 The victim's daughter ran into the restaurant for help. The responding detective from the Milwaukee Police Department found the victim lying in a pool of blood

in the parking lot, and observed pieces of bone, scalp, and brain matter scattered over an approximate eighty-foot radius surrounding the victim.

¶8 Jackson was arrested and charged with first-degree intentional homicide, armed robbery, attempted armed robbery, and possession of a short-barreled shotgun, all as a party to a crime. He was waived into criminal court and the matter proceeded to trial in July 1995. He was convicted of all four charges.

¶9 A presentence investigation report (PSI) was prepared. Jackson had no previous record, as either a juvenile or an adult. However, there was a matter pending in Milwaukee County Children's Court at the time of this crime; Jackson had been arrested for a battery that occurred at Oak Creek High School in September 1993. Jackson claimed that the victim had bumped into him in an intimidating way. Jackson then punched the victim in the head, and after the victim fell and struck his head on a shelf, Jackson continued to hit and kick the victim while the victim was on the floor. A witness to the battery stated that Jackson had approached the victim from behind and punched him with no provocation.

¶10 Jackson was also involved in a "confrontation" with another inmate two days before his trial. Jackson thought the other inmate was going to hit him, so he punched the inmate in the jaw. Jackson stated that as a disciplinary measure he was given twenty days "in the hole" and believed that the other inmate had not been disciplined.

¶11 The PSI also described Jackson's family background. Jackson could not recall ever meeting his father, but said that he had a good relationship with his mother. Jackson had to live with relatives for a time while his mother was incarcerated at the House of Corrections for welfare fraud. She was also taken into custody while on probation for threatening her then-boyfriend with a knife. Additionally, Jackson was referred to the Department of Social Services in June 1992 out of concern that he was suicidal.

¶12 Jackson reported that conflicts with his mother began when he turned sixteen years old, and that he had run away from home two different times. He described being disciplined with whippings, but denied that he was abused. He stated that at the time of this crime

he had worked things out with his mother, but was living with relatives. Overall, he felt that "his life was actually very good compared to other individuals."

¶13 The PSI further noted that Jackson was a student at Oak Creek High School at the time of the crime, had an average I.Q., and planned to go to college. He had also held several summer jobs through the Step Up Program. He was evaluated while in detention after this crime and was reported to have no indications of psychopathology, although his "psychological functionings appeared to be inordinately complex." It was further noted by the psychologist that when under stress, Jackson would experience "emotional confusion with both positive and negative feelings" and would generally try to respond in a "passive and non[]aggressive manner." The agent who prepared the PSI, however, concluded that the remorse expressed by Jackson over this crime "lacked sincerity and depth."

¶14 Jackson was sentenced in August 1995. At the sentencing hearing, the trial court noted the sentencing factors that it was required to consider. It specifically discussed the gravity of the crime, stating that it was a

"[c]rime of unbelievable horror and depravity" in the way that Jackson had forced the victim to her knees and "basically blew her head apart" in front of her child.

¶15 The trial court also considered Jackson's "character, personality, and social traits." It referenced information from the PSI, noting Jackson's family and educational background, as well as the altercations Jackson had been involved in. The court also acknowledged that the agent who conducted the PSI believed that any remorse shown by Jackson was "superficial."

¶16 The trial court noted Jackson's age at the time of the crime, stating that it would take Jackson's "youthfulness" into consideration. The court further opined that Jackson's rehabilitative needs were "very limited," but that the needs of the community—protection and punishment for this crime—were very strong.

¶17 The sentence imposed on Jackson by the trial court for the first-degree intentional homicide charge was life imprisonment, with eligibility for parole in 2070. Furthermore, for the other charges Jackson was convicted of, the court ordered sentences totaling an additional

thirty-two years, to be served consecutively. The court fashioned the sentences so that Jackson would not be eligible for parole until he was 101 years old.

¶18 Subsequent to his sentencing, Jackson filed two postconviction motions, one in 1996 and the other in 1998. Neither motion addressed sentencing issues. Both were rejected by the trial court and this court.

¶19 Jackson filed the postconviction motion that is the subject of this appeal in January 2017, seeking resentencing. Jackson, who is represented by counsel from the Frank J. Remington Center at the University of Wisconsin Law School, based his arguments on two recent United States Supreme Court decisions. The first case, *Miller v. Alabama*, 567 U.S. 460 (2012), altered the framework under which juveniles could be sentenced to life imprisonment without the possibility of parole to comply with the requirements of the Eighth Amendment of the United States Constitution against cruel and unusual punishment. In the second case, *Montgomery v. Louisiana*, 136 S. Ct. 718, (2016), the Court determined that its holding in *Miller* is retroactive.

¶20 In his postconviction motion, Jackson asserted that the Supreme Court's reasoning in ***Miller*** and ***Montgomery*** should be applied to his sentence because it is effectively one of life imprisonment without the possibility of parole. As a result, Jackson contended that his sentence is in violation of the Eighth Amendment of the United States Constitution as well as article I, section 6 of the Wisconsin Constitution and, consequently, resentencing is required. Alternatively, Jackson argued that the ***Miller*** and ***Montgomery*** decisions are collectively a new factor that warrants sentence modification.

