STATE OF WISCONSIN | CIRCUIT COURT BRANCH IV | BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

OMER NINHAM,

Defendant.

DECISION AND ORDER

Case No. 99CF523

Before the Court is a postconviction motion brought by Defendant Omer Ninham ("Ninham") pursuant to Wisconsin Statutes section 974.06. Ninham asserts he is entitled to resentencing based on the United States Supreme Court's holdings in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *as revised* (Jan. 27, 2016). For the following reasons, Ninham's motion will be **DENIED**.

FACTUAL BACKGROUND

The tragic facts of this case are not in dispute. On September 24, 1998, 13-year-old Zong Vang ("Vang") was riding home from the grocery store when he was assaulted by a group of teenagers, including 14-year-old Ninham. In an attempt to escape his attackers, Vang ran to the top of the nearby St. Vincent's Hospital parking ramp. After catching up with Vang, Ninham and 13-year-old Richard Crapeau assaulted Vang and threw him off of the parking ramp, to his death.

Prior to trial, the State charged Ninham with one count of threatening a judge and three counts of intimidation of a witness. The latter charges stemmed from alleged threats made by Ninham against the other juveniles present at Vang's murder who had given statements to the police. Following a four-day trial, a jury convicted Ninham of first-degree intentional homicide and physical abuse of a child on March 24, 2000. The charges for threatening a judge and intimidating witnesses were dismissed but read in for sentencing purposes.

On June 29, 2000, the Court sentenced Ninham to life imprisonment without the possibility of parole on the intentional homicide charge and five years imprisonment on the count of physical abuse of a child, consecutive to the life sentence. The Court considered two pre-sentence investigation (PSI) reports—one prepared by an investigator for the State and one prepared by an investigator hired by Ninham—that detailed Ninham's dysfunctional family structure, which included substance abuse and domestic violence, as well as Ninham's own serious substance abuse issues. Ninham's investigator also indicated in her PSI that Ninham was frightened at the thought of going to prison. The PSIs also indicated that, even following his conviction, Ninham continued to deny involvement in or even presence at the scene of Vang's homicide—a claim Ninham himself repeated at the sentencing hearing. At that hearing, Ninham's counsel discussed Ninham's age and background at length and recommended parole eligibility after 25 years. (Sentencing Tr. 16:22-21:22 June 29, 2000.)

In considering the character of the accused, the Court also discussed the fact that Ninham was a juvenile:

> I'll concede for the sake of discussion that Omer Ninham is a child, but he's a child beyond description to this Court. He's a frightening young man, I'll concede that, but he's a frightening young man, again, almost beyond description to this Court. I recognize his age. He's a young man. So was Zong Vang. I recognize his emotional stability or lack thereof.

(*Id.* at 24:15-22.) In addition to expressing amazement at Ninham's continued claim that he was not present at Vang's murder (*id.* at 26:19-20), the Court also stated that the Court had "already conceded that [Ninham]'s a child, but he's a child of the street who knew what he was doing" (*id.* at 25:19-20), and that "there is more ruthlessness in Omer Ninham than frightened child." (*Id.* at 26:3-5.) In addition, the Court considered Ninham's background, including his familial situation and substance abuse issues, but emphasized that neither of those factors excused Ninham's behavior. (*Id.* at 25:9-14; 27:4-19.) Ultimately, the Court decided that "[b]ased on

everything I know about you, based on everything I know about this incident, and based on all of the subsequent activities and your perception of them and your relationship to them," Ninham should never be eligible for parole. (*Id.* at 29:15-20.)

ANALYSIS

The United States Supreme Court has addressed the topic of punishment of juvenile offenders many times and concluded that "children and adults are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464 (citing *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010)). In 2005, the Supreme Court decided *Roper v. Simmons*, concluding that "[t]he Eighth and Fourteenth Amendments [to the Constitution of the United States] forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.* at 578. Subsequently, in 2010, the Supreme Court held that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 130 S. Ct. at 2034.

Based on the holdings in those cases, the Wisconsin Supreme Court considered an appeal from Ninham asserting that sentencing a juvenile to life imprisonment without the possibility of parole for committing homicide constitutes cruel and unusual punishment and is therefore unconstitutional. *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451. In upholding Ninham's sentence, the Wisconsin Supreme Court examined that sentence in the framework of United States Supreme Court Eighth Amendment jurisprudence and concluded that "sentencing a 14-year-old to life imprisonment without the possibility of parole for committing intentional homicide is not categorically unconstitutional" and that such a sentence may be appropriate in the rare cases in which the murder is so horrific and senseless that "the punishment is proportionate to the offense." *Id.* at ¶ 83. The *Ninham* court further concluded that, "[u]nder the

circumstances of this case, Ninham's punishment is severe, but it is not disproportionately so." *Id.* at ¶ 5.

