NO. 442PA20 **TWELFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Cumberland**
	)	
JAMES RYAN KELLIHER	**)**	

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NEW BRIEF FOR THE STATE
Appellant

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NEW BRIEF FOR THE STATE
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ISSUES PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY HOLDING DEFENDANT'S CONSECUTIVE LIFE WITH PAROLE SENTENCES FOR TWO COUNTS OF PREMEDITATED AND DELIBERATE FIRST-DEGREE MURDER VIOLATED THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

II. WHETHER CLAIMS UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SEC. 27 OF THE NORTH CAROLINA CONSTITUTION ARE ANALZYZED THE SAME.

STATEMENT OF THE CASE

On 25 March 2002, defendant was indicted by a Cumberland County Grand Jury for two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery. (R pp 6-7) On 5 June 2002, a Rule 24 hearing was conducted and the matter was declared potentially a capital case. (R p 8) On 4 March 2004, defendant pled guilty to the charged offenses pursuant to a plea agreement. (R pp 10-13) In exchange, the State declared the murder cases noncapital and left sentencing in the discretion of the trial court. (R p 11) The trial court imposed two consecutive sentences of life without parole for the first-degree murder convictions. (R pp 16-19) The trial court also imposed concurrent sentences of a minimum 64, maximum 86 months for the robbery convictions and a minimum 25, maximum 39 months for the conspiracy conviction. (R pp 20-23) No appeal was taken.

On 25 June 2013, defendant filed a motion for appropriate relief alleging his sentences of mandatory life without parole were unconstitutional under Miller v. Alabama, 567 U.S. 460 (2012). (R pp 24-31) On 27 November 2013, the trial court entered an order denying the motion on the basis that Miller was not retroactive. (R pp 33-35) Defendant filed a petition for writ of certiorari seeking review of that order in the Court of Appeals and it was allowed. (R p

36) The appeal was held in abeyance pending determination of several cases in this Court. (R p 36)

On 21 March 2017, the Court of Appeals entered an order reversing the denial of defendant's motion for appropriate relief and remanding the case to the trial court for a resentencing hearing. (R pp 37-38) On 13 December 2018, the trial court vacated the 4 March 2004 judgments and resentenced defendant to two consecutive sentences of life with parole for his first-degree murder convictions. (R pp 39-48) Defendant appealed. (R p 49)

On 6 October 2020, the Court of Appeals issued a published decision holding the trial court was not constitutionally permitted to sentence a juvenile who was convicted of two counts of first-degree murder to consecutive life with parole sentences under the Eighth Amendment of the United States Constitution. State v. Kelliher, 849 S.E.2d 333, 352 (2020). The case was remanded to the trial court with instructions to impose concurrent sentences. Id.

On 23 October 2020, the State filed a motion for a temporary stay and a petition for writ of supersedeas to stay enforcement of the judgment of the Court of Appeals. On 6 November 2020, the State filed a notice of appeal based on a substantial constitutional question and petition for discretionary review, arguing the Court of Appeals erred as a matter of law by holding the imposition

of consecutive life sentences for a double homicide violated the Eighth Amendment of the United States Constitution. Defendant filed a response in opposition and included a conditional request that an additional issue be reviewed if the State's petition was allowed. By order of this Court entered on 12 March 2021, the State's notice of appeal was dismissed ex mero motu and both parties' requests for discretionary review were granted.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

On 12 March 2021, this Court allowed the State's petition for discretionary review of the decision of the Court of Appeals.

STATEMENT OF THE FACTS

Defendant's Crimes

Eric Carpenter and his pregnant girlfriend, Kelsea Helton, were shot in the back of the head on 7 August 2001. (T pp 5, 22-23) Both victims were nineteen years old. (T pp 19, 26, 31) Defendant was seventeen years old at that time. (T p 5) Prior to the homicides, he committed several robberies and broke into a pawn shop. (T pp 10-11) Defendant stole six guns, including a .38 caliber revolver that was used as the murder weapon in this case. (T pp 10-11, 23)

Defendant had multiple conversations with Joshua Ballard about robbing Carpenter. (T pp 11-12) Carpenter was known to sell large quantities of cocaine and marijuana and became a target because of the amount of money

he presumably had from the sale of those drugs. (T pp 11-12) During their second conversation, Ballard stated to defendant that they would have to kill Carpenter because he would know Ballard's face and phone number. (T p 12) Liz Perry, defendant's friend, confirmed that during a telephone conversation with defendant, he told her of the plan to rob and murder a couple. (T p 12) Perry could hear defendant rummaging around in a garage and he stated that he was looking for a quiet way to kill them. (T p 15) Defendant mentioned putting a bag over their heads to suffocate them or placing their heads in the toilet to drown them. (T p 15)

Ballard arranged to meet Carpenter behind a local furniture store to conduct a drug deal. (T p 13) His plan was to shoot Carpenter, go through his vehicle, and take all the money and drugs present. (T p 13) Defendant offered use of the .38 caliber firearm he had in his possession. (T pp 13-14) Defendant, Ballard, and a third man, Jerome Branch, piled into Ballard's truck and headed to the furniture store. (T p 16) When they arrived at the location, a law enforcement officer was driving around the parking lot in his patrol vehicle. (T p 16) Carpenter asked the men to follow him to his apartment and they obliged. (T p 16) Carpenter, Ballard, and defendant went inside while Branch remained in the back of the truck. (T p 16) Kelsea Helton was introduced to the men, and they discussed her pregnancy. (T p 17)

Evidence regarding the events that transpired next was conflicting. According to defendant, Ballard pulled out the weapon defendant had given him earlier and ordered both victims to kneel in the kitchen, facing the wall. (T p 17) Defendant was gathering drugs from a backpack on the table when he heard two shots and saw two flashes. (T p 17) Carpenter was shot first; Helton was shot next and fell on top of Carpenter. (T p 23) Ballard and defendant ran out of the apartment and down to the truck. (T p 18) They drove to a local park and split up the stolen drugs. (T p 18) Defendant met up with Perry later that evening and told her that he had killed three people, a man and a pregnant woman. (T p 18) According to Lisa Boliaris, Ballard's girlfriend at the time, Ballard stated to her that he shot Carpenter and defendant shot Helton. (T p 20)

Defendant was arrested two days later. (R p 4) He subsequently pled guilty to the charged offenses.[1] (R pp 10-13) Ballard was charged with the same offenses and the matter was called for trial. (T p 5) Defendant testified against Ballard and identified him as the shooter. (T pp 6, 17) Ballard testified on his own behalf that he went to Carpenter's apartment for a drug deal only and

[1] Branch also pled guilty to accessory after the fact and conspiracy to commit robbery with a dangerous weapon. (T p 21)

that defendant's robbery and murder of the victims was unexpected.[2] The jury found Ballard to be guilty as charged. (T p 6) He appealed and was awarded a new trial. (T p 6) Ballard was subsequently acquitted of the charged offenses at the completion of his second trial. (T p 6)

Resentencing Hearing

A. State's Evidence

The State detailed the factual basis underlying defendant's guilty plea in this case as set forth above and offered victim impact testimony. James Carpenter, Eric's father, testified that he found out about his death when his neighbors took him to the crime scene after hearing about a double homicide. (T p 27) Eric's father had to call his mother and tell her the news. (T p 27) Eric was very close with his younger sister and she was a "moderate basket case" for a while after his murder. (T p 28) For a long time, Eric's family avoided the subject of his murder; however, later it just became part of their world. (T p 28) Eric's father was angry he never got to meet his grandson. (T p 29) He was doing the best he could to get through it. (T p 29)

Emory Helton, Kelsea's father, also testified at the hearing. (T p 30) He

[2] This information was obtained from the decision issued in Ballard's direct appeal of his convictions in State v. Ballard, 180 N.C. App. 637, 640, 638 S.E.2d 474, 477 (2006).

stated that Kelsea was upbeat and outgoing. (T p 33) Even though she and Eric did not make a lot of money, they made sandwiches and passed them out to the homeless people in town. (T p 33) Instead of taking the traditional route, Kelsea wanted to become a beautician and eventually open her own business. (T p 33) She was excited about Nathaniel, the child she was pregnant with, and was planning on moving in with her sister. (T pp 33-34)

After he was informed about the murders, Mr. Helton felt the need to go to the apartment because he "didn't want somebody else cleaning the blood of [his] daughter off the wall." (T pp 35-36) Kelsea's mother came over as well and the two of them cleaned the kitchen as well as the carpet in the dining area. (T p 36) Mr. Helton is still haunted by the look on Kelsea's face when she died. (T p 36) He testified that the funeral home who prepared her for burial could not erase the sad expression on her face. (T p 36) The family decided to have a closed casket. (T p 36) Nathaniel was laid to rest with Kelsea. (T p 37)

Kelsea's death affected every single area of her family's life. (T p 37) Mr. Helton analogized it to losing a limb; something that affected him but that he had learned to live with. (T p 37) The Helton family endured countless hours of grief counseling and the nightmares they had were indescribable. (T p 37) Mr. Helton's wife and his other daughter did not attend the hearing because they did not want to relive her murder again. (T p 40) Mr. Helton was glad that

defendant had done some positive things while in prison but noted that he still gets to talk to his family or friends; he can celebrate holidays and special events; he can study, workout, or watch sports; and he has his life. (T p 40) He noted that the three people who he murdered do not. (T p 40) Mr. Helton stated that if defendant was paroled at twenty-five years, then each one of the lives he took was worth only eight years and four months in prison. (T p 41)

B. Defendant's Evidence

Thomas Harbin, a forensic psychologist and mitigation specialist, testified that he interviewed defendant in January and February 2018. (T p 44) Defendant was raised by his biological parents. (T p 45) He had a good relationship with his mother and two older sisters. (T p 45) His relationship with his father was difficult and defendant stated that there was a history of physical abuse. (T p 45) As an adolescent, defendant had a history of substance misuse. (T p 46) He began daily drinking and using marijuana at age fifteen. (T p 47) Defendant dropped out of school after the ninth grade; however, he later obtained a G.E.D. while he was in jail. (T p 46)

Dr. Harbin diagnosed defendant with PTSD because he was having ongoing nightmares about the murders and had not been able to remove those thoughts or images from his mind. (T pp 47, 51) Dr. Harbin explained that there was an unofficial diagnosis of Perpetrator Induced Stress Disorder,

which has similar symptoms to PTSD, but it is based upon what the defendant did, not what someone did to him. (T p 55) Defendant was also diagnosed with panic disorder and attention deficit hyperactivity disorder. (T p 54) Dr. Harbin opined that defendant had a low risk of future violence. (T p 53) Even though he was violent as an adolescent, defendant had not exhibited negative behaviors since he was incarcerated. (T p 54)

Defendant was also part of the Southeastern Baptist Theological Seminary prison program. (T p 59) The program offers a four-year undergraduate degree from a college. (T p 61) Graduates serve as peer counselors, mentors, and tutors. (T p 61) At the time of the hearing, defendant was a sophomore in the program, a very good student, and an intern at the writing center. (T pp 70, 77)

At the conclusion of the hearing, the trial court stated that shooting a nineteen-year-old man and his pregnant girlfriend was a "wicked" and "despicable" crime. (T p 126) The trial court noted in all the years he was a judge and prosecutor, the one thing he saw consistently was that parents who had their sons or daughters murdered never get over it and that it was a "a big and bitter pill to swallow." (T p 126) The trial court stated that he could feel the pain of the victims' families and it was gut wrenching to think that all of them were now just stumbling through life. (T p 126) On the other hand, the

trial court looked at defendant's record and noted that he had done well while he was incarcerated. (T pp 126-27) However, the trial court continued "in this Court's mind when it comes to murder, there are not bogos. There is no buy one, get one. There is no kill one, get one. There is not combination of sentences. There is no consolidation of sentences." (T p 127)

The trial court made a number of findings regarding the crimes and the statutory mitigating factors. (T pp 128-131) It concluded the mitigating factors outweighed the circumstances of the offense and that defendant was neither incorrigible nor irredeemable. (T p 131) The trial court then imposed two consecutive sentences of life with parole. (T p 132)

STANDARD OF REVIEW

The standard of review is whether there is any error of law in the decision of the Court of Appeals. State v. Brooks, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). Constitutional issues are reviewed de novo. State v. Whittington, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014). This Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." State v. Williams, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008).

