SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,	*	
	*	
Plaintiff-Respondent,	*	
	*	
v.	*	Appeal No. 2008AP001139
	*	
OMER NINHAM,	*	
	*	
Defendant-Appellant-Petitioner.	*	

On Appeal from the Wisconsin Court of Appeals, District 3

Brown County Circuit Court Case No. 99-CF-523
The Honorable J.D. McKay Presiding

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS.. i

TABLE OF AUTHORITIES. iv

STATEMENT OF THE ISSUES. 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION .. 3

STATEMENT OF THE CASE. 4

STATEMENT OF THE FACTS. 5

ARGUMENT. 8

I. SENTENCING A FOURTEEN-YEAR-OLD CHILD TO LIFE IMPRISONMENT WITHOUT PAROLE IS CRUEL AND UNUSUAL IN VIOLATION OF THE UNITED STATES AND WISCONSIN CONSTITUTIONS.. 8

A. Children Fourteen and Younger Are a Distinct Group of Juveniles for Whom a Sentence of Life Imprisonment Without Parole is Unconstitutional.. 12

B. The Extreme Rarity With Which Life Without Parole Sentences Are Imposed on Fourteen-Year-Old Children Demonstrates That There Is a National Consensus Against Such Sentences.. 23

C. The Characteristics of Fourteen-Year-Old Offenders Demonstrate That the Extremely Harsh, Permanent Punishment of Life Without Parole Is Not Appropriate.. 29

D. Conclusion. 34

II. NEW SCIENTIFIC RESEARCH REGARDING ADOLESCENT BRAIN DEVELOPMENT THAT BEARS DIRECTLY ON THE DIMINISHED CULPABILITY AND HEIGHTENED REHABILITATIVE POTENTIAL OF CHILDREN IS A NEW FACTOR THAT FRUSTRATES THE PURPOSE OF THE SENTENCE IN THIS CASE.. 35

III. OMER'S SENTENCE IS UNDULY HARSH AND EXCESSIVE UNDER WISCONSIN LAW IN LIGHT OF ALL THE CIRCUMSTANCES IN THIS CASE INCLUDING HIS YOUNG AGE AND BACKGROUND.. 41

IV. THE SENTENCING COURT RELIED ON IMPROPER FACTORS IN IMPOSING THE SENTENCE IN THIS CASE.. 46

CONCLUSION. 49

FORM AND LENGTH CERTIFICATION

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

CERTIFICATION OF MAILING

CERTIFICATE OF SERVICE

APPENDIX

A. State v. Ninham, No. 2008AP1139 (Wis. Ct. App. Mar. 3, 2009) (slip opinion)

B. Decision and Order of the Brown County Circuit Court, Case No. 99-CF-523, Apr. 11, 2008

C. Motion for Sentencing Relief and a New Trial Under Wis. Stat. §§ 974.06, 805.15, and this Court's Inherent Power to Modify Sentencing, Case No. 99-CF-523, Oct. 18, 2007

Appendix 1, Affidavit of Ralph Tarter

Appendix 1A, Curriculum Vitae of Ralph Tarter

Appendix 2, Affidavit of Rachel Germany

D. Transcript of Sentencing Hearing, Case No. 99-CF-523, June 29, 2000

CERTIFICATION OF APPENDIX

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002). 24, 25, 26

Booth v. Maryland, 482 U.S. 496 (1987). 48

State v. Doe, 78 Wis. 2d 161, 254 N.W.2d 210 (Wis. 1977).. 9

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Graham v. Florida, 130 S. Ct. 2011 (2010). . . . . passim

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STATUTES

Cal. Pen. Code § 190.5(b). 6

Colo. Rev. Stat. § 17-22.5-104. 27

Tex. Penal Code Ann. § 12.31. 27

U.S. Const. Amend. 8. . . . . 9, 34

U.S. Const. Amend. 14. . . . . 9, 34

Wis. Const. Article I, Section 6. . . . . 9, 34

Wis. Stat. Ann. § 146.33. 13

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Wis. Stat. Ann. § 302.18. 13

Wis. Stat. Ann. § 343.06. 13

Wis. Stat. Ann. § 343.07. 13

Wis. Stat. Ann. § 765.02. 13

Wis. Stat. Ann. §§ 948.01. 13

Wis. Stat. Ann. § 948.02. 13

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STATEMENT OF THE ISSUES

I. Do United States Supreme Court precedents that impose constitutional restrictions on severe sentences for children convicted of serious crimes as adults and Wisconsin law establishing heightened protections for fourteen-year-old children establish that sentencing a fourteen-year-old child to die in prison through a sentence of life imprisonment without parole is cruel and unusual punishment?

Both the circuit court and the court of appeals decided this issue was without merit. The court of appeals acknowledged that Roper v. Simmons, 543 U.S. 551 (2005), established differences between children and adults and that those differences are relevant to sentencing, but declined to apply the reasoning in Roper to a case involving a sentence of life imprisonment without parole, a position which has now been rejected by Graham v. Florida, 130 S. Ct. 2011 (2010).

II. Is new scientific evidence regarding adolescent brain development that bears on the distinctly diminished culpability and heightened rehabilitative potential of children a new factor that is highly relevant to a death-in-

prison sentence for a fourteen-year-old and changes the original sentencing considerations so as to require modification of Omer Ninham's sentence?

The circuit court and the court of appeals both concluded that this new information about adolescent brain development is not highly relevant and does not frustrate the purpose of the original sentence because the sentencing court was fully aware of the differences between juveniles and adults at the time of sentencing.

III. In light of United States Supreme Court precedent and Wisconsin law, is the sentence in this case unduly harsh and excessive given Omer's age and status as a young adolescent and his level of development at the time of the offense?

Both the circuit court and the court of appeals found that this issue was without merit and relied primarily on the nature of Omer Ninham's offense to find that his sentence was not disproportionate. Both courts declined to engage in an inquiry about how Omer's age at the time of the offense or categorical protections for children affect the analysis of whether his sentence is unduly harsh and excessive.

IV. Did the trial court consider an improper factor in sentencing Omer Ninham to die in prison based on the victim's family's religious beliefs about the appropriate punishment?

The circuit court found that reliance on these beliefs was not inappropriate. The court of appeals also rejected this claim, holding that the sentencing court's references to the victim's family's religious beliefs "did not constitute reliance on an improper factor."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Omer Ninham respectfully requests oral argument. This is a case of first impression in Wisconsin, concerning the constitutionality of imposing a death-in-prison sentence on a fourteen-year-old child. Given the complexity and importance of this claim, and the new evidence alleged in Omer's post-conviction motion concerning the extreme rarity of his sentence and the compelling mitigating evidence in his case, defendant-appellant-petitioner believes that oral argument would assist the Court's consideration and adjudication of the issues presented. Defendant-appellant-petitioner leaves the question of publication to the discretion of the Court.