¶21 The State distinguished ***Miller*** and ***Montgomery*** as being limited to situations where a life sentence without the possibility of parole was mandated by state statute. Since Wisconsin does not have such a mandate, and sentences are imposed at the discretion of the trial court, the State argued that the holdings in ***Miller*** and ***Montgomery*** are inapposite here. Instead, the State contended that the governing cases are ***State v. Ninham***, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451, and ***State v. Barbeau***, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W. 2d 520, both of which concluded that sentences of life

imprisonment for juveniles are constitutionally permissible.

¶22 The trial court agreed with the State and denied Jackson's motion in its entirety. This appeal follows.

DISCUSSION

¶23 In this appeal, Jackson is not pursuing the sentence modification argument that he sought in his 2017 postconviction motion, nor is he requesting a new trial. Rather, he seeks resentencing on the premise that under the analyses of *Miller* and *Montgomery* regarding the requirements of the Eighth Amendment, his sentence is unconstitutional.

¶24 The Eighth Amendment of the United States Constitution, as well as article I, section 6 of the Wisconsin Constitution, provides protection from cruel and unusual punishment. *Ninham*, 333 Wis. 2d 335, ¶45. "Generally, we interpret provisions of the Wisconsin Constitution consistent with the Supreme Court's interpretation of parallel provisions of the federal constitution," particularly in cases where, like here, "the text of the provision in our

state constitution is virtually identical to its federal counterpart[.]" *See* ***id.*** We review *de novo* the interpretation of constitutional provisions. *See* ***State v. City of Oak Creek,*** 2000 WI 9, ¶18, 232 Wis. 2d 612, 605 N.W.2d 526.

¶25 ***Miller*** and ***Montgomery*** are the latest in a series of cases decided by the United States Supreme Court that significantly changed the manner in which juveniles are sentenced. The first case in this series was ***Roper v. Simmons,*** 543 U.S. 551 (2005), where the Court held that the Eighth Amendment prohibits imposing the death penalty on juvenile offenders. ***Id.*** at 578. The Court's decision was based on distinctions between juvenile offenders and adult offenders, particularly relating to juveniles' lack of maturity, susceptibility to negative influences, and character traits that are "more transitory, less fixed." ***Id.*** at 569–70. Indeed, the Court determined that a categorical prohibition was necessary because "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare

juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

¶26 Following *Roper* was *Graham v. Florida*, 560 U.S. 48 (2010), where the Supreme Court held that sentencing a juvenile to life imprisonment without parole for a crime other than homicide is unconstitutional. *Id.* at 82. In its decision, the Court relied on its holding in *Roper*, noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham*, 560 U.S. at 68.

¶27 The *Graham* decision was followed two years later by *Miller*. In *Miller*, the Supreme Court expanded the prohibitions proscribed by the Eighth Amendment regarding juvenile sentences to include mandatory life sentences without the possibility of parole. *Miller*, 567 U.S. at 465. In its analysis, the Court began with the premise established in *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. The Court identified factors specific to juveniles that are disregarded when a mandatory life sentence is required to be imposed, such as immaturity, awareness of risks and their consequences,

the effect of peer pressure, family history, and the potential for rehabilitation. *Id.* at 477-78. Therefore, the Court held that statutory sentencing schemes that include mandatory life sentences without the possibility of parole for juveniles violate the Eighth Amendment because they "mak[e] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence[.]" *Id.* at 479. While the Court declined to consider whether the Eighth Amendment requires a categorical bar on sentences of life imprisonment without parole for juveniles, it indicated that the imposition of "this harshest possible penalty will be uncommon," because after taking youth into consideration, it is difficult to distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479-80 (citations omitted).

¶28 Subsequently in *Montgomery*, the Supreme Court determined that the holding in *Miller* was a new "substantive rule of constitutional law" and therefore must be given retroactive effect. *Montgomery*, 136 S. Ct. at 736. In fact, the Court decided *Montgomery* specifically to resolve the question of whether the *Miller* rule was

retroactive. ***Montgomery***, 136 S. Ct. at 725. However, the Court was mindful of the potential consequences of deeming the ***Miller*** rule retroactive, and thus provided further instruction: "[g]iving ***Miller*** retroactive effect ... does not require [s]tates to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A [s]tate may remedy a ***Miller*** violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." ***Montgomery,*** 136 S. Ct. at 736.

¶29 Jackson contends that his sentence constitutes a *de facto* life-without-parole sentence because he is not eligible for parole until he is 101 years old. Thus, he argues that his sentence violates the Eighth Amendment pursuant to ***Miller*** and its retroactive application pursuant to ***Montgomery***, and that he is entitled to resentencing. In contrast, the State asserts that ***Miller*** and ***Montgomery*** are limited to *mandatory* life imprisonment sentencing schemes, and did not address discretionary sentencing structures such as that which is in effect in Wisconsin. Moreover, the State points out that the Wisconsin Supreme Court has addressed similar

challenges in ***Ninham*** and ***Barbeau***, decisions by which we are bound.

¶30 In ***Ninham***, decided the year before ***Miller***, our supreme court reviewed the constitutional challenge of the life imprisonment sentence without the possibility of parole that was imposed on Ninham for first-degree intentional homicide. ***Ninham,*** 333 Wis. 2d 335, ¶¶2-3. Ninham was fourteen years old when the crime was committed. ***Id.,*** ¶2.