ARGUMENT

I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY HOLDING DEFENDANT'S CONSECUTIVE LIFE WITH PAROLE SENTENCES FOR TWO COUNTS OF PREMEDITATED AND DELIBERATE FIRST-DEGREE MURDER VIOLATED THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Court of Appeals erred as a matter of law by holding the Graham/Miller/Montgomery trilogy compel the reversal of defendant's consecutive life with parole sentences for two counts of premeditated and deliberate first-degree murder because the sentences are tantamount to de facto life without parole with no meaningful opportunity for release. None of these decisions considered or addressed aggregate sentencing for multiple criminal offenses; rather, these decisions focused on a single sentence arising out of a single conviction and have no application here.

The Court of Appeals ignored the narrow holdings of these decisions and instead relied upon dicta to expand this jurisprudence far beyond its actual reach. Now, as a result of the decision below, most if not all juveniles in North Carolina who commit multiple premeditated and deliberate first-degree murders can be sentenced to no more than twenty-five years imprisonment prior to parole eligibility regardless of the number of people they kill or the circumstances thereof. Trial courts will be stripped of the discretionary

sentencing authority that was expressly given to them by statute, N.C.G.S. § 15A-1354(a), and now will rarely be able to differentiate between a juvenile who intentionally murders multiple victims with his own hands and the juvenile who was implicated in a murder under some other theory when imposing punishment. Each will likely be sentenced the same. This all-encompassing rule far surpasses that which is constitutionally required under the Eighth Amendment and the Graham/Miller/Montgomery trilogy. The decision of the Court of Appeals must be reversed.

A. The recent evolution in juvenile sentencing requirements under the Eighth Amendment.

In 2005, the Supreme Court of the United States considered whether it was constitutionally permissible under the Eight Amendment to impose the death penalty upon the defendant for committing a gruesome murder at the age of seventeen. Roper v. Simmons, 543 U.S. 551, 555-56 (2005). The Court noted that the Eighth Amendment applies to the death penalty with special force because it is the most severe punishment available in our criminal justice system. Id. at 568. Accordingly, it had to be limited to those defendants who commit "a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution." Id. (citation omitted).

The Court then outlined three general differences between defendants under the age of eighteen and adults, which demonstrated that juveniles could not be reliably classified as the "worst offenders": (1) juveniles have a lack of maturity and an underdeveloped sense of responsibility often resulting in impetuous and ill-considered actions; (2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and (3) the character of a juvenile is not as well formed as that of an adult. Id. at 569-70. Once the diminished culpability of juveniles was recognized, the Court held the penological justifications for the death penalty apply to them with lesser force than to adults. Id. at 571. For these reasons, the Court adopted a categorical ban on the imposition of capital punishment on all defendants who were under the age of eighteen when their crimes were committed. Id. at 578.

Five years later, in Graham, the Supreme Court of the United States adopted another categorical ban on the "sentencing practice" of imposing life without parole on juveniles who committed a nonhomicide crime. Graham v. Florida, 560 U.S. 48, 74 (2010). In so holding, the Court relied heavily on the reasoning in Roper that "because juveniles have lessened culpability they are less deserving of the most severe punishments." Id. at 68. It also recognized that "defendants who do not kill, intend to kill, or foresee that life will be taken

are categorically less deserving of the most serious forms of punishment than are murderers." Id. at 69. This was so because there

> is a line between homicide and other serious violent offenses against the individual. Serious nonhomicide crimes may be devastating in their harm . . . but in terms of moral depravity and of the injury to the person and to the public, . . . they cannot be compared to murder in their severity and irrevocability.

Id. It followed that a juvenile who had not killed, when compared to an adult murderer, had twice diminished moral culpability. Id.

The Court also noted that a sentence of life without parole was the second most severe penalty permitted by law and that it "share[d] some characteristics with death sentences that are shared by no other sentences." Id. Indeed, while the State does not execute defendants sentenced to life without parole, "the sentence alters the [defendant's] life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . ." Id. The Court reiterated that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile who is convicted of a non-homicide offense, "it does not require the State to release that [juvenile] during his natural life." Id. at 75. The State was only required to give these individuals "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id.

More recently, in Miller, the Supreme Court of the United States held that mandatory life without parole for juveniles convicted of murder violates the Eighth Amendment. Miller, 567 U.S. at 465 (emphasis added). In reaching its holding, the Court again relied upon its earlier decisions in Roper and Graham to establish that "[c]hildren are constitutionally different from adults for purposes of sentencing." Id. at 471. Because the Court had previously likened life without parole for juveniles to the death penalty itself, individualized sentencing was required. Id. at 470. The Court concluded that a trial court "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Id. at 489.

Miller did not categorically bar life without parole for juveniles who are convicted of murder; rather, the Court held only that a trial court is required "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480. While the Court did not foreclose a sentencing court's ability to impose a sentence of life without parole in homicide cases, it noted the imposition of the harshest penalty should be "uncommon." Id. at 479 (quotation omitted). This was so because of the difficulty in distinguishing between the juvenile whose "crime reflects unfortunate yet transient immaturity" and the rare juvenile "whose crime reflects irreparable corruption." Id.

Later, in Montgomery, the Court held that Miller announced a new substantive rule of constitutional law and it applied retroactively to cases on collateral review. Montgomery v. Louisiana, 193 L. Ed. 2d 599, 620 (2016). The Court noted that giving Miller retroactive effect did not require States to relitigate sentences in every case where a juvenile convicted of murder received a mandatory sentence of life without parole. Id. at 622.

> A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Id. (internal citation omitted) (emphasis added).

Following Montgomery, some courts including our own Court of Appeals, suggested the Supreme Court had expanded the requirements of Miller based on the sweeping dicta in that decision. See, e.g., State v. Williams, 261 N.C. App. 516, 518, 820 S.E.2d 521, 523 (2018) ("After prohibiting mandatory sentences of life without parole for [juveniles] in Miller v. Alabama, the United States Supreme Court held in Montgomery v. Louisiana that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption and who exhibit such irretrievable depravity that rehabilitation is impossible.") (internal citations and quotations

omitted)), disc. review allowed, 372 N.C. 358, 828 S.E.2d 21 (2019).[3] However, contrary to these suggestions, we now know for certain that Montgomery did nothing to change the landscape of Miller except to hold it was retroactive.

Most recently, in Jones v. Mississippi, 141 S. Ct. 1307 (2021), the Supreme Court of the United States expressly stated such. In that case, the defendant argued that that a sentencer's discretion to impose a sentence less than life without parole does not alone satisfy Miller and that a sentencer must make a separate factual finding that the defendant is permanently incorrigible or, at a minimum, must provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible. Id. at 1311. Although the plain language of Miller and Montgomery stated there was no such fact-finding requirement, the defendant advanced three reasons why the Court should hold otherwise. Id. The Court did not find any of these arguments to be persuasive. Id.

First, the Court rejected the defendant's argument that "permanent incorrigibility" is an eligibility criterion akin to sanity or a lack of intellectual disability so that a court must make such a finding before sentencing a juvenile under eighteen to life without parole. Id. at 1315. It explained that "Miller

[3] This appeal is currently being held in abeyance by issuance of a special order by this Court. See Docket No. 233PA12-2.

repeatedly described youth as a sentencing factor akin to a mitigating circumstance. And Miller in turn required a sentencing procedure similar to the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases[.]" Id. at 1315 (citations omitted). While it was true that courts must consider relevant mitigating circumstances, they are afforded wide discretion in assigning weight to those factors and are not required to make any particular factual findings regarding those factors. Id. at 1316.

The Court noted in Miller it had cited Roper and Graham in that decision; however, it stated those cases were not cited to require a finding of permanent incorrigibility or to impose a categorical bar against life without parole for juveniles under eighteen. Id. It was for the simple proposition that "youth matters" for sentencing purposes. Id. The Court then succinctly summarized the holdings in its two previous decisions:

> In short, Miller followed the Court's many death penalty cases and required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence. Miller did not require the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence. And Montgomery did not purport to add to Miller's requirements.

Id.

Second, the Court rejected the defendant's argument that "the Montgomery Court must nonetheless have assumed that a separate factual finding of permanent incorrigibility was necessary because Montgomery deemed Miller a substantive holding for purposes of applying Miller retroactively on collateral review." Id. He relied upon the language in Montgomery which "described Miller as permitting life-without-parole sentences only for 'those whose crimes reflect permanent incorrigibility,' rather than 'transient immaturity.'" Id. at 1317.

The Court stated that was an incorrect interpretation of Miller and Montgomery. Id. It reiterated that Montgomery explicitly stated that "a finding of fact regarding a child's incorrigibility . . . is not required." Id. at 1318 (quotation omitted). The Court stated again "[t]he key assumption of both Miller and Montgomery was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." Id.

The Court also rejected the defendant's third argument that such a finding was necessary to ensure that life without parole for juveniles convicted of murder was rare. Id. It retorted that Miller stated, "a discretionary sentencing procedure—where the sentencer can consider the defendant's youth

and has discretion to impose a lesser sentence than life without parole—would itself help make life-without-parole sentences 'relatively rar[e]' for murderers under 18." Id. (emphasis added). This conclusion was based upon data, not speculation:

> The Court pointed to statistics from 15 States that used discretionary sentencing regimes to show that, "when given the choice, sentencers impose life without parole on children relatively rarely." In light of those statistics, the Court reasoned that a discretionary sentencing procedure would make life-without-parole sentences relatively rare for [juveniles]. But the Court did not suggest that the States with discretionary sentencing regimes also required a separate factual finding of permanent incorrigibility, or that such a finding was necessary to make life-without-parole sentences for [juveniles] relatively rare.

Id. (citation omitted).

Finally, the Court addressed and rejected defendant's alternative argument that there must be an implicit finding of permanent incorrigibility based upon virtually the same reasoning. Id. at 1319-21.

In its conclusion, the Court noted that this decision had generated a vigorous dissent with accusations that it was overruling Miller and Montgomery. Id. at 1321. The Court respectfully, but firmly disagreed:

> Miller held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding. Montgomery later held that Miller applies retroactively on collateral review. Today's decision likewise does not disturb that holding.

> We simply have a good-faith disagreement with the dissent over how to interpret Miller and Montgomery. That kind of debate over how to interpret relevant precedents is commonplace. Here, the dissent thinks that we are unduly narrowing Miller and Montgomery. And we, by contrast, think that the dissent would unduly broaden those decisions. The dissent draws inferences about what, in the dissent's view, Miller and Montgomery "must have done" in order for the decisions to "make any sense." We instead rely on what Miller and Montgomery said—that is, their explicit language addressing the precise question before us and definitively rejecting any requirement of a finding of permanent incorrigibility.