STATEMENT OF THE CASE

In 2000, Omer Ninham was convicted in the Brown County Circuit Court of first-degree intentional homicide and child abuse for his involvement in the death of Zong Vang. Omer was fourteen years old at the time of the offense. (R. 82:2.) On June 29, 2000, he was sentenced to life imprisonment without the possibility of parole. (R. 70:29.)

On November 16, 2000, Omer Ninham filed a motion for postconviction relief, which was denied on March 5, 2001. (R. 53, 59.) Two issues addressing the trial court's sua sponte excusal of jurors with felony convictions were raised on appeal to the Wisconsin Court of Appeals, which affirmed on December 4, 2001. State v. Ninham,2002 WI App. 34, 250 Wis. 2d 354 (Wis. Ct. App. 2001). On February 20, 2002, this Court denied review. (R. 82:3.)

In March 2005, the United States Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005), established a new constitutional inquiry and rule for sentencing children. On October 18, 2007, Omer Ninham, through undersigned counsel, filed a postconviction motion for sentencing relief (R. 76), which asserted that his sentence to die in prison for an offense at age fourteen is

impermissibly harsh and excessive and violates the Wisconsin and United States Constitutions, that his sentence should be modified in light of new evidence that frustrates the purpose of his death-in-prison sentence, and that his sentence was based on an improper factor. (R. 76:12–28.)

On April 11, 2008, the circuit court denied relief. (R. 82.) On March 3, 2009, the Wisconsin Court of Appeals affirmed. State v. Ninham, 2009 WI App. 64, 316 Wis. 2d 776, 767 N.W.2d 326 (Wis. Ct. App. 2009) (Appendix A). On May 17, 2010, the United States Supreme Court in Graham v. Florida, 130 S. Ct. 2011 (2010), held that the reasoning of Roper also applies to cases in which children have been sentenced to life imprisonment without possibility of parole. On September 13, 2010, this Court granted Omer Ninham's petition for review.

STATEMENT OF THE FACTS

Omer Ninham is the only person in the State of Wisconsin sentenced to die in prison for an offense at age fourteen.[1] Only eighteen states, including Wisconsin, have imposed such sentences

[1]Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison 20, 32 (2007), available at http://www.eji.org/eji/files/20071017cruelandunusual.pdf.

on children fourteen or younger for murder.[2] Nationwide, 73 people are sentenced to death in prison for offenses at or under age fourteen.[3] The United States is the only country in the world where death-in-prison sentences are imposed on children.[4]

The circuit court found it "undisputed that [Omer Ninham] had an extremely difficult and tumultuous childhood." (R. 82:1.) His parents and older brothers physically and emotionally abused Omer, using closed fists and weapons, requiring police intervention, and resulting in Omer's father's incarceration for domestic violence. (R. 76:14.) Apart from physical violence, Omer's parents provided no parental guidance or support, and their severe alcoholism contributed to their inability to ensure Omer consistently had shelter and other basic necessities. (R. 76:14.) He received his first toothbrush from youth shelter

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[2]Id. at 20. This report identified eighteen states, in addition to Wisconsin, where thirteen- or fourteen-year-olds have been sentenced to death in prison. A total of eighteen states, not nineteen, is more relevant to this Court's analysis because California statutorily prohibited the imposition of life imprisonment without parole on a defendant under age sixteen who, like Omer Ninham, is convicted of first-degree murder, Cal. Pen. Code, § 190.5(b), and also no longer permits fourteen-year-olds to be sentenced to life without parole for any offense, see In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

[3]Cruel and Unusual, at 20.

[4]See Connie De La Vega & Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law & Practice, 42 U.S.F. L. Rev. 983, 990 (2008).

employees when he was fourteen. (R. 76:App. 1, ¶ 11.)

Omer tried to flee his violent and chaotic environment by repeatedly running away and, by the seventh grade, used alcohol to alleviate his depression, chronic severe stress, and alienation, often drinking alone and to the point of unconsciousness. (R. 76:14–15.) Brown County Human Services Mental Health Center diagnosed Omer's alcohol abuse disorder and suggested, but did not provide, treatment. (R. 76:15.) At age fourteen, according to the circuit court's findings, Omer was with four other young teenagers when a bullying episode escalated into a tragic assault, resulting in the death of Zong Vang, a thirteen-year-old boy whom Omer and Ricky Crapeau pushed or threw from a parking ramp. (R. 82:2–3.)

Brown County Social Services subsequently referred Omer to the Oneida Boys Home because of his family background of abuse and neglect and because he was suffering suicidal thoughts. (R. 76:15.) Omer, who is Native American, made significant progress at the Boys Home, where he was exposed for the first time to positive role models and structure guided by Native American spirituality. However, six months after his arrival, his treatment

and progress were cut short when he was arrested for this offense. (R. 76:15.)

Despite having no prior violent record, and based in part on statements made while in pre-trial detention that, for all their adolescent bluster and poor judgment, were unaccompanied by violent acts, Omer Ninham was sentenced to lifelong imprisonment with no possibility of parole. (R. 70:23–29.) Seven years later, at age twenty-three, Omer was examined by a clinical neuropsychologist who concluded that he no longer suffers from the severe behavioral dyscontrol that dominated his young teenage years, that he does not suffer from psychopathy or any serious psychiatric disorder, and has grown into a thoughtful young man whose prognosis for successful re-entry into the community, and absence of recidivism, is very good. (R. 76:25.)

ARGUMENT

I. SENTENCING A FOURTEEN-YEAR-OLD CHILD TO LIFE IMPRISONMENT WITHOUT PAROLE IS CRUEL AND UNUSUAL IN VIOLATION OF THE UNITED STATES AND WISCONSIN CONSTITUTIONS.

Omer Ninham is the only child fourteen or younger in Wisconsin who has been sentenced to life imprisonment without parole, the harshest penalty available for adults under Wisconsin

law. Children fourteen and younger are a distinct group of juvenile offenders for whom a sentence of life imprisonment without parole is cruel and unusual. Under United States Supreme Court precedent, sentencing a fourteen-year-old child to die in prison through a sentence of life without parole categorically violates the Eighth and Fourteenth Amendments to the United States Constitution. In addition, Omer's sentence to die in prison violates Article I, Section 6 of the Wisconsin Constitution.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This provision is applicable to the States through the Fourteenth Amendment. See, e.g., Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam); Robinson v. California, 370 U.S. 660, 666–67 (1962). Article I, Section 6 of the Wisconsin Constitution includes identical language, but this Court has also "never hesitated" to "afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court." State v. Doe, 78 Wis. 2d 161, 171, 254 N.W.2d 210, 215–16 (Wis. 1977).

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). This precept "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

In recent years, the United States Supreme Court has twice addressed the application of the Eighth Amendment to harsh penalties imposed on children and recognized that the substantial differences between children and adults are constitutionally relevant. In Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court addressed cases in which older teens had been convicted of aggravated homicide and sentenced to death. The Court found that, even in the most serious murder cases, three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." Id. at 569. When compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of

responsibility," they "are more vulnerable or susceptible to negative influences and outside pressures," and their character "is not as well formed." Id. at 569–70. Because these distinctions mean the juveniles are less culpable than adults, the Court concluded that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." Id. at 573–74.

