No. 442PA20 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	From Cumberland County
v	)	No. 016CRS59934
	)	No. COA19-530
JAMES RYAN KELLIHER	)	

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MOTION FOR TEMPORARY STAY
(State of N.C.)
(Filed 23 October 2020)
(Allowed 23 October 2020)
and
PETITION FOR WRIT OF SUPERSEDEAS
(State of N.C.)
(Filed 23 October 2020)
Allowed 10 March 2021)
and
NOTICE OF APPEAL
(Constitutional Question)
(State of N.C.)
(Dismissed ex mero motu 10 March 2021)
and
PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(State of N.C.)
(Filed 6 November 2020)
(Allowed 10 March 2021)
and
CONDITIONAL PETITION FOR DISCRETIONARY
REVIEW UNDER G.S. 7A-31
(Defendant)
(Filed 16 November 2020)
(Allowed 10 March 2021)

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NO. **TWELFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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

****

STATE'S PETITION FOR WRIT OF SUPERSEDEAS
AND
APPLICATION FOR TEMPORARY STAY

****

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

The State of North Carolina, by and through Kimberly N. Callahan, Assistant Attorney General, respectfully petitions this Court, pursuant to Rule 23(b) of the North Carolina Rules of Appellate Procedure, to issue its writ of supersedeas to stay enforcement of the judgment of the North Carolina Court of Appeals in State v. Kelliher, No. COA19-530 (N.C. Ct. App. Oct. 6, 2020), pending review by this Court of that decision which held the trial court was not constitutionally permitted to sentence a juvenile offender who was convicted of two counts of first-degree murder for killing two teenagers, one of whom was pregnant, to consecutive life with parole sentences under the Eighth

Amendment of the United States Constitution and Article I, sec. 27 of the North Carolina Constitution. Kelliher, slip op. at 44. The case was remanded to the trial court with instructions to impose concurrent sentences. Id., slip op. at 44. A copy of the opinion of the Court of Appeals is attached.

The Court of Appeals' mandate will issue on 26 October 2020. The State of North Carolina further moves, pursuant to Rule 23(b) of the North Carolina Rules of Appellate Procedure, that this Court enter an order temporarily staying the enforcement of the judgment of the Court of Appeals to permit this Court to consider the State's petition for writ of supersedeas, and forthcoming notice of appeal (constitutional question), and alternative petition for discretionary review. In support of this application and petition, the State shows the following.

PROCEDURAL HISTORY

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 and it was allowed. (R p. 36) The appeal was held in abeyance pending determination of several cases in our Supreme Court. (R p 36) On 21 March 2017, this Court 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

offender who was convicted of two counts of first-degree murder for killing two teenagers, one of whom was pregnant, to consecutive life with parole sentences under the Eighth Amendment of the United States Constitution and Article I, sec. 27 of the North Carolina Constitution. Kelliher, slip op. at 44. The case was remanded to the trial court with instructions to impose concurrent sentences. Id., slip op. at 44.

REASONS WHY THIS COURT SHOULD ISSUE A TEMPORARY STAY AND WRIT OF SUPERSEDEAS

The State intends to file a timely Notice of Appeal (Constitutional Question) pursuant to N.C.G.S. § 7A-30(1) and an alternative Petition for Discretionary Review pursuant to N.C.G.S. § 7A-31(c) within fifteen days of the Court of Appeals' mandate in accordance with Rules 14(a) and 15(b) of the Rules of Appellate Procedure requesting that this Court review the judgment of the Court of Appeals in this case. This Court should stay enforcement of the mandate of the Court of Appeals because it erred as a matter of law by holding that sentencing a juvenile offender to consecutive life with parole sentences for two premeditated and deliberate first-degree murders violated the Eighth Amendment of the United States Constitution. The basis of the decision was that fifty years imprisonment prior to parole eligibility was tantamount to a de facto life without parole sentence in violation of Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); and Montgomery v.

Louisiana, 193 L. Ed. 2d 599 (2016), even though defendant will possibly have a chance of life outside prison walls.

This is an issue of first impression in this jurisdiction and courts across the nation are sharply divided on how to view consecutive sentences for multiple crimes under the Eighth Amendment. As will be demonstrated in the State's notice of appeal, the decision of the Court of Appeals "directly involves a substantial question arising under the Constitution of the United States or of this State." N.C.G.S. § 7A-30(1).

Also, as will be demonstrated in the State's alternative petition for discretionary review, it is important for this Court to accept review of this case because the subject matter of the appeal has significant public interest, N.C.G.S. § 7A-31(b)(1), and the cause involves legal principles of major significance to the jurisprudence of the State, N.C.G.S. § 7A-31(c)(2). The decision of the Court of Appeals is published and if left standing would become binding precedent for all subsequent Miller sentencing hearings and challenges on appeal to consecutive sentences of life with parole for juvenile murderers.

In order to permit this Court to adequately determine whether to accept this case under N.C.G.S. § 7A-31, this Court should issue a temporary stay. Then, pending review, this Court should issue a writ of supersedeas. It is

imperative that the status quo in this matter be preserved while these issues of great importance are being considered by this Court.

WHEREFORE, the State of North Carolina respectfully requests that this Court temporarily stay enforcement of the mandate of the Court of Appeals pending resolution of the petition for writ of supersedeas. The State further respectfully requests that this Court issue the writ of supersedeas to stay enforcement of the Court of Appeals' judgment pending review of the decision by this Court.

Electronically submitted this the 23rd day of October, 2020.

JOSHUA H. STEIN
ATTORNEY GENERAL

Electronically Submitted
Kimberly N. Callahan
Assistant Attorney General

North Carolina Department of Justice
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State Bar No. 36667
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VERIFICATION

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Kimberly N. Callahan, Assistant Attorney General for the State of North Carolina, first being duly sworn, hereby deposes and says that she has read the foregoing STATE'S PETITION FOR WRIT OF SUPERSEDEAS AND APPLICATION FOR TEMPORARY STAY and I affirm, under the penalties for perjury, that the foregoing representations are true. See Order of the Chief Justice of the Supreme Court of North Carolina, Emergency Directive § 5 (Oct. 15, 2020).

This the 23rd day of October, 2020.

Kimberly N. Callahan
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing PETTITION FOR WRIT OF SUPERSEDEAS AND APPLICATION FOR TEMPORARY STAY upon the DEFENDANT by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

Kathryn L. VandenBerg
Assistant Appellate Defender
Email: kathryn.l.vandenberg@nccourts.org

Electronically submitted this the 23rd day of October, 2020.

Electronically Submitted
Kimberly N. Callahan
Assistant Attorney General

Supreme Court of North Carolina
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From N.C. Court of Appeals
(19-530)
From Cumberland
(01CRS59934)

23 October 2020

Ms. Kimberly N. Callahan
Assistant Attorney General
N.C. DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602

RE: State v James Ryan Kelliher - 442P20-1

Dear Ms. Callahan:

The following order has been entered on the motion filed on the 23rd of October 2020 by the State of North Carolina for Temporary Stay:

"Motion Allowed by order of the Court in conference, this the 23rd of October 2020."

s/ Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of October 2020.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Ms. Kathryn L. VandenBerg, Assistant Appellant Defender, For Kelliher, James Ryan - (By Email)
Mr. Robert C. Ennis, Assistant Attorney General, For State of North Carolina - (By Email)
Mr. Glenn Gerding, Appellate Defender, For Kelliher, James Ryan - (By Email)
Ms. Kimberly N. Callahan, Assistant Attorney General, For State of North Carolina - (By Email)
Mr. William R. West, District Attorney
Hon. Lisa Scales, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

NO. **TWELFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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STATE'S NOTICE OF APPEAL
(CONSTITUTIONAL QUESTION)
AND
ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW

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SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	**)**	
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STATE'S NOTICE OF APPEAL
(CONSTITUTIONAL QUESTION)
AND
ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW

****

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

The State of North Carolina, by and through Kimberly N. Callahan, Assistant Attorney General, hereby appeals to the Supreme Court of North Carolina, pursuant to N.C.G.S. § 7A-30(1) and N.C. R. App. P. 14(b)(2), and alternatively petitions this Court, pursuant to N.C. R. App. P. 15 and N.C.G.S. § 7A-31, to certify for discretionary review the judgment from the 6 October 2020 opinion of the North Carolina Court of Appeals in State v. Kelliher, No. COA19-530 (N.C. Ct. App. October 6, 2020). In support of this notice of appeal and alternative petition, the State shows the following.

PROCEDURAL HISTORY

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.

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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 offender who was convicted of two counts of first-degree murder for killing two teenagers, one of whom was pregnant, to consecutive life with parole sentences under the Eighth Amendment of the United States Constitution and Article I, sec. 27 of the North Carolina Constitution. Kelliher, slip op. at 44. The case was remanded to the trial court with instructions to impose concurrent sentences. Id., slip op. at 44.

STATEMENT OF THE FACTS

The facts underlying the charged offenses in this case and the evidence presented at the resentencing hearing are fully set forth in the decision of the Court of Appeals. Id., slip op. at 2-9. To briefly summarize, defendant and Joshua Ballard planned to rob Eric Carpenter, a known drug dealer. (T pp 11-12) During their many conversations, Ballard suggested Carpenter would have

to be killed to conceal his identity as the perpetrator. (T p 12) Defendant offered to give a firearm he had previously stolen from a pawn shop to Ballard for this purpose. (T pp 11, 13-14) 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 pp 12, 15)

On 7 August 2001, Ballard arranged to meet up with Carpenter under the guise that he wanted to conduct a drug deal. (T p 13) Ballard, defendant, and a third man, Jerome Branch, ultimately ended up meeting Carpenter at his apartment. (T p 16) His pregnant girlfriend, Kelsea Helton, was also present. (T p 17) When it came time to carry out the robbery, both Carpenter and Helton were shot in the back of the head. (T pp. 5, 22-23) Both victims were just nineteen years old. (T pp 5, 22-23) There was conflicting evidence about who was the shooter: Defendant, Ballard, or both men. (T pp 17-18, 20 23) Defendant pled guilty to premeditated and deliberate first-degree murder, among other charges. (T pp 5, 120; R pp 10-13)

REASONS WHY CERTIFICATION SHOULD ISSUE

Direct review of substantial constitutional questions is permitted in this Court pursuant to section 7A-30(1) of the General Statutes. N.C.G.S. § 7A-30(1) (2019). The constitutional question must be real, substantial, and one which has not already been the subject of conclusive judicial determination.

State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 382 (1968), cert. denied, 393 U.S. 1087 (1969). This Court should allow the State to proceed on its Notice of Appeal because this case involves such a question. The Court of Appeals erred as a matter of law in holding that the trial court was not constitutionally permitted to sentence a juvenile offender who murdered two teenage victims, one of whom was pregnant, to consecutive life with parole sentences under the Eighth Amendment of the United States Constitution and also Article I, sec. 27 of the North Carolina Constitution because the two provisions are read in parallel and the same analysis applied. The Court adopted defendant's argument that fifty years imprisonment prior to parole eligibility was tantamount to a de facto life without parole sentence in violation of Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); and Montgomery v. Louisiana, 193 L. Ed. 2d 599 (2016), even though defendant will possibly have a chance of life outside prison walls.

None of the above decisions addressed the imposition of consecutive sentences for multiple criminal offenses. The Court of Appeals ignored their narrow holdings and instead relied upon dicta to expand this jurisprudence far beyond its actual reach. This result is in direct contravention to the United States Supreme Court's admonishment that lower courts must refrain from extending federal constitutional protections beyond the boundaries drawn by

that Court's own precedents. See Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (per curiam) (rejecting a state court's holding that "it may interpret the United States Constitution to provide greater protection than [the United States Supreme Court's] own federal constitutional precedents provide"); accord Oregon v. Hass, 420 U.S. 714, 719 (1975).

Now, as a result of the decision below, most if not all juvenile offenders 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 offender 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. If left undisturbed, this decision will fundamentally alter the way all juvenile offenders are punished in this State.

The resulting impact is not hard to imagine as it will surely trickle down to other scenarios such as juvenile offenders who commit both a homicide and non-homicide offense, and those offenders who commit multiple non-homicide offenses as well. This will result in our entire sentencing scheme—as established by our state legislature—being completely upended and trial courts will be left with little guidance on permissible sentencing practices. The decision of the Court of Appeals "directly involves a substantial question arising under the Constitution of the United States or of this State" and the State should be allowed to proceed as a matter of right. N.C.G.S. § 7A-30(1).

Alternatively, the State petitions this Court to certify discretionary review of the decision of the Court of Appeals because the subject matter of the appeal has significant public interest, N.C.G.S. § 7A-31(b)(1), and the cause involves legal principles of major significance to the jurisprudence of the State, N.C.G.S. § 7A-31(c)(2). This appeal involves an issue of first impression in this jurisdiction and courts across the nation are sharply divided on how to view consecutive sentences for multiple crimes under the Eighth Amendment.[1]

[1] 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. See infra pp 18-25. There appears to be no consensus on where the line should be drawn on when a term of imprisonment deprives a juvenile offender of a meaningful opportunity to obtain release.

There are at least four other appeals pending in the Court of Appeals that involve these same questions, Kelliher, slip op. at 13 n. 9, and an unknown amount of cases that may be pending in the trial division. Whether North Carolina should join the jurisdictions that strictly adhere to and apply the holdings of the United States Supreme Court as they are written or to extend the rationale of those holdings to scenarios not considered by those decisions to recognize de facto life without parole sentences for juvenile murderers should be a matter determined by our highest court.

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 line of cases 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.

In a trilogy of cases, the United States Supreme Court established rules prohibiting the harshest punishments for certain juvenile offenders on the grounds that such sanctions run afoul of the Eighth Amendment. See Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting capital punishment for all juvenile murderers); Graham, 560 U.S. at 48 (prohibiting life without parole for juvenile offenders who committed a nonhomicide crime); Miller, 567 U.S. at 465 (prohibiting mandatory life without parole sentences for juvenile murderers). See also Montgomery, 193 L. Ed. 2d at 599 (holding Miller announced a new substantive rule of constitutional law and retroactively applied to cases on collateral review). However, a thorough reading of the cases relied upon by the Court of Appeals to support its decision demonstrates that the United States Supreme Court carefully limited the scope of these decisions. None of them are applicable to the question presented here in this appeal.

A. Contrary to the assertion of the Court of Appeals, Graham expressly limited its holding by stating that its decision "concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense."

In Graham, the Supreme Court held that the Eighth Amendment forbids the imposition of life without parole for a juvenile offender who committed a non-homicide offense. Graham, 560 U.S. at 63. In so holding, the Court relied heavily on the reasoning that "because juveniles have lessened culpability they

are less deserving of the most severe punishments." Id. at 68 (citation omitted). 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 (citations omitted). It went on to state that "[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. Accordingly, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability than an adult who commits murder. Id.

The Supreme Court itself, however, expressly limited the holding by stating that its decision "concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." Id. at 63 (emphasis added). Despite this clear indication from the United States Supreme Court, the Court of Appeals inexplicitly stated, "[n]owhere in the Graham decision does the Supreme Court specifically limit its holding to offenders who were convicted for a single nonhomicide offense[.] That decision granted Eighth Amendment protection to a juvenile irrespective of his numerous offenses[.]" Kelliher, slip op. 34 (internal citation omitted). The Court of Appeals also incorrectly posited that the categorical prohibition in Graham was "principally focused on the offender, not on the crime or crimes committed." Kelliher, slip

op. at 36. Both assertions are simply incorrect and are belied by the plain language of the majority opinion.

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 a juvenile offender who had committed a homicide offense and one who committed a non-homicide offense as explained above. Id. at 69. The Court also stated that "[j]uvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide." Id. at 63. While the age of the offender was indeed a major part of its analysis, the crime committed was also a principal consideration. Id. at 63 & 68-69.

Graham's reasoning also supports the assertion that it did not rule on the constitutional validity of lengthy, consecutive sentences. The Court noted at that time, there were only "123 juvenile nonhomicide offenders serving life without parole sentences." Id. at 64. Based on this and other data, the Supreme 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.

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) ("Underscoring its narrow holding and the rarity of sentencing juvenile nonhomicide offenders to life without the possibility of parole, the 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.").

Instead, the Court confined the scope of its decision to sentences of life without parole for a single non-homicide offense as was recognized in each of the dissenting opinions. See Graham, 560 U.S. at 113 n.11 (Thomas, J., dissenting) ("[T]he Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years imprisonment)."); id. at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence

to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole "probably" would be constitutional."). It is true that statements in a dissenting opinion by a single justice are not binding; however, the State is not relying upon them as such. The dissenting opinions in Graham simply point out the scope of the opinion set forth by the plain language of the majority.

B. Miller applies only to cases in which a sentencing scheme mandates life in prison without parole for juvenile murderers.

In Miller, the United States Supreme Court held that sentencing schemes that mandate life without parole for juvenile murderers violate the Eighth Amendment. Miller, 567 U.S. at 465. The Court reiterated that juveniles are constitutionally different than adults for purposes of sentencing. Id. at 489. 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 juvenile murderers; 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.

Every statement 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.

C. Death and life without parole are different.

In both Graham and Miller, the Court set life without parole and a sentence of death apart from 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 offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable." Graham, 560 U.S. at 69 (emphasis added). Indeed, there is no hope for the future and the defendant will remain in prison for the rest of his 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. The United States Supreme Court made that clear when it discussed remedying a Miller violation in its decision in Montgomery:

> A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. §6-10-301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). 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.