In 2012, the United States Supreme Court concluded in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that a *mandatory* sentence of life in prison without the possibility of parole for a juvenile convicted of a homicide offense is unconstitutional, and that 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 2469 (footnote omitted). *Miller* emphasized that children have "diminished culpability and greater prospects for reform," *id.* at 2464, and that "the distinctive attributes of youth diminish the penological justifications" for life-without-parole sentences for juvenile offenders. *Id.* at 2465. Although *Miller* did not consider the prisoners' "alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger," the Supreme Court expressed a belief that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," especially because of the inherent difficulty in distinguishing between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 2469 (quotations and citations omitted).

Following *Miller*, Ninham brought another motion for resentencing, asserting that his life-without-parole sentence was unconstitutional under *Miller* because this Court did not adequately consider his age and related factors as mitigating and that he is therefore entitled to resentencing. Ninham further argues that consideration of those mitigating factors warrants imposition of a lesser sentence. In response, the State argues that *Miller* does not apply and, even if *Miller* does apply, Ninham is not entitled to resentencing because the Court did consider

Ninham's age as a mitigating factor at the time of sentencing.[1] In January 2016, the Court held Ninham's motion in abeyance pending the decision in *Montgomery v. Louisiana*, in which the United States Supreme Court determined that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." *Montgomery*, 136 S. Ct. at 732. The *Montgomery* Court stressed that, "[a]lthough *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption." *Id.* at 726 (internal quotations and citations omitted).

In light of all relevant precedent, the Court will now consider Ninham's motion for resentencing and assess whether *Miller* applies to Ninham and whether the Court appropriately considered Ninham's age at the time of sentencing.

I. *Miller v. Alabama* does not apply to Ninham's sentence

In *Miller*, the United States Supreme Court considered two cases in which 14-year-old offenders were convicted of murder and sentenced to life imprisonment without the possibility of parole. 132 S. Ct. at 2460. In both cases, the sentencing authority had no discretion; imposition of life without parole was mandated by statute. *Id.* Without addressing the question of *discretionary* life-without-parole sentences, the Supreme Court concluded that the Eighth Amendment prohibits *mandatory* life imprisonment for juveniles. *Id.* at 2469. Instead, a juvenile convicted of a homicide offense cannot be sentenced to life in prison without the possibility of parole unless the sentencing authority considers "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* (footnote omitted). The Supreme Court did not specify factors a sentencing authority must consider before

[1] The State also asserted that Ninham's motion was barred because the arguments therein had already been adjudicated in Wisconsin's appellate system. However, as explained in the January 8, 2016 decision in which the Court held Ninham's motion in abeyance, Ninham's motion would not be barred if *Miller* applies to his sentence, and therefore analysis of his arguments is appropriate.

imposing such a sentence, but mentioned that issues such as "immaturity, impetuosity, and failure to appreciate risks and consequences" would be relevant considerations. *Id.* at 2468.

As an initial matter, to the extent that Ninham suggested in his written submissions and at the motion hearing that imposition of a discretionary sentence of life in prison without the possibility of parole is categorically unconstitutional for juvenile offenders, particularly those as young as Ninham was at the time of his offense, that argument is easily rejected. In *State v. Ninham*, 2011 WI 33, Ninham's prior appeal in this same case, the Wisconsin Supreme Court determined that a sentence of life in prison without parole for a defendant who is 14 years old at the time he or she commits intentional homicide is not categorically unconstitutional. Subsequently, in *State v. Barbeau*, 2016 WI App. 51, 370 Wis. 2d 736, 883 N.W.2d 520, the Wisconsin Court of Appeals considered *Ninham* in light of *Miller* and concluded that "[a]lthough *Miller* was decided after *Ninham,* nothing in *Miller* undercuts our supreme court's holding in *Ninham*. . . . Thus, it is not unconstitutional to sentence a juvenile to life imprisonment without the possibility of supervised release for intentional homicide if the circumstances warrant it." *Barbeau*, 2016 WI App. 51 at ¶ 32 (quoting *Miller,* 132 S.Ct. at 2469). Accordingly, Ninham's life-without-parole sentence is not per se unconstitutional because he was a juvenile when he committed the offense.