¶31 The court determined that sentencing a fourteen-year-old to life imprisonment without parole eligibility was not categorically unconstitutional. ***Id.,*** ¶4. The court considered the Supreme Court's analyses in ***Roper*** and ***Graham***, and determined that neither case "foreclose[d] a sentencing court from concluding that a juvenile who commits homicide is sufficiently culpable to deserve life imprisonment without the possibility of parole." ***Ninham,*** 333 Wis. 2d 335, ¶77.

¶32 Ninham also sought sentence modification on the grounds that his sentence was unduly harsh and excessive, in violation of the Eighth Amendment. ***Id.,*** ¶3.

The court rejected that argument, noting that a sentence may be deemed cruel and unusual "only if the 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 what is right and proper under the circumstances.'" *Id.*, ¶85 (citation and one set of quotation marks omitted). The court found that Ninham's sentence was certainly severe but "not disproportionately so" based on the "horrific and senseless" nature of the crime; Ninham, together with a group of friends, had taunted and beaten a thirteen-year-old boy without any provocation, ultimately swinging him over the concrete wall of a parking garage and letting him drop nearly forty-five feet to his death. *Id.,* ¶¶9-17, 86.

¶33 The *Ninham* court also rejected the argument that new research regarding the brain development of adolescents was a new factor warranting sentence modification. *Id.,* ¶92. Citing *Roper* and *Graham*, the court concluded that the "new" research referred to by Ninham was merely confirming the fact that there are fundamental differences between the minds of juveniles and adults, a

fact that the United States Supreme Court had already recognized. ***Ninham,*** 333 Wis. 2d 335, ¶92.

¶34 ***Barbeau***, on the other hand, was decided by this court after ***Miller***, and shortly after ***Montgomery***.[2] Barbeau was convicted of first-degree intentional homicide for killing his great-grandmother with a hatchet when he was thirteen years old. ***Barbeau,*** 370 Wis. 2d 736, ¶¶2, 5. The crime was committed in 2012, after the enactment of truth-in-sentencing legislation in Wisconsin. ***Id.,*** ¶16. The truth-in-sentencing statutory scheme did away with parole and instead allows for release on extended supervision as determined at the discretion of the sentencing court. ***Id.,*** ¶17. Specifically, the truth-in-sentencing statute allows the sentencing court three options when imposing a life imprisonment sentence: (1) eligibility for release to extended supervision after twenty years of initial confinement; (2) eligibility for release to extended supervision some time after twenty years of confinement;

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[2] Jackson points out that the briefing for ***State v. Barbeau***, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520, was completed prior to the United States Supreme Court's release of ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), and thus the parties were not able to reference ***Montgomery*** in their arguments.

or (3) no eligibility for release to extended supervision. WIS. STAT. § 973.014(1g)(a) (2015-2016)[3]; *see also* ***Barbeau,*** 370 Wis. 2d 736, ¶24.

¶35 Barbeau mounted a categorical challenge to the truth-in-sentencing statute on the grounds that it allows for a juvenile convicted of first-degree intentional homicide to be sentenced to life imprisonment without eligibility for extended supervision.[4] ***Barbeau***, 370 Wis. 2d 736, ¶24. We rejected Barbeau's constitutional arguments. We pointed out that ***Miller*** did not strictly prohibit a sentence of life imprisonment without parole for a juvenile, as long as the sentencing court "'take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" ***Barbeau,*** 370 Wis. 2d 736, ¶32 (quoting ***Miller***, 567 U.S. at 480). Thus, we concluded that "it is not unconstitutional to sentence a juvenile to life

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[4] This court concluded that Barbeau did not have standing to challenge the truth-in-sentencing statute on those grounds because his sentence included extended supervision. ***Barbeau***, 370 Wis. 2d 736, ¶24. Nevertheless, we decided to address the merits of Barbeau's argument in light of ***Miller v. Alabama***, 567 U.S. 460 (2012). ***Barbeau***, 370 Wis. 2d 736, ¶25.

imprisonment without the possibility of supervised release for intentional homicide if the circumstances warrant it." *Barbeau,* 370 Wis. 2d 736, ¶32.

¶36 We also rejected Barbeau's argument that the truth-in-sentencing statute's mandatory minimum of twenty years of initial confinement is categorically unconstitutional. *Id.,* ¶35. We recognized the "legitimate penological goals" of deterrence and retribution that were considered by the legislature in implementing this provision of the truth-in-sentencing statute—even for juveniles—and concluded that there was "nothing disproportionate on a constitutional level in this scheme." *Id.,* ¶43.

¶37 Of course, *Ninham* and *Barbeau* are binding precedent on this court. Still, Jackson argues that the trial court's reliance on these cases in denying his postconviction motion was misplaced. First, he argues that the *Ninham* court did not have the benefit of the *Miller* decision, and the *Barbeau* court did not have the benefit of arguments from the parties based on *Montgomery*. However, the *Barbeau* court concluded that *Miller* did not affect the analysis in *Ninham*. *Barbeau,* 370 Wis. 2d 736, ¶25.

Moreover, the analysis in ***Montgomery*** focused on whether the ***Miller*** rule was a substantive or procedural change in the law for purposes of determining whether it should be applied retroactively. *See* ***Montgomery,*** 136 S. Ct. at 732. That analysis is not directly relevant to the overarching issue here of whether the ***Miller*** rule applies to discretionary life sentences.