Id. at 1321-22 (emphasis added) (citation omitted).

The Court of Appeals decision in this case did not have the benefit of Jones and that case certainly did not address the issue here. However, Jones is of great importance because it sheds light on how the Supreme Court of the United States interprets its own holdings in Miller and Montgomery. Those cases must be read as they are written based on the precise question that was before the Court. It explicitly rejected broadening the scope of those decisions many times over.

B. Failure to adhere to the narrow holdings in the decisions of the Supreme Court of the United States has created chaos in Eighth Amendment jurisprudence around the country.

The Supreme Court of the United States has long admonished lower courts to refrain from extending federal constitutional protections beyond the

boundaries drawn by the Court's own precedents. See Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (per curiam); Oregon v. Hass, 420 U.S. 714, 719 (1975). This is so because the refusal to apply decisions as they are written only invites "frequent and disruptive reassessments of our Eighth Amendment precedents." Roper, 543 U.S. at 594 (O'Connor, J., dissenting).

The Court has long stated that the "words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court." Armour & Co. v. Wantock, 323 U.S. 126, 132 (1944) (emphasis added). Indeed, binding precedent is fixed upon case-specific holdings, not the general expressions in an opinion that exceed its required scope. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 282 (2001) ("[T]his Court is bound by holdings not language."); Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend[.]"). Because "clear, predictable, and uniform constitutional standards are especially desirable" with regard to the Eighth Amendment, Roper, 543 U.S. at 594 (O'Connor, J., dissenting); the decisions of the Supreme Court of the United States must only be applied as written.

The Supreme Court of the United States has never held or addressed whether lengthy consecutive sentences for multiple crimes is the functional equivalent of life without parole or whether those sentences are constitutionally permissible. Nevertheless, federal and state courts across the nation are sharply divided on how to view aggregate sentences for multiple crimes under the Eighth Amendment and the decisions in Graham and Miller. This division is a direct result of the tension between jurisdictions that strictly follow the holdings of the Supreme Court of the United States and those jurisdictions that extend the rationale of those holdings to scenarios not considered by those decisions. The failure of courts to adhere to the Court's admonishment to refrain from extending federal constitutional protections beyond the boundaries drawn by its own precedents has created nationwide confusion as to what is constitutionally permissible under the Eighth Amendment.

As stated in its petition for discretionary review, the State has attempted to compile a comprehensive list of cases that have addressed this issue and has found at least six different approaches when determining whether a term of imprisonment constitutes de facto life without parole. (State's PDR pp 18-25) However, those cases can be broadly divided into three categories: (1) jurisdictions who refuse to extend Graham and Miller to sentences other than

actual life without parole; (2) jurisdictions who recognize de facto life without parole sentences under Graham or Miller, but require the term imposed for a single offense or aggregate offenses to indisputably exceed the defendant's life span; and (3) those jurisdictions who have expanded Graham and Miller far beyond its holdings and apply those protections to sentences imposed that will allow the defendant an opportunity to spend some of his life beyond prison walls. The decision of the Court of Appeals falls within this third category.

C. The Court of Appeals improperly employed the Eighth Amendment to institute novel changes to our juvenile sentencing practices in this State, a function that is more properly in the purview of the legislature.

The Court of Appeals misinterpreted the decisions in the Graham/Miller/Montgomery trilogy and erred as a matter of law by holding defendant's consecutive sentences of life with parole are in violation of those decisions and the Eighth Amendment of the United States Constitution. Because there is no constitutional violation here, any changes to juvenile sentencing practices in this State are more properly in the purview of the legislature.

1. Graham's holding was specifically limited to the imposition of an actual life without parole sentence for juveniles who commit "a non-homicide offense."

The sole issue decided in Graham was whether the defendant's life without parole sentence for one count of armed burglary was constitutionally permitted under the Eighth Amendment. Graham, 560 U.S. at 57-58. In holding that it was not, the Court distinguished between juveniles who had committed a homicide offense and ones who committed a non-homicide offense. Id. at 69. As stated above, it recognized that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Id. at 69 (citations omitted). And "[a]lthough an offense like robbery or rape is a serious crime deserving serious punishment those crimes differ from homicide crimes in a moral sense." Id. It also stated that juveniles "who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than [juveniles] who committed no homicide." Id. at 63. The Court finally noted at that time there were only 123 juveniles who were convicted of non-homicide offenses serving life without parole sentences. Id. at 64. Based on this and other data, the Court concluded that a sentence of life without parole for a nonhomicide offense "is exceedingly rare. And it is fair to say that a national consensus has developed against it." Id. at 67.

Graham carefully and explicitly limited its holding by stating that its decision concerned only those juveniles "sentenced to life without parole solely for a nonhomicide offense." Id. at 63 (emphasis added). If the Court had "intended for its holding in Graham to apply to consecutive, lengthy sentences, the number of inmates incarcerated for such sentences would likely be in the thousands and certainly exceed the 123 individuals the Supreme Court calculated were serving life in prison without the possibility of parole for committing a nonhomicide offense." State v. Nathan, 522 S.W.3d 881, 886 (Mo. 2017); see also State v. Slocumb, 827 S.E.2d 148, 154 (S.C. 2019) ("[T]he Graham majority discussed in detail the number of juveniles nationwide who were serving de jure life sentences, counting 123 affected individuals. Significantly, the Supreme Court excluded from its calculations the number of juveniles serving de facto life sentences due to a lengthy term of years.").

Graham could not have been clearer in stating that the facts of this case—where a person under the age of eighteen commits two counts of premeditated and deliberate murder—presented a much different situation than the one in which it was basing its ruling, a life without parole sentence for a burglary conviction as a juvenile. Graham simply has no application here. Neither its explicit holding nor its reasoning informs the question currently before this Court.

Despite the clear language of the decision, the Court of Appeals erroneously held "[t]he straightforward applicability of Graham's reasoning to de facto LWOP sentences is clear from the reasoning itself." Kelliher, 849 S.E.2d at 346. The Court of Appeals then improperly interpreted Graham by stating: (1) "[n]owhere in the Graham decision does the Supreme Court specifically limit its holding to [juveniles] who were convicted for a single nonhomicide offense[.] That decision granted Eighth Amendment protection to a juvenile irrespective of his numerous offenses" id. at 348 (internal quotation omitted); and (2) the categorical prohibition in Graham was principally focused on the defendant, "not on the crime or crimes committed." Id. at 349.

These assertions are incorrect. Graham simply does not say what the Court of Appeals says that it does. The crime committed by the juvenile, a non-homicide versus a homicide offense, was its principal consideration and the basis of its holding. Id. at 63 & 68-69; see also Miller, 567 U.S. at 473 ("Graham's flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm."). Graham says nothing about what sentence(s) are constitutionally permissible for juveniles who commit multiple murders.

2. Miller applies only to cases in which a sentencing scheme mandates life in prison without parole for juveniles who are convicted of homicide.

Similarly, Miller says nothing about the imposition of lengthy consecutive sentences for multiple crimes. Every statement in Miller that is even arguably a holding of the Court is specifically limited to a "mandatory life without parole" sentence for a conviction of first-degree murder. Miller, 567 U.S. at 465 & 479. The Court distinguished the mandatory sentencing schemes at issue in Miller from other alternatives whereby "a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years." Id. at 489. "This distinction indicates that . . . the analysis in Miller is limited to the sentence at issue in that case, mandatory life without parole, and does not extend to lengthy aggregate sentences or life sentences with the possibility of parole." Lucero v. People, 394 P.3d 1128, 1133 (Colo. 2017), cert. denied, 199 L. Ed. 2d 544 (2018); see also United States v. Sparks, 941 F.3d 748, 754 (5th Cir. 2019) ("Given Miller's endorsement of 'a lengthy term of years' as a constitutional alternative to life without parole, it would be bizarre to read Miller as somehow foreclosing such sentences."), cert. denied, 206 L. Ed. 2d 264 (2020). Indeed, "Miller did not address the constitutional validity of consecutive sentences, let alone the cumulative effect of such sentences." Nathan, 522 S.W.3d at 891.

To be sure, Miller cited Graham in its analysis; however, it was for the proposition that "youth matters" in sentencing juvenile. Jones, 141 S. Ct. at 1316. And because youth matters, "Miller held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence, just as a capital sentencer must have discretion to consider other mitigating factors before imposing a death sentence." Id.

When read together Graham and Miller stand for the proposition that the imposition of life without parole on a juvenile is different than any other sentence that could be imposed. "[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the [defendant] sentenced to life without parole, but the sentence alters the [defendant's] life by a forfeiture that is irrevocable." Graham, 560 U.S. at 69. Indeed, there is no hope for the future and the defendant will remain in prison for the rest of his or her days. Id.; see also Miller, 567 U.S. at 470 (likening life without parole for a juvenile to the death penalty itself). Any sentence in which the defendant has the opportunity for parole is materially distinguishable.

3. Montgomery did not expand Miller's requirements.

As noted above, many courts erroneously believed that when Montgomery was issued, the requirements of Miller were expanded based on

dicta in that decision. The Court of Appeals fell into that camp. It stated that in Montgomery, "the Supreme Court clarified the applicability of Roper, Graham, and Miller in several ways pertinent to this appeal." Kelliher, 849 S.E.2d at 343. It stated the most important way was that it purported to explain "Miller announced a categorical prohibition against LWOP sentences for juvenile homicide defendants who are not 'irreparably corrupt.'" Id. at 344. This misconstrues Montgomery's holding.

In Jones, the Supreme Court of the United States rejected that interpretation of its decisions in Miller and Montgomery. Jones, 141 S. Ct. at 1317. The Court held that a sentencing court was not required to explicitly or implicitly find that the juvenile was permanently incorrigible prior to imposing life without parole. Id. at 1311. In so holding, the Court specifically rejected the notion that "permanent incorrigibility" was an eligibility criterion for life without parole imposed on juveniles convicted of murder. Id. at 1315. It also stated that Montgomery did not purport to add to Miller's requirements or expand its holding; but rather, that decision merely held that Miller's rule was substantive for retroactivity purposes. Id. at 1316-17. Indeed, "[t]he key assumption of both Miller and Montgomery was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps

ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." Id. at 1318.

Accordingly, neither Graham, Miller, nor Montgomery lend support for the Court of Appeals' holding in this case. To the contrary, the Court of Appeals erred by interpreting "the United States Constitution to provide greater protection than [the United States Supreme Court's] own federal constitutional precedents provide[.]" Sullivan, 532 U.S. at 772.

4. The decision of the Court of Appeals does not fall into the "clear majority of jurisdictions" who recognize de facto life without parole sentences.

Courts around the nation are divided on whether to recognize de facto life without parole sentences under Graham/Miller/Montgomery and, if so, where to draw the line on the length of sentence which deprives a defendant of a meaningful opportunity to obtain release. The Court of Appeals acknowledged this division and stated that it would join the "clear majority" of jurisdictions regarding de facto life without parole sentences based upon aggregated offenses. Kelliher, 849 S.E.2d at 345 & 348. The Court overstates the level of consensus regarding de facto life without parole sentences.