In addition, Ninham's case is distinguishable from the defendants in *Miller*, and therefore *Miller* is arguably not applicable to Ninham. Unlike the juvenile offenders in *Miller*, offenders—juvenile or otherwise—who are convicted of homicide offenses in Wisconsin are not automatically sentenced to life in prison without the possibility of parole.[2] Instead, for crimes committed on or after July 1, 1988 but before December 31, 1999, circuit courts have discretion

[2] The Court recognizes that, for offenses committed on or after December 31, 1999, courts determine offenders' eligibility for extended supervision, rather than parole. However, because Ninham's offense was committed during the statutorily-defined period in which convicted offenders could be released from prison on parole, rather than extended supervision, the Court will refer generally to "parole" throughout this decision.

to make determinations as to whether and when a person sentenced to life imprisonment shall be eligible for parole based on the individual circumstances of each case. WIS. STAT. § 973.014(1) (1997-98). Nevertheless, Ninham asserts *Miller* applies retroactively to discretionary, in addition to mandatory, life-without-parole sentences, and that he is therefore entitled to resentencing if the Court "did not treat [Ninham's] youth and its attendant circumstances as mitigating" when imposing his sentence. (Mot. Sent. Relief 3.) In support of this contention, Ninham cites as persuasive authority decisions from courts in several other states invalidating discretionary life-without-parole sentences for juvenile homicide offenders if the sentencing authority did not consider the juvenile's age at sentencing, as required by *Miller*. (*See generally* Not. Supp. Authority July 7, 2015; Not. Supp. Authority July 6, 2016.)

What Ninham does not address, however, is the existence of persuasive authority from the Wisconsin Court of Appeals in the form of an unpublished decision[3] that suggests that *Miller* is not "directly applicable" to juveniles sentenced to *discretionary* life-without-parole sentences for first-degree homicide. *State v. Williams*, 2014 WI App 16, ¶ 9, 352 Wis. 2d 573, 842 N.W.2d 536. The *Williams* court considered an appeal from a juvenile convicted of first-degree intentional homicide and sentenced to life in prison with the possibility of parole in 101 years. Williams argued that *Miller* applied to his sentence, and that the sentencing court was therefore required to adequately explain why a 101-year sentence—essentially ensuring Williams would die in prison—was appropriate. *Id.* at ¶ 10. The Court of Appeals determined that Williams was not entitled to resentencing because *Miller* is "not directly applicable to Williams, because [*Miller*] concluded that *mandatory* life-without-parole sentences [for juveniles] were unconstitutional," and "Williams was not subjected to a mandatory life-without-parole sentence." *Id.* at ¶ 9.

[3] This decision is cited only for its persuasive value, pursuant to Wisconsin Statutes section 809.23(3)(b) (2013-14).

The United States Court of Appeals for the Seventh Circuit reached a similar conclusion in *Martinez v. United States*, 803 F.3d 878 (7th Cir. 2015), *cert denied*, 136 S. Ct. 1230 (2016). The juvenile defendants in *Martinez* were convicted under federal law for racketeering offenses, including murder, and the district court, exercising its discretion, sentenced both defendants to life in prison. The Seventh Circuit concluded that, "[b]ecause [the defendants'] life sentences were imposed after an individualized sentencing, and not by statutory mandate, . . . the district court did not violate *Miller*" in pronouncing sentence. *Id.* at 883.

Based on the foregoing analysis, the Court is satisfied that Ninham is not entitled to resentencing under *Miller* because his life-without-parole sentence was discretionary, not mandatory. Nevertheless, the Court will examine whether, at the time of sentencing, the Court sufficiently considered Ninham's age and related circumstances when imposing a sentence of life in prison without the possibility of parole.

II. The Court sufficiently considered Ninham's youth at the time of sentencing

Under *Miller*, *Montgomery*, and their predecessors, sentences of life in prison without the possibility of parole should be reserved only for the "rarest" of juvenile offenders—"those whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 726 (quotations and citations omitted). Although *Miller* required that a sentencing court consider a juvenile offender's "youth and attendant characteristics" as sentencing factors at a hearing, *id.* at 735, neither *Miller* nor *Montgomery* established a concrete procedure by which such consideration must be effected. In other words, the Supreme Court did not dictate certain magic words that a court must use, or specific findings of fact that a court must make, in order to make a juvenile offender's sentence to life in prison without parole constitutionally valid. *Id.* States are free to determine the manner in which they will administer their criminal justice systems; the only requirement is a finding that the crime was not reflective of transient immaturity. *Id.* Indeed, it would be unreasonable to

now require that, at Ninham's sentencing in 2000, use the phrase "transient immaturity," which did not appear in Supreme Court jurisprudence until five years later.

Miller and *Montgomery* established that, to constitutionally impose a life sentence without parole on a juvenile convicted of first-degree homicide, the sentencing court must consider the juvenile's youth and associated characteristics. Here, after presiding over a four-day jury trial, after which Ninham was found guilty of Vang's murder, examining two detailed pre-sentence investigation reports, and listening to the statements of those affected by Vang's murder—including Ninham—and the arguments of counsel at the sentencing hearing on June 29, 2000, the Court considered Ninham's youth and attendant characteristics, and nonetheless determined that Ninham's crime was so horrific and senseless as to merit the harshest penalty possible. Importantly, Ninham's assertions that the Court did not consider those factors, or did not consider them to the extent that Ninham may have liked, are inapposite in light of the evidence to the contrary in the record.