In Graham v. Florida, 130 S. Ct. 2011 (2010), the Supreme Court found that the same differences between children and adults that the Court recognized in Roper are also relevant when reviewing the constitutionality of sentences of life imprisonment without parole. Id. at 2026. In Graham, the Court specifically addressed a case in which a sixteen-year-old had been sentenced to life without parole for armed burglary. Id. at 2020. The Court held in the case before it that "the Eighth Amendment forbids the sentence of life without parole" for a juvenile offender. Id. at 2030. The Court also made clear that the reasoning of Roper, including the recognition that differences between children and adults are

constitutionally significant, applies to a categorical challenge based on age to a sentence of life imprisonment without parole. Id. at 2022–23, 2026.

Thus, the United States Supreme Court has now held that a child convicted of aggravated homicide is entitled to constitutional protection despite the heinous nature of the offense, Roper, 543 U.S. at 574, and that the constitutional limitations on sentencing children apply to sentences of life imprisonment without parole, Graham, 130 S. Ct. at 2030.

A. Children Fourteen and Younger Are a Distinct Group of Juveniles for Whom a Sentence of Life Imprisonment Without Parole is Unconstitutional.

Unlike the older teens addressed in Roper and Graham, Omer was only fourteen years old at the time of the offense for which he was sentenced to life imprisonment without parole. Young adolescents like Omer are legally and developmentally distinct from older teens and adults in ways that are constitutionally relevant to punishment. These differences require a distinct analysis when evaluating whether a sentence of life imprisonment without parole imposed on a fourteen-year-old child is cruel and unusual.

Wisconsin law has long recognized that young adolescents, more than older teens, are in need of additional protections and unprepared for adult responsibilities. Unlike older teens, fourteen-year-olds are considered incapable of consenting to sexual activity. See Wis. Stat. Ann. §§ 948.01, 948.02, 948.09 . Young adolescents are also prohibited from getting married, even with parental consent. See Wis. Stat. Ann. § 765.02. Fourteen-year-olds are not allowed to drive, or even obtain a learner's permit. See Wis. Stat. Ann. §§ 343.06, 343.07. They are prevented from donating blood, Wis. Stat. Ann. § 146.33, or organs, Wis. Stat. Ann. § 157.06. Fourteen-year-old crime victims receive extra protections under certain sexual offense statutes, Wis. Stat. Ann. §§ 948.02, 948.09, 948.075, and may be shielded from having to testify in open court, Wis. Stat. Ann. § 967.04. Finally, unlike older teens, children fourteen and younger cannot be incarcerated with adults. Wis. Stat. Ann. § 302.18. That these restrictions and protections are not applied to late adolescents demonstrates that Wisconsin's citizens recognize that early adolescents are developmentally distinct from adults and older teens.

Wisconsin courts have similarly recognized the special

vulnerability of young adolescents. For example, in discussing a statute authorizing criminal prosecution of those who employ children under 16 years of age in the operation of dangerous machinery, this Court lauded efforts to protect young teens. See Pinoza v. Northern Chair Co., 152 Wis. 473, 473, 140 N.W. 84, 86–87 (1913).

This Court has also acknowledged the particular vulnerabilities of juveniles, and especially young adolescents, when engaged in other traditionally adult, high-stakes situations. See, e.g., Loveridge v. Chartier, 161 Wis. 2d 150, 175, 468 N.W. 2d 146, 153 (Wis. 1991) ("The legislature recognized the difference between those under 16 and those between 16 and 18 by making sexual contact with the former a felony and sexual contact with the latter a misdemeanor. The lesser penalty for sexual contact with persons between 16 and 18 indicates that the legislature considered such contact to be less harmful than sexual contact between an adult and a person under 16 years of age."); Wells v. State, 40 Wis. 2d 724, 732, 162 N.W.2d 634, 638 (Wis. 1968) ("[T]he question of whether the accused validly waived his right to counsel . . . becomes especially important in cases where the accused is of

young age or low intelligence.").

In 2005, this Court overturned a fourteen-year-old appellant's delinquency adjudication and exercised its supervisory authority to require that all future interrogations of juvenile suspects be electronically recorded. See In re Jerrell C.J., 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110 (2005). The Court's decision once again recognized the particular vulnerability of younger adolescents and held:.

> [Y]outh remains a critical factor for our consideration, and the younger the child the more carefully we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or simple immaturity that would not affect an adult has tainted the juvenile's confession. Simply put, children are different than adults, and the condition of being a child renders one uncommonly susceptible to police pressures.

Id. at ¶ 26 (emphasis added). In her concurring opinion, Chief Justice Abrahamson further argued, "juveniles do not have the decision-making capacity and understanding of adults . . . children under the age of 16 are less capable than adults of understanding their Miranda rights, have a propensity to confess to police, and are less capable than adults of making long range decisions." Id. at ¶ 101 (emphasis added). As these examples make clear, both the

Wisconsin legislature and Wisconsin courts have long recognized that young adolescents are a distinct group of juveniles in need of greater protection.

Recent scientific research supports the legal recognition of young adolescence as a distinct developmental period. Relative to that of adults and even older adolescents, young teenage judgment is handicapped in nearly every conceivable way: young adolescents lack life experience and background knowledge to inform their choices; they struggle to generate options and to imagine consequences; and, perhaps for good reason, they lack the necessary self-confidence to make reasoned judgments and stick by them.[5] Even when compared to twelfth graders (rather than

[5] See B. Luna, The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior 249, 252–56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., Adolescent Decision-Making, 12 J. Adolescence 265, 267–70 (1989) (Young adolescents show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than mid-adolscents); Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older adolescents than younger ones).

adults), eighth graders show relative deficiencies in imagining risks and future consequences.[6] At fourteen, the major transformation in brain structure that will result in a sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely underway.[7]

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[6]Catherine C. Lewis, How Adolescents Approach Decisions, 52 Child Dev. 538, 543 (1981); see also Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Dev. Psychol. 257, 271 (2001) (noting important differences in decision-making competence of early adolescents and older teenagers).

[7]See Luna, supra note 5, at 257; see also Thomas J. Whitford et al., Brain Maturation in Adolescence, 28 Human Brian Mapping 228, 228 (2007) (adolescence is "peak period of neural reorganization"). At the core of this transformation are co-occurring increases in white matter (myelination) and decreases in gray matter (synaptic pruning). Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77, 77–83 (2004). Myelination increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior – it is the wiring of connections among and between the frontal regions and the rest of the brain. Immature myelination is thought to make adolescents vulnerable to impulsive behavior, while the increased processing speed facilitated by myelination facilitates cognitive complexity. Charles Geier & Beatriz Luna, The Maturation of Incentive Processing and Cognitive Control, 93 Pharmacol. Biochem. Behav. 212, 216 (2009); see also Giedd, supra, at 80 (during myelination transmission time between neurons is increased up to 100 times). White matter in the brain increases in a linear fashion, such that older adolescents and adults benefit from a greater number of myelinated neurons than younger teens. Giedd, supra, at 80.