Indeed, different panels of our own Court of Appeals disagree on this issue. Although Kelliher was the first decision issued in this State on de facto life without parole sentences, enforcement of the judgment was subsequently

stayed by this Court and two other decisions issued later by the Court of Appeals disagreed with Kelliher's analysis. See State v. Anderson, 853 S.E.2d 797, 798 (N.C. Ct. App. 2020) ("We hold that the sentences imposed by the trial court, though significant, are not unconstitutional. Miller v. Alabama has never held as being unconstitutional a life with parole sentence imposed on a defendant who commits a murder when he was 17 years old. Here, Defendant will be eligible for parole in 50 years. Assuming that a de facto LWOP sentence (where a defendant is sentenced to consecutive terms for multiple felonies) is unconstitutional, we hold that a 50-year sentence does not equate to a de facto life sentence based on the evidence in this case."); State v. Conner, 853 S.E.2d 824, 825 (N.C. Ct. App. 2020) ("Miller has never held as being unconstitutional a life with parole sentence imposed on a defendant who commits a murder when he was a minor. Here, Defendant will be eligible for parole when he is 60 years old. Assuming that a de facto LWOP sentence (where a defendant is sentenced to consecutive terms for multiple felonies) is unconstitutional, we hold that based on the evidence before the trial court a 45-year sentence imposed on this 15-year old does not equate to a de facto life sentence.").[4]

[4] Both Anderson and Conner are pending in this Court on appeal based on the dissenting opinion. N.C.G.S. § 7A-30(2). The author of the opinion in Kelliher and the dissents in Anderson and Conner were the same judge.

Moreover, cases from other jurisdictions—both federal and state—can be broadly divided into three categories. The first is those jurisdictions who refuse to apply Graham and Miller to sentences other than those specifically labeled life without parole. This includes four federal courts. See, e.g., See Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 198 (4th Cir. 2019), cert. denied, 206 L. Ed. 2d 469 (2020); Sparks, 941 F.3d at 754; United States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016), cert. denied, 198 L. Ed. 2d 729 (2017); Bunch v. Smith, 685 F.3d 546, 552-53 (6th Cir. 2012), cert. denied, 569 U.S. 947 (2013).

And fourteen state courts. See Wilson v. State, 157 N.E.3d 1163, 1174 (Ind. 2020); State v. Soto-Fong, 474 P.3d 34, 41 (Ariz. 2020); Slocumb, 827 S.E.2d at 148 (South Carolina); Veal v. State, 810 S.E.2d 127, 129 (Ga. 2018), cert. denied, 202 L. Ed. 2d 218 (2018); Lucero, 394 P.3d at 1132 (Colorado); State v. Ali, 895 N.W.2d 237, 246 (Minn. 2017), cert. denied, 199 L. Ed. 2d 543 (2018); Willbanks v. Dep't of Corrections, 522 S.W.3d 238, 240 (Mo. 2017), cert. denied, 199 L. Ed. 2d 125 (2017)[5]; Vasquez v. Commonwealth, 781 S.E.2d 920,

[5] Missouri appears to have conflicting viewpoints on this issue. Three opinions were issued on the very same day with different analyses. Compare State ex rel. Carr v. Wallace, 527 S.W.3d 55, 63-64 (Mo. 2017) (parole eligibility after fifty years constituted a de facto life without parole sentence subject to Miller's sentencing requirements); with Nathan, 522 S.W.3d at 893 ("For this Court to hold Graham and Miller apply to consecutive sentences amounting to the functional equivalent of life in prison without the possibility of parole, it would

925 (Va. 2016), cert. denied, 196 L. Ed. 2d 448 (2016); Hobbs v. Turner, 431 S.W.3d 283, 289 (Ark. 2014); Brown, 118 So.3d at 342 (Louisiana); see also Mason v. State, 235 So. 3d 129, 134-35 (Miss. Ct. App. 2017), cert. denied, 233 So. 3d 821 (2018); Grooms v. State, 2015 Tenn. Crim. App. LEXIS 198, at *4 (Tenn. Crim. App. 2015) (unpublished), appeal denied, 2015 Tenn. LEXIS 606 (Tenn. 2016), cert. denied, 194 L. Ed. 2d 218 (2016); State v. Williams, 2013 Wisc. App. LEXIS 1017, at *6 (Wis. Ct. App. 2013) (unpublished); Diamond v. State, 419 S.W.3d 435, 440-41 (Tex. App. 2012).

The rationale commonly found in these cases is that none of the decisions of the Supreme Court of the United States involved de facto life sentences for juveniles and their holdings did not implicate such sentences. Without further guidance, these jurisdictions refused to extend the holdings in Graham and

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undoubtedly need to extend both holdings to uncharted waters. The Court declines to do so."); and Willbanks, 522 S.W.3d at 246 (same).

Oregon and Louisiana also have cases holding a lengthy term of years could constitute a de facto life without parole sentence for a single conviction but refused to extend that reasoning to aggregate sentences for multiple offenses. Compare White v. Premo, 443 P.3d 597, 604-05 (Or. 2019), cert. dismissed, 206 L. Ed. 2d 389 (2020), and State ex rel. Morgan v. State, 217 So. 3d 266, 271 (La. 2016); with Kinkel v. Persson, 417 P.3d 401, 411 (Ore. 2018), cert. denied, 202 L. Ed. 2d 585 (2019), and State v. Brown, 118 So.3d 332, 342 (La. 2013).

Miller. Additionally, "well-meaning attempts at fully defining de facto life sentences can end up creating requirements that would vastly alter sentencing procedures for a large swath of juveniles." Wilson, 157 N.E.3d at 1175.

The second category is those jurisdictions who recognize de facto life sentences under Graham or Miller, but require the term imposed for a single offense or aggregate offenses to indisputably exceed the defendant's life span. This category includes cases that both grant and deny the defendant relief based on the length of the sentence. The first type of cases are those courts who vacated sentences that are not labeled "life without parole" but are so lengthy there is no question that they are the functional equivalent. This includes three federal courts. See Budder v. Addison, 851 F.3d 1047, 1059–60 (10th Cir. 2017) (striking down aggregate sentence where the juvenile would have to serve 131.75 years before becoming eligible for parole), cert. denied, 199 L. Ed. 2d 374 (2017); McKinley v. Butler, 809 F.3d 908, 913-14 (7th Cir. 2016) (vacating a 100-year sentence imposed on a sixteen-year-old juvenile); Moore v. Biter, 725 F.3d 1184, 1191-92 (9th Cir. 2013) (holding an aggregate sentence of 254 years is entitled to protection under Graham).

And seven state courts. See State v. Ramos, 387 P.3d 650, 658 (Wash. 2017) (holding an 85-year aggregate sentence was a de facto life sentence because it exceeded the average human life span), cert. denied, 199 L. Ed. 2d

355 (2017); People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016) (holding parole eligibility after 89 years imprisonment is de facto life without parole); Morgan, 217 So. 3d at 271 (Louisiana) (holding the defendant's 99-year sentence for a single non-homicide offense was an effective life sentence); State v. Moore, 76 N.E.3d 1127, 1149 (Ohio 2016) (holding an aggregate sentence of 112 years violated the Eighth Amendment), cert. denied, 199 L. Ed. 2d 183 (2017); State v. Boston, 363 P.3d 453, 458 (Nev. 2015) (aggregate sentence totaling 100 years prior to parole eligibility is without a doubt the functional equivalent of life without parole); Henry v. State, 175 So.3d 675, 679-80 (Fla. 2015) (holding because the defendant's aggregate sentence of ninety years requires him to be imprisoned until he is at least nearly ninety-five years old, it does not afford him a meaningful opportunity for release), cert. denied,194 L. Ed. 2d 552 (2016); People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (holding consecutive sentences totaling 110-years-to-life was de facto life without parole).

The other type of case in the second category are those courts who deny the defendant relief because while the sentence imposed was lengthy, he or she will have a meaningful opportunity release at some point during their lifetime. This includes two federal courts. See United States v. Mathurin, 868 F.3d 921, 935 (11th Cir. 2017) (holding that with good time credit, the defendant would be "eligible for release approximately 43.4 years after the sentencing date,

which was over five years before the end of his own projected life span and almost ten years before the date projected for all males his age. Thus, Defendant has 'some meaningful opportunity to obtain release' during his lifetime, as required by Graham."), cert. denied, 202 L. Ed. 2d 42 (2018); Demirdjian v. Gipson, 832 F.3d 1060, 1076 (9th Cir. 2016) (holding sentencing a juvenile to two consecutive 25-year terms with parole eligibility at age 66 did not clearly violate the Eighth Amendment), cert. denied, 199 L. Ed. 2d 22 (2018).

And seven state courts. See State v. Quevedo, 947 N.W.2d 402, 408 (S.D. 2020) (parole eligibility at age 62 complied with Miller and the defendant's sentence did not violate the Eighth Amendment); State v. Shanahan, 445 P.3d 152, 161 (Idaho 2019) (holding Miller applied to functional life without parole sentences; however, the defendant's thirty-five-year sentence did not constitute such), cert. denied, 205 L. Ed. 2d 345 (2019); Ira v. Janecka, 419 P.3d 161, 171 (N.M. 2018) (holding parole eligibility at age 62 does not deprive the defendant of a meaningful opportunity for release); Steilman v. Michael, 407 P.3d 313, 319 (Mont. 2017) (potential for parole eligibility after thirty-one years imprisonment for a seventeen-year-old defendant was not a de facto life without parole sentence), cert. denied, 201 L. Ed. 2d 260 (2018); State v. Smith, 892 N.W.2d 52, 66 (Neb. 2017) ("[B]ecause Smith will be parole eligible at age

62, we do not agree that his sentence represents a 'geriatric release' or equates to 'no chance for fulfillment outside prison walls' . . . ."), cert. denied, 199 L. Ed. 2d 208 (2017); see also Martinez v. State, 442 P.3d 154, 156-57 (Okla. Crim. App. 2019) (holding Graham, Miller, and Montgomery do not apply to aggregated sentences and parole eligibility at age 79 offers a meaningful opportunity to obtain release); Commonwealth v. Foust, 180 A.3d 416, 438 (Pa. Super. Ct. 2018) ("A sentence of 30 years to life imprisonment does not constitute a de facto LWOP sentence which entitles a defendant to the protections of Miller.").

Finally, the third category includes those jurisdictions who have extended the holdings of Graham and Miller and apply its protections to sentences whose lengths are less than the remainder of the defendant's life span. Most cases in this category hold that approximately fifty years in prison prior to parole eligibility constituted a de facto life without parole sentence based on life expectancy charts, retirement age, or simply labeling it as "geriatric release." The Court of Appeals decision falls into this category along with eight other state courts. See Premo, 443 P.3d at 604-05 (Oregon) (holding an 800-month sentence for a single homicide was subject to Miller protections); Carter v. State, 192 A.3d 695, 734 (Md. 2018) (holding parole eligibility after fifty years is a de facto life sentence because it the eligibility date will be later

than a typical retirement date for someone of the defendant's age); State v. Zuber, 152 A.3d 197, 213 (N.J. 2017) (Defendants' potential release after five or six decades of incarceration, when they would be in their seventies and eighties, implicates the principles of Graham and Miller."), cert. denied, 199 L. Ed. 2d 38 (2017); Casiano v. Comm'r of Corr., 115 A.3d 1031 (Conn. 2015) (holding life expectancy data suggests a juvenile sentenced to a fifty year term of imprisonment may never experience freedom and that he would be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment), cert. denied, 194 L. Ed. 2d 376 (2016); Wallace, 527 S.W.3d at 63-64 (Missouri) (holding mandatory concurrent sentences with parole eligibility after fifty years constituted a de facto life without parole sentence subject to Miller's sentencing requirements); Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014) ("[t]he prospect of geriatric release" after 45 years imprisonment is the functional equivalent of life without parole); State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) ("[W]hile a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger Miller-type protections" even though the evidence did not establish that the defendant's prison term is beyond his life expectancy); see also Williams v. State, 476 P.3d 805, 822 (Kan. Ct. App. 2020) (holding a fifty-year sentence is

the functional equivalent of a sentence of life without parole because he would have "no opportunity to truly reenter society or have any meaningful life outside of prison.").