¶38 Jackson next argues that the decision in ***Ninham*** relied on the ***Graham*** court's distinction between homicide and nonhomicide cases, which was rejected in ***Miller***. Specifically, Jackson points to the ***Miller*** court's statement that the reasoning in ***Graham***—that there are fundamental differences between juvenile and adult minds—also "implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." ***Miller,*** 567 U.S. at 473. However, this court addressed this argument in ***Barbeau***, explicitly stating that ***Miller*** did not categorically prohibit sentences of life imprisonment without parole for juveniles as long as the distinctive characteristics of a juvenile offender are taken into consideration. ***Barbeau,*** 370 Wis. 2d 736, ¶32; *see also* ***Miller,*** 567 U.S. at 483.

¶39 That is precisely what the trial court did here. When sentencing Jackson, the court specifically stated that it was taking Jackson's "youthfulness" into consideration. It further considered his character, personality, and social traits, as well as his relationship with his family, his education, and his work history, as described in the PSI. The court also noted Jackson's psychological evaluation which found no indications of psychopathology. Additionally, the court discussed Jackson's rehabilitative needs, characterizing them as "very limited[.]"

¶40 In short, the trial court took into consideration all of these factors relating to Jackson's age—most of which are the same factors that were discussed in ***Miller*** when it was decided almost seventeen years later. Additionally, the trial court considered other relevant sentencing factors and objectives such as the gravity of the crime, the protection of the public, punishment, deterrence, and Jackson's rehabilitative needs.[5] *See* ***McCleary v. State,*** 49 Wis. 2d 263, 282, 182

[5] We further note that in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, a decision that affirmed and clarified the standards and requirements for sentencing as set forth in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), our supreme court explained

N.W.2d 512 (1971). Using all of this relevant information, the trial court imposed Jackson's sentence, including his parole eligibility date.

¶41 Like the sentence in *Ninham*, Jackson's sentence is certainly severe, but not disproportionately so based on the circumstances of the crime. *See id.,* 333 Wis. 2d 335, ¶86. Furthermore, the sentence follows the directive of *Miller*, which "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.*, 567 U.S. at 483. Indeed, the record indicates that the trial court implicitly determined that Jackson was "'the rare juvenile offender whose crime reflects irreparable corruption.'" *See id.* at 479-80 (citations omitted).

¶42 Jackson's final argument is that his case is distinguishable from *Ninham* and *Barbeau* because those

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with more particularity the sentencing objectives and goals that are to be discussed by a trial court at sentencing in light of the truth-in-sentencing statute. *See Gallion*, 270 Wis. 2d 535, ¶¶33-44. In sentencing Jackson, the trial court intuitively utilized the directives of *Gallion*, although *Gallion* would not be decided for nearly nine years after Jackson was sentenced.

cases were categorical constitutional challenges, and he is arguing only that his particular sentence is unconstitutional. Based on our analysis here, this argument does not compel a different result. We have already discussed the specifics of Jackson's sentence in the context of the relevant decisions from both state and federal case law, and concluded that Jackson's sentence comports with the directives of those decisions.

¶43 Therefore, we conclude that Jackson's sentence is not unconstitutional. Accordingly, we affirm the trial court's denial of Jackson's most recent postconviction motion.

By the Court. —Order affirmed.

No recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN IN CIRCUIT COURT

COUNTY OF MILWAUKEE BRANCH FORTY-TWO

FILED MARCH 28, 2017

CASE NO. 95CF951873

STATE OF WISCONSIN

PLAINTIFF,

V.

JEVON DION JACKSON

DEFENDANT

DECISION AND ORDER

DENYING MOTION FOR RESENTENCING OR SENTENCE MODIFICATION

On January 24, 2017, the defendant by the Frank J. Remington Center filed a motion for resentencing pursuant to section 974.06, Wis. Stats., or for sentence modification. He claims that his sentence to life in prison as a juvenile with parole eligibility in the year 2070 constitutes cruel and unusual punishment in violation of the Eighth Amendments to the United States and Wisconsin Constitutions because it is the equivalent of a life sentence without parole.

The defendant was 16 years old at the time he committed first degree intentional homicide (PTAC), attempt armed robbery (PTAC), armed robbery (PTAC), and possession of a short-barreled shotgun (PTAC). A jury trial was held before this court on July 24-26, 1995, after which the defendant was found guilty as charged. On August 28, 1995, the court sentenced him to life in prison with parole eligibility date of November 16, 2070 with credit for 650 days served (count one); ten years (consecutive)(count two); twenty years (consecutive)(count three); and two years (consecutive (count four). Postconviction/appellate counsel was appointed, and a notice of appeal was filed on February 7, 1996. The Court

of Appeals affirmed the judgment of conviction on January 13, 1997. On March 24, 1998, the defendant filed a *pro se* motion for postconviction relief under section 974.06, Stats., alleging that appellate counsel was ineffective for failing to raise other meritorious issues. This court denied the motion on April 28,1998, and the defendant appealed once again. The Court of Appeals affirmed the postconviction order on September 28, 1999. This second 974.06 motion follows, which normally would be barred by *State v. Escalona-Naranjo,* 185 Wis.2d 169, 178 (1994); however, the defendant relies on two recent United States Supreme Court cases in support of his request for resentencing or sentence modification.