Cortical gray matter is thickest early in adolescence. Id. at 82. Later in the teenage years, this cortical gray matter undergoes significant "pruning," making more efficient that part of the brain responsible for inhibiting impulses and assessing risk. Id.; see also Tracy Rightmer, Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than

Early teenagers' incapacity for responsible decisionmaking is closely related to adolescent risk-taking.[8] A "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" drives the young adolescent toward increased sensation-seeking and risk-taking; "this increase in

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Adults, 9 Quinnipiac Health L.J. 1, 12 (2005); L.P. Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 Neurosci. & Biobehav. Rev. 417, 439 (2000).

Pruning typically is not complete until middle to late adolescence, and the parts of the brain that control executive functioning and process risk do not finish myelinating until late adolescence or early adulthood. Jay N. Giedd et al., Brain Development During Childhood and Adolescence: a Longitudinal MRI Study, 2 Nature Neurosci. 861, 862 (1999); see also Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neurosci. 859, 860 (1999) (in longitudinal study of brain development, finding prefrontal cortex loses gray matter only at end of adolescence); Beatriz Luna & John A. Sweeney, The Emergence of Collaborative Brain Function, 1021 Annals N.Y. Acad. Sci. 296, 301 (2004). These "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into late adolescence." Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence, 58 Am. Psychologist 1009, 1013 (2003). Indeed, the brain does not appear to finish growing completely until late adolescence. Elizabeth R. Sowell et al., Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping, 9 NeuroImage 587, 596 (1998); see also Halpern-Felsher & Cauffman, supra note 6, at 271 ("Importance progress in the development of decision-making competence occurs sometime during late adolescence. . . .").

[8]See, e.g., Laurence Steinberg, Risk-Taking in Adolescence: New Perspectives from Brain and Behavioral Science, 16 Current Dir. Psychol. Sci. 55, 56–58 (2007); Geier & Luna, supra note 7, at 218; Ann E. Kelley et al., Risk Taking and Novelty Seeking in Adolescence, 1021 Annals N.Y. Acad. Sci. 27, 27 (2004). The literature documenting adolescents' proclivity for risk-taking is too extensive even to summarize within the compass of this brief.

reward seeking precedes the structural maturation of the cognitive control system and its connections to areas of the socioemotional system, a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control."[9] "The temporal gap between the arousal of the socioemotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of heightened vulnerability to risk taking during middle adolescence."[10] This is compounded by the fact that, while all adolescents are more peer-oriented than adults, the research indicates that vulnerability to peer pressure, especially for boys, increases during early adolescence to an all-time high in eighth grade.[11] Indeed, extreme

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[9]Laurence Steinberg, Elizabeth Cauffman, et al., Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report, 44 Dev. Psychol. 1764, 1764 (2008).

[10]Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Ann. Rev. Clinical Psychol. 459, 466 (2009).

[11]Laurence Steinberg & Susan B. Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 Child Dev. 841, 848 (1986); id. at 846 (autonomy in the face of peer pressure has been shown to decline during early adolescence, "especially for boys, and especially when the pressure is to do something wrong"); see also Mann supra note 5, at 267–268, 274 (early adolescence associated with greatest conformity to peer group pressure); Steinberg, Risk-Taking, supra note 8, at 57 (susceptibility to antisocial peer influence peaks in mid-adolescence); N. Dickon Reppucci, Adolescent

vulnerability to peer influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is statistically aberrant for boys to refrain from minor criminal behavior during this period.[12] But most teens grow out of this behavior as a predictable part of the maturation process.[13]

Young adolescents also have less ability than older adolescents and adults to free themselves from morally toxic or dangerous environments. State and federal laws meant to protect young teens from exploitation and from their own underdeveloped sense of responsibility – including restrictions on driving, working, and leaving school – also operate conversely to disable a fourteen-year-old from escaping an abusive parent, a dysfunctional or violent household, or a dangerous neighborhood.

Development and Juvenile Justice, 27 Am. J. Community Psychol. 307, 318 (1999) (social conformity peaks around age 15)

[12]Spear, supra note 7, at 421; Reppucci, supra note 11, at 319.

[13]Spear, supra note 7, at 421 (adolescent experimentation in risk-taking is transient for most individuals); Daniel Seagrave & Thomas Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, 26 L. & Human Behav. 219, 229 (2002) (defying rules is part of adolescent experimentation with autonomy and identity development, and many youths who manifest "deviance" in adolescence will not do so in adulthood); Reppucci, supra note 11, at 319 ("[D]esistance from antisocial behavior is also a predictable part of the maturation process.").

Young teens, to a greater extent than older teens, are also handicapped by their undeveloped sense of self and their inability to imagine their futures.[14] It is not until the late teens or early twenties that they begin to form a coherent identity – although teens sixteen and older have a more mature sense of self than adolescents under fifteen.[15] Very few young adolescents think about their future beyond age 30.[16] As adolescents grow older, they

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[14]See Nurmi, supra note 5, at 12–13; see also Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence, 20 L. & Human Behav. 249, 255 (1996) (moral reasoning and reflectiveness are associated with sense of identity, which does not begin to consolidate until late teens or early twenties; extreme vulnerability in self-image seen especially in younger adolescents); Seagrave & Grisso, supra note 13, at 229 ("Many adolescents focus excessively on present circumstances and weight the importance of risks differently than do adults, especially when under emotional stress or in situations where a solution is not readily apparent."); Reppucci, supra note 11, at 318 (adolescents "discount the future more than adults" and "weigh more heavily the short-term versus the long-term consequences of decisions"); Jeffrey Arnett, Reckless Behavior in Adolescence, 12 Dev. Rev. 339, 344 (1992) (adolescents' limited life experience impairs ability to fully apprehend possible negative consequences of their actions); Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 Dev. Rev. 78, 90 (2008) (feelings of self-consciousness increase during early adolescence, peak around age 15, then decline).

[15]Steinberg, Social Neuroscience, supra note 14, at 94 (future orientation and planning increase from 16–18); Seagrave & Grisso, supra note 13, at 226 (adolescence is time of dramatic changes in identity, during which adolescent may present an "insincere and seemingly choreographed social facade, either by attempting to manage peers' impressions or because they are 'trying on' a not yet established personality style, which can be misinterpreted as the manipulative, false, and shallow features of the psychopathic offender"); id. at 229 (adolescents "focus excessively on present circumstances").

[16]Nurmi, supra note 5, at 27.

become increasingly focused upon tasks of self-development, contemplating future education, occupation, and family; with this added perspective, their ability to plan and to realistically anticipate long-term consequences improves.[17]

The flip side of young adolescents' nascent sense of self is that they have, relative to older individuals, more potential to change and develop positive character traits as they grow up. A typical fourteen-year-old who acts irresponsibly in reaction to a thrilling impulse or succumbs to peer pressure is not irretrievably depraved or permanently flawed. Nothing about his character is permanent, and he has years of development ahead, during which he can (and, in most cases, will) grow into a moral, law-abiding adult.[18]

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited. . . .
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> . . . [M]ost juvenile offenders mature out of crime . . . and . . . will desist whether or not they are caught,

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[17] Id. at 27–29.