Montgomery, 193 L. Ed. 2d at 622 (emphasis added).

While defendant will not be eligible for parole for fifty years, he will still have an opportunity to live some of his life outside of the prison walls. In other words, his consecutive sentences of life with parole do not amount to a "forfeiture that is irrevocable." Graham, 560 U.S. at 69.

D. Graham and Miller must be applied as written.

The United States Supreme Court has long admonished lower courts to refrain from extending federal constitutional protections beyond the boundaries drawn by its own precedents. Sullivan, 532 U.S. at 772; Hass, 420 U.S. at 719. 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 Supreme 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.").

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); Miller and Graham must be applied as written. The Supreme Court 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. Nathan, 522 S.W.3d at 885. 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.

1. Courts around the nation are deeply divided on whether to recognize de facto life without parole sentences 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 United States Supreme Court "has not yet decided the question of whether consecutive sentences are, for constitutional purposes, the functional equivalent of life in prison without the possibility of parole. This issue has appeared in state and federal courts across the country, with differing conclusions." Nathan, 522 S.W.3d at 885. The Court of Appeals acknowledged there was a deep split of authority and decided that it would join the "clear majority" of jurisdictions recognizing de facto life without parole sentences. Kelliher, slip op. at 27. Any assertion that there is a clear consensus on these issues across the country is incorrect and overstated. See Solcumb, 827 S.E.2d at 156 n.16 & appendix (noting when the opinion was issued in early 2019, courts across the country were essentially evenly split). It is difficult to quantify a majority and minority position on whether Graham and Miller apply

to aggregate sentences for multiple crimes and, if so, where the line should be drawn on when a particular sentence deprives a juvenile offender of a meaningful opportunity to obtain release. Indeed, there appears to be at least six different approaches that have been taken when addressing this question.

First, there are four federal circuit courts and eleven state courts that have refused to extend Graham and Miller to sentences other than life without parole. 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); see also State v. Soto-Fong, 2020 Ariz. LEXIS 299, at *18 (Ariz. Oct. 9, 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); Vasquez v. Commonwealth, 781 S.E.2d 920, 925 (Va. 2016), cert. denied, 196 L. Ed. 2d 448 (2016); Hobbs v. Turner, 431 S.W.3d 283, 289 (Ark. 2014); 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).

Second, three jurisdictions—Oregon, Missouri, and Louisiana—have recognized 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) (holding an 800-month sentence for a single homicide was subject to Miller protections), cert. dismissed, 206 L. Ed. 2d 389 (2020); State ex. rel Carr v. Wallace, 527 S.W.3d 55, 63-64 (Mo. 2017) (holding mandatory concurrent sentences with parole eligibility after fifty years constituted a de facto life without parole sentence subject to Miller's sentencing requirements); State ex rel. Morgan v. State, 217 So. 3d 266, 271 (La. 2016) (holding the defendant's 99-year sentence for a single non-homicide offense was an effective life sentence and violated the mandate in Graham); with Kinkel v. Persson, 417 P.3d 401, 411 (Ore. 2018) (recognizing the United States Supreme Court "neither considered nor decided in Miller and Graham how the categorical limitations that it announced for a single sentence for one conviction would apply to an aggregate sentence for multiple convictions. It follows that the holdings in Miller and Graham do not dictate the result when

a juvenile is convicted of multiple murders and attempted murders, as petitioner was."), cert. denied, 202 L. Ed. 2d 585 (2019); Willbanks v. Dep't of Corrections, 522 S.W.3d 238, 240 (Mo. 2017) ("Because Graham did not address juveniles who were convicted of multiple nonhomicide offenses and received multiple fixed-term sentences, as Willbanks had, Graham is not controlling."), cert. denied, 199 L. Ed. 2d 125 (2017); 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 undoubtedly need to extend both holdings to uncharted waters. This Court declines to do so." (internal quotation omitted)); and State v. Brown, 118 So.3d 332, 342 (La. 2013) (upholding the defendant's four consecutive ten year sentences because "nothing in Graham addresses a defendant convicted of multiple offenses and given term of year sentences, that, if tacked on to the life sentence parole eligibility date, equate to a possible release date when the defendant reaches the age of 86.").

Third, there are at least two federal circuit courts and five state courts that have recognized that a lengthy term of years could possibly constitute a de facto life without parole sentence; however, the defendant was nonetheless denied relief where he would become eligible for parole before reaching his life expectancy and had a meaningful opportunity for release for at least some

years prior to his death. See United States v. Mathurin, 868 F.3d 921, 935-36 (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 offender 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); see also 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).

Fourth, Pennsylvania and Oklahoma have held each individual sentence must be examined, not the aggregate, to determine if the sentence constitutes a de facto life sentence. Martinez v. State, 442 P.3d 154, 156-57 (Okla. Crim. App. 2019); Commonwealth v. Foust, 180 A.3d 416, 438 (Pa. Super. Ct. 2018).

Fifth, there are three federal circuit courts and six state court cases that hold the defendant received a de facto life without parole sentence where it was indisputable that the aggregate term would exceed the average human life span and he would die in prison. See Budder v. Addison, 851 F.3d 1047, 1059–60 (10th Cir. 2017) (striking down three consecutive life-with-parole sentences plus 20 years imposed on a juvenile non-homicide offender because he 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 offender); Moore v. Biter, 725 F.3d 1184, 1191-92 (9th Cir. 2013) (holding an aggregate sentence of 254 years for a juvenile non-homicide offender is "materially indistinguishable" from the life sentence without parole and thus

entitled to protection under Graham); see also 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); State v. Moore, 76 N.E.3d 1127, 1149 (Ohio 2016) (holding the 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) (holding sentences totaling 100 years before being eligible for parole are without a doubt the functional equivalent of a sentence of life without the possibility of 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).

Finally, six other state courts, along with the Court of Appeals here, have held 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." See Williams

v. State, 2020 Kan. App. LEXIS 76, at *45 (Kan. Ct. App. Oct. 9, 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."); Carter v. State, 192 A.3d 695, 734 (Md. 2018) (holding parole eligibility after fifty years is a de facto life sentence because it (1) far exceeds the parole eligibility date for a defendant sentenced to life in prison under Maryland law (15 years); (2) exceeds the threshold duration recognized by most courts in decisions and legislatures in reform legislation (significantly less than 50 years); and (3) 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 offender 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); 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).

While there may be technically a few more jurisdictions that recognize de facto life sentences rather than not, there is no "clear majority" or any nationwide consensus on this issue. Indeed, as demonstrated above, there is little agreement on where to draw the line to determine when a sentence deprives a juvenile offender 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.

That there is no clear answer from the United States Supreme Court and there is a sharp divide between jurisdictions on these issues are reasons enough for this Court to weigh in on this subject matter.

2. Recognizing de facto life without parole sentences is problematic for numerous reasons.

A number of problems arise when a jurisdiction recognizes de facto life without parole sentences:

> "At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty,

> thirty, forty, fifty, some lesser or greater number? . . . Could the number [of years] vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter?" . . . Also, "What if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?"

Vasquez, 781 S.E.2d at 928 (quotation omitted). Attempting to answer these questions with the level of specificity necessary would require a proactive exercise inconsistent with traditional principles of judicial restraint. Id. Moreover, "courts that have held de facto juvenile life sentences unconstitutional provide a cautionary tale, as they have invariably usurped the legislative prerogative to devise a novel sentencing scheme or otherwise delegated the task to trial courts to do so." Soto-Fong, 2020 Ariz. LEXIS 299, at *22. Absent further guidance from the Supreme Court, appellate courts "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.

Nevertheless, 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, slip op. at 41. The Court of Appeals noted defendant's loss of opportunity to directly contribute to

society, both through a career and in other respects, like raising a family. Id. at 40. Graham, however, does not mandate that "defendants have a 'meaningful life outside of prison' in which to 'engage meaningfully' in a career or raising a family. Rather, Graham requires only a meaningful and realistic opportunity to obtain release." Smith, 892 N.W.2d at 66. It does not guarantee eventual freedom. Graham, 560 U.S. at 75. Defendant, here, has a meaningful opportunity for release as will be argued below in section F.

Unlike in the trial court, absent from consideration in the decision of the Court of Appeals concerning defendant's sentence is the impact of his crimes. Eric Carpenter and Kelsea Helton will never have the opportunity to have a career or to raise their family. Their lives were taken from them at the age of nineteen years old—at least in part, if not in whole—by defendant. These factors must be included in determining the appropriate sentence to impose.

The Court of Appeals also failed to consider the long-lasting implications of its holding in this case. As it stands now in this jurisdiction, unless a juvenile murderer is the "rare juvenile offender whose crime reflects irreparable corruption," and a de jure 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, the holding in State v. James from this Court, and North Carolina's juvenile murderer sentencing statute. See Miller, 567 U.S. at 477 (holding that in determining the appropriate sentence to impose for a convicted juvenile murderer, 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 solely upon 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).

For all the above reasons, Graham and Miller should be applied as written and found to be inapplicable to the facts of this case.

E. Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.

Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence. The United States Supreme Court has suggested as much, albeit in dictum. See O'Neil v. Vermont, 144 U.S. 323, 331 (1892) ("It would scarcely be competent for a person to assail the

constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offences in the same prosecution is not material upon this question.").

This reasoning has been adopted by other federal and state courts. See Pearson v. Ramos, 237 F.3d 881, 886 (7th Cir. 2001) ("[I]t is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim."); Hawkins v. Hargett, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) ("The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes."), cert. denied, 531 U.S. 830 (2000); United States v. Aiello, 864 F.2d 257, 265 (2d Cir. 1988) (same); see also Martinez, 442 P.3d at 156 ("[W]e hold that where multiple sentences have been imposed, each sentence should be analyzed separately to determine whether it comports with the Eighth Amendment under the Graham/Miller/Montgomery trilogy of cases[.]").

The Court of Appeals did not find this reasoning to be persuasive because it erroneously believed its "own caselaw and statutes compel the State to consider consecutive sentences as a single punishment." Kelliher, slip op. at

36. To support this proposition, it relied upon section 15A-1354(b) of the General Statutes. See N.C.G.S. § 15A-1354(b) (2019) ("In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Division of Adult Correction and Juvenile Justice of the Department of Public Safety must treat the defendant as though he has been committed for a single term . . . ."). However, a statute providing the manner in which consecutive sentences will be served for purposes of the Department of Public Safety has no application to Eighth Amendment analysis.

This Court has made clear that "[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). Indeed, "multiple violent crimes deserve multiple punishments." Nathan, 522 S.W.3d at 892. Nothing in Graham, Miller, or Montgomery takes away a sentencer's authority to run sentences consecutively for multiple homicide offenses. N.C.G.S. § 15A-1354(a). The decision of the Court of Appeals improperly strips trial courts of this discretionary power granted to them by our state legislature.

Defendant participated in the execution-style, premeditated and deliberate murder of two nineteen-year-old victims. If defendant's sentences are considered in the aggregate and held to constitute de facto life without

parole, one of his heinous crimes will essentially be erased for sentencing purposes. And, "there is nothing in Roper, Graham, and/or Miller that speaks to volume discounts for multiple crimes." Foust, 180 A.3d at 436.

F. Finally, defendant has some meaningful opportunity to obtain release and therefore his sentences cannot violate the Eighth Amendment.

Even assuming arguendo a term-of-years-sentence could possibly be a de facto life without parole sentence, that scenario is not present in this case. Graham and Miller stand for the proposition that most juvenile offenders should have "some meaningful opportunity to obtain release" from imprisonment. Graham, 560 U.S. at 75. However, the United States Supreme Court "did not require that states provide the opportunity for release at any particular time related to either the offender's age or length of incarceration." Angel v. Commonwealth, 704 S.E.2d 386, 402 (Va. 2011), cert. denied, 565 U.S. 920 (2011).

"[A] number of courts have held that sentences that allow the juvenile offender 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 will be eligible for parole after fifty years imprisonment. He will be in his sixties. Defendant therefore has "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75. The Court of Appeals erred as a matter of law by holding his consecutive life with parole sentences for two counts of premeditated and deliberate first-degree murder violated the Eighth Amendment.

CONCLUSION

The State respectfully requests that this Court hear this appeal as a matter of right pursuant to N.C.G.S. § 7A-30(1). The State alternatively requests this Court allow its petition for discretionary review of the decision of the Court of Appeals because the subject matter of the appeal has significant public interest, N.C.G.S. § 7A-31(b)(1), and the cause involves legal principles of major significance to the jurisprudence of the State, N.C.G.S. § 7A-31(c)(2).

ISSUE TO BE BRIEFED

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 VIOLATE THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Electronically submitted this the 6th day of November, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing STATE'S NOTICE OF APPEAL (CONSTITUTIONAL QUESTION) AND ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW upon the DEFENDANT by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

Kathryn L. VadenBerg
Assistant Appellate Defender
Email: Kathryn.L.VandenBerg@nccourts.org

Electronically submitted this the 6th day of November, 2020.

Electronically Submitted
Kimberly N. Callahan
Assistant Attorney General

APPENDIX

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-530

Filed: 6 October 2020

Cumberland County, No. 01 CRS 059934

STATE OF NORTH CAROLINA

v.

JAMES RYAN KELLIHER, Defendant.

Appeal by Defendant from judgments entered 13 December 2018 by Judge Carl R. Fox in Cumberland County Superior Court. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant.

McGEE, Chief Judge.

James Ryan Kelliher ("Defendant"), following a troubled early life marked by physical abuse and substance use, participated in a robbery at age 17 that ended with the murders of a man and his pregnant girlfriend. Defendant was sentenced to two consecutive mandatory punishments of life without parole ("LWOP"). Following the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and the General Assembly's enactment of N.C. Gen. Stat. § 15A-1340.19A, *et seq*. in response, Defendant sought and received a resentencing hearing.

At resentencing, the trial court determined that mitigating factors outweighed the circumstances of the offenses, concluded Defendant was neither "incorrigible" nor "irredeemable," *Graham v. Florida*, 560 U.S. 48, 72, 75, 176 L. Ed. 2d 825, 844, 846 (2010), and resentenced him to two consecutive sentences of life with parole. Under the terms of these sentences, Defendant will not be eligible for parole until he has served 50 years in prison, placing his earliest possible release at age 67. Defendant now appeals, arguing that the consecutive sentences constitute *de facto* LWOP in violation of the Eighth Amendment and Article I, Section 27 of the North Carolina Constitution. We agree with Defendant and reverse and remand for resentencing.

I. FACTUAL AND PROCEDURAL HISTORY

A. Defendant's Early Life

Defendant was born in 1984 as the youngest of three siblings. Though he had good relationships with his mother and older sisters, Defendant's father physically abused him during his childhood. Defendant began abusing substances at an early age; he began drinking alcohol at age 13, was drinking daily and using marijuana at age 15, and was under the continuous influence of some combination of alcohol, marijuana, ecstasy, acid, psilocybin, and cocaine at age 17. Defendant attempted suicide on three occasions: first by overdose at age 10, again at age 17 on the night after the murders, and a final time while awaiting trial. He dropped out of school in the ninth grade, and exhibited the equivalent of a sixth grade education at age 17.

Defendant committed several thefts in his teenage years, breaking and entering into vehicles and stores after they had closed. On one occasion, Defendant stole from a video store with the help of someone named Jerome Branch. Defendant, Mr. Branch, and Joshua Ballard would "hang out" together during this time, drinking alcohol and doing drugs.

B. The Murders

In the days before the murders involved in this appeal, Mr. Ballard suggested to Defendant that they rob a cocaine and marijuana dealer named Eric Carpenter. The two discussed the matter several times, with Mr. Ballard stating in later conversations that he believed he would have to kill Mr. Carpenter in order to avoid being identified as one of the perpetrators of the robbery. Defendant offered to give a firearm he had previously stolen from a pawn shop to Mr. Ballard for this purpose. They continued to plan the robbery over future phone calls, ultimately agreeing that Defendant would serve as the driver while Mr. Ballard killed and robbed Mr. Carpenter. Mr. Branch was later included in the planning, though he was never given a defined role. Defendant also told his friend Liz Perry about the plans to rob and murder Mr. Carpenter.

Mr. Ballard arranged to purchase drugs from Mr. Carpenter behind a local furniture store on 7 August 2001. On the night of the drug deal, Defendant drove Mr. Ballard and Mr. Branch to the furniture store in Mr. Ballard's truck. They met with

Mr. Carpenter when they arrived, but they spotted a marked police vehicle in the parking lot and arranged with Mr. Carpenter to move the deal to his apartment. Carpenter's girlfriend, Kelsea Helton, also lived at the apartment, and was present when the group reconvened in the apartment parking lot a short time later. Following introductions, everyone went inside the apartment and began talking civilly. Ms. Helton left the apartment briefly; when she returned,[1] the conversation turned to her pregnancy. What exactly occurred after that conversation is disputed; what is certain, however, is that when it came time to carry out the robbery, Defendant, Mr. Ballard, or both shot and killed Mr. Carpenter and Ms. Helton.

Defendant, Mr. Branch, and Mr. Ballard met in the parking lot after the shooting and split the drugs they had stolen from the apartment. The three met with another group, which included Defendant's friend, Ms. Perry, at a local park where they drank cognac and smoked marijuana laced with cocaine. At some point during the evening, Defendant told Ms. Perry about the robbery and murders. Defendant, Mr. Ballard and Mr. Branch were later arrested for the murders.