While there may be more jurisdictions that recognize de facto life without parole sentences rather than not, there is no nationwide consensus on this issue. As demonstrated above, there is little agreement on where to draw the line to determine when a sentence deprives a juvenile of a meaningful opportunity to obtain release. Willbanks, 522 S.W.3d at 246; Smith, 892 N.W.2d at 66; Casiano, 115 A.3d at 1045. Absent further guidance from the Supreme Court of the United States, this Court "should not arbitrarily pick the point at which multiple aggregated sentences may become the functional equivalent of life without parole." Willbanks, 522 S.W.3d at 245. And it should not adopt the analysis of the Court of Appeals because under the particular facts and circumstances of this case, defendant has a meaningful opportunity to obtain release.

5. The Court of Appeals reasoning for drawing the line at retirement age (or 50 years in prison) is misguided.

The Court of Appeals decided that in North Carolina the functional equivalent of life without parole is a sentence that affords the defendant release only at or after retirement age. Kelliher, 849 S.E.2d at 350. It reasoned

that because our state Constitution provides that part of a person's "inalienable rights" includes the enjoyment of the fruits of their own labor under N.C. Const. art. I, § 1, that "incarcerating a juvenile with no hope for release until or after the point at which society no longer considers them an ordinary member of the workforce seems to run afoul of the 'hope for some years of life outside prison walls' required by Graham and Miller." Id. The Court of Appeals then lamented defendant's loss of opportunity to directly contribute to society, both through a career and in other respects, like raising a family. Id.

Again, the Court of Appeals misconstrues the decision in Graham. There, the Supreme Court described a life without parole sentence as a "forfeiture that is irrevocable" and "a denial of hope" because the defendant will spend the rest of his or her days in prison. Graham, 560 U.S. at 69-70. A sentence that affords a defendant an opportunity for parole even at an older age cannot be said to be its functional equivalent.

Moreover, the Court explicitly stated "[a] State is not required to guarantee eventual freedom to a juvenile" and that "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." Graham, 560 U.S. at 75. What Graham required the State to do is give defendants "some

meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id.

Graham does not, in any way, mandate that "defendants have a 'meaningful life outside of prison' in which to 'engage meaningfully' in a career or raising a family." Smith, 892 N.W.2d at 66; see also Angel v. Commonwealth, 704 S.E.2d 386, 402 (Va. 2011) (holding the Supreme Court of the United States did not require that states provide the opportunity for release at any particular time related to either the juvenile's age or length of incarceration), cert. denied, 565 U.S. 920 (2011).

A number of courts have held that sentences that allow juveniles "to be released in his or her late sixties or early seventies satisfy the 'meaningful opportunity' requirement." Smith, 892 N.W.2d at 65; see also Martinez, 442 P.3d at 157; Commonwealth v. Bebout, 186 A.3d 462, 468 (Pa. Super. Ct. 2018); State v. Russell, 908 N.W.2d 669, 677 (Neb. 2018), cert. denied, 202 L. Ed. 2d 121 (2018); Williams v. State, 197 So. 3d 569, 572 (Fla. App. 2016); Angel, 704 S.E.2d at 402. This is so "because in today's society, it is not unusual for people to work well into their seventies and have a meaningful life well beyond age 62 or even at age 77." Smith, 892 N.W.2d at 66. Defendant, here, has a meaningful opportunity to obtain release after he serves fifty years for committing two counts of premeditated and deliberate first-degree murder. Graham, 560 U.S.

at 75. His sentence is not the functional equivalent of life without parole.

The Court of Appeals also erroneously relied upon our Miller-fix statute to support its position. It stated that our General Assembly has offered some indication as to what an appropriate life with parole sentence in compliance with Miller looks like and cited N.C.G.S. § 15A-1340.19A (2019) (defining life with parole as serving a minimum of 25 years imprisonment prior to becoming eligible for parole). Kelliher, 849 S.E.2d at 350. It also cited the provision in N.C.G.S. § 15A-1340.19B(a)(1) providing that "[i]f the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole" for the proposition that "our General Assembly has determined parole eligibility at 25 years for multiple offenses sanctionable by life with parole is not so excessive as to run afoul of Miller."[6] Id. at 351.

The problem with these assertions is that there is nothing in our Miller-fix statute which provides that consecutive sentences are not permissible. And section 15A-1354 states that when "multiple sentences of imprisonment are imposed on a person at the same time" the trial court has discretion to

[6] The statutory interpretation of the provision in N.C.G.S. § 15A-1340.19B(a)(1) was not part of this appeal, was not briefed by the parties, and was first brought up in oral argument. Whether this is the correct interpretation of that provision is an open question of law for another day.

determine whether those sentences are to run consecutively or concurrently. N.C.G.S. § 15A-1354 (2019). Indeed, in Conner, the Court of Appeals unanimously agreed that, as a statutory matter, the trial court was authorized to sentence a defendant for murder under the Miller-fix statutes to life with parole and run that punishment consecutively to another sentence under N.C.G.S. § 15A-1354. Conner, 853 S.E.2d at 825 & 832 (C.J. McGee, concurring in part and dissenting in part). And, while not in a juvenile case, this Court held long ago that "the imposition of consecutive life sentences, standing alone, does not constitute cruel or unusual punishment. A defendant may be convicted of and sentenced for each specific criminal act which he commits." State v. Ysaguire, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983) (emphasis added).

Finally, the Court of Appeals failed to consider the long-lasting implications of its holding in this case. As it stands now, unless a juvenile is one of the "rare" defendants where an actual life without parole sentence is appropriate, Miller, 567 U.S. at 479, the trial court will be required to impose life with parole eligibility after twenty-five years without regard to the number of victims killed or consideration of the juvenile's level of involvement in the murders. Such a sentencing practice is in direct contravention to the holding in Miller, this Court's decision in State v. James, 371 N.C. 77, 813 S.E.2d 195

(2018), and North Carolina's juvenile sentencing statute. See Miller, 567 U.S. at 477 (holding that in determining the appropriate sentence to impose for a juvenile convicted of murder, the court should consider, among many other factors, the circumstances of the homicide offense and the level of the defendant's participation); State v. James, 371 N.C. 77, 94, 813 S.E.2d 195, 207 (2018) (explaining our statute requires the trial court to choose between the available sentencing alternatives based on a consideration of "the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors," under N.C.G.S. § 15A-1340.19C(a) and in light of the United States Supreme Court's statements in Miller).

The resulting impact of this decision is not hard to imagine as it will surely trickle down to other scenarios such as juveniles who commit both a homicide and non-homicide offense, and those juveniles who commit multiple non-homicide offenses as well. This will result in our entire sentencing scheme being completely upended and trial courts will be left with little guidance on permissible sentencing practices.

While there may be valid policy arguments regarding the appropriate lengths of sentences for juveniles, such arguments should be made to the legislature; legal arguments should remain the purview of this Court. At present the North Carolina legislature has thus far declined to act further on

those policy considerations. See N.C.G.S. § 15A-1340.19C(a); N.C.G.S. § 15A-1354; see also State v. Whittle Commc'ns, 328 N.C. 456, 470, 402 S.E.2d 556, 564 (1991) (holding "absent constitutional restraint, questions as to public policy are for legislative determination.").

Conclusion

The decision of the Court of Appeals should be reversed. Defendant's consecutive sentences of life with parole do not offend the Eighth Amendment under the prevailing jurisprudence of the Supreme Court of the United States. Even if this Court were to determine that de facto life without parole sentences exist under Graham or Miller, it should decline to hold that the length of those sentences could be something less than defendant spending his actual remaining days in prison. Defendant has a meaningful opportunity for release and to spend some time outside of prison walls. Eric Carpenter and Kelsea Helton do not have that same opportunity. Their lives were taken from them at the age of nineteen years old—at least in part, if not in whole—by defendant.

II. CLAIMS UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SEC. 27 OF THE NORTH CAROLINA CONSTITUTION ARE ANALZYZED THE SAME BECAUSE THE TWO PROVISIONS ARE READ IN PARALLEL.

In his conditional request for review of an additional issue, defendant asked this Court to determine whether Article I, Section 27 of the North

Carolina Constitution provides greater protection than the Eighth Amendment in the context of sentencing juveniles. It does not. These provisions have always been read in parallel and the same analysis applied. Because defendant's consecutive life with parole sentences do not violate the Eighth Amendment for all the reasons set forth above, those sentences also do not violate the North Carolina Constitution.

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Similarly, article I, section 27 of the North Carolina Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. Const. art. I, § 27. Despite the slight difference in the language in these provisions, this Court has "historically analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." State v. Green, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998), cert. denied, 525 U.S. 1111 (1999). This is so because

> [w]hether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. These cases indicate that the Court simply

> examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual."

Id. (quotation omitted).

This Court explicitly rejected the suggestion that the protection afforded under the state Constitution might be broader than that provided by the Eighth Amendment based on the small difference in phrasing between the two provisions. Green, 348 N.C. at 603 n.1, 502 S.E.2d at 828 n.1. It then examined "each of defendant's contentions in light of the general principles enunciated by this Court and the Supreme Court guiding cruel and unusual punishment analysis." Id. at 603, 502 S.E.2d at 828.

There does not appear to be a single case from this jurisdiction that has deviated from this analysis or even suggested there could be certain circumstances were that may be appropriate. Indeed, the Court of Appeals in this case analyzed defendant's claims the same under both constitutional provisions. Kelliher, 849 S.E.2d at 344 n.10.

Nevertheless, defendant has asked this Court to "revisit" Green and hold that the state Constitution provides broader protection in sentencing juveniles. (Def's Resp. p 9) Such a request is extraordinary and there are no compelling reasons for this Court to overturn its long-standing precedent. Cf. Gamble v.

United States, 204 L. Ed. 2d 322, 332 (2019) ("[E]ven in constitutional cases, a departure from precedent 'demands special justification.'" (quotation omitted)).

To be sure, "[q]uestions concerning the proper construction and application of the North Carolina Constitution can be answered with finality only by this Court." State v. Jackson, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). In construing our state Constitution, "this Court is not bound by the decisions of federal courts, including the United States Supreme Court." Id. at 648, 503 S.E.2d at 104. "States remain free to interpret their own constitutions in any way they see fit[.]" Id. However, this Court gives "the most serious consideration" to decisions of federal courts and may conclude that the reasoning of such decisions is persuasive. Id. In those instances, this Court "will follow the reasoning of the federal court and apply it in construing our state constitutional provision." Id.