[18] See supra note 13.

arrested, prosecuted or sanctioned . . . .[19]

As is readily observable and widely accepted, the youngest adolescents are the least mature, most susceptible to internal impulses and external influences, and have the greatest capacity for change.[20] This particular vulnerability has longstanding recognition in Wisconsin law. For these reasons, adolescents fourteen and younger are a distinct group of young offenders who must be considered separately from older juveniles when evaluating whether a sentence of life imprisonment without parole is cruel and unusual.

B. The Extreme Rarity With Which Life Without Parole Sentences Are Imposed on Fourteen-Year-Old Children Demonstrates That There Is a National Consensus Against Such Sentences.

In evaluating whether a sentence is cruel and unusual, "[t]he analysis begins with objective indicia of national consensus." Graham, 130 S. Ct. at 2023. The Supreme Court has found that

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[19]Steinberg, supra note 10, at 478.

[20]See, e.g., Laurence Steinberg, Sandra Graham et al., Age Differences in Future Orientation and Delay Discounting, 80 Child Dev. 28, 28 (2009) [hereinafter Steinberg, Graham, et al., Future Orientation]; Laurence Steinberg & Kathryn C. Monahan, Age Differences in Resistance to Peer Influence, 43 Dev. Psycho. 1531, 1540 (2007); Steinberg, Cauffman, et al., supra note 9, at 1775–76.

"[a]ctual sentencing practices are an important part of the . . . inquiry into consensus." Id. Omer is the only person in the State of Wisconsin serving a sentence of life imprisonment without the possibility of parole for a crime committed at the age of fourteen. Nationwide only 73 children age fourteen or younger have been sentenced to spend the rest of their lives in prison.[21] This number is substantially less than the 123 sentences which the Supreme Court in Graham found demonstrated that "[t]he sentencing practice now under consideration is exceedingly rare." 130 S. Ct. at 2023, 2026. It is also similar to the number of sentences found indicative of a national consensus in previous cases. When Roper recognized a national consensus against death sentences for juveniles, 72 juvenile offenders were under that sentence.[22] When Atkins v. Virginia, 536 U.S. 304 (2002), found a national consensus against death sentences for persons with mental retardation, it was estimated that one to three percent of the death-row

[21]See Cruel and Unusual, supra note 1, at 20.

[22]Victor L. Streib, Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – September 30, 2004 3 (2004), available at http://www.demaction.org/dia/organizations/ncadp/Affiliate/Toolkit/Resources/DeathPenalty/JuvDeathSept302004.pdf.

population – roughly 71 people – were mentally retarded.[23]

The total of 73 young adolesents who are serving sentences of life without parole is particularly strong evidence of the rarity of these sentences for two reasons. First, as the Supreme Court noted in Graham, because "a juvenile sentenced to life without parole is likely to live in prison for decades," "these statistics likely reflect nearly all [young adolescent] offenders who have received a life without parole sentence stretching back many years." 130 S. Ct. at 2024. Second, these cases represent just a tiny fraction of cases in which people fourteen or younger might have received such sentences. According to the FBI's Uniform Crime Statistics, since 1995, 103,068 children fourteen or younger have been arrested for offenses that could potentially expose them to life without parole, and 1,878 of those children were arrested for homicides.[24] In same time period, in Wisconsin, 1,153 juveniles

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[23]See Atkins, 536 U.S. at 309 n.5; Death Penalty Information Center, Size of Death Row By Year, http://www.deathpenaltyinfo.org/ death-row-inmates-state-and-size- death-row-year#year (last visited Oct. 12, 2010) (showing 3,557 death row inmates in 2002).

[24]These number were compiled from data available at http://www.fbi.gov/ucr.

were arrested for murder.[25] However, only one fourteen-year-old, Omer Ninham, has been sentenced to life without parole in Wisconsin in that time period. The Graham Court found that similar data supported a conclusion that the sentencing practice at issue was unusual. 130 S. Ct. at 2025.

Additionally, children fourteen years old or younger are known to have been sentenced to life without parole in only eighteen states.[26] Thus, in the vast majority of states, no child Omer's age has been subjected to life imprisonment without possibility of parole. Moreover, in ten of the eighteen states identified as having sentenced children as young as fourteen to life without the possibility of parole, only one or two children have received that sentence.[27] That only a minority of states have imposed these sentences is strong evidence of a national consensus. See, e.g., Roper, 543 U.S. at 564–65; Atkins, 536 U.S. at 316.

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[25]This number was compiled from data from the Wisconsin Office of Justice Assistance, available at http://oja.wi.gov/category.asp?linkcatid=1324&linkid=709& locid=97.

[26]Cruel and Unusual, surpa note 1, at 20. Although this report indicates that there are nineteen states in which thirteen- and fourteen-year-olds have been sentenced to life without parole, there are now only eighteen because the only such sentence in California has recently been overturned. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

[27]Cruel and Unusual, supra note 1, at 20.

One of these eighteen states, Colorado, no longer allows imposition of life without parole on any juvenile. See Colo. Rev. Stat. § 17-22.5-104(IV). California courts have also now prohibited life without parole for children under sixteen. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009). The fact that these two states that formerly permitted this sentence have moved away from it makes clear that the trend is against imposing this unusual sentence. Since this case was filed, Texas also has formally abolished life without parole for all juveniles. See Tex. Penal Code Ann. § 12.31(b)(1).

As the Graham Court recognized, this strong evidence of a national consensus is not undermined by the fact that many states do not explicitly prohibit life without parole for fourteen-year-old children. 130 S. Ct. at 2025. While most states have statutory schemes that theoretically permit a life-without-parole sentence for a fourteen-year-old child (because they have separately authorized life-without-parole sentences for adults and the transfer of fourteen-year-olds to adult court), this is insufficient to demonstrate that these states have made the deliberate judgment that such a sentence is appropriate, especially where, as in the

vast majority of states, such a sentence has never actually been imposed. See Graham, 130 S. Ct. at 2025 ("[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences."); Thompson v. Oklahoma, 487 U.S. 815, 829 n.24 (1988) ("That these three States have all set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.").

The extreme rarity with which sentences of life imprisonment without parole are imposed on fourteen-year-old children demonstrates that "[t]he sentencing practice now under consideration is exceedingly rare." Graham, 130 S. Ct. at 2026. The national consensus against such sentences strongly supports the conclusion that such sentences are cruel and unusual.

C. The Characteristics of Fourteen-Year-Old Offenders Demonstrate That the Extremely Harsh, Permanent Punishment of Life Without Parole Is Not Appropriate.