C. Defendant's Plea and Ballard's Trials

Defendant was indicted on two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery

[1] Ms. Helton's father, in his victim impact statement, said Ms. Helton left the apartment to call her sister to finalize plans to vacate Mr. Carpenter's apartment and move in with her sister later that evening because Ms. Helton felt there were "some things that [were] happening [she] d[id]n't like."

with a dangerous weapon by a grand jury on 25 March 2002. He pleaded guilty to all charges in 2004 and was sentenced to two consecutive terms of LWOP for the murders and concurrent terms of years for the robbery and conspiracy convictions.[2] Mr. Ballard was also charged with two counts of first-degree murder but pleaded not guilty.

Although his plea agreement did not require it, Defendant testified for the State at Mr. Ballard's trial,[3] as did Ms. Perry and a friend of Mr. Ballard, Lisa Boliaris. Defendant testified that he did not shoot either Mr. Carpenter or Ms. Helton, instead stating that Mr. Ballard shot both victims. Ms. Perry offered a different account, stating that Defendant had admitted to killing the couple on the night of the murders. Ms. Boliaris gave yet another recollection of events, testifying that Mr. Ballard told her he shot Mr. Carpenter while Defendant killed Ms. Helton.[4]

Mr. Carpenter was convicted of the killings at the conclusion of his trial. However, his convictions were set aside on appeal and Mr. Ballard was granted a new trial. *Ballard*, 180 N.C. App. at 646, 638 S.E.2d at 481. Defendant again testified for the State on retrial, but Mr. Ballard was ultimately acquitted. The district attorney who secured Defendant's plea and prosecuted both of Mr. Ballard's trials later wrote

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[2] Defendant has since served the terms for robbery and conspiracy.

[3] Mr. Branch pled guilty to accessory after the fact and was sentenced to a six-to-eight-year term of imprisonment. He did not testify against Mr. Ballard.

[4] A more detailed rendition of this testimony is available in this Court's opinion in *State v. Ballard*, 180 N.C. App. 637, 638 S.E.2d 474 (2006).

a letter to Defendant's counsel stating that he believed Defendant "testified truthfully in both trials."

D. Defendant's Resentencing

Defendant filed a motion for appropriate relief ("MAR") in June 2013. In that motion, Defendant asserted that: (1) the United States Supreme Court's decision in *Miller* rendered his LWOP sentences unconstitutional under the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution; (2) resentencing was required under the recently enacted N.C. Gen. Stat. § 15A-1340.19B;[5] and (3) life with the possibility of parole was the appropriate sentence. The MAR was denied by the trial court on the grounds that *Miller* and N.C. Gen. Stat. § 15A-1340.19B did not apply retroactively. That order was subsequently reversed by order of this Court, and Defendant received a resentencing hearing on 13 December 2018.

At the resentencing hearing, Defendant and the State consented to a recitation of the facts surrounding the murders consistent with the above history. The State called the fathers of Mr. Carpenter and Ms. Helton to give victim impact statements. Both testified to the indescribable hardship of losing a child—and future grandchild—

[5] Defendant's MAR sought relief under subsection (a)(1) of the statute, which applies to juvenile felony murder convictions. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2019). Defendant was ultimately resentenced pursuant to subsection (a)(2), which applies to all other juvenile first-degree murder convictions. N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2019). Defendant did not argue the applicability of subsection (a)(1) at resentencing, conceded that this was not a felony murder case before the trial court, and does not raise the issue on appeal.

and the enduring impact on their families. Each expressed their love for their children, their dismay at the loss of life, the sadness of lost opportunities to raise their grandchild, and the lasting emotional trauma inflicted on their families. The State rested its presentation following their testimony.

Defendant presented the testimony of several witnesses in mitigation. A clinical and forensic psychologist who had examined Defendant in January and February of 2019 testified that Defendant suffered from post-traumatic stress disorder as a result of the murders. He further reported that although Defendant had a history of antisocial behavior, Defendant had ceased to exhibit those traits since he had been imprisoned in 2004. The psychologist's report detailed Defendant's childhood physical and drug abuse, his shortened education, and his efforts at self-improvement while in prison. Specifically, the report disclosed that Defendant had earned his GED and was pursuing a bachelor's degree in ministry from Southeastern Baptist Theological Seminary ("the Seminary"). Based on Defendant's history, current diagnoses, and efforts to better himself, the psychologist determined that Defendant presented a low risk of future violence and was neither incorrigible nor irredeemable. This low risk aligned with a separate assessment conducted by the Department of Public Safety.

Defendant offered additional testimony from the director of prison programs at the Seminary. He testified that Defendant was accepted into the four-year

seminary program after a rigorous application process, describing him as an active and very good student. Another witness from the Seminary testified that Defendant assisted other students, was professional in his conduct, and sought to minister to inmates outside the program who were struggling with incarceration. A pastor from Redeemer Lutheran Church in Fayetteville also testified, stating he had visited with Defendant every week since his arrest and had seen a remarkable change: "[T]oday unfortunately [Defendant] makes me ashamed of my own spirituality. . . . [H]e is the one who sometimes comforts me instead of vice versa. . . . He's the one who has consoled me. So, I enjoy immensely our visits because I think frankly I get more out of it than he does."

Defendant also tendered documentary evidence in support of mitigation, including his record of two nonviolent infractions while in prison and the assessments of low risk completed by the Department of Public Safety and Defendant's psychologist. He concluded his presentation of evidence by colloquy, telling the trial court that he knew he had "failed to do anything resembling the right thing" and thought about the victims everyday with sorrow and regret. He stated that although he knew he could never undo the pain caused, he sought to improve himself so that he might help others "as harm reduction." He concluded by telling the court he "wish[ed] more than anything that [he] could somehow do something to change the events from August 7, 2001."

In closing arguments, the State asked the trial court to sentence Defendant to either LWOP, or to consecutive sentences of life with the possibility of parole as an alternative. Defendant argued for concurrent sentences of life with the possibility of parole, requesting that the Department of Correction have the opportunity to review Defendant's eligibility for parole at 25 years rather than 50 years. The trial court then announced its order, which included thirteen findings in mitigation based on Defendant's troubled early life, his immaturity and drug addictions at the time of the offenses, and the substantial evidence of rehabilitation. Based on these findings, the trial court concluded that "[t]he mitigating factors and other factors and circumstances present outweigh all the circumstances of the offense[,]" and "Defendant is neither incorrigible nor irredeemable." The trial court then sentenced Defendant to two consecutive sentences of life with the possibility of parole. Defendant appeals.

II. ANALYSIS

Defendant presents one principal argument on appeal: Defendant's two consecutive sentences, considered in the aggregate, constitute a disproportionate *de facto* punishment of LWOP in violation of the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. More specifically, he contends that because he is a juvenile defendant and is neither incorrigible nor irredeemable, this *de facto* LWOP sentence violates *Miller* and

related United States Supreme Court precedents, as determined by several state and federal courts that have considered the question. The State, in response, contends that Defendant failed to preserve this issue and, in the alternative, asks us to follow a different line of state and federal decisions that have rejected arguments similar to Defendant's. We first address the State's preservation argument before reaching the merits of Defendant's appeal.

A. Preservation

Our Supreme Court has made clear that the North Carolina Rules of Appellate Procedure require constitutional sentencing errors be raised before the trial court in order to be preserved for appellate review. *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018). However, a party is only required to "stat[e] the specific grounds for the ruling the party desired the court to make *if the specific grounds were not apparent from the context*[,]" N.C. R. App. P. 10(a)(1) (2020) (emphasis added), and our Supreme Court has held constitutional arguments "implicitly presented to the trial court" are preserved for review. *State v. Murphy*, 342 N.C. 813, 822, 467 S.E.2d 428, 433 (1996). Defendant insists that his argument was preserved on appeal under these precedents because: (1) his MAR sought a sentence that comported with the Eighth Amendment, *Miller*, and the North Carolina Constitution; and (2) his counsel argued for concurrent sentences based on *Miller* at the resentencing hearing. Reviewing the transcript from the resentencing hearing, Defendant's counsel did

argue that concurrent sentences were appropriate, given the alternative would prohibit parole for 50 years:

> I would just say this as far as the punishment is concerned. I'm 68, if you sentence me to 50 years, I'll do the best I can but I'm going to leave most of that time on the floor. If you sentence me to 25, I may make it.
>
> If you sentence a 17-year old to 25 years, he'll do 100 percent of that sentence probably. But at the end of 25 years if he's serving consecutive sentences, he doesn't get out.
>
> . . . .
>
> And then at some point possibly he'll be paper paroled[6] from the first one and get to serve a minimum of 25 more years before he's reviewed again and then every two years.
>
> . . . .
>
> Now he's going to be in prison for a while. He's only done 17 years. But we're asking the Court to put it in the hands of Department of Corrections [sic] to let them review him as they have scrutinized his life for 17 years and sentence him to life with parole and run the sentences concurrently.

Construed together with his MAR, we hold that Defendant has, at a minimum, raised an implied argument that two concurrent sentences of life—with the possibility of

[6] We note that the practice of issuing "paper parole" is no longer permitted under North Carolina law. *See Robbins v. Freeman*, 127 N.C. App. 162, 165, 487 S.E.2d 771, 773 (1997) ("[W]e can find no statutory authority for [the Department of Correction's and Parole Commission's] practice of issuing 'paper paroles.' "), *aff'd per curiam*, 347 N.C. 664, 496 S.E.2d 375 (1998). We thus understand counsel's argument as asserting that parole is not available under two consecutive sentences for life with the possibility parole until 50 years into a defendant's sentence. Both Defendant and the State agree on appeal that Defendant must serve 50 years before being eligible for parole under the consecutive sentences imposed in this case.

parole after 25 years, as opposed to 50 years—are proportional punishment under the Eighth Amendment, *Miller*, and the North Carolina Constitution. Defendant has therefore preserved his constitutional argument for review.

Although we hold Defendant has preserved his argument, we note that he has requested this Court use its discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and set aside the requirements of Rule 10. *See* N.C. R. App. P. 2 (2020) ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements of any of these rules in a case pending before it[.]"). Assuming *arguendo* that Defendant's constitutional question was not preserved under Rule 10, a discretionary implementation of Rule 2 is warranted under the circumstances. Our Supreme Court has employed the Rule "on several occasions to review issues of constitutional importance." *State v. Mobley*, 200 N.C. App. 570, 573, 684 S.E.2d 508, 510 (2009) (first citing *State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987); and then citing *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002)). Given that multiple state appellate

courts[7] and federal courts of appeal[8] have addressed the constitutional issues presented here—and there are at least four other similar cases presently pending before this Court[9]—Defendant's appeal is certainly of "constitutional importance." *Mobley*, 200 N.C. App. at 573, 684 S.E.2d at 510 (citations omitted). Furthermore, the State's alleged violation of the United States Constitution in resentencing implicates a substantial right supporting application of Rule 2. *See State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (affirming this Court's discretionary invocation of Rule 2 where the trial court "committed error relating to a substantial right," namely the right to be free from unreasonable searches and seizures under the Fourth Amendment). Our Supreme Court has invoked Rule 2 "more frequently in the criminal context when severe punishments were imposed[,]" lending further support to its application here. *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205

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[7] *See Pedroza v. State*, 291 So.3d 541 (Fla. 2020); *State v. Slocumb*, 827 S.E.2d 148 (S.C. 2019); *Carter v. State*, 192 A.3d 695 (Md. 2018); *Veal v. State*, 810 S.E.2d 127 (Ga.), *cert. denied*, ____ U.S. ____, 139 S. Ct. 320, 202 L. Ed. 2d 218 (2018); *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018); *Kinkel v. Persson*, 417 P.3d 401 (Or. 2018), *cert. denied,* ____ U.S. ____, 139 S. Ct. 789, 202 L. Ed. 2d 585 (2019); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017), *cert. denied*, ____ U.S. ____, 138 S. Ct. 641, 199 L. Ed. 2d 544 (2018); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017), *cert. denied*, ____ U.S. ____, 138 S. Ct. 640, 199 L. Ed. 2d 543 (2018); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55 (Mo. 2017); *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017); *State v. Zuber*, 152 A.3d 197, (N.J. 2017); *State v. Ramos*, 387 P.3d 650 (Wash. 2017) (en banc); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State ex rel. Morgan v. State*, 217 So.3d 266 (La. 2016); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *Vasquez v. Commonwealth,* 781 S.E.2d 920 (Va. 2016); *Casiano v. Comm'r of Corr.,* 115 A.3d 1031 (Conn. 2015); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *People v. Caballero,* 282 P.3d 291 (Cal. 2012).

[8] *See United States v. Grant*, 887 F.3d 131, *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3rd Cir. 2018); *Kelly v. Brown*, 851 F.3d 686 (7th Cir. 2017); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *Budder v. Addison*, 851 F.3d 1047 (10th Cir.); *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012).

[9] *See State v. Anderson*, No. COA19-841; *State v. Slade*, No. COA19-969; *State v. Conner*, No. COA19-1087; *State v. Brimmer*, No. COA19-1103.

(2007) (first citing *State v. Moore*, 335 N.C. 567, 612, 440 S.E.2d 797, 823 (1994); then citing *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982); then citing *State v. Poplin*, 304 N.C. 185, 186-87, 282 S.E.2d 420, 421 (1981); and then citing *State v. Adams*, 298 N.C. 802, 804, 260 S.E.2d 431, 432 (1979)). We therefore conclude that, even if Defendant failed to preserve his constitutional argument through valid objection under Rule 10, review of his appeal is appropriate pursuant to Rule 2.

B. The Eighth Amendment and Juveniles

Resolution of this appeal requires consideration of the Eighth Amendment as applied to juveniles under four decisions of the Supreme Court of the United States: *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, ____ U.S. ____, 193 L. Ed. 2d 599 (2016).

1. *Roper* Prohibits Execution of Juveniles

In the first of these cases, the Supreme Court considered "whether it is permissible under the Eighth and Fourteenth Amendments . . . to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." *Roper*, 543 U.S. at 555-56, 161 L. Ed. 2d at 13. It examined the question first by conducting "a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question[,]" before "determinin[ing], in the exercise of our own independent judgment, whether the

death penalty is a disproportionate punishment for juveniles." *Id.* at 564, 193 L. Ed. 2d at 18. The Supreme Court ultimately answered the question in the affirmative, issuing a categorical holding that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.* at 578, 161 L. Ed. 2d at 28.

In conducting the first step of its two-pronged examination, the Supreme Court observed that, in the years leading up to the case, there was a "significant" and "consistent" trend away from the execution of juveniles amongst the States, *id.* at 565-66, 161 L. Ed. 2d at 19-20, leading to the conclusion that "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18[.]" *Id.* at 568, 161 L. Ed. 2d at 21. It then turned to the second step: whether the Eighth Amendment compelled a categorical prohibition against the execution of juveniles. *Id.* The majority found the answer by recognizing that "the death penalty is reserved for a narrow category of crimes and offenders[,]" *id.* at 568-69, 161 L. Ed. 2d at 21, and then discerning that, because of their unique developmental characteristics, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569, 161 L. Ed. 2d at 21. Once these precepts were established, the Supreme Court concluded that "the penological justifications for the death penalty apply to them with lesser force than to adults[,]" *id.* at 571, 161 L. Ed. 2d. at 23, meaning that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of

some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573-74, 161 L. Ed. 2d at 24.

Roper makes clear that its logic is grounded in the fundamental recognition that juveniles are of a special character for the purposes of the Eighth Amendment. In examining juveniles as a class of criminal offenders, the Supreme Court observed that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 570, 161 L. Ed. 2d at 21. Compared to adults, juveniles possess " '[a] lack of maturity and an underdeveloped sense of responsibility . . . . These qualities often result in impetuous and ill-considered actions and decisions.' " *Id.* (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 125 L. Ed. 2d 290, 306 (1993)) (additional citation omitted). Such immaturity "means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' " *Id.* at 570, 161 L. Ed. 2d at 22 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 101 L. Ed. 2d 702, 719 (1988) (plurality opinion)). Juveniles are likewise "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . [J]uveniles have less control, or less experience with control, over their own environment," *id.* at 569, 161 L. Ed. 2d at 22 (citations omitted), providing them "a greater claim than adults to be forgiven for failing to escape negative influences in

their whole environment." *Id.* at 570, 161 L. Ed. 2d at 22 (citation omitted). Lastly, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* (citation omitted). "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* This is no less true of juveniles guilty of "a heinous crime." *Id.* On the whole, juveniles are thus of "diminished culpability[.]" *Id.* at 571, 161 L. Ed. 2d at 23.

These unique qualities and resultant lesser culpability undercut the penological justifications behind the death penalty. *Id.* Death as retribution is disproportionate:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

Id. Deterrence does not even the scales:

> [I]t is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . . [T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life

> imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

Id. at 571-72, 161 L. Ed. 2d at 23. The Supreme Court would later examine exactly when the "severe sanction" of LWOP may be imposed on juveniles in *Graham*.

2. *Graham* Prohibits LWOP for Juveniles in Non-Homicide Cases

In *Graham*, the Supreme Court extended the categorical rationale in *Roper* to hold that juveniles may not be sentenced to LWOP for non-homicide offenses under the Eighth Amendment. 560 U.S. at 61-62, 74, 176 L. Ed. 2d at 837, 845. Taking the same two-pronged approach, the majority first determined that, in light of actual sentencing practices rather than strict consideration of legislative prohibitions, "life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual." *Id.* at 66, 176 L. Ed. 2d at 840. Thus, though the practice was permitted in many states, it was nonetheless "exceedingly rare. And 'it is fair to say that a national consensus has developed against it.' " *Id.* at 67, 176 L. Ed. 2d. at 841 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316, 153 L. Ed. 2d 335, 347 (2002)).