The case was first assigned to this court's homicide successor who ordered a briefing schedule, to which the parties have responded. The case was transferred back to this court because of the defendant's allegations that the court was unaware of certain background information at the time of sentencing.

The special prosecutor described the criminal act which took place in the parking lot of a fast food restaurant:

> [The defendant] indicated that he wanted to scare her [the victim] . . . . I don't know how someone could be more scared than what they were when she and her daughter, confronted by two individuals, one with a sawed-off shotgun, she's on her knees and the gun is pointed inches away from her head. He wanted to scare her, and that's why he pulled the trigger.

(Tr. 8/28/95, p. 11). Despite the fact that the victim threw down her coin purse and keys, the defendant didn't pick them up but instead executed her in front of her daughter with a shotgun. (Id. at 14-15). At sentencing, the court noted that he blew her head apart and referenced the pictures showing brain matter and her skull all over the parking lot. (Id. at 29).

The defendant argues that he will first become parole eligible in the year 2078 on all counts when he is 101 years old, which he claims is essentially a death sentence for him in prison. He relies on *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life imprisonment without parole for persons under the age of 18 violates the Eighth Amendment's prohibition against cruel and unusual punishment and that a court may not sentence a juvenile to life without parole without taking into account "how children are different and how those differences counsel against irrevocably sentencing them to a lifetime

in prison." *Id.* at 2469. He also relies on *Montgomery v. Louisiana,* 136 S. Ct. 718, 734 (2016) to show that the *Miller* case has retroactive effect. Based on the holding in *Miller,* the defendant maintains that this court did not take anything except his age into consideration, but rather than viewing his youthful age as a mitigating factor, the court viewed it as an aggravating factor, which he claims flies in the face of what *Miller* requires.[1] *Miller* found that the statute at issue before it prevented a judge from considering a youngster's culpability due to age and thus found the punishment (life without parole for intentional homicide) disproportionate as to a juvenile.

[1] The court disagrees with this conclusion. At sentencing, the court duly considered the defense sentencing comments about the talent demonstrated by the defendant in school, how he had a lot of potential, and heard how he was good with electronics. (TR. 8/25/95, p. 18). The court also noted that he did not come from a deprived home and had no prior record, only a pending battery charge, (Id. at 31). The court specifically indicated it was taking his "youthfulness" into consideration "at least for … the parole eligibility date." (Id. at 33). It then went on to consider the needs of the public and the community. Clearly, this court took both mitigating and aggravating factors into account with regard to the defendant's youth, his accomplishments at that age, and his particular character which allowed him to blast a woman in the head with a shotgun over some chicken and a little money.

The State argues that *Miller's* holding is limited, i.e. life in prison without parole is unconstitutional only where the State *mandates* life in prison without parole, and since Wisconsin does not have mandatory life in prison without parole for a juvenile, it does not apply here. The high court stated: "We therefore hold that *mandatory* 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.'" *Miller,* 132 S. Ct. at 2460 (emphasis added). Thus, *Miller* does *not* stand for the proposition that a juvenile can't be sentenced to life in prison; such a sentence is only prohibited if the State *mandates* [by statute or law] that a juvenile who commits a homicide dies in prison. *Miller* does *not* preclude a court from imposing a life sentence without parole for juveniles in homicide cases, provided it takes certain factors into consideration.[2] The State asserts, however, that in this case, the defendant was not actually sentenced to life in

[2] The *Miller* court indicated that the circuit court must "take into account how children are different, and how those differences counsel against irrevocably sentencing [juvenile offenders] to a lifetime in prison." 132 S. Ct. at 2469.

prison without parole; instead, he is eligible for parole on his life sentence in 2070.

The State aptly distinguishes the *Montgomery* case, indicating that the defendant in that case was sentenced to life in prison without parole based on a Louisiana statute that required the court to impose life without parole for any person (adult or juvenile) who committed murder.[3] The court agrees with the State that the prohibition announced by the *Miller* court applies narrowly to cases where a state statue or law requires mandatory life without parole for juveniles convicted of a homicide. The sentence imposed by this court was not mandated by law; it was discretionary.[4]

The State contends that *State v. Ninham,* 333 Wis. 2d 335 (2011) and *State v. Barbeau,* 370 Wis. 2d 736 (Ct. App. 2016), govern this situation. The defendant asserts, however, that *Ninham* was decided prior to *Miller* and *Montgomery,* and thus, the Wisconsin Supreme Court did not have the benefit of those cases when it decided *Ninham.*

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[3] The *Miller* case involved the same type of scenario.

[4] The court declines to apply the holdings of other states cases as set forth on page 13 of the defendant's motion as the court finds that the Wisconsin cases cited by the State take precedence.

As for *Barbeau,* the defendant argues that a categorical challenge was made (as in *Ninham*[5]) rather than an "as applied" challenge, as the defendant makes here. The State argues that *Barbeau* definitively decided that the *Miller* case did not alter the analysis and result of *Ninham.* The court agrees.