In addition to community consensus, the Supreme Court has also looked to "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," including "whether the challenged sentencing practice serves legitimate penological goals." Graham, 130 S. Ct. at 2026. Here, the characteristics of fourteen-year-olds frustrate any possible purpose for imposing the permanent sanction of life imprisonment without parole.

Both Roper and Graham recognized that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." Roper, 543 U.S. at 569; see also Graham, 130 S. Ct. at 2026. First, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." Roper, 543 U.S. at 569. Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including

peer pressure" partly because "juveniles have less control, or less experience with control, over their own environment." Id. And third, "the character of a juvenile is not as well formed as that of an adult." Id. at 570. As the research discussed above demonstrates, each of these characteristics applies with even greater force to young adolescents. Compared to older teens, fourteen-year-olds are less mature and more impulsive, have even more limited control of their environments, are uniquely susceptible to peer pressure, and have a greater capacity for change.

As to the severity of the sentence, life imprisonment without parole is the harshest penalty available under Wisconsin law for offenders of any age. The Graham Court found that, while death sentences are unique, a sentence of life without parole also "alters the offenders life by a forfeiture that is irrevocable." Id. at 2027. Such a sentence "deprives the convict of the most basic liberties without giving hope of restoration." Id. Moreover, "[l]ife without parole is an especially harsh punishment for a juvenile," who will "serve more years and a greater percentage of his life in prison than an adult offender." Id. at 2028. For these reasons, Omer's

life without parole sentence constitutes an extremely harsh, final judgment that denies all hope for the future.

None of the generally recognized purposes of punishment is adequate to justify imposing such a permanent sentence on a young adolescent. "Retribution is a legitimate reason to punish," but "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Graham, 130 S. Ct. at 2028. As both Roper and Graham recognized, even with respect to older teens, "the case for retribution is not as strong with a minor as with an adult." Id. (quoting Roper, 543 U.S. at 571). "[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments." Graham, 130 S. Ct. at 2026; see also Roper, 543 U.S. at 569–70. "A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" Graham, 130 S. Ct. at 2026 (quoting Thompson, 487 U.S. at 835). It is still more true of younger teens that their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Roper, 543 U.S. at 571. Much like the older juvenile nonhomicide offenders addressed

in Graham, young adolescents in many ways have a "twice diminished moral culpability," 130 S. Ct. at 2027, compared to adults because they are an additional step behind even older teens in their maturity and development.

The deterrence rationale for punishment also fails in the case of young adolescents. Even with respect to older teens, the Supreme Court has recognized that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Roper, 543 U.S. at 571. Teenager's impulsivity and lack of future-orientation means that they are "less likely to take a possible punishment into consideration when making decisions." Graham, 130 S. Ct. at 2028–29. Again these observations are especially true of young adolescents. Given that eighth graders struggle to imagine their lives only a few years into the future, it is unlikely that they would plan their current actions by assigning heavier deterrent weight to a life-without-parole sentence than to a life-with-eligibility-for-parole sentence. Moreover, testing of individuals from 10 and 30 years of age shows "significantly lower planning scores among adolescents between 12 and 15 than among younger or older

individuals."[28]

"While incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts," Graham, 130 S. Ct. at 2029, it is insufficient to support making a permanent, unalterable judgment about a young adolescent whose character is as yet unformed. "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." Graham, 130 S. Ct. at 2029. Yet even with respect to older teens, "[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." Roper, 543 U.S. at 572. Young adolescents have an even greater capacity for change, and thus, for "the sentencer to make a judgment that the juvenile is incorrigible" is particularly inappropriate. Graham, 130 S. Ct. at 2029.

Finally, a life without parole sentence for a young adolescent "forswears altogether the rehabilitative ideal." Id. at 2030. Given

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[28]Steinberg, Graham et al., Future Orientation, supra note 20, at 36.

the especially high potential for rehabilitation of young adolescents, such a denial of the "chance to demonstrate growth and maturity," id. at 2029, cannot be justified. Because none of the purposes of punishment adequately supports a sentence of life without parole for a fourteen-year-old child, Omer should be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 2030.

D. Conclusion

Applying the analysis and reasoning of the Supreme Court's decisions in Roper and Graham leads to the conclusion that Omer's sentence is cruel and unusual in violation of the Eighth and Fourteenth Amendemnts to the United States Constitution. In light of the historic recognition of the vulnerability of young adolescents under Wisconsin law, this Court should also conclude that sentencing a fourteen-year-old child to life imprisonment without parole, the harshest penalty available for adults in Wisconsin, is cruel and unusual under Article I, Section 6 of the Wisconsin Constitution. This Court should remand for Omer to be resentenced to a penalty that provides a meaningful opportunity for release.

II. NEW SCIENTIFIC RESEARCH REGARDING ADOLESCENT BRAIN DEVELOPMENT THAT BEARS DIRECTLY ON THE DIMINISHED CULPABILITY AND HEIGHTENED REHABILITATIVE POTENTIAL OF CHILDREN IS A NEW FACTOR THAT FRUSTRATES THE PURPOSE OF THE SENTENCE IN THIS CASE.

It is well established under Wisconsin law that a circuit court has the inherent power to modify a sentence based on a new factor that "frustrates the purpose of the original sentence." State v. Trujillo, 2005 WI 45, ¶¶ 10–13, 279 Wis. 2d 712, 721–23, 694 N.W.2d 933, 937–38 (Wis. 2005). This Court has defined a new factor as "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." Trujillo, 2005 WI 45, at ¶ 13 (quoting Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (Wis. 1975)). "Whether a new factor exists is a question of law, which [this Court] review[s] de novo." Id. at ¶ 11.

The sentencing court in this case based its sentence in large part on its view that Omer's character was irredeemably depraved and that therefore he should be incarcerated for the rest of his life. (R. 70:23–29.) New scientific research that was not available at

sentencing fundamentally undermines this basis for sentencing a fourteen-year-old child to life imprisonment without parole by demonstrating that young adolescents are physiologically distinct in precisely the areas of the brain that bear on culpability and recidivism.

Based on MRI studies unavailable at the time of sentencing in this case, scientists now reject the previously widely-held belief that the brain is fully developed early in childhood.[29] As explained in greater detail above, supra pp. 16–23, at fourteen, a child's brain has just begun the processes of synaptic pruning and mylineation that over the course of the teenager years increase the efficiency of the parts of the brain responsible for inhibiting impulses and assessing risk.[30] At the same time, increased activity in

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[29] See, e.g., Interview by Frontline with Dr. Charles Nelson, Director of the Center for Neurobehavioral Development at the University of Minnesota, Inside the Teenage Brain, available at http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/nelson.html ("The biggest jump in our knowledge over the last few years is that well into the adolescent period, through 15 or 18 years of age, there are changes going on in the front of the brain that we didn't know very much about even 10 or 15 years ago."); see also Wisconsin Council on Children and Families, Rethinking the Juvenile in Juvenile Justice: Implications of Adolescent Brain Development on the Juvenile Justice System 14 (March 2006), available at http://www.wccf.org/ pdf/rethinkingjuv_jjsrpt.pdf.