At the second step, the *Graham* Court took *Roper*'s observations about juveniles as foundational precepts:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U.S., at 569. As compared to adults, juveniles have a " 'lack of maturity and an underdeveloped sense of responsibility' "; they "are more vulnerable or

> susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.,* at 569–570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.,* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.,* at 569. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835 (plurality opinion).

Id. at 68, 176 L. Ed. 2d at 841. The Supreme Court then deemed it "relevant to consider next the nature of the offenses to which this harsh penalty [of LWOP] might apply[,]" *id.* at 68-69, 176 L. Ed. 2d at 842, and determined that not only are juveniles fundamentally less culpable, but, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id.* at 69, 176 L. Ed. 2d at 842.

The Supreme Court turned next to the nature of the punishment. "[L]ife without parole is the second most severe penalty permitted by law." *Id.* (citation and quotation marks omitted). LWOP sentences thus:

> share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration[.] . . . [T]his sentence means denial of hope; it means that good behavior and character improvement

> are immaterial; it means that whatever the future might hold in store for the mind and spirit . . . he will remain in prison for the rest of his days.

Id. at 69-70, 176 L. Ed. 2d at 842 (citation and quotation marks omitted). Such lifelong permanence "is . . . especially harsh . . . for a juvenile. . . . A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." *Id.* at 70-71, 176 L. Ed. 2d at 843 (citations omitted).

As a final consideration, the Supreme Court examined the penological underpinnings as applied to non-homicide juvenile defendants. In rejecting retribution and deterrence as valid objectives, *id.* at 71-72, 176 L. Ed. 2d. at 843-44, the majority relied extensively on *Roper*, reiterating that juveniles' unique qualities render them less culpable and "less likely to take a possible punishment into consideration when making decisions." *Id.* at 72, 176 L. Ed. 2d at 844. Incapacitation, too, was an inadequate justification for related reasons; juveniles are malleable, yet "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. . . . [I]ncorrigibility is inconsistent with youth. . . . [LWOP] improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 72-73, 176 L. Ed. 2d at 844-45 (citation and quotation marks omitted). The Supreme Court further held rehabilitation, a fourth penological

objective, is entirely irreconcilable with LWOP sentences. *Id.* at 74, 176 L. Ed. 2d at 845.

Absent any adequate penological theory, and in light of "the limited culpability of juvenile homicide offenders; and the severity of life without parole sentences[,]" the Supreme Court concluded that a categorical bar akin to *Roper* was required by the Eighth Amendment. *Id.* It further stressed that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [such] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75, 176 L. Ed. 2d at 845-46.

3. *Miller* Prohibits Mandatory LWOP for Juvenile Homicide Defendants

The Supreme Court, relying on *Roper* and *Graham*, held in *Miller* that mandatory LWOP for a juvenile defendant convicted of homicide crimes is a disproportionate punishment under the Eighth Amendment. 567 U.S. at 465, 183 L. Ed. 2d at 414-15. Its ruling was derived from "two strands of precedent reflecting our concern with proportionate punishment." *Id.* at 470, 183 L. Ed. 2d at 417. The first, which included *Roper* and *Graham*, announced categorical prohibitions against certain sentences "based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* (citation omitted). The second line "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities

consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 470, 183 L. Ed. 2d at 418 (citations omitted). Taken together, "these two lines of precedent lead[] to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.*

The Court's analysis in *Miller* began with *Roper* and *Graham*, which "establish that children are constitutionally different from adults for purposes of sentencing." *Id.* at 471, 183 L. Ed. 2d at 418. Reiterating the three differences between adult and juvenile defendants identified in those two cases—immaturity, vulnerability to influence and lack of control, and malleability—as observations based "on common sense . . . [and] science and social science[,]" *id.* at 471, 183 L. Ed. 2d at 418-19, the Court again acknowledged that "those findings . . . both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Id.* at 472, 183 L. Ed. 2d at 419 (citations and quotation marks omitted). It once more stated that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* Also, though it acknowledged *Graham*'s categorical holding applied only to non-homicide offenses, the Supreme Court clarified that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . . So *Graham*'s reasoning implicates any life-

without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.* at 473, 183 L. Ed. 2d at 420.

In considering the penalty itself, *Miller* pulled a flat parallel out of *Graham*: the " '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment.' " *Id.* at 475, 183 L. Ed. 2d at 421 (alteration in original) (quoting *Graham*, 560 U.S. at 89, 176 L. Ed. 2d at 856 (Roberts, C.J., concurring in the judgment)). The Supreme Court thus turned to its line of death penalty cases, which require individualized sentencing "so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." *Id.* at 475-76, 183 L. Ed. 2d at 421 (citations omitted). When that line is considered "[i]n light of *Graham's* reasoning, th[o]se decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders." *Id.* at 476, 183 L. Ed. 2d at 422. Mandatory LWOP sentences for juvenile homicide offenders thus ran afoul of both lines as disproportionate even though such sentences did not fit squarely within their express holdings. *Id.* at 479, 183 L. Ed. 2d at 424.

4. *Montgomery: Miller* Is Substantive Rule of Retroactive Effect

The core question in *Montgomery* was whether *Miller*'s holding announced a substantive rule of retroactive effect. ___ U.S. at ___, 193 L. Ed. 2d at 610. In concluding that it did, the Supreme Court clarified the applicability of *Roper*, *Graham*, and *Miller* in several ways pertinent to this appeal. First, it explained "[t]he

'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles. Those cases include *Graham* . . . and *Roper*." *Montgomery*, ___ U.S. at ___, 193 L. ed. 2d at 618 (citations omitted). Second, and of particular importance to this appeal, it explained that *Miller* announced a categorical prohibition against LWOP sentences for juvenile homicide defendants who are not "irreparably corrupt":

> *Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." *Id.,* [567 U.S. at 472], 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407, 419. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " *Id.,* at [479], 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (quoting *Roper,* 543 U.S., at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " 567 U.S., at [479-80], 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (quoting *Roper, supra,* at 573, 126 S. Ct. 1183, 161 L. Ed. 2d 1), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. *Penry,* 492 U.S., at 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256. As a result, *Miller* announced a substantive rule of constitutional law.

Id. at ___, 193 L. Ed. 2d at 619-20. Thus, *Montgomery*, as a distillation of *Roper*, *Graham*, and *Miller*, made clear that juvenile homicide offenders who are neither

incorrigible nor irreparably corrupt, are—like other juvenile offenders—so distinct in their immaturity, vulnerability, and malleability as to be outside the realm of LWOP sentences under the Eighth Amendment.

C. Defendant's Sentence and De Facto *LWOP*

Defendant's argument asks us to apply the above principle from *Miller*, derived from *Roper* and *Graham* and plainly stated in *Montgomery*, to hold that Defendant's consecutive sentences of life with parole constitute a *de facto* LWOP sentence in violation of those precedents and the Eighth Amendment and Article I, Section 27 of the North Carolina Constitution.[10] Specifically, he contends that because he will not be eligible for parole until age 67, he will not be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 569 U.S. at 75, 176 L. Ed. 2d. at 846, and will suffer "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* at 79, 176 L. Ed. 2d at 848. *See also Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424 (quoting the first excerpt from *Graham*). His ultimate argument thus consists of three constituent questions that do not appear to have been answered by the courts of this State and have caused concern in other jurisdictions: (1) are *de facto* LWOP sentences, as opposed to sentences expressly named as such, cognizable and barred as cruel and

[10] Our Supreme Court "historically has 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). Our analysis therefore applies equally to both.

unusual when applied to redeemable juveniles under the Eighth Amendment; (2) can aggregated punishments, *i.e.* multiple consecutive sentences totaling a lengthy term of years, amount to a *de facto* LWOP sentence; and (3) must a *de facto* LWOP punishment obviously exceed a juvenile defendant's natural life, or does some term of years that may (or may not) fall short of the juvenile's full lifespan nonetheless constitute an impermissible *de facto* LWOP sentence?

1. *De Facto* LWOP Sentences

The question of whether *de facto* LWOP sentences are cognizable as a cruel and unusual punishment barred under *Graham* and *Miller* has been answered by a sizeable number of state appellate courts. Of those identified by this Court as having addressed the issue, these jurisdictions predictably fall into two camps: (1) those that recognize *de facto* LWOP sentences as cognizable and may warrant relief under the

Eighth Amendment;[11] and (2) those that have thus far decided not to do so.[12] A clear majority of these states count themselves among the former.[13] We see considerable reason to join the majority.

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[11] *See People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding consecutive sentences totaling 110-years-to-life was *de facto* LWOP sentence under *Graham*); *State v. Ragland*, 836 N.W.2d 107, 121-22 (Iowa 2013) (holding a life sentence with parole eligibility after 60 years was a *de facto* LWOP sentence in violation of *Miller*); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014) (holding consecutive sentences, including a life sentence for homicide, with parole eligibility after 45 years was *de facto* LWOP controlled by *Miller*); *Casiano v. Comm'r of Corr.,* 115 A.3d 1031, 1047-48 (Conn. 2015) (holding a juvenile's 50 year sentence without possibility of parole was a *de facto* LWOP sentence controlled by *Miller*); *Henry v. State*, 175 So.3d 675, 679-80 (Fla. 2015) (holding 90 year sentence for non-homicide juvenile defendant was unconstitutional under *Graham*); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (holding aggregate sentences for non-homicide offenses placing parole eligibility at 100 years are a *de facto* LWOP sentence in violation of *Graham*); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) (holding mandatory 97 year sentence with parole eligibility after 89 years is *de facto* LWOP and unconstitutional under *Miller*); *State ex rel. Morgan v. State*, 217 So.3d 266, 271 (La. 2016) ("We . . . construe the defendant's 99-year sentence as an effective life sentence, illegal under *Graham*."); *State v. Moore*, 76 N.E.3d 1127, 1140-41 (Ohio 2016) (holding consecutive terms-of-years sentences for non-homicide crimes with parole eligibility after 77 years is an unconstitutional *de facto* LWOP sentence under *Graham*); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55, 63-64 (Mo. 2017) (holding mandatory concurrent sentences with parole eligibility after 50 years constituted a *de facto* LWOP sentence subject to *Miller*'s sentencing requirements); *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017) (holding *de facto* LWOP sentences are subject to constitutional protections of *Graham, Miller,* and *Montgomery*); *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017) (holding "lengthy term-of-years sentences that amount to life without parole" are controlled by *Graham* and *Miller*); *State v. Ramos*, 387 P.3d 650, 659 (Wash. 2017) (en banc) ("We now join the majority of jurisdictions that have considered the question and hold that *Miller* does apply to juvenile homicide offenders facing de facto life-without-parole sentences."); *Commonwealth v. Foust*, 180 A.3d 416, 431 (Pa. 2018) (holding a term-of-years sentence constituting a *de facto* LWOP sentence requires sentencing protections of *Miller*); *Carter v. State*, 192 A.3d 695, 735 (Md. 2018) (100-year aggregate punishment for non-homicide crimes with parole eligibility after 50 years was *de facto* LWOP sentence in violation of *Graham*); *Ira v. Janecka*, 419 P.3d 161, 167 (N.M. 2018) (holding *Roper*, *Graham*, and *Miller* applied to term-of-years sentences); *White v. Premo*, 443 P.3d 597, 604-05 (Or. 2019) (holding juvenile's 800-month sentence for murder with parole eligibility at 54 years was *de facto* LWOP sentence subject to *Miller* protections).

[12] Several state courts appear to have held that *de facto* LWOP sentences are not cognizable under any circumstances. *See State v. Kasic*, 265 P.3d 410, 414 (Ariz. Ct. App. 2011) (holding *Graham* inapplicable to term-of-years sentences); *Hobbs v. Turner*, 431 S.W.3d 283, 289 (Ark. 2014) (holding *Graham* and *Miller* do not apply to a "nonlife sentence"); *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017) (refusing to recognize *de facto* LWOP sentences in part because "[l]ife without parole is a specific sentence"); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) (refusing to apply *Miller* and *Montgomery* to any sentences "other than LWOP"). Another state court appears to have ignored the argument outright. *See Diamond v. State*, 419 S.W.3d 435, 441 (Tex. Ct. App. 2012) (upholding a 99-year

We, like many states in that majority, decline to stand behind the simple formalism that a sufficiently lengthy term-of-years sentence cannot be a sentence of LWOP because it does not bear the name and terminates at a date certain. Rejection of the proposition is, first, a simple "matter of common sense . . . . Otherwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence." *Carter*, 192 A.3d at 725. As was noted in *Miller*, "[t]he Eighth

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sentence imposed on a juvenile without discussing *Graham* despite counsel's argument raising the issue). At least two states seem to have suggested *de facto* LWOP sentences may exist but have yet to hold as such. *See State v. Quevedo*, 947 N.W.2d 402, ___ (S.D. 2020) ("[O]ur cases have seemed to suggest that a juvenile sentence involving a lengthy term of years and the lack of a meaningful opportunity for release could constitute a de facto life sentence and transgress *Graham*'s categorical Eighth Amendment prohibition on life without parole[.]" (citations omitted)); *Mason v. State*, 235 So.3d 129, 134 (Miss. 2017) (suggesting the defendant may have shown a *de facto* life sentence in violation of *Miller* and *Montgomery* had he presented evidence in support, but failure to do so and concession that his life expectancy would extend beyond parole eligibility defeated claim). Another grouping of states has elected not to afford relief under a *de facto* LWOP theory by declining to answer whether aggregated sentences and/or term-of-years sentences violate the Eighth Amendment absent a Supreme Court decision to that express effect. *See State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (declining to recognize aggregated term-of-years sentences as *de facto* LWOP sentences "absent further guidance from the [Supreme] Court" on both aggregation and recognition of *de facto* LWOP); *State v. Slocumb*, 827 S.E.2d 148, 152 (S.C. 2019) (recognizing that *de facto* LWOP punishments, whether as a single sentence or aggregated punishment, exist and may violate *Graham* and *Miller*, but declining to so hold "without further input from the Supreme Court"). Still another category has held that aggregated sentences cannot constitute a *de facto* LWOP sentence and resolved the defendants' appeals on that ground without affirmatively stating whether *de facto* LWOP sentences are otherwise cognizable. *See 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 concluding, without any discussion, that parole eligibility at age 79 offers a "meaningful opportunity to obtain release on parole during [the defendant's] lifetime"); *Vasquez v. Commonwealth,* 781 S.E.2d 920, 926 (Va. 2016) (declining to grant relief under *Graham* to aggregated term-of-years sentence without addressing single term-of-years sentences that exceed natural life).

[13] We note that, in *Slocumb*, the South Carolina Supreme Court stated that "jurisdictions around the country are approximately evenly split" on whether to recognize *de facto* LWOP sentences under *Graham* or *Miller*. 827 S.E.2d at 157 n. 17.

Amendment's prohibition of cruel and unusual punishment '*guarantees* individuals the right not to be subjected to excessive sanctions[,]' " 567 U.S. at 469, 183 L. Ed. 2d at 417 (emphasis added) (quoting *Roper*, 543 U.S. at 560, 161 L. Ed. 2d at 16), and allowing sentencers to so easily avoid its application would render it no guarantee at all. Any holding to the contrary ignores the fact that *Graham* and *Miller* declared cruel and unusual those punishments imposed against redeemable juveniles that deprive them of " 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *Miller,* 567 U.S. at 479, 183 L. Ed. 2d at 424 (quoting *Graham*, 560 U.S. at 75, 176 L. Ed. 2d at 846). Stated differently, "[t]he court in *Graham* was not barring a terminology—'life without parole'—but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release." *Moore*, 76 N.E.3d at 1139-40.

Many of the states that have declined to afford relief to juveniles sentenced to *de facto* LWOP sentences have refused to do so under the rationale that the Supreme Court's decisions in *Graham* and *Miller* were limited to the specific LWOP sentences considered in those cases. *See, e.g., Lucero*, 394 P.3d at 1132 ("*Graham* and *Miller* apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense." (citations omitted)). However, such holdings ignore *Graham*'s own caution against denying the true reality of the actual

punishment imposed on a juvenile when determining whether it violates the Eighth Amendment. In pointing out that adults and juveniles who receive the same sentence of LWOP do not, in fact, receive the same punishment, the majority in *Graham* stated "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. *This reality cannot be ignored*." 560 U.S. at 70-71, 176 L. Ed. 2d at 843 (emphasis added). To hold that the factual equivalent of the punishments prohibited by *Graham* and *Miller* is not actually prohibited by those decisions is to deny the factual reality. *Roper*, *Graham*, and *Miller* are all concerned with "imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472, 183 L. Ed. 2d at 419. A *de jure* LWOP sentence is certainly as "harsh" as its functional equivalent.