Ninham held that sentencing a 14-year-old to life imprisonment without parole for homicide was not categorically unconstitutional. After determining that the circuit court had the statutory authority to sentence a 14-year-old defendant to life imprisonment without the possibility of parole, it applied a two-step analysis as set

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[5] *Ninham* involved a categorical constitutional challenge which asserted that "sentencing a 14-year-old to life imprisonment without parole is cruel and unusual in violation of the Eighth Amendment . . . ." 333 Wis. 2d at 344. The court found that it was not categorically unconstitutional because Ninham "failed to demonstrate that there is a national consensus against sentencing a 14-year-old to life imprisonment without parole when the crime is intentional homicide." Id. at 345. It also concluded that a sentence of life imprisonment without the possibility of parole was not unduly harsh and excessive." Ninham's punishment is severe, but it is not disproportionately so." Id. It further concluded that Ninham didn't show by clear and convincing evidence "that the scientific research on adolescent brain development . . . constitutes a 'new factor.'" Id. (Referenced was the scientific/psychological evidence cited by the United States Supreme Court in *Thompson v. Oklahoma,* 487 U.S. 815 in 1988.)

forth by *Graham v. Florida,* 130 S. Ct. 2011 (2010), the first question being whether there was a national consensus against sentencing a 14-year-old to life imprisonment without parole for committing intentional homicide. It found that a vast majority of states – 44 states – permit life without parole sentences for homicide crimes, and accordingly held that the defendant had failed to demonstrate that there was a national consensus against such a sentence. Second, it did an independent analysis to determine whether the punishment violated the Constitution. In so doing, it considered the reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005), which held that the imposition of the death penalty on juvenile offenders under the age of 18 was unconstitutional due to the differences between juvenile and adult offenders.[6] The *Ninham* court first noted that the *Roper* court affirmed the Missouri Supreme Court's decision modifying a 17-year-old

[6] Three main differences were given: "(1) juveniles possess a lack of maturity and an underdeveloped sense of responsibility, qualities which often result in impulsive actions and decisions; (2) juveniles are more vulnerable or susceptible to negative influences and peer pressure; and (3) a juvenile's character is not as well formed as that or an adult. *Roper*, U.S. at 569-570. *See Ninham*, 333 Wis. 2d at 371-372.

defendant's death sentence to life imprisonment without parole eligibility, and thus, did not conclude "that the diminished culpability of juvenile offenders render[ed] them categorically less deserving of the second most severe penalty, life imprisonment without parole." *Ninham*, 333 Wis. 2d at 376. It also noted that *Graham* did not prohibit juveniles who committed homicide from being less categorically deserving of life imprisonment without parole. *Id.* at 377. The court found that scientific/psychological research pertaining generally to 14-year-olds was "insufficient to support a determination that 14-year-olds who commit homicide are never culpable enough to deserve life imprisonment without parole" (*Id.* at 378), and provided several examples as to why it found that evidence insufficient. The court also found that such a sentence "serve[d] the penological goals of retribution, deterrence, and incapacitation." *Id.* at 379. The court then determined that the sentence in Ninham's case was not unduly harsh and excessive, and thus, did not constitute "cruel and unusual punishment" as that term is used by the Eighth Amendment.

> A sentence is clearly cruel and unusual only if the 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 what is right and proper under the circumstances.'" [Cites omitted].

Ninham, 333 Wis. 2d at 382.

In the end, Wisconsin's supreme court in *Ninham* found that the sentence was not so disproportionate to the crime that was committed to shock public sentiment given the severity of the homicide, the manner in which the juvenile committed the homicide, and his refusal to take any responsibility for it. "That Ninham was just 14 years old at the time of the offense and suffered an indisputably difficult childhood does not . . . automatically remove his punishment out of the realm of proportionate. The circuit court was well within its statutory authority to sentence Ninham to life imprisonment without parole, and we will not interfere with its exercise of discretion." *Id.* at 382. It also concluded that the research regarding adolescent brain development did not constitute a new factor.

The State asks the court to apply *Ninham* to the issue presented, and the court concurs with that request. Even though an "as applied" challenge was not made in any of the above cases, the fact of the matter is that the cases

on which the defendant relies – *Miller* and *Montgomery* – both dealt with a statutory scheme that *mandated* life imprisonment *without parole* as punishment for a juvenile who was convicted of intentional homicide; this case does not. The court therefore finds that the holdings of *Miller* and *Montgomery* do not govern the outcome of this case and that the *Ninham* court would not have been decided any differently had it had the benefit of the two United States Supreme Court cases cited by the defendant.

The court also declines to grant sentence modification to the defendant for the same reasons set forth by the State in its brief. The defendant's claim that the court was unaware of relevant information is rejected. This court ordered the defendant's juvenile file to review prior to sentencing and had the benefit of a presentence report. (Tr. 8/28/95, p. 2). The court perused everything prior to sentencing.

Because the court finds that neither *Miller* nor *Montgomery* apply to this case, those cases do not constitute a "new factor" for purposes of modifying the defendant's sentence. As in *Ninham,* the court finds that the sentence in this case "serves the penological goals of

retribution, deterrence, and incapacitation." 333 Wis. 2d at 379.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for resentencing (or sentence modification) is DENIED.

BY THE COURT

David A. Hansher
Circuit Court Judge

APPENDIX D

STATE OF WISCONSIN

PLAINTIFF,

V.

JEVON DION JACKSON

DEFENDANT.

SENTENCING REMARKS OF THE CIRCUIT COURT

OF THE COUNTY OF MILWAUKEE, WISCONSIN

August 28, 1995

THE COURT: Okay, the defendant will rise.