Prior to pronouncing sentence, the Court made a lengthy record detailing the reasons for imposing a sentence of life in prison without the possibility of parole. The Court's first statements about the character of the offender acknowledge that Ninham is a juvenile.[4] (Sent. Tr. at 24:13-22.) Inherent in that acknowledgment is the understanding that juveniles, in general, are less culpable than adults. By following the fact that Ninham is a child with the statements that "Omer Ninham is a child, but he's a child beyond description to this Court" (*id.* at 24:16-17), and "he's a frightening young man, again, almost beyond description to this Court" (*id.* at 24:18-19), the Court indicated that the usual presumptions associated with an offender's youth may not

[4] In referencing Ninham's youth, the Court stated, "I'll concede for the sake of discussion that Omer Ninham is a child." Ninham asserts that use of this expression indicates that the Court did not sufficiently consider Ninham's age as a mitigating factor. Use of such a colloquialism is not itself evidence that the Court did not give Ninham's youth sufficient weight, particularly in light of the remainder of the record.

apply to Ninham. The Court subsequently supported that conclusion with additional references to Ninham's character.

The Court described many factors relevant to Ninham's sentencing, including: Ninham's youth (*id.* at 24:20), his "emotional stability or lack thereof" (*id.* at 24:21-22), his "ruthlessness" (*id.* at 26:4), his familial situation (*id.* at 24:23-25:14), and his substance abuse. (*Id.* at 27:4-11.) In discussing each of those factors, the Court expressed concern about Ninham's true nature, referring to Ninham as "a child of the street who knew what he was doing" (*id.* at 25:19-20); stating that "there is more ruthlessness in Omer Ninham than there is frightened child" (*id.* at 26:3-5); explaining that "Mr. Ninham's character is fraught with negative . . . because for the most part that's the direction in which he chose to go" (*id.* at 25:15-18); and pointing out that "[y]ou [Ninham] weren't going to overcome this frightening aspect of your personality [substance abuse] because it didn't serve any useful purpose to you." (*Id.* at 27:17-19.) Although the words were different, the Court expressed, in various ways, the belief that Ninham was one of those rarest, irreparably corrupt juvenile offenders deserving of the harshest possible punishment.

The Court's description of Vang's murder also supports the conclusion that Ninham is one of those "rarest" juvenile offenders:

> The gravity of the offense is so severe and is so involved and complicated that all I can do is rely on the one simple and direct statement that both [pre-sentence investigators] have agreed on. This crime was horrific.

(*Id.* at 24:3-6.) A "transiently immature" juvenile offender is less likely to perpetrate a murder as "involved and complicated" as Ninham's murder of Vang. The Court also considered Ninham's conduct prior to trial, which resulted in the read-in charges. (*Id.* at 28:23-25.) Threats to the presiding judge and the other individuals present at Vang's murder do not, as Ninham suggests, reflect Ninham's youth and inability to deal with the adult criminal justice system. To the

contrary, threatening individuals involved in the matter in an attempt to weaken the State's case against him demonstrates a level of sophistication beyond that which would reasonably be attributed to a "transiently immature" juvenile in Ninham's position.

Ultimately, the Court concluded, based on knowledge of Ninham's character, the circumstances of Vang's murder, and the read-in charges that reflected Ninham's threatening conduct prior to trial, that Ninham should be sentenced to life in prison without the possibility for parole. (*Id.* at 29:14-20.) Upon examination of the entire record, the Court is therefore satisfied that the sentencing Court appropriately considered Ninham's youth and related characteristics when imposing this sentence. Notably, even if the Court were compelled to resentence Ninham, the Court would be obligated to assess the same factors considered by the Court at Ninham's sentencing in 2000—and, although the Court may now use terminology more consistent with *Miller* and related decisions, the only conceivable conclusion is that sentencing Ninham to life in prison without parole for Vang's murder is just warranted in 2016 as it was in 2000. Accordingly, even if *Miller* applies to a discretionary life-without-parole sentence, Ninham's sentence is not unconstitutional and he is therefore not entitled to resentencing.

CONCLUSION & ORDER

Based upon the foregoing analysis, it is hereby **ORDERED** that Ninham's postconviction motion is **DENIED**.

Dated at Green Bay, Wisconsin, this 7th day of October, 2016.

BY THE COURT:

Honorable Kendall M. Kelley
Circuit Court Judge, Branch IV

c: Atty ANA Kerrigan-Navas

10/7/16 Faxed to Atty D'Addario (she will send c: to Madison counsel)