The straightforward applicability of *Graham*'s reasoning to *de facto* LWOP sentences is clear from the reasoning itself. Its observations about juveniles' immaturity, underdeveloped self-control, and capacity for change are true independent of any sentence. That those characteristics undermined the punitive justifications of LWOP is thus equally true of *de facto* LWOP sentences. *See Carter*, 192 A.3d at 726 ("The same [penological] test [from *Graham*] applied to a sentence of a lengthy term of years without eligibility for parole yields the same conclusion [as *Graham*]."). Retribution concerns must be measured against the culpability of defendants, and, because juveniles—"even when they commit terrible crimes"—are

inherently less culpable regardless of the sentence imposed, " 'the case for retribution is not as strong with a minor as with an adult.' " *Miller*, 567 U.S. at 472, 183 L. Ed. 2d at 419 (quoting *Graham*, 560 U.S. at 71, 176 L. Ed. 2d at 883). A *de facto* LWOP sentence is no more of a deterrent to a juvenile than its *de jure* equivalent because, in either case, "their immaturity, recklessness, and impetuosity[ ]make them less likely to consider potential punishment." *Id.* (citing *Graham*, 560 U.S. at 72, 176 L. Ed. 2d at 844). *De jure* and *de facto* LWOP sentences are also equally incapacitating; if incapacitation is inadequate to justify the former, *id.* at 472-73, 183 L. Ed. 2d at 419, then logic dictates it is inadequate for the latter. This same logic applies to rehabilitative concerns that are in irreconcilable conflict with LWOP sentences. *Id.* at 473, 183 L. Ed. 2d at 419-20. In sum, "none of what [*Graham*] said about children . . . is crime-specific. . . . So *Graham*'s reasoning implicates *any* life-without-parole sentence imposed on a juvenile[.]" *Id.* at 473, 183 L. Ed. 2d at 420 (emphasis added).

The other authorities relied upon by those state courts that do not recognize *de facto* LWOP challenges do not dissuade us of this holding. Several rely on language from Justice Alito's dissent in *Graham* for the proposition that it was a narrow decision. *See, e.g., Vasquez*, 781 S.E.2d at 925 (" 'Nothing in the Court's opinion [in *Graham*] affects the imposition of a sentence to a term of years without the possibility of parole.' " (quoting *Graham*, 560 U.S. at 124, 176 L. Ed. 2d at 877 (Alito, J., dissenting))). However, as other Supreme Court Justices have noted, a dissent from

a singular justice is not binding on the application of Supreme Court precedent. *Georgia v. Public.Resource.Org, Inc.*, ___ U.S. ___, ___, 206 L. Ed. 2d 732, 748 (2020) ("As every judge learns the hard way, 'comments in [a] dissenting opinion' about legal principles and precedents 'are just that: comments in a dissenting opinion.' " (quoting *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177 n. 10, 66 L. Ed. 2d 368, 377 n. 10 (1980)). *See also Moore*, 76 N.E.3d at 1157-58 (O'Connor, C.J., concurring) (observing Justice Alito's dissent in *Graham* is not controlling in the application of the majority's decision). Justice Thomas's observation in a footnote to his dissent in *Graham* that the majority did not include term-of-years sentences in calculating how many juveniles nationwide had been sentenced to life without parole is similarly unpersuasive. 560 U.S. at 113 n. 11, 176 L. Ed. 2d at 870 n. 11 (Thomas, J., dissenting). We note that a narrow reading of both *Roper* and *Graham* was expressly rejected in *Miller*; there, the Arkansas Supreme Court denied a defendant's Eighth Amendment challenge on the grounds that "*Roper* and *Graham* were 'narrowly tailored' to their contexts," and the Supreme Court reversed. 567 U.S. at 467, 183 L. Ed. 2d at 416. Our Supreme Court has also instructed this Court that we must "examine each of defendant's [Eighth Amendment and analogous state Constitution] contentions *in light of the general principles enunciated* by [the North Carolina Supreme] Court and the Supreme Court [of the United States] guiding cruel and unusual punishment analysis." *Green*, 348 N.C. at 603, 502 S.E.2d at 828 (emphasis

added). The "general principles enunciated" in *Graham*, *Miller*, and *Montgomery* are, as explained above, applicable to *de facto* LWOP sentences even if the specific facts of those decisions did not involve them.

Those states in the minority of jurisdictions have likewise relied on federal court decisions holding *Graham* and *Miller* do not apply to term-of-years sentences. *See, e.g., Vasquez*, 781 S.E.2d at 926 (relying on *Bunch v. Smith*, 685 F.3d 546 (6th. Cir. 2012)). *Bunch*, however, dealt with *Graham* in a specific context: whether, under the deferential standard of collateral habeas review applicable to the Antiterrorism and Effective Death Penalty Act of 1996, an Ohio court[14] that sentenced a defendant to a lengthy term-of-years sentence acted contrary to "clearly established federal law." 685 F.3d at 549. That standard presents a markedly different legal question than the one considered here. *See Atkins v. Crowell*, 945 F.3d 476, 480 (6th Cir. 2019) (Cole, C.J., concurring) (noting that *Miller* and *Graham* compelled the conclusion that a *de facto* LWOP sentence was unconstitutional but denying habeas relief because "[o]n occasion, AEDPA's onerous standards require us to deny . . . relief even though the sentence . . . is unconstitutional").

2. Aggregate Sentences As *De Facto* LWOP Sentences

[14] Ohio's highest court later recognized *de facto* LWOP sentences imposed on juveniles as violative of the Eighth Amendment in an appeal brought by Bunch's codefendant. *Moore*, 76 N.E.3d at 1139.

Having held that *de facto* LWOP sentences for redeemable juveniles are unconstitutional under *Graham, Miller,* and *Montgomery*, we next address whether an *aggregate* punishment of concurrent sentences may amount to that unlawful punishment. Again, state courts are sharply divided on the issue. Some states that recognize *de facto* LWOP sentences do so only when imposed as a single sentence.[15] Others who have rejected recognition of *de facto* LWOP sentences have done so on the ground that aggregated sentences do not present such a circumstance.[16] However, a majority of courts again favor recognition of aggregated sentences as *de facto* LWOP punishments subject to *Graham, Miller,* and *Montgomery*.[17]

We also hold that aggregated sentences may give rise to a *de facto* LWOP punishment. As other courts have observed, "[n]owhere in the *Graham* decision does the Supreme Court specifically limit its holding to offenders who were convicted for a *single* nonhomicide offense[.]" *Boston*, 363 P.3d at 457. That decision granted Eighth Amendment protection to a juvenile irrespective of his numerous offenses:

> [O]ne cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, *serious crimes* early in his term of supervised release and

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[15] *See State v. Brown*, 118 So.3d 332, 342 (La. 2013) (holding *Graham* does not apply to multiple term-of-years sentences leading to release at age 86); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 246 (Mo. 2017) (en banc) (declining to extend *de facto* LWOP recognition to aggregated term-of-years sentences); *Foust*, 180 A.3d at 434 (same).

[16] *Martinez*, 442 P.3d at 156-57; *Vasquez*, 781 S.E.2d at 926; *Ali*, 895 N.W.2d at 246.

[17] Reviewing cases from those jurisdictions cited *supra* nn. 11-12, we identify 11 states that have rejected aggregation and 13 that have recognized it. Maryland's highest court's observation that "[m]ost of the decisions in other jurisdictions applying *Graham* and *Miller* to sentences expressed in a term of years have actually involved stacked sentences" still appears true. *Carter*, 192 A.3d at 732-33.

> despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an *"escalating pattern of criminal conduct,"* but it does not follow that he would be a risk to society for the rest of his life.

Graham, 560 U.S. at 73, 176 L. Ed. 2d at 844 (emphasis added) (citation omitted). As for *Miller*, one of the appellants in that case was also convicted of two felonies, with no apparent impact on the ultimate holding. 567 U.S. at 466, 183 L. Ed. 2d at 415.

The applicability and scope of protection found in the Eighth Amendment under both decisions turned on the identity of the defendant, *not* on the crimes perpetrated. *Graham*, which followed the categorical approach used in *Roper* to invalidate death penalties against minors, noted that such categorical cases "turn[] on the characteristics of the offender[.]" 560 U.S. at 61, 176 L. Ed. at 837. Although *Graham* itself stated that "the age of the offender and the nature of the crime each bear on the analysis[,]" 560 U.S. at 69, 176 L. Ed. 2d at 842, the identity of the offender as a juvenile was of primary importance as recognized in *Miller* and *Montgomery*: "The 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate *when applied to juveniles*. . . . *Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.' " *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 618 (emphasis added) (citations omitted). *Miller* appropriately recognized that "none of what [*Graham*] said

about children . . . is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile[.]" 567 U.S. at 473, 183 L. Ed. 2d at 420. That is, the categorical prohibition is principally focused on the offender, not on the crime or crimes committed.

The states that have not recognized aggregate punishments as *de facto* LWOP sentences have done so on grounds that we hold distinguishable. For example, Pennsylvania rejected the argument on the basis that its caselaw "has long disavowed the concept of volume discounts for committing multiple crimes." *Foust*, 180 A.3d at 436. North Carolina law is not so averse. To be sure, our Supreme Court has held that "[t]he 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 act which he commits." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983) (citations omitted). However, such consecutive sentences are not "standing alone" when they also involve a juvenile defendant. *Cf. Graham*, 560 U.S. at 70-71, 176 L. Ed. 2d at 843 ("A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." (citations and quotations omitted)). We note our own caselaw and statutes compel the State to consider consecutive sentences as a single punishment. *See* N.C. Gen. Stat. 15A-1354(b) (2019) ("In determining the effect of consecutive

sentences . . . , the Division of Adult Correction and Juvenile Justice of the Department of Public Safety must treat the defendant as though he has been committed for a single term[.]"); *Robbins*, 127 N.C. App. at 165, 487 S.E.2d at 773 (holding parole eligibility for consecutive sentences must be calculated as if serving a single term).

Other states have found persuasive the following non-binding *dicta* from the Supreme Court's decision in *O'Neil v. Vermont*: " [']It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.['] " 144 U.S. 323, 331, 36 L. Ed. 450, 455 (1892) (quoting the Vermont Supreme Court). We do not deem this language adequate to counter *Roper, Graham, Miller*, and *Montgomery*; needless to say, *O'Neil* did not involve juveniles, and long predated the express adoption of categorical Eighth Amendment prohibitions in juvenile cases that primarily focus not on the crimes committed but instead "turn[] on the characteristics of the offender." *Graham*, 560 U.S. at 61, 176 L. Ed. 2d at 837; *see also Moore*, 76 N.E.3d at 1142 ("Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability." (emphasis in original)).

In short, "*O'Neil* . . . does not indicate anything about the Supreme Court's view on the matter." *Ira*, 419 P.3d at 166.

3. Defendant's Sentences Are an Unconstitutional *De Facto* LWOP Punishment

The final question posed by Defendant's argument is whether his consecutive sentences, which place his eligibility for parole at 50 years and earliest possible release at age 67, are sufficiently lengthy to constitute an unconstitutional *de facto* LWOP punishment in light of the trial court's determination that he is neither irredeemable nor irreparably corrupt. Though the issue of identifying *de facto* LWOP sentences certainly presents some practical challenges, we hold that Defendant's consecutive sentences of life and parole eligibility at 50 years constitute a *de facto* LWOP punishment.

Several courts have held *de facto* LWOP sentences that do not conclusively extend beyond the juvenile's natural life are nonetheless unconstitutional sentences, and many of them have found such sentences to exist when release (either through completion of the sentence or opportunity for parole) is only available after roughly 50 years, and sometimes less.[18] Those states have adopted differing methods for their

[18] *See Zuber*, 152 A.3d at 212-13 (55 years); *State ex rel. Carr*, 527 S.W.3d at 57 (50 years); *People v. Contreras*, 411 P.3d 445, 446 (Cal. 2018) (50 years); *Carter*, 192 A.3d at 734 (50 years); *Casiano*, 115 A.3d at 1035 (50 years); *Bear Cloud*, 334 P.3d at 136 (45 years); *People v. Buffer*, 137 N.E.3d 763, 774 (Ill. 2019) (40 years). Courts that have not identified an exact point at which a *de facto* LWOP sentence arises have indicated that 50 years is close to the limit. *See, e.g., Ira*, 419 P.3d at 170 ("Certainly the fact that Ira will serve almost 46 years before he is given an opportunity to obtain

delineations, *see Carter*, 192 A.3d at 727-28 (surveying decisions and identifying five different means). Though the State rightly points out that the task of demarcating the bounds of a *de facto* LWOP sentence may be difficult, the task is not impossible.

For example, retirement age has been used to discern whether a sentence is a *de facto* LWOP punishment. *Id.* at 734. North Carolina's Constitution provides that persons' "inalienable rights" include the "enjoyment of the fruits of their own labor," N.C. Const. Art. I, § 1, and our Supreme Court has recognized that "a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life . . . is legal grotesquery." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940). It is difficult, then, to deny 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*. *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 623. Stated differently:

> [T]he language of *Graham* suggests that the high court envisioned more than the mere act of release or a de minimis quantum of time outside of prison. *Graham* spoke of the chance to rejoin society in qualitative terms—"the rehabilitative ideal" ([*Graham*] at 130 S. Ct. 2011)—that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry. The

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release is the outer limit of what is constitutionally acceptable." (citation omitted)). The 50-year mark identified by several courts "seems consistent with the observation of the *Graham* Court that the defendant in that case would not be released 'even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.' " *Carter*, 192 A.3d at 728-29 (quoting *Graham*, 560 U.S. at 79, 176 L. Ed. 2d at 848).

> "chance for reconciliation with society" (id. at 130 S. Ct. 2011), "the right to reenter the community" (id. at 130 S. Ct. 2011), and the opportunity to reclaim one's "value and place in society" (*ibid.*) all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement. . . . Confinement with no possibility of release until age 66 or age 74 seems unlikely to allow for the reintegration that *Graham* contemplates.

Contreras, 411 P.3d at 454. To release an individual after their opportunity to directly contribute to society—both through a career and in other respects, like raising a family—"does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." *Null*, 836 N.W.2d at 71 (quoting *Graham*, 560 U.S. at 74, 176 L. Ed. 2d at 845-46). Lastly, we observe that our General Assembly has elsewhere defined what an appropriate life with parole sentence in compliance with *Miller* looks like; N.C. Gen. Stat. § 15A-1340.19A (2019), the statute enacted for that purpose, provides that " 'life imprisonment with parole' shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole."[19]

[19] Defendant asserted at oral argument, that, as a matter of statutory construction, juveniles sentenced to first-degree murder under N.C. Gen. Stat. § 15A-1340.19A, *et seq.* must be given parole eligibility at 25 years. Defendant never raised the issue before the trial court, nor did he brief any statutory interpretation arguments; any arguments as to the purported construction and interpretation of N.C. Gen. Stat. § 15A-1340.19A, *et seq.* have not been presented in this appeal. *See* N.C. R. App. P. 28(a) (2020) ("Issues not presented and discussed in a party's brief are deemed abandoned."). We therefore do not address the statutory construction of N.C. Gen. Stat. § 15A-1340.19A and instead look to it as an expression of the General Assembly's judgment on what constitutes a constitutionally permissible juvenile life sentence following *Miller*—an issue that *was* expressly argued and addressed by the parties in their briefs.

A holding that Defendant's sentences constitute a *de facto* LWOP sentence is in line with the above; his ineligibility for parole for 50 years falls at the limit identified by numerous other jurisdictions as constituting an unconstitutional *de facto* LWOP sentence, and it affords him release only at or after retirement age. *See United States v. Grant*, 887 F.3d 131, 151 (surveying various means of calculating retirement age and observing "by all accounts, the national age of retirement to date is between sixty-two and sixty-seven inclusive"), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3rd Cir. 2018).

As far as identifying what a sentence that would *not* amount to a *de facto* LWOP punishment, our General Assembly has offered some indication. *See* N.C. Gen. Stat. § 15A-1340.19A. The definition provided therein is not strictly limited to single offenses: "If 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." N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2019). Defendant here has clearly abandoned any assertion that he was convicted under the felony murder rule. But N.C. Gen. Stat. § 15A-1340.19B(a)(1) nonetheless indicates 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*. *See, e.g., Ramos*, 387 P.3d at 661-62 (noting that "[s]tate legislatures are . . . allowed some flexibility in fashioning the methods for fulfilling *Miller*'s substantive

requirements, so long as the State's approach does not 'demean the substantive character of the federal right at issue.' " (quoting *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 621)). This Court has twice held that life with the possibility of parole after 25 years does not constitute a *de facto* LWOP sentence subject to *Miller*. *See State v. Jefferson*, 252 N.C. App. 174, 181, 798 S.E.2d 121, 125 (2017) ("Defendant's sentence is neither an explicit nor a *de facto* term of life imprisonment without parole. Upon serving twenty-five years of his sentence, Defendant will become eligible for parole[.]"); *State v. Seam*, 263 N.C. App. 355, 361, 823 S.E.2d 605, 609-10 (2018) (holding *Miller*'s individualized sentencing requirement inapplicable to a single sentence of felony murder carrying mandatory punishment of life imprisonment with the opportunity for parole after 25 years), *aff'd per curiam*, 373 N.C. 529, 837 S.E.2d 870 (2020).

We stress, as the Supreme Court did in *Graham*, that nothing in our decision compels the State to actually release Defendant after 25 years. The Post-Release Supervision and Parole Commission will ultimately decide whether Defendant may be released in his lifetime. Our decision simply upholds the Eighth Amendment's constitutional requirement that Defendant, as a juvenile who is neither incorrigible nor irredeemable, have his "hope for some years of life outside prison walls . . . restored." *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 623.