[30] See Giedd, supra note 7, at 77–85, 83; Rightmer, supra note 7, at 12; Geier & Luna, supra note 7, at 216.

socioemotional system of the brain during puberty causes young adolescents to engage in high levels of sensation-seeking and risk-taking.[31] Scientists have only recently begun to understand these "explosive changes" of the brain's structure that occur during the teenage years.[32]

These new studies explain that making poor, impulsive decisions and engaging in risky, even criminal, behavior is an inevitable part of young adolescence, but also that as the brain matures, young adolescents almost universally grow out of it.[33] Indeed, because their brains are still developing (still determining which pathways will be reinforced and which will be pruned away), young adolescents have an enormous potential to change for the better. Significantly, while some young adolescents may go on to become adult offenders, because of the dramatic changes occurring during adolescence, there are no reliable means for identifying these children at the outset.[34] Both Graham and Roper recognized

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[31]Steinberg, Cauffman, et al., supra note 9, at 1764.

[32]Giedd, supra note 7.

[33]Spear, supra note 7, at 421; Reppucci, supra note 11, at 319.

[34]Steinberg & Scott, supra note 7, at 1014.

the critical import of this scientific research to our understanding of appropriate sentences for children. See Graham, 130 S. Ct. at 2026; Roper, 543 U.S. at 569–70.

Also of particular significance in this case, "[m]ounting research suggests that alcohol causes more damage to the developing brains of teenagers than was previously thought, injuring them significantly more than it does adult brains."[35] Dr. Aaron White of the Duke University psychiatry department explains: "We definitely didn't know five or ten years ago that alcohol affected the teen brain differently. Now there's a sense of urgency. It's the same place we were in when everyone realized what a bad thing it is for pregnant women to drink."[36] In Omer's case, the development of his brain was almost certainly significantly impaired by alcohol and drug abuse which would have been extreme at any age, but was particularly so given his young age. Omer was likely first exposed to alcohol abuse in the womb. (R. 76:23.) Both of his parents are alcoholics. (R. 76:23.) Omer himself began experimenting with alcohol when he was only in

[35]Katy Butler, The Grim Neurology of Teenage Drinking, N.Y. Times, July 4, 2006, at F1.

[36]Id.

fifth grade; his consumption was problematic by the next year, and excessive by seventh grade. (R. 76:23.) He often drank alone and to the point of unconsciousness. (R. 76:23.)

The new research indicates that during adolescence, as the frontal lobes develop and teenagers slowly learn to make thoughtful decisions and control their impulses, "'alcohol creates disruption in parts of the brain essential for self-control, motivation and goal setting.'"[37] Heavy adolescent drinkers are more likely to engage in high-risk behaviors. [38] Alcoholic teens experience deficiencies in memory and planning, and MRI studies show that their hippocampi (located in the temporal lobes) are underdeveloped.[39] But while the teenage brain is more vulnerable to alcohol, it may also be more resilient. Studies have shown that teenagers who stop drinking will, over time, be able to perform almost as well as those who have rarely had a drink.[40] Thus

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[37]Id. (quoting Dr. Fulton Crews, a neuropharmacologist at the University of North Carolina).

[38]See Ralph W. Hingson, et al., Age at Drinking Onset and Alcohol Dependence: Age at Onset, Duration, and Severity, 160 Archives Pediatric Adolescent Med. 739 (July 2006) (citations omitted).

[39]Id. (citations omitted).

[40]Butler, supra note 35.

Omer's young exposure to alcohol further increased his susceptibility to engage in risky, ill-considered behavior, but, after a lengthy period of sobriety due to his incarceration, the impact of alcohol in stunting his development has likely abated.

Without the benefit of this information, the trial court sentenced Omer Ninham to permanent, lifelong imprisonment because it found that his culpability for the offense was not significantly diminished by his age and that his "character" was unlikely to reform. The new evidence undermines the sentencing court's reasoning that, at age fourteen, Omer was more a "ruthless young man" than a child; it undermines the court's belief that Omer's criminal behavior followed from a fully-informed and competent choice to act out; it refutes the court's dismissal as "excuses" of child abuse, neglect, and alcohol dependence by demonstrating how these factors damage a child's brain development and impair his already-limited capacity for decision-making and impulse control; and, by showing that Omer's character necessarily will change as his brain develops, it eviscerates the trial court's perceived need to protect the public by ensuring Omer never has a chance for release. (R. 70:24–29.)

The sentencing court's findings regarding culpability and recidivism are squarely undermined by this new scientific research and therefore constitute a new factor that is highly relevant to the imposition of the sentence in this case. See State v. Sepulveda, 119 Wis. 2d 546, 560–61, 350 N.W. 2d 96, 104 (Wis. 1984) (finding new information about defendant's amenability to rehabilitation constituted a new factor that frustrated the purpose of the sentence). This conclusion is supported by the findings of the United States Supreme Court that the distinctions between children and adults revealed by this recent scientific evidence frustrate the purposes of imposing permanent, unalterable sentences of children. Graham, 130 S. Ct. at 2028–30 ; Roper, 543 U.S. at 570–72.

Because new scientific research not known to the trial court has frustrated the purpose of the original sentence in this case, this Court should remand this case for the trial court to modify Omer's sentence based on this highly relevant new factor.

III. OMER'S SENTENCE IS UNDULY HARSH AND EXCESSIVE UNDER WISCONSIN LAW IN LIGHT OF ALL THE CIRCUMSTANCES IN THIS CASE INCLUDING HIS YOUNG AGE AND BACKGROUND.

Under Wisconsin law, the standard for determining if a

sentence is cruel and unusual in a particular case is whether it 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." State v. Paske, 163 Wis. 2d 52, 69, 471 N.W.2d 55, 62 (Wis. 1991) (quoting State v. Pratt, 36 Wis. 2d 312, 322, 153 N.W.2d 18, 22–23 (Wis. 1967)). The same test applies to determine whether a postconviction court should invoke its inherent authority to modify an unduly harsh and excessive sentence. State v. Taylor, 2006 WI 22, ¶ 19, 289 Wis. 2d 34, 45, 710 N.W.2d 466, 472 (Wis. 2006).

Even if not categorically prohibited, the sentence in this case is unduly harsh and excessive in this case because Omer's culpability and risk of recidivism was diminished due to the fact that he was fourteen at the time of the offense — and diminished further due to the fact that, as a result of extreme abuse, neglect, alcohol dependence, and trauma, he was underdeveloped for a child his age.

As the circuit court recognized, "[i]t is undisputed that [Omer] had an extremely difficult and tumultuous childhood." (R.

82:1). Both of his parents, as well as his older brothers, were both physically and emotionally abusive. (R. 82:1–2.) His parents fought each other and their children with closed fists and weapons. (R. 76:14.) The police were repeatedly called to the home by neighbors, Omer's mother, and sometimes the children themselves. (R. 76:14.) Omer's father was repeatedly incarcerated for domestic violence and went to prison for violating a restraining order initiated by Omer's mother. (R. 76:14.)