(Defendant stands.)

THE COURT: Okay, for sentencing purposes I have to consider numerous factors as set forth by Supreme Court guidelines. Considering — I have to consider the gravity of the offense, the character of the defendant, including his prior record and acceptance of responsibility, his needs, the needs to protect the public, and the need for punishment. Those are general terms.

As to the nature of the crime, I think it's undisputed this is probably the cruelest and most cold–blooded murder in recent Milwaukee history. Crime of unbelievable horror and depravity. I think as Ms. Tan said when she heard about it on the news, she was shocked that something like this could happen in Milwaukee, let alone in the United States. I thought the same thing when I heard it on the news. It's the type of murder, actually execution, that outrages the community.

But I can't sentence the defendant merely because it's outrageous. I can take that in consideration the type of crime, but I can't just say it's such an outrageous crime he

has to be sentenced to the year 3000, but it's a horrible crime. So were the other counts also. Obviously not as shocking, and any comments I make in sentencing apply to both counts 2, 3, and 4, the attempted armed robbery of Miss S——— where she was forced to her knees, the armed robbery of her child, M———, where the chicken was taken from her, and possession of a short barreled shotgun which is illegal, obviously, under Wisconsin law.

But going again back to the gravity of the offense, at least the first degree intentional homicide, I think the most or the most difficult part for me to understand or for anyone here to understand, and I don't know if it's gotten to Jevon Jackson, is how he could force this woman to her knees in a parking lot in Milwaukee, in front of her child, hold a shotgun to her head, demand money, she said she has no money, she throws her keys and her coin purse there. He could have grabbed her keys, drove off in her car, could have grabbed her coin purse. And then she looks at him, and according to the statements and he denies it to some extent, but that he felt she had an attitude, he looked in her eyes — and I'm looking at him also — he pulled the shotgun trigger and basically blew her head apart. The

pictures showed brain matter all over the parking lot. Her skull was all over the parking lot. And I'm saying this for the record, not to shock anyone, but just to talk about some other factors later.

Then he and his co–defendant then left, ditching the gun shortly thereafter and going home, and according to his co–defendant, he was — the co–defendant was upset, he was up most of the night. But according to Jevon, he was able to sleep eight hours that night. How any human being could go home and sleep eight hours after what he did is beyond me. Just absolutely unbelievable. And then to run off and leave a 10–year–old girl sitting there watching her mother die in the parking lot — actually she was killed immediately, again, is just shocking.

He was just — this was a premeditated, cold–blooded murder. There's no question about it. The defendant keeps claiming he didn't know the gun was loaded. I think the facts were overwhelming he knew the gun was loaded. He knew that it was loaded by his — either he or his co–defendant. They had bullets there. Or shotgun shells.

I think it's very interesting, I keep hearing what a great student he was. He was a great student until recently, and I mentioned it to Ms. Tan, and this goes to his character, which I also have to consider. He had a fight just prior to this in September of 1993 at the school, Oak Creek High School, where he, according to witnesses, in an unprovoked manner, beat up seriously another student. That student had to go to the hospital, and according to reports, he didn't like the way the student looked at him, which is consistent with his statement he didn't like Miss S———'s attitude or she seemed to have an attitude. So there was something building up in him, some anger, it could have been something that happened in his family, that led to what happened on November 16th, 1993.

As to his prior record, there is no juvenile record except for the pending battery charge. He was charged in juvenile court with battery, that was pending, and I believe it was even waived here, and that has to be taken care of after this case.

But he was — this is not a child from the streets. He had everything. There's no claim by Miss Tan or no claim by anyone this is an urban psychosis type of child, that he

was deprived as a child. He had everything when he was a child. I listened to his mother, she seemed like a very nice person. I read some of the letters from members of his family, I read — he had a good family and they put him in 220 program and got him to Oak Creek High School, a good school. But for reasons that we don't know he deteriorated to the point where he became an animal. An animal who was stalking his prey on November 16th, 1993.

I also should add, it's mentioned in the presentence report, when I talk about his character, what's been happening, that there was also an altercation even in jail while this case was pending where he got into a fight with another prisoner, where he struck him. That's why he's wearing, instead of orange uniform, this maroon uniform, which indicates that he had served time, quote, "in the hole," for disciplinary reasons. So, there's a lot of anger still in Jevon.

An interesting point also I should bring up is on cross examination, Miss Kraft asked the question about when he had the gun, what was he thinking about, and isn't it true you felt you had the power, and I think that was a salient point. You were a child, 16 years of age, with

a sawed–off shotgun and you did have the power, and that's the whole problem in today's community, not just in your case. Children with guns, children with sawed–off shotguns. It's power to them. Power over other people. It just sickens this court to see case after case of child after child killing other children or other adults, but nothing has been more shocking than this case.

As to your acceptance of responsibility, you say you're sorry today, you said you're sorry in the presentence. Miss Amy Wittman, who is one of the best presentence writers around, and I think she was assigned this because she's one of the most experienced, thought your remorse was superficial, you thought mostly of yourself. I give some credence to that. I have to accept at least your statement that you're sorry and you had nothing more to say. What more could you say. Words cannot describe what you did. This was a vicious and aggravated and unprovoked murder.