III. CONCLUSION

The facts, the law, and all that results in this appeal are difficult. As shown by the victim impact statements offered at resentencing, the murders of Mr. Carpenter and Ms. Helton—two teenagers who were soon to be parents—caused irreparable loss and irrevocable harm to victims and their families. Defendant was shaped by what was a profoundly troubled childhood, leading him to actively participate in these truly heinous crimes. These facts have led this Court in reviewing Defendant's constitutional claims that have divided courts nationwide, to discuss the difficult subject of sentencing, for outrageous acts, a juvenile offender who is inherently less culpable than adults and was found by the trial court to be redeemable. "Few, perhaps no, judicial responsibilities are more difficult than sentencing." *Graham*, 560 U.S. at 77, 176 L. Ed. 2d at 847. This case is certainly no exception, as the trial court explained following resentencing: "[T]hese are real tragedies. . . . [T]hey don't put [you] in positions like this because you're weak or because you're a coward. If you can't, you know, make hard decisions, you will never last as a judge and you will never last as a prosecutor or a defense lawyer." Indeed, when it comes to sentencing juveniles for the most egregious crimes, these difficulties are heightened; in such circumstances, the (in)humanity of the perpetrator, the victims, the crimes, and the punishment are inseparable under the Eighth Amendment.

This Court's duty is to uphold the federal and state Constitutions irrespective of these difficulties. In determining Defendant's appeal, we hold under Eighth Amendment jurisprudence: (1) *de facto* LWOP sentences imposed on juveniles may run afoul of the Eighth Amendment; (2) such punishments may arise out of aggregated sentences; and (3) a sentence that provides no opportunity for release for 50 or more years is cognizable as a *de facto* LWOP sentence. Consistent with the Eighth Amendment as interpreted by *Roper, Graham, Miller,* and *Montgomery*, these holdings compel us to reverse and remand Defendant's sentence. Under different circumstances, we would leave resentencing to the sound discretion of the trial court. *See, e.g., State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) (remanding for resentencing and noting that, on remand, "[w]hether the two sentences should run concurrently or consecutively rests in the discretion of the trial court"). Here, however, we hold that of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional. We therefore instruct the trial court on remand to enter two concurrent sentences of life with parole as the only constitutionally permissible sentence available under the facts presented.

REVERSED AND REMANDED.

Judges BRYANT and HAMPSON concur.

Neutral
As of: October 22, 2020 9:38 PM Z

State v. Soto-Fong

Supreme Court of Arizona

October 9, 2020, Filed

Nos. CR-18-0595-PR, CR-18-0489-PR, CR-19-0379-PR

Reporter
2020 Ariz. LEXIS 299 *; 2020 WL 5987900

STATE OF ARIZONA, Respondent, v. MARTIN RAUL SOTO-FONG, Petitioner.STATE OF ARIZONA, Respondent, v. WADE NOLAN CLAY, Petitioner.STATE OF ARIZONA, Respondent, v. MARK NORIKI KASIC JR., Petitioner.

Prior History: [*1] Appeal from the Superior Court in Pima County. The Honorable Peter W. Hochuli, Judge. No. CR039599.

Memorandum Decision of the Court of Appeals Division Two No. 2 CA-CR 18-0181 PR. Filed November 9, 2018.

Appeal from the Superior Court in Mohave County. The Honorable Richard D. Lambert, Judge. No. S8015CR13572.

Memorandum Decision of the Court of Appeals Division One. No. 1 CA-CR 18-0463 PRPC. Filed September 13, 2018.

Appeal from the Superior Court in Pima County. The Honorable Kathleen Quigley, Judge. No. CR20084770.

Opinion of the Court of Appeals Division Two. No. 2 CA-CR 19-0143 PR. Filed November 7, 2019.

State v. Kasic, 453 P.3d 1151, 2019 Ariz. App. LEXIS 1018 (Ariz. Ct. App., Nov. 7, 2019)
State v. Soto-Fong, 2018 Ariz. App. Unpub. LEXIS 1595, 2018 WL 5883908 (Nov. 9, 2018)
State v. Clay, 2018 Ariz. App. Unpub. LEXIS 1352, 2018 WL 4374418 (Sept. 13, 2018)

Disposition: AFFIRMED.

Core Terms

sentences, juvenile, parole, consecutive, offenders, facto, murder, robbery, parole-ineligible, aggregate, armed, arson, dicta, proportionality, imprisonment, burglary, eligible, non-homicide, categorical, twenty-five, aggravated, homicide, neighbor

Case Summary

Overview

HOLDINGS: [1]-Petitioners' arguments that their sentences violated the Eighth Amendment were without merit because United State Supreme Court caselaw did not constitute a significant change in the law under *Ariz. R. Crim. P. 32.1(g)*, and did not prohibit de facto juvenile life sentences. Thus, consecutive sentences imposed for separate crimes, when the cumulative sentences exceeded a juvenile's life expectancy, did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Outcome
Judgments affirmed.

LexisNexis® Headnotes

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

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN1[] Fundamental Rights, Cruel & Unusual Punishment

Consecutive sentences imposed for separate crimes, when the cumulative sentences exceed a juvenile's life expectancy, did not violate the Eighth Amendment's prohibition against cruel and unusual punishments. Such de facto life sentences did not violate the Eighth Amendment, as interpreted in United States Supreme Court caselaw (Graham v. Florida, Miller v. Alabama, and Montgomery v. Louisiana). Consequently, those cases did not constitute a significant change in the law under *Ariz. R. Crim. P. 32.1(g)*.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Interpretation

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

HN2[] Constitutional Law, State Constitutional Operation

Questions of constitutional interpretation are reviewed de novo.

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

HN3[] Fundamental Rights, Cruel & Unusual Punishment

When evaluating categorical rules under the Eighth Amendment, the United States Supreme Court first considers the objective indicia of society's standards, as expressed in legislative enactments and state practice to determine if there is a national consensus against the contested sentencing practice. The Court then considers whether the Eighth Amendment's text, history, meaning, and purpose in light of the Court's independent judgment makes the punishment in question unconstitutional.

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

HN4[] Fundamental Rights, Cruel & Unusual Punishment

While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.

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

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

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

HN5[] Fundamental Rights, Cruel & Unusual Punishment

The United State Supreme Court has held that the federal Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. The state need not guarantee the offender eventual release, but must provide him with a realistic opportunity to obtain release. While the Eighth Amendment does not foreclose the possibility that persons convicted of non-homicide crimes committed before adulthood will remain behind bars for life, the state may not make that judgment solely on the crime committed. This holding is premised on the concept of proportionality. The Supreme Court addresses proportionality in two ways: (1) challenges to the length of a sentence in relation to the circumstances in the case, and (2) court-imposed categorical restrictions on penalties. The second category was expanded to include juvenile offenders sentenced to life without the

possibility of parole for a non-homicide offense.

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

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

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

HN6[] Fundamental Rights, Cruel & Unusual Punishment

The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. A judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. To effectuate this directive, a trial court must consider an offender's youth and attendant characteristics before sentencing a juvenile to life without the possibility of parole.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

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

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN7[] Sentencing, Age & Term Limits

The United States Supreme Court has held that a trial court must consider certain factors before sentencing a juvenile to life without the possibility of parole. A categorical ban on parole-ineligible life sentences for juveniles was not imposed.

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

HN8[] Fundamental Rights, Cruel & Unusual Punishment

The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

HN9[] Sentencing, Age & Term Limits

Graham v. Florida and Miller v. Alabama are inapplicable to de facto juvenile life sentences. If petitioners' sentences are not parole-ineligible life sentences for a single conviction, but rather aggregated sentences for multiple crimes, this caselaw does not afford relief.

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

Criminal Law & Procedure > Sentencing > Consecutive Sentences

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

HN10[] Fundamental Rights, Cruel & Unusual Punishment

The imposition of consecutive sentences will not be considered in a proportionality inquiry. Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence. Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate. Such a proposition holds even

if the total sentences exceed a normal life expectancy.

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

HN11 **Fundamental Rights, Cruel & Unusual Punishment**

Generally, courts do not permit defendants to stack their crimes to generate an Eighth Amendment claim.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Consecutive Sentences

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

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

Criminal Law & Procedure > ... > Sentencing Guidelines > Departures From Guidelines > Personal Characteristics

HN12 **Sentencing, Age & Term Limits**

The Supreme Court of Arizona rejects the notion that Graham v. Florida and Miller v. Alabama implicate a juvenile's de facto life term resulting from multiple consecutive sentences. Those cases apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense. Graham v. Florida did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole. The United States Supreme Court has neither expanded its analysis in these cases to sentences other than life without the possibility of parole nor addressed the impact of consecutive sentences imposed for separate crimes. Indeed, it has not squarely addressed whether consecutive sentences should be considered in a proportionality review of an adult offender's sentence.

Governments > Courts > Judicial Precedent > Dicta

Governments > Courts > Judicial Precedent

HN13 **Judicial Precedent, Dicta**

The Supreme Court of Arizona is bound to follow applicable holdings of United States Supreme Court decisions, but not mere dicta or other statements that allegedly bear on issues neither presented nor decided in such decisions. Dictum is without force of adjudication and is not controlling as precedent.

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

HN14 **Sentencing, Confinement Practices**

The United States Supreme court did not hold in Graham v. Florida that juveniles must have a chance for reconciliation with society.

Criminal Law & Procedure > Sentencing > Ranges

HN15 **Sentencing, Ranges**

The fixing of prison terms for specific crimes is properly within the providence of the legislature, not courts.

Governments > State & Territorial Governments > Legislatures

HN16 **State & Territorial Governments, Legislatures**

The wide-ranging considerations necessary to resolve what is quintessentially a policy question militate in favor of deference to the legislature. he fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is properly within the province of the legislature, not courts. The question of what acts are deserving of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution.

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

HN17 **Fundamental Rights, Cruel & Unusual Punishment**

The Eighth Amendment does not prohibit de facto juvenile life sentences.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Interpretation

HN18 **Constitutional Law, State Constitutional Operation**

The Supreme Court of Arizona's primary purpose when interpreting the Arizona Constitution is to effectuate the intent of those who framed the provision. When the language of a provision is clear and unambiguous, the supreme court applies it without resorting to other means of constitutional construction. The supreme court may examine its history, if necessary, to determine the framers' intent.

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

Constitutional Law > State Constitutional Operation

HN19 **Fundamental Rights, Cruel & Unusual Punishment**

Ariz. Const. art. 2, § 15 is identical to the Eighth Amendment and prohibits cruel and unusual punishment. The drafters of the Arizona Constitution elected to adopt the Eighth Amendment's wording and declined the committee's proposal of "cruel nor unusual punishment." The Supreme Court of Arizona has not interpreted Ariz. Const. art. 2, § 15 to afford broader protection than its federal counterpart.

Constitutional Law > State Constitutional Operation

Governments > Courts > Judicial Precedent

HN20 **Constitutional Law, State Constitutional Operation**

Although the Supreme Court of Arizona is not bound by federal precedent in interpreting its Constitution and it does not follow federal precedent blindly, federal precedent is highly persuasive when the federal and state constitutional provisions are identical.

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

Constitutional Law > State Constitutional Operation

HN21 **Fundamental Rights, Cruel & Unusual Punishment**

Nothing in the Arizona Constitution suggests Ariz. Const. art. 2, § 15 exceeds Eighth Amendment protections for minors charged with crimes.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

HN22 **Sentencing, Age & Term Limits**

United States Supreme Court caselaw (Graham v. Florida, Miller v. Alabama, and Montgomery v. Louisiana) do not prohibit de facto juvenile life sentences.

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

HN23 **Sentencing, Confinement Practices**

Under United States Supreme Court caselaw (Graham v. Florida), the State is not required to guarantee a juvenile release; it must only provide him or her with a realistic opportunity for release.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Consecutive Sentences

Criminal Law & Procedure > Sentencing > Multiple Convictions

HN24 **Sentencing, Age & Term Limits**

United States Supreme Court caselaw (Graham v. Florida, Miller v. Alabama, and Montgomery v.

Louisiana) do not prohibit consecutive sentences imposed for separate crimes when the aggregate sentences exceed a juvenile's life expectancy.

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Judges: JUSTICE LOPEZ authored the opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, and JUSTICES BOLICK, GOULD, BEENE, and PELANDER (RETIRED)* joined.

Opinion by: LOPEZ

Opinion

JUSTICE LOPEZ, opinion of the Court:

HN1[↑] P1 We consider whether consecutive sentences imposed for separate crimes, when the cumulative sentences exceed a juvenile's life expectancy, violate the *Eighth Amendment's* prohibition against "cruel and unusual punishments." We conclude that such de facto life sentences do not violate the *Eighth Amendment*, as interpreted in *Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*, *Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*, and *Montgomery v. Louisiana, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)*. Consequently, *Graham*, *Miller*, and *Montgomery* do not constitute a significant change in the law under *Arizona Rule of Criminal Procedure 32.1(g)*.

BACKGROUND

P2 Wade Clay was seventeen when he murdered one victim and attempted to murder a second. **[*3]** In 1991, a jury convicted Clay of first degree murder of J.M. (Count 1), attempted murder of A.M. (Count 2), and aggravated assault of A.M. (Count 3). At sentencing, the trial court considered Clay's age but found that it was not a mitigating factor because he was not an "immature child." The court sentenced Clay to life with the possibility of parole after twenty-five years on Count 1 and imposed concurrent terms of twelve and nine years for Counts 2 and 3 respectively, to run consecutive to the life sentence. The court of appeals denied Clay's requested relief in his most recent post-conviction proceeding. *State v. Clay, No. 1 CA-CR 18-0463, 2018 Ariz. App. Unpub. LEXIS 1352, 2018 WL 4374418, at *1 ¶ 4 (Ariz. App. Sept. 13, 2018)* (mem. decision). Clay is now eligible for parole on the life sentence.

P3 Mark Kasic committed six arsons and one attempted arson between August 2007 and August 2008. He

* Justice William G. Montgomery has recused himself from this case. Pursuant to article 6, section 3 of the Arizona Constitution, the Honorable John Pelander, Justice of the Arizona Supreme Court (Retired), was designated to sit in this matter.

committed four of those crimes while he was seventeen and the others after he turned eighteen. The arsons destroyed three houses and numerous vehicles, severely burned a homeowner, and caused extensive property damage. All the arsons were committed while occupants were asleep in their homes. A jury convicted Kasic on thirty-two counts—including six counts of arson of an occupied **[*4]** structure, fifteen counts of endangerment, one count of attempted arson of an occupied structure, and one count of aggravated assault. The trial court sentenced Kasic to enhanced concurrent and consecutive prison sentences totaling nearly 140 years. The court of appeals affirmed Kasic's convictions and sentences, distinguishing *Graham* because "different considerations apply to consecutive term-of-years sentences based on multiple counts and multiple victims." *State v. Kasic, 228 Ariz. 228, 233-34 ¶ 26, 265 P.3d 410 (App. 2011)*.

P4 A jury convicted Martin Raul Soto-Fong of three counts of first degree murder, one count of armed robbery, two counts of attempted armed robbery, one count of aggravated robbery, and two counts of attempted aggravated robbery arising from a robbery of a market. The trial court sentenced Soto-Fong to death. That sentence, however, was vacated in light of *Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)* ("The *Eighth* and *Fourteenth Amendments* forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). The trial court then sentenced Soto-Fong to three consecutive life sentences without the possibility of release for twenty-five years. The court of appeals denied Soto-Fong's requested relief in his most recent post-conviction proceeding, finding **[*5]** that *Miller* did not apply to his aggregate prison term. *State v. Soto-Fong, No. 2 CA-CR 18-0181, 2018 Ariz. App. Unpub. LEXIS 1595, 2018 WL 5883908, at *1 ¶¶ 4-5 (Ariz. App. Nov. 9, 2018)* (mem. decision). Soto-Fong will not be eligible for release until he has served 109 years of imprisonment.

P5 Petitioners argue that their sentences violate the *Eighth Amendment* and request that we remand their cases to the trial court to fashion constitutional sentences. We consolidated these cases to resolve the common question of whether *Graham*, *Miller*, and *Montgomery* prohibit aggregated consecutive sentences for separate crimes that exceed a juvenile's life expectancy, a recurring issue of statewide importance. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution and *A.R.S. § 12-120.24*.

I.

HN2[↑] P6 Whether the *Eighth Amendment* prohibits de facto life sentences for juveniles is a matter of constitutional interpretation that we review de novo. *Heath v. Kiger, 217 Ariz. 492, 494 ¶ 6, 176 P.3d 690 (2008)*.

A.

P7 *Graham* involved a sixteen-year-old defendant who was charged with armed burglary by assault or battery and attempted armed robbery. *560 U.S. at 53-54*. Graham pleaded guilty to both charges pursuant to a plea agreement. *Id. at 54*. The trial court withheld adjudication of guilt and sentenced Graham to concurrent three-year terms of probation. *Id.* Six months later, Graham was arrested for his role in two robberies that resulted in the shooting **[*6]** of one of his co-conspirators. *Id. at 54-55*.

P8 After his second arrest, the court revoked Graham's probation and found him guilty of the earlier armed burglary and attempted armed robbery charges. *Id. at 57*. The court sentenced Graham to life imprisonment for the armed burglary and fifteen years of imprisonment for the attempted armed robbery. *Id.* At the time, because Florida had no parole system, Graham had no possibility of release save executive clemency. *Id.* Graham challenged his sentence under the *Eighth Amendment*, and the United States Supreme Court eventually addressed that challenge on certiorari. *Id. at 58*.