In addition to Green, this Court has routinely rejected criminal defendants' arguments that they should be granted more protection under our state Constitution and this case should be no different. See, e.g., id. at 653-654, 503 S.E.2d at 107 (holding the reasoning of the Supreme Court of the United States when construing the Confrontation Clause of the Sixth Amendment in Inadi and White was persuasive and adopting that reasoning for purposes of resolving issues arising under the Confrontation Clause of the North Carolina

Constitution); State v. Garner, 331 N.C. 491, 506, 417 S.E.2d 502, 510 (1992) ("[T]here is nothing to indicate anywhere in the text of Article I, Section 20 any enlargement or expansion of rights beyond those afforded in the Fourth Amendment as applied to the states by the Fourteenth Amendment."); State v. Brunson, 327 N.C. 244, 249, 393 S.E.2d 860, 864 (1990) ("We do not accept defendant's contention that the law of this state confers greater former jeopardy protection upon defendants than the federal law does."); State v. Arrington, 311 N.C. 633, 643, 319 S.E.2d 254, 261 (1984) (for resolving questions arising under Article 1, Section 20 of the Constitution of North Carolina with regard to the sufficiency of probable cause to support the issuance of a search warrant, this Court adopted the totality of circumstances test of Gates and Upton because it found the reasoning of the Supreme Court of the United States compelling); State v. Lawson, 310 N.C. 632, 644, 314 S.E.2d 493, 501 (1984) ("The United States Supreme Court says the federal constitution does not prohibit the use of absolute prosecutorial discretion in determining which cases to prosecute for first degree murder so long as such discretionary decisions are not based on race, religion, or some other impermissible classification. We are not inclined to interpret our state constitution to require more."), cert. denied, 471 U.S. 1120 (1985). But see State v. Carter, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988) (refusing to

adopt a good faith exception to the exclusionary rule under our state constitution).

Defendant will inevitably rely upon the reasoning of Miller and cite several cases from other jurisdictions that use the Miller decision to expand protections for juveniles under their own state constitutions. See, e.g., State v. Bassett, 394 P.3d 430, 446 (Wash. 2017) (life without parole or early release sentence is unconstitutional); State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014) (holding all mandatory minimum sentences of imprisonment for juveniles are unconstitutional); Diatchenko v. DA, 1 N.E.3d 270, 285 (Mass. 2013) (holding all sentences of life in prison without parole imposed on juveniles do not pass constitutional muster).

This authority is certainly not binding and should not be considered persuasive in light of this Court's long-standing acceptance of the principles articulated above. Those state Supreme Courts simply used the discretion under their state constitutions to extend Miller farther than its holding can bear.

As this Court warned in Green, "[c]ourts are not representative bodies" and "the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in

choosing between competing political, economic and social pressures." Green, 348 N.C. at 604, 502 S.E.2d at 829. This Court has stated:

> Since our earliest cases applying the power of judicial review under the Constitution of North Carolina, however, we have indicated that great deference will be paid to acts of the legislature -- the agent of the people for enacting laws. This Court has always indicated that it will not lightly assume that an act of the legislature violates the will of the people of North Carolina as expressed by them in their Constitution and that we will find acts of the legislature repugnant to the Constitution only "if the repugnance do really exist and is plain."

State ex rel. Martin v. Preston, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). Stated somewhat differently, this Court has the power, "in proper cases, to declare an act of the General Assembly unconstitutional -- but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." Id. at 449, 385 S.E.2d at 478.

The imposition of consecutive life with parole sentences is permissible according to the sentencing scheme enacted by our legislature pursuant to section 15A-1340.19A, et seq. and 15A-1354 of the General Statutes. Conner, 853 S.E.2d at 825 & 832. Based on the narrow holdings of Graham, Miller, and Montgomery, and the sharp divide on how aggregate sentences are analyzed nationwide, there is much "reasonable doubt" that defendant's sentences are

unconstitutional. This Court should not be persuaded that the North Carolina Constitution requires a broader approach to juvenile sentencing than is reflected in prevailing United States Supreme Court jurisprudence.

CONCLUSION

The State respectfully requests this Court reverse the decision of the Court of Appeals and reinstate the judgments entered against him at the resentencing hearing.

Electronically submitted this the 21st day of May, 2021.

JOSHUA H. STEIN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing NEW BRIEF FOR THE STATE upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEYS OF RECORD as follows

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APPENDIX

Caution
As of: November 5, 2020 4:28 PM Z

Grooms v. State

Court of Criminal Appeals of Tennessee, At Knoxville

November 18, 2014, Assigned on Briefs; March 25, 2015, Filed

No. E2014-01228-CCA-R3-HC

Reporter
2015 Tenn. Crim. App. LEXIS 198 *

BILLY L. GROOMS v. STATE OF TENNESSEE

Subsequent History: Appeal denied by Grooms v. State, 2015 Tenn. LEXIS 606 (Tenn., July 21, 2015)

US Supreme Court certiorari denied by Grooms v. Tennessee, 2016 U.S. LEXIS 1524 (U.S., Feb. 29, 2016)

Prior History: *Tenn. R. App. P. 3* **[*1]** Appeal as of Right; Judgment of the Circuit Court Affirmed. Appeal from the Circuit Court for Cocke County. No. 4544. Ben W. Hooper, II, Judge.

Grooms v. State, 2001 Tenn. Crim. App. LEXIS 188 (Tenn. Crim. App., Mar. 14, 2001)

Disposition: Judgment of the Circuit Court Affirmed.

Overview

HOLDINGS: [1]-The habeas court properly denied petitioner a writ of habeas corpus because the indictment was not void; [2]-On direct appeal, the court of appeals observed that petitioner was transferred and indicted as an adult, and that was the law of the case; [3]-Because petitioner's claims went to the form of the indictment, rather than the substance, he was required to raise any objections prior to trial; [4]-Even if petitioner could show the indictment was defective because it was not endorsed by the foreperson or endorsed as "a true bill" under Tenn. Code Ann. § 40-13-109, such a claim did not present a proper ground for habeas corpus relief; [5]-Pursuant to Tenn. Code Ann. § 40-13-202, the indictments were sufficient to allow petitioner to know the charges he had to answer for, to provide the trial court with adequate jurisdiction, and to protect him from double jeopardy.

Outcome
Judgment affirmed.

Core Terms

indictment, corpus, sentence, void, endorse, notice, parole, juvenile, minutes, waived, foreperson's, spread

Case Summary

LexisNexis® Headnotes

Constitutional Law > Congressional Duties & Powers > Suspension Clause

HN1[] **Congressional Duties & Powers,**

Suspension Clause

Tenn. Const. art. I, § 15 guarantees the right to seek habeas corpus relief. However, the grounds for the writ are very narrow.

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN2 **Jurisdiction, Cognizable Issues**

Habeas corpus relief is appropriate only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired. The writ may be used to correct judgments that are void, rather than merely voidable. A judgment is void when it is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired. A voidable judgment is one which is facially valid and requires the introduction of proof beyond the face of the record or the judgment to establish its invalidity.

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN3 **Standards of Review, De Novo Review**

The court of criminal appeals reviews the dismissal of a habeas corpus petition de novo with no presumption of correctness given to the conclusions of the habeas corpus court.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN4 **Appellate Jurisdiction, Final Judgment Rule**

A judgment becomes final in the trial court thirty days after its entry if no post-trial motions are filed. Once a judgment becomes final, the trial court loses the jurisdiction to amend it.

Criminal Law & Procedure > Habeas Corpus > Appeals > General Overview

Criminal Law & Procedure > Appeals > Procedural Matters > Time Limitations

HN5 **Habeas Corpus, Appeals**

While a petitioner may appeal as of right from the final judgment of a habeas corpus proceeding, the notice of appeal must be filed within thirty days after the judgment becomes final. *Tenn. R. App. P. 3(b)*, *4(a)*.

Criminal Law & Procedure > Appeals > Procedural Matters > Notice of Appeal

HN6 **Procedural Matters, Notice of Appeal**

The notice of appeal document is not jurisdictional, and the court of criminal appeals may waive the filing requirement in the interest of justice. Tenn. R. App. P. (4)(a).

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult > Transfer Hearings

HN7 **Jurisdiction, Cognizable Issues**

A defendant who does not file a motion for an acceptance hearing within ten days of his or her transfer to criminal court is subject to indictment and trial as an adult. The absence of a transfer hearing and a petition to transfer are not cognizable grounds for habeas corpus relief because they do not divest the criminal court of jurisdiction to hear the case. Such allegations are based on an alleged due process violation, which would render the judgment merely voidable instead of void.

Criminal Law & Procedure > ... > Indictments > Contents > Challeng

es

Criminal Law &
Procedure > ... > Reviewability > Waiver > Triggers of Waivers

HN8 **Contents, Challenges**

A petitioner may raise a challenge at any time that an indictment is defective due to a lack of subject matter jurisdiction of the trial court or the failure of the indictment to charge an offense. However, objections to a defective indictment that go to matters of form rather than substance must be raised before trial, or the issue will be deemed waived. *Tenn. R. Crim. P. 12(b)(2)(B), (f)*.

Criminal Law & Procedure > ... > Grand Juries > Indictments > Challenges to Indictments

Criminal Law &
Procedure > ... > Procedures > Return of Indictments > Procedural Requirements

HN9 **Indictments, Challenges to Indictments**

Tenn. Code Ann. § 40-13-109 states that all felony indictments returned into court by the grand jury with the endorsement a "true bill" shall be entered by the clerk with the return in full on the minutes of the court. However, a failure to spread a felony indictment upon the minutes of the court neither enhances nor diminishes the rights of a defendant. Instead, the purpose of this procedural requirement is to ameliorate the consequences if the original indictment is lost or destroyed. It does not invalidate the indictment. As a result, a claim that the clerk failed to spread the indictment upon the minutes of the court goes to the form, rather than the substance, of the indictment.

Criminal Law &
Procedure > ... > Indictments > Contents > Challenges

Criminal Law &
Procedure > ... > Jurisdiction > Cognizable Issues > General Overview

HN10 **Contents, Challenges**

Challenges to an indictment go to the form of the indictment and are not cognizable claims for habeas corpus relief.

Criminal Law &
Procedure > ... > Indictments > Contents > Content Requirements

Criminal Law &
Procedure > ... > Indictments > Contents > Sufficiency of Contents

HN11 **Contents, Content Requirements**

An indictment is valid if it contains sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy. An indictment must state the facts constituting an offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment. *Tenn. Code Ann. § 40-13-202*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

HN12 **Fundamental Rights, Cruel & Unusual Punishment**

Mandatory sentencing schemes imposing a sentence of life without the possibility of parole for a juvenile offender violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

HN13 **Fundamental Rights, Cruel & Unusual Punishment**

Sentences that provide for the possibility of parole, even if the possibility will not arise before many years of incarceration, do not violate the rule that mandatory sentencing schemes imposing a sentence of life without the possibility of parole for a juvenile offender violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Counsel: Billy L. Grooms, Wartburg, Tennessee, Pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; and John H. Bledsoe, Senior Counsel, for the appellee, State of Tennessee.

Judges: JOHN EVERETT WILLIAMS, J., delivered the opinion of the Court, in which ROBERT W.WEDEMEYER and TIMOTHY L. EASTER, JJ., joined.

Opinion by: JOHN EVERETT WILLIAMS

Opinion

The petitioner, Billy L. Grooms, appeals the denial of his petition for writ of habeas corpus and/or motion to correct an illegal sentence. He argues that: (1) the indictment is void because it was returned without a juvenile petition for transfer, prior to transfer to the criminal court, and without the criminal court's acceptance; (2) the indictment is void because it and the endorsements were not part of the record insofar as they were never spread upon the minutes of the trial court to become part of the record; (3) the indictment is void because it alleged only legal conclusions, did not provide adequate protections against double jeopardy, and did not enable the trial court to enter **[*2]** an appropriate judgment; and (4) his sentence is void in light of *Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*. After a thorough review of the record, the briefs of the parties, and the applicable law, we affirm the judgment of the habeas corpus court.