Omer's parents were also both extreme alcoholics. (R. 82:2; 76:13.) They offered Omer no structure outside of unpredictable physical discipline. (R. 76:14). Omer's family moved almost twenty times throughout Green Bay and Milwaukee while he was growing up. (R. 76:14.) Omer attempted to flee this chaotic environment, running away at least three times in three years. Two of his siblings also ran away as children. (R. 82:2; 76:14.) Omer eventually ended up in Green Bay Shelter Care, where he was referred to the Oneida Boys Home by Brown County Social Services because of family issues and suicidal thoughts. (R. 76:15.) Omer made significant progress at the Boys' Home, but was arrested for the present crime (which occurred before he entered

the Boys' Home) approximately six months after his arrival. (R. 76:15.)

Omer began abusing alcohol himself at a very young age. (R. 82:2; 76:15.) He experimented with alcohol as early as the fifth grade, and was drinking excessively by the seventh grade, often alone and to the point of unconsciousness. (R. 76:15.) He was diagnosed with alcohol abuse by Brown County Human Services Mental Health Center and was advised to seek assessment and treatment for his abuse. (R. 76:15.)

These substantial mitigating facts combined with Omer's young age to make him particularly lacking in the capacity to make appropriate decisions, avoid risky behaviors, resist peer pressure, and recognize the future consequences of his actions. As Graham and Roper recognize, all of these factors reduced his culpability for this offense in ways that must be taken into account at sentencing. Graham, 130 S. Ct. at 2026; Roper, 543 U.S. at 569–70. They also make it less likely that this offense was the result of an irretrievably depraved character, rather than the result of his youthful inability to cope with the many negative influences in his environment. Graham, 130 S. Ct. at 2026; Roper,

543 U.S. at 570.

"The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." Taylor, 2006 WI 22, at ¶ 20. A sentence of life imprisonment without parole was not necessary to serve any of the purposes of punishment under Wisconsin law. A sentence of life with the possibility of parole would also impose a harsh sanction for a serious offense while recognizing the diminished culpability of an abused and neglected fourteen-year-old. Such a sentence would adequately protect the public by permitting the possibility of life-long incarceration while also providing the opportunity to evaluate in the fullness of time whether Omer is able to reform himself as an adult and become someone who can safely be reintegrated into the community.

Particularly in light of the widespread recognition of the reduced culpability of children, which was relied on by the Supreme Court in Roper and Graham, it shocks public sentiment and violates the judgment of reasonable people to impose the maximum possible punishment for an adult on an severely

impaired, abused and neglected child. For these reasons, it was unduly harsh and excessive to impose a sentence of life imprisonment without parole in this case.

IV. THE SENTENCING COURT RELIED ON IMPROPER FACTORS IN IMPOSING THE SENTENCE IN THIS CASE.

Wisconsin law prohibits the sentencing court from imposing its sentence based on "clearly irrelevant or improper factors." State v. Harris, 2010 WI 79, ¶ 30, 786 N.W.2d 409, 416 (Wis. 2010). Similarly, the United States Constitution prohibits states from imposing sentences based on arbitrary or irrelevant factors. See McCleskey v. Kemp, 481 U.S. 279, 291 n.8 (1987) ("It would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on an unjustifiable standard such as race, religion, or other arbitrary classification."). The sentencing court in this case violated this prohibition by basing its sentence in part on religious views of the victim's family.

During the sentencing hearing in this case, Seng Say Vang, the brother of the victim, read a statement on behalf of his family. (R. 70:8–9.) He specifically asked the judge to impose "the maximum life sentence without parole" because "[i]n our Hmong

culture we believe that the spirit of a murdered person cannot be set free to go in peace until the perpetrators be brought to justice." (R. 70:8–9.) He emphasized that the sentencing court "is the only one to have the power to set free the spirit of our beloved son, brother, and friend." (R. 70:9.) In imposing a sentence of life without parole, the trial court relied in part on the beliefs of the victim's family, noting "I find it incredibly interesting and somewhat significant that not only am I being asked to impose a sentence in this matter, . . . but I'm being asked to release a soul."[41] (R. 70:27.)

While the grief and sentiments of the victim's family are completely understandable, it was improper for the sentencing court to base its sentence on the ethnic or religious views of the victim's family. Wisconsin courts have previously found religion to be an irrelevant consideration at sentencing. See State v. Fuerst, 181 Wis. 2d 903, 912–13, 512 N.W.2d 243, 246 (Wis. App. 1994) (reversing sentence as based on an improper factor where

[41]The Court of Appeals found that this comment referred to Omer's supposed "intolerance," which it claimed was reflected in the testimony of Jeremy Whiting. Ninham, 2009 WI App. 64, at ¶ 10. However, Mr. Whiting's testimony (which the sentencing court did not reference) never suggested that Omer's behavior or comments were motivated by any racial or ethnic bias. (R. 67:277.)

sentencing court relied on defendant's religious beliefs at sentencing); see also State v. Kramer, 2001 WI 132, ¶ 18, 248 Wis. 2d 1009, 1024, 637 N.W.2d 35, 42 (Wis. 2001) (identifying religion as "arbitrary classification" in making prosecution determinations). The United States Supreme Court has also found that considerations such as "race, religion, or political affiliation" are "constitutionally impermissible" and "totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 885 (1983). This Court has recognized that race is an improper consideration at sentencing, see Harris, 2010 WI 79, at ¶ 33, and the same concerns now also require the rejection of sentences based on ethnicity or cultural beliefs.

The opinion of the victim's family about the appropriate sentence is also an impermissible consideration at sentencing. See Booth v. Maryland, 482 U.S. 496, 508 (1987) abrogated in non-relevant part by Payne v. Tennessee, 501 U.S. 808, 829 n.2 (1991). Such considerations introduce arbitrary distinctions between defendants who have committed the same crime based solely on the personal beliefs of the victim's family about retribution or forgiveness. For these reasons, it was improper for the sentencing

court in this case to consider the victim's family's desire, based on their religious beliefs, for imposition of the maximum sentence, and this Court should reverse Omer's sentence.

CONCLUSION

For the foregoing reasons, Omer Ninham asks that this Court vacate his sentence of life imprisonment without parole and remand to the trial court with instructions to impose a parole-eligible sentence.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,549 words.

s/Frank Tuerkheimer
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that on October 13, 2010, I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

s/Frank Tuerkheimer
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CERTIFICATION OF MAILING

I hereby certify that this brief, including the appendix, was delivered to a third-party commercial carrier for overnight delivery to the Clerk of the Supreme Court on October 13, 2010. I further certify that the brief, including the appendix, was correctly addressed and the fee for delivery was prepaid.

s/Bryan Stevenson
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CERTIFICATE OF SERVICE

I hereby certify that, on October 13, 2010, three true and correct copies of this petition for review were furnished by third-party commercial carrier to:

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