HN3[↑] P9 When evaluating categorical rules under the *Eighth Amendment*, the Supreme Court first considers the "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine if there is a national consensus against the contested sentencing practice. *Id. at 61* (quoting *Roper, 543 U.S. at 563*). The Court then considers whether the *Eighth Amendment's* "text, history, meaning, and purpose" in light of the Court's "independent judgment" makes the punishment in question unconstitutional. *Id.* (quoting *Kennedy v. Louisiana, 554 U.S. 407, 421, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008)*).

P10 Reasoning that the "most reliable" evidence of a national consensus is legislation enacted by the states, the *Graham* Court noted that a majority **[*7]** of states, thirty-seven, permitted a life without parole sentence for

juveniles. *Id. at 62*. Despite this clear consensus and logical stopping point, the Court shifted its focus to the number of juvenile offenders serving parole-ineligible life sentences, as quantified in a non-peer-reviewed study based upon incomplete data. *Id. at 62-63*. The Court then concluded that, because it could find only 124 cases involving parole-ineligible juvenile life sentences, a national consensus against such sentences must exist. The Court dismissed criticisms of the flawed study and faulted Florida for not producing its own countervailing study or data. *Id. at 63*. *Graham*'s analysis of the national consensus against parole-ineligible juvenile life sentences is, at best, dubious. *Id. at 107* (Scalia, J., dissenting) ("No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence."); *see also State v. Slocumb, 426 S.C. 297, 827 S.E.2d 148, 153 n.9 (S.C. 2019)* ("The so-called consensus against sentencing juvenile offenders to life without parole could not be found in the laws of this country, for the vast majority of states did not forbid such a sentence.").

P11 Having glided past the "most reliable" measure of national consensus—the duly enacted **[*8]** laws of the state legislatures—in favor of an analytically novel metric, the Court attempted to bolster its conclusion by invoking the "judgments of other nations and the international community." *Graham, 560 U.S. at 80*. After acknowledging that considerations of foreign judgments were not dispositive, the Court noted that they were "not irrelevant." *Id.* (quoting *Enmund v. Florida, 458 U.S. 782, 796 n.22, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)*). Relying on a single study about the sentencing practices of other nations, the Court observed that the United States stood alone in subjecting juveniles to parole-ineligible sentences. *Id. at 80-81*.

P12 We pause here to express our concern with the Court's reliance on international laws and judgments to resolve an issue raised under the United States Constitution, particularly when they are invoked to justify the Court's disregard of the "most reliable" evidence of national consensus: the will of the American people as expressed through their state laws. Such implicit deference to foreign decisions runs the risk of ceding to foreign governments "what our laws and our Constitution mean, and what our policies in America should be." 151 Cong. Rec. S3109 (daily ed. Mar. 20, 2005) (statement of Sen. Cornyn). ***HN4***[↑] "While Congress, as a *legislature*, may wish to consider **[*9]** the actions of other nations on any issue it likes, . . . *Eighth Amendment* jurisprudence should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida, 537 U.S. 990, 990, 123 S. Ct. 470, 154 L. Ed. 2d 359* n.* (2002) (Thomas, J., concurring in the denial of certiorari). After all, our Constitution was the product of our nation consciously breaking away from its old-world origins and embedding distinctively American values and principles into our rule of law.

HN5[↑] P13 After assessing the national consensus and international norms, the Court held that the federal Constitution "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham, 560 U.S. at 82*. The Court clarified that the state "need not guarantee the offender eventual release," but must provide him with a "realistic opportunity" to obtain release. *Id.* While the *Eighth Amendment* "does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life," the state may not make that judgment solely on the crime committed. *See id. at 75*.

P14 *Graham*'s holding is premised on the concept of proportionality. *Id. at 59*. The Supreme Court addresses proportionality in two ways: (1) challenges to the length of a sentence in relation to the **[*10]** circumstances in the case, and (2) court-imposed categorical restrictions on penalties. *Id. Graham* expanded the second category to include juvenile offenders sentenced to life without the possibility of parole for a non-homicide offense. *See id. at 60-61*.

P15 The Supreme Court did not address Graham's fifteen-year sentence for the attempted armed robbery. Instead, *Graham*'s holding considered only his life sentence for armed burglary and stated that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id. at 82*. No more, no less.

B.

P16 *Miller* involved the consolidated cases of two fourteen-year-old defendants, Kuntrell Jackson and Evan Miller. Jackson participated in a robbery during which his co-conspirator shot and killed a video store clerk. *Miller, 567 U.S. at 465-66*. A jury convicted Jackson of capital felony murder and aggravated robbery and a judge sentenced him, consistent with Arkansas law, to life without parole. *Id. at 466*; *see also Ark. Code Ann. § 5-4-104(b)* (1997) ("A defendant convicted of capital murder or treason shall be

sentenced to death or life imprisonment without parole.").

P17 Miller and an accomplice were drinking with a neighbor who lost consciousness. *Miller, 567 U.S. at 468*. Miller and **[*11]** his accomplice attempted to steal $300 from the neighbor's wallet. *Id.* The neighbor awoke, a struggle ensued, and Miller struck the neighbor repeatedly with a baseball bat. *Id.* Miller and his accomplice later returned to set the neighbor's trailer ablaze. *Id.* The state charged Miller with murder in the course of arson. *Id.* A jury convicted Miller, and a judge sentenced him to life without parole. *Id. at 468-69*; *see also* *Ala. Code §§ 13A-5-40(a)(9)*, *13A-6-2(c)* (1982). The defendants' *Eighth Amendment* challenges to their sentences ultimately reached the Supreme Court.

P18 The *Miller* Court abandoned *Graham*'s analytical approach—counting the number of juveniles in the country serving a similar sentence—to determine the existence of a national consensus. Instead, the Court declared a national consensus against parole-ineligible life sentences for juveniles for homicide offenses because only twenty-nine jurisdictions permitted the sentencing practice. Thus, although a majority of states permitted such sentences, the Court concluded that there was a consensus *against* the practice because fewer states allowed it than the practice foreclosed in *Graham*. *Miller, 567 U.S. at 483-84*. The Court emphasized that many jurisdictions did not explicitly authorize life without the possibility of parole **[*12]** for juveniles convicted of homicide, but instead relied on statutes that transfer juveniles to adult courts for prosecution to achieve that outcome. *Id. at 485*. The Court then dismissed the significance of the states' sanctioned practice of allowing parole-ineligible juvenile life sentences through adult court transfer statutes because "it was impossible to say whether the legislatures had endorsed" the practice. *Id.*

HN6[↑] P19 Thus, the *Miller* Court expanded *Graham*, stating that "the *Eighth Amendment* forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id. at 479*. The Court held that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id. at 489*. To effectuate this directive, the Court held that a trial court must consider "an offender's youth and attendant characteristics" before sentencing a juvenile to life without the possibility of parole. *See id. at 483*.

C.

P20 *Montgomery* involved a seventeen-year-old defendant who murdered a deputy sheriff. *136 S. Ct. at 725*. In 1963, Louisiana charged Montgomery with murder and a jury convicted him as "guilty without capital punishment," resulting in a life sentence without **[*13]** parole. *Id. at 725-26*. The Court held that, because *Miller* was substantive and therefore retroactively applicable, a trial court must determine if Montgomery was "irreparably corrupt" when he murdered a deputy sheriff fifty-three years previously, or afford him an opportunity for release. *Id. at 736-37*.

P21 *Montgomery* muddied the *Eighth Amendment* jurisprudential waters with its construction of *Miller*. *See id. at 743* (Scalia, J. dissenting). The majority in *Montgomery* asserted that *Miller* had invalidated life without parole sentences for "a class of defendants because of their status." *Id.* (internal quotations omitted). Ultimately, the majority concluded that *Miller* "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.*

P22 As Justice Scalia clarified in his *Montgomery* dissent, *Miller* did not enact a categorical ban; it merely mandated that trial courts "*follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* (quoting *Miller, 567 U.S. at 483*). Justice Scalia further chided the majority for its reliance on dicta from *Miller* to rewrite its holding. *Id.*; *see also* *State v. Valencia, 241 Ariz. 206, 211 ¶ 26, 386 P.3d 392 (2016)* (Bolick, J., concurring) ("Searching in **[*14]** vain to find such a substantive rule in *Miller*, the Court instead created one in *Montgomery*, reasoning that the unannounced rule that courts make a finding of 'irreparable corruption' before sentencing a juvenile offender to life imprisonment without parole was implicit in the earlier case.") (internal citation omitted).

HN7[↑] P23 We agree with Justice Scalia. *Miller*'s holding was narrow—a trial court must consider certain factors before sentencing a juvenile to life without the possibility of parole. *567 U.S. at 483*. *Miller* did *not* impose a categorical ban on parole-ineligible life sentences for juveniles. *Id.* ("Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*.").

II.

P24 The Supreme Court's *Eighth Amendment* jurisprudence concerning parole-ineligible life sentences for juveniles has left the nation's courts in a wake of confusion. State courts and federal circuits have reached disparate resolutions of these cases. *See Slocumb, 827 S.E.2d at 158-66* (collecting cases). Today, we sift through the Court's opinions to determine the applicability of *Graham*, *Miller*, and *Montgomery* to Petitioners' cases.

A.

HN8[] P25 "*Eighth Amendment* analysis focuses on the sentence imposed for each specific crime, **[*15]** not on the cumulative sentence." *United States v. Aiello, 864 F.2d 257, 265 (2d Cir. 1988)*. In *Graham*, the Court noted that it was examining the specific "sentencing practice" of mandatory parole-ineligible life sentences for juveniles who commit non-homicide offenses. *560 U.S. at 61*. In *Miller*, the sentencing practice concerned mandatory parole-ineligible life sentences for juveniles convicted of homicide. *567 U.S. at 479*. *Graham*, *Miller*, and *Montgomery* involved juvenile defendants sentenced to life without parole for a single crime. Here, Petitioners received very different sentences—each received multiple sentences for multiple crimes which, in the aggregate, resulted in terms of incarceration that will or may exceed their life expectancy.

P26 Petitioners argue that *Graham*, too, involved multiple criminal acts and, thus, its reasoning applies to their cases. We disagree. Petitioners ignore *Graham*'s facts and holding. Although Graham was convicted and sentenced for multiple offenses, his contested sentence arose from a single crime, the July 2003 burglary. *Graham, 560 U.S. at 57-58*. The Court was silent on his other convictions and sentences. *See id. at 54, 57*. Likewise, in *Miller*, the Court addressed only the defendants' homicide-related sentences, *567 U.S. at 468-69*, and in *Montgomery*, the Court considered only the sentence **[*16]** for murder, *136 S. Ct. at 725*. Thus, *Graham* and its progeny did not involve contested consecutive sentences arising from multiple crimes.

HN9[] P27 Numerous courts considering this issue have concluded that *Graham* and *Miller* are inapplicable to de facto juvenile life sentences. *See, e.g.*, *Vasquez v. Commonwealth, 291 Va. 232, 781 S.E.2d 920, 928 (Va. 2016)* ("*Graham* does not apply to aggregate term-of-year sentences involving multiple crimes . . . ."); *Slocumb, 827 S.E.2d at 158-66* (collecting cases). We join these courts in holding that, because Petitioners' sentences are not parole-ineligible life sentences for a single conviction, but rather aggregated sentences for multiple crimes, *Graham* and its progeny do not afford Petitioners relief.

B.

P28 *Graham*, *Miller*, and *Montgomery* do not involve de facto life sentences for juveniles, nor do their holdings implicate such sentences.

HN10[] P29 We "will not consider the imposition of consecutive sentences in a proportionality inquiry." *State v. Berger, 212 Ariz. 473, 479 ¶ 27, 134 P.3d 378 (2006)* (quoting *State v. Davis, 206 Ariz. 377, 387 ¶ 47, 79 P.3d 64 (2003)*). "*Eighth Amendment* analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *Id. ¶ 28* (quoting *Aiello, 864 F.2d at 265*). "Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive **[*17]** sentences are lengthy in aggregate." *Id.* (concluding such a proposition holds even if the total sentences exceed a normal life expectancy); *see also Ewing v. California, 538 U.S. 11, 28, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003)* (upholding a sentence of twenty-five years to life for felony grand theft based on the defendant's prior convictions).

HN11[] P30 Although *Berger* and *Ewing* analyzed the length of sentences relative to the crime's circumstances, their logic is relevant here because, generally, courts do not permit defendants to "stack" their crimes to generate an *Eighth Amendment* claim. *See, e.g.*, *Commonwealth v. Foust, 2018 PA Super 39, 180 A.3d 416, 436 (Pa. 2018)* ("Contrary to the arguments made by Appellant at oral argument, there is nothing in *Roper*, *Graham*, and/or *Miller* that speaks to volume discounts for multiple crimes."); *see also Hawkins v. Hargett, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999)* (refusing to apply increased proportionality review because a juvenile's aggregated consecutive sentences totaled more than 100 years). Proportionality review is prohibited in this context because such an approach would produce "the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable *Eighth Amendment* claim." *Pearson v. Ramos, 237 F.3d 881, 886 (7th Cir. 2001)*; *see also Foust, 180 A.3d at 434* ("Moreover, extensive case law in this jurisdiction holds that defendants convicted of multiple

offenses are not entitled to a 'volume discount' on their aggregate **[*18]** sentence.").

HN12[↑] P31 Thus, we reject the notion that *Graham* and *Miller* implicate a juvenile's de facto life term resulting from multiple consecutive sentences. *See* Lucero v. People, 394 P.3d 1128, 1132, 2017 CO 49 ¶ 15 (Colo. 2017) ("*Graham* and *Miller* apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense."); Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012) ("[*Graham*] did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole."). The Supreme Court has neither expanded its analysis in these cases to sentences other than life without the possibility of parole nor addressed the impact of consecutive sentences imposed for separate crimes. *See* State v. Ali, 895 N.W.2d 237, 246 (Minn. 2017). Indeed, it has not squarely addressed whether consecutive sentences should be considered in a proportionality review of an adult offender's sentence. *See id.*; *see also* O'Neil v. Vermont, 144 U.S. 323, 331, 12 S. Ct. 693, 36 L. Ed. 450 (1892) (quoting, in dictum, a state court's reasoning that "[t]he mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material" to the Eighth Amendment inquiry).

C.

P32 As *Graham*, *Miller*, and *Montgomery* afford Petitioners no harbor in their holdings, they **[*19]** seek refuge in the cases' dicta. HN13[↑] This Court, of course, is bound to follow applicable holdings of United States Supreme Court decisions, but not mere dicta or other statements that allegedly bear on issues neither presented nor decided in such decisions. *Cf.* State v. Mata, 185 Ariz. 319, 327-28, 916 P.2d 1035 (1996) (rejecting assertion that prior Supreme Court cases had specifically addressed or decided the issue before this Court). Thus, mere dicta offers Petitioners no relief. *See* Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 81, 638 P.2d 1324 (1981) (noting that dictum is "without force of adjudication" and "is not controlling as precedent").

P33 Soto-Fong points to *Graham*'s observation that a mandatory life without parole sentence "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *See* 560 U.S. at 79. Undoubtedly true, but this statement and others are superfluous to the scope of the Court's analysis and holding; the Court simply noted the obvious implication of mandatory life without parole sentences for non-homicide juvenile offenders. *Id.* HN14[↑] Notably, the Court did not hold that juveniles *must* have a chance for "reconciliation with society." *See id.*

P34 Many courts that have interpreted *Graham* and *Miller* to prohibit de facto juvenile life sentences have also relied **[*20]** on dicta or otherwise discounted the cases' narrow holdings. *See* Slocumb, 827 S.E.2d at 162-65 (listing states that find *Graham* and *Miller* apply to de facto life sentences). For example, in *Moore v. Biter*, the Ninth Circuit held that *Graham* applied to de facto life sentences after concluding that the facts in *Graham* were "materially indistinguishable" from the facts before it. 725 F.3d 1184, 1186 (9th Cir. 2013). Graham was sentenced to life without the possibility of parole for committing an armed burglary. Graham, 560 U.S. at 57. By contrast, Moore sexually victimized four women in separate incidents during a five-week period. 725 F.3d at 1186. Following Moore's convictions, the trial court imposed consecutive sentences requiring him to serve 127 years in prison before reaching parole eligibility. Id. at 1187. Despite the differences in Graham and Moore's convictions and sentences, the Ninth Circuit concluded that *Graham*'s holding foreclosed Moore's de facto life sentence. Id. at 1192-93.

P35 We find *Moore*'s holding untenable and, instead, concur with the dissent from rehearing en banc which concluded that *Graham* did not apply to Moore's situation, much less prohibit his sentences. Moore v. Biter, 742 F.3d 917, 917-919 (9th Cir. 2014) (O'Scannlain, J., dissenting), *denying reh'g en banc to* 725 F.3d 1184 (9th Cir. 2013) (noting that the panel failed to "confront the most meaningful distinction **[*21]** between Moore's case and *Graham*: Moore's term of imprisonment is composed of over two dozen separate sentences . . . Graham's is one sentence").

D.

P36 Having concluded that *Graham*, *Miller*, and *Montgomery* do not preclude de facto juvenile life sentences, we note another reason to decline to invoke the cases' dicta to extend this jurisprudence. To do so would invariably require us to assume the legislative prerogative to establish criminal sentences. *See* Berger, 212 Ariz. at 483 ¶ 50 HN15[↑] ("[T]he fixing of prison terms for specific crimes . . . is properly within the

providence of the legislature, not courts.") (quoting *Harmelin v. Michigan, 501 U.S. 957, 998, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)* (Kennedy, J., concurring in part)).