OPINION

I. Facts and Procedural History

On May 23, 1982, the petitioner was convicted of two counts of first degree murder committed during the perpetration of armed robbery, and he received concurrent life sentences. *State v. Richard Grooms and Billy Grooms, CCA No. 107, 1986 Tenn. Crim. App. LEXIS 2639, 1986 WL 3678, at *1 (Tenn. Crim. App. Mar. 26, 1986)*. On direct appeal, this court affirmed the convictions. *Id*. The petitioner twice filed petitions for writ of habeas corpus that this court treated as petitions for post-conviction relief and ultimately denied. *Billy Grooms v. State, No. 142, 1989 Tenn. Crim. App. LEXIS 230, 1989 WL 25254, at *1 (Tenn. Crim. App. Mar. 21, 1989)*; *Billy Grooms v. State, No. 03-C-019103-CR-00092, 1991 Tenn. Crim. App. LEXIS 882, 1991 WL 227663, at *1 (Tenn. Crim. App. Nov. 6, 1991)*. He filed a third petition for post-conviction relief, which this court again denied. *Billy Grooms v. State, No. 03C01-9603-CC-00136, 1997 Tenn. Crim. App. LEXIS 374, 1997 WL 189919, at *1 (Tenn. Crim. App. April 21, 1997)*. This court also affirmed the denial of a "Petition to Correct Illegal Judgment/Sentence." *Billy J. Grooms v. State, No. E2000-00958-CCA-R3-PC, 2001 Tenn. Crim. App. LEXIS 188, 2001 WL 252076, at *1 (Tenn. Crim. App. Mar. 14, 2001)*.

On June 20, 2013, the petitioner filed a "Petition to Correct Illegal Sentence and/or for Habeas Corpus Relief." On January 21, 2014, the trial court summarily dismissed the petition without appointing counsel or holding a hearing. The court found that each issue had previously been determined and that the doctrines of res judicata **[*3]** and collateral estoppel applied to the petitioner's issues because he raised them in prior petitions for habeas corpus relief. However, the petitioner did not receive a copy of the order dismissing the case until April 28, 2014, and he filed a notice of appeal on May 15, 2014. He also filed a motion to set aside and re-enter the order of dismissal filed on January 21. Finding that the petitioner was not provided with copies of the January 21 order in a timely manner and would have been unable to file an appeal in a timely manner, the habeas corpus court issued an order on May 16, 2014, granting the motion to set aside and refile the initial order dismissing the petition for habeas

corpus.

II. Standard of Review

Article I, section 15 of the Tennessee Constitution ***HN1***[] guarantees the right to seek habeas corpus relief. However, the grounds for the writ are very narrow. *Archer v. State, 851 S.W.2d 157, 162 (Tenn. 1993)*. ***HN2***[] Habeas corpus relief is appropriate "only when 'it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." *Id. at 164* (citation omitted). The writ may be used to correct **[*4]** judgments that are void, rather than merely voidable. *Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999)*. A judgment is void when it "is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired." *Id*. A voidable judgment "is one which is facially valid and requires the introduction of proof beyond the face of the record or the judgment to establish its invalidity." *Id*. ***HN3***[] This court reviews the dismissal of a habeas corpus petition de novo with no presumption of correctness given to the conclusions of the habeas corpus court. *Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007)*.

III. Analysis

A. Untimely Appeal

As an initial matter, the State points out that the trial court did not have jurisdiction to enter the May 16, 2014 order providing the petitioner with an appeal because the judgment had already become final. ***HN4***[] "A judgment becomes final in the trial court thirty days after its entry if no post-trial motions are filed." *State v. Mixon, 983 S.W.2d 661, 670 (Tenn. 1999)*. Once a judgment becomes final, the trial court loses the jurisdiction to amend it. *State v. Peele, 58 S.W.3d 701, 704 (Tenn. 2001)*. Here, the habeas corpus court filed its order denying the petitioner relief on January 21, 2014, and the judgment became final thirty days later, on February 21, 2014. Thus, the May 16, 2014 order was entered **[*5]** after the judgment had become final, and the court was without jurisdiction to issue the order. ***HN5***[] While a petitioner may appeal as of right from the final judgment of a habeas corpus proceeding, the notice of appeal must be filed within thirty days after the judgment becomes final. *Tenn. R. App. P. 3(b)*, *4(a)*. The judgment became final on February 21, 2014, and the petitioner filed his notice of appeal on May 15, 2014, which was more than thirty days after the judgment became final. As a result, the petitioner's notice of appeal was untimely.

HN6[] The notice of appeal document is not jurisdictional, and this court may waive the filing requirement in the interest of justice. Tenn. R. App. P. (4)(a). In its brief, the State observes that it has no objection to waiving the filing requirement in this case. The petitioner has in effect asked this court to waive the notice requirement because he was not notified of the judgment denying his petition. The habeas corpus court's attempt to re-enter the order confirms the factual basis of the petitioner's request. Accordingly, we conclude that the interests of justice permit the waiver of the notice requirement, and we proceed to consider the petitioner's issues.

B. Transfer [*6] From Juvenile Court

The petitioner argues that "the indictment is void because it was returned without a juvenile petition for transfer, prior to the transfer to the criminal court, and without the criminal court's acceptance." He contends that he was indicted as an adult before his transfer to criminal court, which prevented the criminal court from obtaining jurisdiction over his case. He also contends that the judgment is void because his transfer to criminal court was conducted without an acceptance hearing and initiated without a petition for transfer.

The habeas corpus court found that the petitioner was transferred from juvenile court on December 6, 1982, and indicted on December 20, 1982. On direct appeal, this court also observed that the petitioner was transferred on December 6 and indicted as an adult on December 20. *Billy Grooms, 1986 Tenn. Crim. App. LEXIS 2639, 1986 WL 3678, at *6*. This is the law of the case, and the petitioner is not entitled to relief.

The petitioner's arguments addressing his transfer to criminal court also do not entitle him to relief. This court addressed the petitioner's claim regarding the absence of a transfer hearing on direct appeal. *1986 Tenn. Crim. App. LEXIS 2639, [WL] at *6*. This court concluded that the issue was waived because the petitioner did not **[*7]** file a motion for an acceptance hearing within

ten days of his transfer to criminal court, and HN7[] a defendant who does not file such a motion is subject to indictment and trial as an adult. *Id*. The absence of a transfer hearing and a petition to transfer are not cognizable grounds for habeas corpus relief because they do not divest the criminal court of jurisdiction to hear the case. *Eddie F. Depriest v. Kevin Meyers, Warden, No. M2000-02312-CCA-R3-PC, 2001 Tenn. Crim. App. LEXIS 494, 2001 WL 758739, at *2 (Tenn. Crim. App. Jul. 6, 2001)*; *see also Patrick Dale Potter v. State, No. E2005-01183-CCA-R3-HC, 2006 Tenn. Crim. App. LEXIS 649, 2006 WL 2406769, at *4-5 (Tenn. Crim. App. Aug. 22, 2006)*; *Thomas Wray v. State, No. E2004-02901-CCA-R3-HC, 2005 Tenn. Crim. App. LEXIS 626, 2005 WL 1493158, at *1 (Tenn. Crim. App. June 24, 2005)*. Such allegations are based on an alleged due process violation, which would render the judgment merely voidable instead of void. *See Depriest, 2001 Tenn. Crim. App. LEXIS 494, 2001 WL 758739, at *2*. The petitioner is not entitled to relief as to these issues.

C. Endorsement of Indictment

The petitioner argues that his "indictment is void because it and the endorsements were not part of the record insofar as they were never spread upon the minutes of the trial court to become part of the record." Specifically, he contends that no evidence indicates that the grand jury returned his indictment into court.

HN8[] A petitioner may raise a challenge at any time that an indictment is defective due to a lack of **[*8]** subject matter jurisdiction of the trial court or the failure of the indictment to charge an offense. *State v. Nixon, 977 S.W.2d 119, 120 (Tenn. Crim. App. 1997)*. However, objections to a defective indictment "that go to matters of form rather than substance" must be raised before trial, or the issue will be deemed waived. *Id. at 121*; *Tenn. R. Crim. P. 12(b)(2)(B)*, *(f)*.

The petitioner cites to *Tennessee Code Annotated section 40-13-109*, HN9[] which states that all felony indictments "returned into court by the grand jury with the endorsement a 'true bill' shall be entered by the clerk with the return in full on the minutes of the court." However, a failure to spread a felony indictment upon the minutes of the court neither enhances nor diminishes the rights of a defendant. *Glasgow v. State, 68 Tenn. 485, 486, 2 Shan. 544 (Tenn. 1876)*; see *Davidson v. State, 223 Tenn. 193, 443 S.W.2d 457, 459 (Tenn. 1969)*. Instead, the purpose of this procedural requirement is to ameliorate the consequences if the original indictment is lost or destroyed; "[i]t does not invalidate the indictment." *Davidson, 443 S.W.2d at 459*. As a result, a claim that the clerk failed to spread the indictment upon the minutes of the court goes to the form, rather than the substance, of the indictment. *Derrick Richardson v. Virginia Lewis, Warden, No. E2005-00817-CCA-R3-HC, 2006 Tenn. Crim. App. LEXIS 927, 2006 WL 3479530, at *2 (Tenn. Crim. App. Dec. 1, 2006)* (concluding that petitioner's claim that the trial court clerk failed to sign the indictment and to spread the indictment upon the minutes of the court **[*9]** was not cognizable claim for habeas corpus relief).

Insofar as the petitioner claims that the indictment fails because it allegedly was not endorsed "A True Bill" or because it allegedly lacks the foreperson's signature, he is likewise not entitled to relief. The habeas corpus court found that the reverse side of the petitioner's indictment contained the title "True Bill," along with the signatures of the grand jury foreperson and the county clerk and the dates of the signatures. The court also found that the issue was waived because it was not raised in the motion for new trial or on direct appeal. This court has repeatedly held that such HN10[] challenges to an indictment go to the form of the indictment and are not cognizable claims for habeas corpus relief. *Robert Guerrero v. Dwight Barbee, Warden, No. W2012-01873-CCA-R3-HC, 2013 Tenn. Crim. App. LEXIS 258, 2013 WL 1189462, at *3-4 (Tenn. Crim. App. Mar. 22, 2013)* (concluding that the failure to endorse an indictment "A True Bill" and the foreperson's failure to endorse the indictment did not deprive the trial court of jurisdiction and did not state a cognizable claim for habeas corpus relief), *no perm. app. filed*; *Sidney Cleve Metcalf v. David Sexton, Warden, No. E2011-02532-CCA-R3-HC, 2012 Tenn. Crim. App. LEXIS 631, 2012 WL 3555311, at *6 (Tenn. Crim. App. Aug. 20, 2012)* (holding that the absence of the foreperson's **[*10]** signature does not deprive the trial court of jurisdiction); *William Perry Thompson v. Howard Carlton, Warden, No. 03C01-9611-CR-00395, 1998 Tenn. Crim. App. LEXIS 90, 1998 WL 19932, at *2 (Tenn. Crim. App. Jan. 22, 1998)* (same); *see also Gregory Hedges v. David Mills, Warden, No. W2005-01523-CCA-R3-HC, 2006 Tenn. Crim. App. LEXIS 63, 2006 WL 211819, at *2 (Tenn. Crim. App. Jan. 26, 2006)* (holding that the failure to endorse the indictment as "a true bill" did not deprive the trial court of jurisdiction). Because the petitioner's claims go to the form of the indictment, rather than the substance, he was required to raise any objections prior to trial. *Nixon, 977 S.W.2d at 120*. Even if the petitioner could show that the indictment was defective because it

was not endorsed by the foreperson or endorsed as "a true bill" — a showing that would be contrary to the findings of the habeas corpus court — such a claim does not present a proper ground for habeas corpus relief.