I have to consider your age, and you were 16 at the time, which is also shocking. Years ago kids at 16, if they were involved in a fight, that was shocking. But now it's moved up to guns and sawed–off shotguns. So I will take in

consideration for sentencing purposes your youthfulness, at least for sentencing the parole eligibility date.

But I also have to consider the needs of the public and the community. Your needs are limited, it seems. You did claim to have smoked, I think, some marijuana before, so there may be some A. O. D. A. problem we don't know of. You may have some drug problem we don't know of. But you have very limited rehabilitative needs.

But as to the needs of the community, I think they're strong needs. Needs to protect other members of the community from someone who is going to go out and commit such a cold–blooded murder. There's also the need for punishment, and I can consider that also. That someone has to be punished, and you should be punished for what happened.

You wrote a letter to Mr. McCann. I kept that article, Mr. Dennis McCann of the Journal. You said I — but I deserve a chance, a chance to succeed, a chance to prosper, and a chance to make positive change. I don't think you deserve that chance. C——— S——— doesn't have that chance. Her children are going to have limited chances

because of the problems. They had to leave the community. I do not believe you deserve that chance. They had to be taken by C——— family, J——— and L——— S———, out to Waukesha and raised with their children, and I want to comment parenthetically on J——— and L——— S——— . I think they should be complimented and be blessed for what they did, taking three additional children, moving them to Waukesha to live with their three children. They had to expand their home, and they've done as much as they can for C——— children, and this court recognizes them and hope the community recognizes them for what they did. They're good people. It's nice to at least know there are good people in this community who can help others.

As to the S——— children and S—— family, no one's calling for your blood, no one is saying sentence him to the maximum so he dies in prison. You heard from her oldest daughter, J———, who did not ask for blood. There's also a letter, I believe, in the file from M———, who was with her mother that night, the one who was probably most profound who basically blacked out a lot of it. She says, quote, "I will forgive the man who did this to my mother

and my family if he really is sorry. I hope he is sorry, but if he isn't, I hope it's on his conscience." There's just no hatred in the S—— family.

Miss Wittman also in her presentence report recommends, she doesn't give me a parole eligibility date, but she recommends that any sentence I impose on the other counts be consecutive. She also commented this type of killing, the depravity of it, seems to be the unraveling of society, and I think it's a great statement. It seems to me also that I begin to question whether or not we live in a civilized society anymore when something like this happens, and I've seen, as a homicide judge, probably 50 or 60 homicides, but this is the most shocking and I may never see a more shocking one again.

I also found in the juvenile file a letter you wrote to Judge Christopher Foley prior to the waiver to adult court dated February 7th, 1994. You said, "If God, the most powerful person in the universe, can forgive me, how come society can't? And I did ask God for — and I did ask God to forgive me. I know He has, because it's hard for me to remember that night." I don't think God has forgiven you.

You may think so, I do not. I don't know how God could forgive you for something such as this.

I have considered for sentencing purposes your character, personality, and social traits. As I said, the fact you had lived a crime free life before but in the past year, as I said, the file is replete with suspensions, disciplinary actions, reports from teachers. Just prior to this you were being thrown out of class. I don't know what happened, but in that last year — and there's claims because your mother had been sent to jail on a welfare fraud case that this affected you, but it should not affect you to the extent where you go out beating people up, being disruptive in school, and eventually commit a murder.

I'm also considering your demeanor at trial, your degree of culpability — and you were the main actor — your social traits, your character, your remorse, be it truthful or not, your repentance, cooperation, but also I have to consider the rights of the public. As I've said in other homicide cases, no matter what I sentence you, it's not going to bring C—— S—— back to life. Life imprisonment is probably an insufficient sentence for you in this case. I think a death penalty would be insufficient

penalty for you in this case because you're not going to suffer. You say you suffer, but life imprisonment may deprive you of freedom but it's not going to have you suffer, and I think there should be a good deal of suffering. I only pray that after you die, be it in prison or out of prison, that somehow you have to endure some personal hell for eternity for what you did.

Based upon all the facts and circumstances before this court and based upon this record, as to the first degree intentional homicide, party to a crime, it's the sentence of this court that you serve a period of life imprisonment in the State Prison System. The court will set the parole eligibility date to be, November 16th of 1993, date you committed this crime, the year two thousand — what was the State's recommendation?

MR. FITZGERALD: 2060.

THE COURT: 2070. As to count 2, it's the sentence of this court you serve 10 years in the State Prison System, consecutive to court 1.

It's the sentence of this court as to count 3 you serve 20 years in the State Prison System, consecutive to count 2.

It's the sentence of this court as to count 4 you serve 2 years in the State Prison System, consecutive to count 3. Which should be 32 years. Based upon my calculations, if you serve your entire sentence, including the first degree intentional homicide case, consecutive, you'll be eligible for parole when you're 101 years of age.

You're a convicted felon. You cannot possess a firearm. You have 20 days to appeal this decision. Your attorney will explain your appeal rights. There's a $70 surcharge. Is there anything else from the State?

MR. FITZGERALD: Nothing, Your Honor.

THE COURT: Miss Tan.

MS. TAN: Your Honor, Mr. Jackson is entitled to 650 days credit.

THE COURT: So ordered. Mr. Jackson, is there anything you want to say now?

DEFENDANT: (Shakes head.)

THE COURT: Okay, take him away.