

State of Wisconsin,

Plaintiff,

v.

Case No. 2011CF003780

Mical Thomas,

Defendant.

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**Defendant's Sentencing Memorandum**

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## **The Sentencing Factors**

### **A. Simply because Thomas is charged as an adult does not permit the court to sentence him as though he were an adult.**

A sentencing judge abuses his sentencing discretion if he approaches the process with a "foresworn inflexibility". See *State v. Varnell*, 153 Wis.2d 334, 339, 450 N.W.2d 524, 526 (Ct. App. 1989). Likewise, the court must not use a mechanistic, preconceived sentencing policy which excludes other sentencing alternatives. See *State v. Martin*, 100 Wis.2d 326, 327, 302 N.W.2d 58, 59 (Ct. App. 1981). Nonetheless, the presentence investigator in this case encourages the court to approach the sentencing of Mical Thomas with the formulaic rigidity with which the Department approaches the sentencing of adults. For example, the PSI writer noted that during his interview, Thomas showed little emotion and little understanding of the seriousness of the offense. PSI p. 10.

Thereafter, the report suggests that the court should impose twenty-five to forty-years of initial confinement on a seventeen year-old child. The report makes no effort to explain why that length of time is necessary to accomplish the legitimate sentencing objectives. The court, however, must do so.

The Wisconsin Supreme Court has reminded the lower courts numerous times that the court must impose the minimum amount of confinement which is consistent with the protection of the public, the gravity of the offense, and the defendant's rehabilitative needs. *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). A circuit court also should consider the defendant's prior record, attitude, and capacity for rehabilitation, and the rehabilitative goals to be accomplished by reconfinement for the time period in question in relation to the time left on the defendant's original sentence.

Likewise, not new to our sentencing jurisprudence is the concept that probation should be considered as the first alternative. In *Bastian v. State*, 54 Wis. 2d 240, 248-49, n.1, 194 N.W.2d 687 (1972), this court expressly adopted Standard 1.3 of the ABA Standards Relating to Probation. That standard provides in part that, "Probation should be the sentence unless the sentencing court finds that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed."

*State v. Gallion*, 2004 WI 42, P25 (Wis. 2004)

So what are the legitimate sentencing considerations where a defendant is convicted of felony murder for a crime that was committed when he was sixteen years old?

Earlier this week, the United States Supreme Court established that mandatory life sentences for juveniles are unconstitutional. The court eloquently explained:

[c]hildren are constitutionally different from adults for sentencing purposes. Their "lack of maturity" and "underdeveloped sense of responsibility" lead to recklessness, impulsivity,

and heedless risk-taking. *Roper*, 543 U. S., at 569. They “are more vulnerable . . . to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid*. And because a child’s character is not as “well formed” as an adult’s, his traits are “less fixed” and his actions are less likely to be “evidence of irretrievabl[e] deprav[ity].” *Id.*, at 570. *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”

*Miller v. Alabama*, \_\_\_\_\_ U.S. \_\_\_\_\_, *slip opinion*, June 25, 2012. Thus, simply because the Wisconsin legislature permitted sixteen year-olds to be charged in adult court, does not mean that the court should --or is even permitted to-- approach sentencing of the child as though he were an adult. In the words of the United States Supreme Court, there is no *penological justification* for doing so.

## **B. The proper sentencing factors for sentencing a juvenile**

Thus, the so-called “sentencing factors” that we are accustomed to using in adult sentencing hearings, then, have little or no application here. Instead, the court must consider, as pointed out by the United States Supreme Court, the extent to which Thomas’s crime was a function of an “underdeveloped sense of responsibility”, bearing in mind that the character of children is malleable and more easily reformed; the extent to which Thomas was subjected to “negative influences and outside pressures”; and whether Thomas possessed the ability to remove himself from horrific, crime producing settings.

### **A. Underdeveloped sense of responsibility**

As the PSI writer noted, Thomas appears not to appreciate the seriousness of the crime that he committed. This is almost certainly due to an underdeveloped sense of responsibility. A child, such as Thomas, who lacks the

life experience to understand the devastating impact that a murder has on the community and on the victim's family, certainly cannot be expected to express remorse in the same way that an adult might.

A proper sense of responsibility will develop in Thomas as time passes. However, it certainly is not necessary to keep him confined for twenty-five years in order to allow his sense of responsibility to develop.

### **B. Thomas was subjected to negative influences**

Thomas has been under the influence of the Gangster Disciples since he was ten years old. PSI p. 8. The PSI report presents this to the court *as though it were a negative factor*. Naturally, the report fails to explain why a ten year-old child ought to be held personally responsible for the associations he makes. It is plain, though, that from a very early age, Thomas was subjected to exceedingly negative peer pressure. It really is no wonder that he is a product of this situation.

The good news, though, is that Thomas is still very young. One would hope that the negative character traits that Thomas learned to emulate in the Gangster Disciples are not deeply ingrained. His character is malleable. If Thomas were subjected to positive role models and peers, he can be rehabilitated in much less time than it would take to rehabilitate an adult with a thirty-year track record of antisocial behavior.

### **C. Thomas possessed no ability to extricate himself from a crime-producing setting.**

Suffice it to say that where a ten year-old child is allowed to associate himself with the Gangster Disciples street gang, the child's living situation leaves something to be desired.

Can Thomas be blamed for the geographic accident of his place of birth, and the place where his parents decided to raise him? It is simply ridiculous to

suggest that Mical Thomas had either the ability to resist his negative peer influences, or the ability to extricate himself from the situation.

#### **D. Protection of the Community**

The State may argue that we may all understand *how* Mical Thomas came to be the way that he is; but this does not change the fact that he is a dangerous person, and that the community must be protected from him for as long as possible. After all, Thomas was *already under the supervision of the Department of Corrections* at the time he committed the present offense.

This argument, of course, is to say that the United States Supreme Court was *wrong* when it concluded that life sentences for juveniles are cruel and unusual punishment. The lynch-pin of the Supreme Court's holding in *Miller* is that not only do children have reduced culpability for even horrible crimes, it does not take the same amount of time in the correctional system to reform them. The Supreme Court recognized that its holding will by necessity only apply to *horrible crimes* committed by juveniles.

The pertinent question, then, in deciding what amount of time is necessary to properly protect the community, is: How long will it take for Thomas to develop a sense of responsibility and to be free from the negative influences of his peers and neighborhood?

As a practical matter, there is little difference between twenty-five years of initial confinement and a life sentence. This is even more true if the court were to impose forty years of initial confinement. What prospects will a man have if he is released into the community at the age of forty-two, having spent the last twenty-five years in prison, beginning at the age of sixteen? He will have no wife and family, and little chance of starting one. He will have no job experience, other than the performance of the menial tasks that are assigned to prisoners.

He will have no social skills, other than the character traits necessary to survive in a prison setting. In other words, such a man is set up to fail.

A twenty-seven year old man, though, will still have a chance. He is young enough to start a family. It is not unusual for twenty-seven year olds to be just beginning his or her career. But, most importantly, a twenty-seven year old will have developed a sense of judgment and of responsibility. He will have a chance to succeed.

## **Defendant's Recommendation**

It is hereby recommended that the court imposed a period of ten years of initial confinement followed by a period of fifteen years of extended supervision. The imposition of a significantly longer sentence fails to take into account the unique characteristics of a juvenile offender, and there is no penological basis for doing so.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2012:

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