D. Sufficiency of Indictment

The petitioner argues that the indictment is legally insufficient and therefore void. Specifically, he contends that the indictment fails to allege any facts or circumstances of the crime and is "patently conclusory."

HN11[↑] An indictment is valid if it contains sufficient information "(1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from **[*11]** double jeopardy." *State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997)*. An indictment must "state the facts constituting an offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment." *T.C.A. § 40-13-202*.

The petitioner was charged with two counts of first degree murder, two counts of first degree murder committed during the perpetration of armed robbery, and two counts of armed robbery.[1] *Billy Grooms, 1986 Tenn. Crim. App. LEXIS 2639, 1986 WL 3678, at *1*. The indictments include 1 the elements of the offenses, the names of the victims, and state that the offenses occurred in November of 1982. We conclude that the indictments were sufficient to allow the petitioner to know which charges he must answer for, to provide the court with adequate jurisdiction to enter a judgment, and to protect the petitioner from double jeopardy. *Hill, 954 S.W.2d at 727*. The petitioner is entitled to no relief.

E. Illegal Sentence

The petitioner contends that his sentence is illegal in light of the Supreme Court's **[*12]** holding in *Miller v. Alabama* that a mandatory sentence of life without the possibility of parole violates the *Eighth Amendment to the United States Constitution*. *Miller v. Alabama, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012)*. Specifically, he contends that because he is "functionally serving a sentence of life without parole," his sentence is illegal. The State responds that *Miller* does not apply retroactively and contends that even if it does, the petitioner is not entitled to any relief.

We note that one panel of this court has concluded that *Miller* created a new rule of constitutional law warranting retroactive application. *Charles Damien Darden v. State, No. M2013-01328-CCA-R3-PC, 2014 Tenn. Crim. App. LEXIS 230, 2014 WL 992097, at *10 (Tenn. Crim. App. Mar. 13, 2014)*, *perm. app. filed*. However, we need not resolve this question because even a retroactive application of Miller would not benefit the petitioner.

In *Miller*, the Supreme Court held that ***HN12***[↑] mandatory sentencing schemes imposing a sentence of life without the possibility of parole for a juvenile offender violated the *Eighth Amendment's* prohibition against cruel and unusual punishment. *Miller, 132 S. Ct. at 2469*. In the case *sub judice*, the petitioner received concurrent sentences of life with the possibility of parole. Although the petitioner contends that he is serving a functional life sentence, this court has concluded that ***HN13***[↑] sentences that provide for the possibility **[*13]** of parole, even if the possibility will not arise before many years of incarceration, do not violate *Miller*. *Charles Damien Darden v. State, 2014 Tenn. Crim. App. LEXIS 230, 2014 WL 992097, at *11*; *see also Floyd Lee Perry, Jr., v. State, No. W2013-00901-CCA-R3-PC, 2014 Tenn. Crim. App. LEXIS 327, 2014 WL 1377579, at *5 (Tenn. Crim. App. April 7, 2014)* (concluding that the court was without jurisdiction because no application for permission to appeal was filed but noting that the petitioner would not be entitled to relief under *Miller* when he received a sentence of life with the possibility of parole as a juvenile). Because the petitioner received a sentence of life with the possibility of parole, there is nothing illegal about his sentence. The petitioner is not entitled to any relief.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the habeas corpus court.

JOHN EVERETT WILLIAMS, JUDGE

[1] Although the petitioner was charged with two counts of armed robbery, the record contains an indictment for only one charge of armed robbery.

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State v. Williams

Court of Appeals of Wisconsin, District One

December 10, 2013, Decided; December 10, 2013, Filed

Appeal No. 2012AP2399

Reporter
2013 Wisc. App. LEXIS 1017 *; 2014 WI App 16; 352 Wis. 2d 573; 842 N.W.2d 536; 2013 WL 6418971

STATE OF WISCONSIN, PLAINTIFF-RESPONDENT, v. JAMES DONTAE WILLIAMS, DEFENDANT-APPELLANT.

Judges: Before Fine, Kessler and Brennan, JJ.

Prior History: **[*1]** APPEAL from an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. Cir. Ct. No. 1997CF971255.

State v. Williams, 2009 WI App 95, 320 Wis. 2d 484, 769 N.W.2d 878, 2009 Wisc. App. LEXIS 323 (2009)

Disposition: Affirmed.

Core Terms

sentence, juveniles, trial court, resentencing, parole, convicted, life-without-parole, mandatory, prison, intentional homicide, eligible for parole, homicide, first-degree, decisions, adult, sentencing discretion, scientific research, juvenile offender, first challenge, impose sentence, question of law, direct appeal, life sentence, de novo, non-homicide, subjected, offenses, entitle, lengthy, commit

Opinion

P1 PER CURIAM. James Dontae Williams, *pro se*, appeals from an order denying his Wis. Stat. § 974.06 (2011-12) motion that sought resentencing on grounds that recent United States Supreme Court decisions require a consideration of "the unique nature of his character as a juvenile."[1] (Capitalization and bolding omitted.) We conclude that those decisions do not entitle Williams to resentencing. Therefore, we affirm.

BACKGROUND

P2 In 1997, seventeen-year-old Williams and his thirteen-year-old girlfriend killed a woman and took her car. Williams was convicted of first-degree intentional homicide as a party to a crime, contrary to Wis. Stat. §§ 940.01(1) and 939.05 (1997-98). The trial court sentenced Williams to life in prison and set a parole eligibility date of August 4, 2098.[2]

P3 Williams appealed and we affirmed the conviction. *See* ***State v. Williams***, No. 1998AP462-CR,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Honorable Dominic S. Amato presided over the jury trial and sentenced Williams. The Honorable Ellen R. Brostrom denied the September 2012 motion that is at issue **[*2]** in this appeal.

unpublished slip op. (WI App June 17, 1999). He subsequently filed a Wis. Stat. § 974.06 motion that was also denied. Again, we affirmed. *See* ***State v. Williams***, *No. 2008AP1831, 2009 WI App 95, 320 Wis. 2d 484, 769 N.W.2d 878, unpublished slip op. (WI App May 5, 2009)*.

P4 In September, 2012, Williams filed the Wis. Stat. § 974.06 motion that is the subject of this appeal. He argued that he is entitled to resentencing because of two United States Supreme Court decisions concerning the sentencing of juveniles to life in prison: ***Graham v. Florida***, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) and ***Miller v. Alabama***, U.S. , 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The trial court denied the motion in a written order, concluding that ***Graham*** and ***Miller*** do not affect Williams because he was not sentenced to life without parole.

DISCUSSION

P5 Resolution of this appeal requires us to determine the potential applicability of ***Graham*** and ***Miller*** to Williams. This presents a question of law that we review *de novo. See* ***Welin v. American Family Mut. Ins. Co.***, 2006 WI 81, ¶16, 292 Wis. 2d 73, 80, 717 N.W.2d 690, 693 ("The interpretation and application of case law and statutes to **[*3]** undisputed facts are ordinarily questions of law" that are decided *de novo* on appeal.).

P6 We begin with a brief review of ***Graham*** and ***Miller***, both of which addressed the constitutionality of life-without-parole sentences imposed on juvenile offenders. ***Graham***, which concerned juveniles convicted of non-homicide offenses, held:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

Id., 560 U.S. at 82. In reaching that decision, the Court discussed prior case law and scientific research suggesting that juveniles lack the same maturity as adults and that there are "fundamental differences between juvenile and adult minds." *See* ***id.*** at 68.

P7 In ***Miller***, the Court considered mandatory life-without-parole sentences that were imposed on two juveniles who were convicted of murder. ***Id.***, 132 S. Ct. at 2460. The Court concluded that "*mandatory* life without parole for those under the age of 18 at the time of their crimes violates **[*4]** the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" ***Ibid***. (emphasis added). The Court explicitly declined to address the "argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger." ***Id.*** at 2469. Further, the Court said that it was "not foreclose[ing] a sentencer's ability" to sentence a juvenile convicted of homicide to life in prison without parole, but the Court predicted that such sentences "will be uncommon." ***Ibid***.

P8 It is clear that ***Graham*** does not mandate resentencing for Williams, because that case addressed life sentences for juveniles who did not commit homicide. Williams acknowledges that ***Graham*** dealt with juveniles convicted of non-homicide offenses and explains that he has cited ***Graham*** because its rationale concerning the culpability of juveniles was adopted in ***Miller***.

P9 But ***Miller*** is also not directly applicable to Williams, because it concluded that *mandatory* life-without-parole sentences were unconstitutional. Williams was not subjected to a mandatory life-without-parole sentence. Rather, the Wisconsin legislature gave trial courts the discretion to elect one of three options **[*5]** in sentencing a defendant convicted of first-degree intentional homicide: the trial court could make the defendant eligible for parole, eligible for parole on a date set by the trial court, or not eligible for parole. *See* Wis. Stat. § 973.014(1) (1997-98); *see also* ***State v. Ninham***, 2011 WI 33, ¶42, 333 Wis. 2d 335, 358, 797 N.W.2d 451, 463 (describing statutory penalties for juveniles convicted of first-degree intentional homicide). Here, the trial court exercised that discretion and elected to make Williams eligible for parole on a certain date.

P10 Williams recognizes that the trial court "was allowed to exercise [its] discretion and sentence Williams to life in prison, without the possibility for parole (or parole in 101 years)," but he asserts that the trial court "was required to adequately explain why a 101 year sentence, which assures Williams will die in prison, was appropriate." Williams also implies that he should be resentenced so that the trial court can take into account new brain science concerning juvenile and adult minds. He states: "[T]he original sentencing court's articulated rationale for issuing such a lengthy sentence ... has now been proven to actually mitigate **[*6]** against lengthy sentences, in all juvenile cases[,] including cases of juveniles convicted of first degree intentional homicide."

In short, Williams argues that the trial court erroneously exercised its sentencing discretion in 1997 *and* that the trial court should resentence him in light of new brain science.

P11 We are unconvinced that Williams is entitled to resentencing. He was sentenced for a homicide and was not subjected to a mandatory life-without-parole sentence, so neither ***Graham*** nor ***Miller*** are directly on point. Further, Williams has not shown any other legal basis for his argument that advances in scientific research entitle him to resentencing years after his sentence was imposed and after his direct appeal and first *Wis. Stat. § 974.06* challenge to his conviction were completed. Finally, Williams has not shown that he is entitled to challenge the trial court's original exercise of sentencing discretion years after his direct appeal and first *Wis. Stat. § 974.06* challenge.[3] We affirm the order denying Williams's motion for resentencing.

By the Court.—Order affirmed.

This opinion will not be published. *See Wis. Stat. Rule 809.23(1)(b)5*.

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[3] The State argues that "a review of the [trial] court's sentencing remarks makes clear that it properly addressed the statutory factors set **[*7]** forth in [*Wis. Stat.] § 973.017(2)* and those outlined in ***McCleary v. State**, 49 Wis. 2d 263, 276, 182 N.W.2d 512[, 519] (1971)*, in determining Williams'[s] sentence: the gravity of the offense, the character and rehabilitative needs of the offender, and the need for protection of the public." We decline to examine the merits of Williams's argument that the trial court failed to follow the dictates of ***McCleary*** because Williams has not shown that he is entitled to challenge the trial court's original exercise of sentencing discretion at this stage of the case.