P37 Petitioners' requested relief raises myriad practical questions about how to effectuate it. Judge O'Scannlain addressed the impracticability of judicially crafting a juvenile sentencing scheme in his *Moore* dissent:

> At what number of years would the *Eighth Amendment* become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? . . . Could the number [of years] vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? Also, what if the aggregate sentences are **[*22]** from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?

742 F.3d at 922 (O'Scannlain, J., dissenting) (internal citations and quotation marks omitted). Implementation of Petitioners' requested relief would require this Court to devise a juvenile sentencing scheme out of whole cloth. We decline the invitation to do so because it "would require a proactive exercise inconsistent with our commitment to traditional principles of judicial restraint." *Vasquez, 781 S.E.2d at 928*.

P38 Indeed, courts that have held de facto juvenile life sentences unconstitutional provide a cautionary tale, as they have invariably usurped the legislative prerogative to devise a novel sentencing scheme or otherwise delegated the task to trial courts to do so. For example, following its reversal of a juvenile's aggregate forty-five-year sentence as violative of *Miller*, the Wyoming Supreme Court dipped its toe in the legislative water, noted that federal sentencing guidelines equate 470 months to a life sentence, but declined to adopt any standard for defining a "life sentence." *Bear Cloud v. State, 2014 WY 113, 334 P.3d 132, 142-44 (Wyo. 2014)*. In so doing, the *Bear Cloud* Court **[*23]** also rejected the defendant's span-of-life projections based on data estimating that the life expectancy of incarcerated juvenile offenders is lower than the general population's. *Id. at 142*. Ultimately, the court thrust the legislative pen in the trial court's hand to devise a sentencing scheme under the guise of "weigh[ing] the entire sentencing package" on remand. *Id. at 143*.

P39 Here, Petitioners invite us to invade the province of the legislature. Petitioners' shifting approach to this issue demonstrates the folly of doing so. Initially, Petitioners asserted that we may not declare a bright-line rule for defining a life sentence due to variations in life expectancy for various racial groups. Petitioners then suggested that the legislature has previously determined that a sentence of twenty-five years constitutes a life sentence because a defendant is eligible for release after twenty-five years when sentenced to life with the possibility of release. ***HN16***[] The wide-ranging considerations necessary to resolve what is quintessentially a policy question militate in favor of deference to the legislature. *See Harmelin, 501 U.S. at 998* (Kennedy, J., concurring in part) ("[T]he fixing of prison terms for specific crimes involves a substantial **[*24]** penological judgment that, as a general matter, is 'properly within the province of the legislature, not courts.'") (quoting *Rummel v. Estelle, 445 U.S. 263, 275-76, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)*; *Graham, 560 U.S. at 120* (Scalia, J., dissenting) ("The question of what acts are 'deserving' of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution.").

P40 Despite the shifting and confusing reasoning embodied in *Graham*, *Miller*, and *Montgomery*, we are bound by the Supremacy Clause to faithfully apply this jurisprudence as we fairly construe it. *Davis, 206 Ariz. at 384 ¶ 34 n.4*. But because those cases do not address or implicate de facto juvenile life sentences, we decline Petitioners' invitation to expand this jurisprudence one step beyond its reach. Our respect for the separation of powers, the will of our citizens, and principles of judicial restraint, rather than dicta from inapposite cases, compel our decision. ***HN17***[] Thus, we hold that the *Eighth Amendment* does not prohibit de facto juvenile life sentences.

III.

P41 Petitioners also argue that the Arizona Constitution prohibits de facto life sentences for juveniles. This issue was not squarely raised for review, but because the parties have briefed the issue, we will **[*25]** address it. *Jimenez v. Sears, Roebuck & Co., 183 Ariz. 399, 406 n.9, 904 P.2d 861 (1995)*.

HN18[] P42 Our primary purpose when interpreting the Arizona Constitution is to "effectuate the intent of those who framed the provision." *Jett v. City of Tucson,*

180 Ariz. 115, 119, 882 P.2d 426 (1994). "When the language of a provision is clear and unambiguous, we apply it without resorting to other means of constitutional construction." *Heath, 217 Ariz. at 494* ¶ 6. We may examine its history, if necessary, to determine the framers' intent. Boswell v. Phx. Newspapers, Inc., 152 Ariz. 9, 12, 730 P.2d 186 (1986).

HN19[↑] P43 Article 2, section 15 of the Arizona Constitution is identical to the Eighth Amendment and prohibits "cruel and unusual punishment." The drafters of the Arizona Constitution elected to adopt the Eighth Amendment's wording and declined the committee's proposal of "cruel nor unusual punishment." State v. Bartlett, 164 Ariz. 229, 240-41, 792 P.2d 692 (1990), *vacated on other grounds*, *501 U.S. 1246, 111 S. Ct. 2880, 115 L. Ed. 2d 1046 (1991)*. We have not interpreted article 2, section 15 to afford broader protection than its federal counterpart. State v. McPherson, 228 Ariz. 557, 563 ¶ 16, 269 P.3d 1181 (App. 2012). **HN20**[↑] Although we are not bound by federal precedent in interpreting our Constitution and we do not "follow federal precedent blindly," Davis, 206 Ariz. at 380, federal precedent is highly persuasive when the federal and state constitutional provisions are identical.

P44 Petitioners argue that article 2, section 15 prohibits de facto juvenile life sentences because the state constitutional framers intended greater protections for children. We disagree. Express protections for children were limited to children in the workforce. **[*26]** *See* Rebecca White Berch, *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 496 (2012) ("The delegates drafted child labor laws after seeing young children at work in smelters and mines."). The delegates' desire to protect children manifests in article 18, section 2 of the Arizona Constitution, *id. at 497*, which prohibits "any child under sixteen years of age [to] be employed in underground mines, or in any occupation injurious to health or morals or hazardous to life or limb" and disallows children under fourteen from employment during school hours. Ariz. Const. art. 18, § 2. **HN21**[↑] Nothing in the Arizona Constitution suggests article 2, section 15 exceeds Eighth Amendment protections for minors charged with crimes.

P45 The State argues that the Arizona Constitution, specifically the Victim's Bill of Rights ("VBR"), favors de facto juvenile life sentences. Specifically, the State contends that the VBR requires a sentencing court to consider victims individually; as such, prohibiting de facto life sentences would effectively deny victims justice because it would artificially cap a juvenile defendant's sentence. But nothing in the VBR's text addresses this issue. *See* Ariz. Const. art 2, § 2.1. The State raises compelling issues that warrant consideration when considering penological goals, but they are best **[*27]** left to legislative deliberations.

IV.

P46 Having concluded that **HN22**[↑] *Graham*, *Miller*, and *Montgomery* do not prohibit de facto juvenile life sentences, we turn to Petitioners' cases.

HN23[↑] P47 Under *Graham*, the State is not required to guarantee Clay release; it must only provide him with a "realistic opportunity" for release. 560 U.S. at 82. Clay is now eligible for parole. Moreover, the sentencing court considered Clay's age. Although Clay contends that his sentencing failed to satisfy *Graham*'s requirements, we decline to address this claim because his parole eligibility renders it moot. Thus, we deny Clay's requested relief.

P48 Kasic's case is clearly distinguishable from *Graham* and its progeny. Kasic's sentences arise from six separate arsons committed over the course of a year, including crimes he committed as an adult. His case bears no resemblance to Graham, Miller, or Montgomery, in which all the defendants received life sentences without the possibility of parole as punishment for a single crime. Consequently, we deny Kasic's requested relief.

P49 Although Soto-Fong's case bears some resemblance to the *Graham* cases because his sentences arise from a *single criminal episode*, the similarities end there. **[*28]** Soto-Fong was convicted of three first degree murders and his consecutive life sentences are the result of his multiple murder and robbery convictions, not from a *single conviction and sentence*. For this reason, we deny Soto-Fong's requested relief.

CONCLUSION

HN24[↑] P50 We hold that *Graham*, *Miller*, and *Montgomery* do not prohibit consecutive sentences imposed for separate crimes when the aggregate sentences exceed a juvenile's life expectancy. Consequently, *Graham* and its progeny do not represent

a significant change in the law under *Rule 32.1(g)*. Therefore, we affirm the court of appeals' decisions and the trial courts' judgments and sentences in Petitioners' cases, and we deny Petitioners' requested relief for resentencing.

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Williams v. State

Court of Appeals of Kansas

October 9, 2020, Opinion Filed

No. 121,815

Reporter
2020 Kan. App. LEXIS 76 *; 2020 WL 5996442

RONELL WILLIAMS, Appellant, v. STATE OF KANSAS, Appellee.

Prior History: [*1] Appeal from Wyandotte District Court; J. DEXTER BURDETTE, judge.

State v. Williams, 277 Kan. 338, 85 P.3d 697, 2004 Kan. LEXIS 134 (Mar. 19, 2004)

Disposition: Reversed, sentence vacated in part, and case remanded with directions.

Core Terms

sentence, juvenile, parole, offender, attendant, youth, mandatory, culpability, murder, aggravating, adults, lifetime, homicide, rehabilitation, first-degree, vacate, diminished, premeditated, disproportionate, categorical, postrelease, heightened, mitigating, cruel, irreparable, corruption, discretionary, immaturity, injustice, triggered

Case Summary

Overview
HOLDINGS: [1]-Appellant's hard 50-year sentence for two counts of premeditated first-degree murder that he committed when he was 14 years old was the functional equivalent of a sentence of life without parole for purposes of the constitutional protections in Miller; he was deprived of the constitutional guarantees afforded under Miller because the sentencing court failed to fully consider his diminished culpability and heightened capacity for change before imposing the hard 50 sentence on him.

Outcome
Reversed, sentence vacated in part, remanded.

LexisNexis® Headnotes

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

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

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

HN1[] **Fundamental Rights, Cruel & Unusual Punishment**

Children are different when it comes to sentencing, and youth and its attendant characteristics must be considered at the time a juvenile is sentenced to life imprisonment without the possibility of parole. The United States Supreme Court recognizes the mitigating qualities of youth and directs that judges in those cases consider a number of factors at sentencing, including immaturity and failure to appreciate risks and consequences; family and home environment; family and peer pressures; an inability to deal with police officers or prosecutors or the juvenile's own attorney; and the possibility of rehabilitation. Miller ultimately holds that the *Eighth Amendment to the United States Constitution*, *U.S. Const. amend. VIII*, prohibits a mandatory sentencing scheme that includes a punishment of life in prison without the possibility of parole for a juvenile offender who has been convicted of homicide if the sentencing process does not give the sentencing court the discretion to consider the juvenile offender's youth and individual attendant characteristics as part of the sentencing process.

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

Governments > Legislation > Interpretation

Criminal Law & Procedure > Habeas Corpus > Procedure > Pretrial Dismissals

HN2 **Standards of Review, De Novo Review**

When a district court summarily denies a *Kan. Stat. Ann. § 60-1507* (Supp. 2019) motion, appellate review of that ruling is de novo. The interpretation of statutes and Kansas Supreme Court rules involves questions of law reviewable de novo.

Criminal Law & Procedure > ... > Successive Petitions > Bars to Relief > Abuse of Writ

Evidence > Burdens of Proof > Allocation

HN3 **Bars to Relief, Abuse of Writ**

A court is not required to entertain successive motions for similar relief on behalf of the same prisoner. *Kan. Stat. Ann. § 60-1507(c)* (Supp. 2019). To avoid having a second or successive *§ 60-1507* motion dismissed as an abuse of remedy, the movant must establish exceptional circumstances. Exceptional circumstances are unusual events or intervening changes in the law that prevented the movant from raising the issue in a preceding *§ 60-1507* motion. The burden to make such a showing lies with the movant.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Time Limitations > Filing Date

Governments > Legislation > Statute of Limitations > Time Limitations

HN4 **Time Limitations, Filing Date**

The one-year time limit may be extended by the court only to prevent a manifest injustice. *Kan. Stat. Ann. § 60-1507(f)(2)* (Supp. 2019). The Kansas Legislature limits the factors a court may consider when determining whether the manifest injustice exception applies to (1) a movant's reasons for the failure to timely file the motion or (2) a movant's claim of actual innocence.

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

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

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

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN5 **Fundamental Rights, Cruel & Unusual Punishment**

In Miller, the United States Supreme Court holds that the *Eighth Amendment to the United States Constitution*, *U.S. Const. amend. VIII*, forbids a sentencing scheme that mandates life in prison without the possibility of parole for a juvenile offender who has been convicted of homicide. The Supreme Court requires only that a sentencer follow a certain process, considering an offender's youth and attendant characteristics, before imposing a particular penalty.

Miller does not prohibit a sentencing scheme that includes a punishment of life in prison without the possibility of parole for a juvenile offender who has been convicted of homicide so long as the court considers a juvenile offender's youth and individual attendant characteristics as part of the sentencing process. A sentence of life without parole should only be imposed on the rare juvenile offender whose crime reflects irreparable corruption.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Governments > Courts > Judicial Precedent

HN6 **Sentencing, Age & Term Limits**

The United States Supreme Court's holding in Miller is retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided.

Criminal Law & Procedure > Sentencing > Ranges

HN7 **Sentencing, Ranges**

The United States Supreme Court's holding in Miller applies to both mandatory and discretionary sentences alike.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

HN8 **Sentencing, Age & Term Limits**

United States Supreme Court precedent now firmly establishes that children are constitutionally different from adults for purposes of sentencing. Because juveniles lack maturity, are more vulnerable to negative influences, and have characters that are less well formed, they are less deserving of the most severe punishments than adults. For the same reasons, the penological justifications for a sentence of life without parole are dramatically weakened for juveniles.

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

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN9 **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment to the United States Constitution*, *U.S. Const. amend. VIII*, permits sentencing a juvenile defendant to life without parole only after a court affirmatively considers the juvenile's diminished culpability and heightened capacity for change and then specifically determines that the juvenile is one of the rare juvenile offenders whose crime reflects irreparable corruption.

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

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN10 **Fundamental Rights, Cruel & Unusual Punishment**

The rule recognized in Miller is not about policing formalistic distinctions in state law between mandatory and non-mandatory sentences. Instead, it is a constitutional guarantee designed to protect individual rights by ensuring that any punishment imposed on a certain class of offenders satisfies the proportionality requirements of the *Eighth Amendment to the United States Constitution*, *U.S. Const. amend. VIII*. So when an individual offender falls within the class, the question is not whether a sentencing court has an opportunity to make the constitutionally required inquiry but whether it seized that opportunity and actually provided the individual with the protections that the Constitution requires.

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

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN11 **Fundamental Rights, Cruel & Unusual Punishment**

Based on the constitutional principles articulated by the United States Supreme Court in Miller and Montgomery, the *Eighth Amendment to the United States Constitution*, *U.S. Const. amend. VIII*, prohibits sentencing a juvenile to life without parole unless he or she is the rare juvenile offender whose crime reflects irreparable corruption and that the prohibition applies regardless of whether the sentencing scheme is construed as mandatory or discretionary. No matter how a state characterizes its sentencing scheme, and no matter what procedures it provides, that scheme must give effect to Miller's substantive holding to be constitutional. So even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

HN12 **Sentencing, Age & Term Limits**

In Graham, the United States Supreme Court holds that children convicted of non-homicide offenses cannot be sentenced to life without parole and must have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Disposition

Criminal Law & Procedure > Juvenile Offenders > Sentencing

HN13 **Juvenile Proceedings, Disposition**

Miller and Montgomery mandate that states must provide a juvenile convicted of homicide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation except in the rarest of instances where the child is found to exhibit such irretrievable depravity that rehabilitation is impossible.

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

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

HN14 **Fundamental Rights, Cruel & Unusual Punishment**

Because the United States Supreme Court counsels against irrevocably sentencing juveniles to a lifetime in prison without consideration of the Miller factors, a sentence that fails to provide an opportunity for release at a meaningful point in a juvenile's life triggers protections under the *Eighth Amendment to the United States Constitution*, *U.S. Const. amend. VIII*, regardless of whether it is labeled life without parole, life with parole, or a term of years.

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

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN15 **Fundamental Rights, Cruel & Unusual Punishment**

A sentence expressed as a term of years that fails to provide an opportunity for release at a meaningful point in a juvenile's life triggers the protections under the

Eighth Amendment to the United States Constitution, *U.S. Const. amend. VIII*, announced in Miller.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Penalties

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > ... > Murder > Attempted Murder > Penalties

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

HN16 **Sentencing, Age & Term Limits**

The constitutional protections afforded under Miller are triggered when a juvenile offender convicted of premeditated first-degree murder is subject to a sentence for a term of years that is the functional equivalent to a sentence of life without parole.

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Sentences

HN17 **Postconviction Proceedings, Motions to Vacate Judgment**

Under *Kan. Stat. Ann. § 60-1507(a)* (Supp. 2019), a prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States may move the court which imposed the sentence to vacate, set aside, or correct the sentence. If the court finds that the constitutional rights of the prisoner have been denied or infringed upon so as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence said prisoner or grant a new trial or correct the sentence as may appear appropriate. *Kan. Stat. Ann. § 60-1507(b)*.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Court's Authority

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Sentences

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN18 **Corrections, Modifications & Reductions, Court's Authority**

A district court's sentence is final when initially pronounced from the bench. District courts generally are prohibited from modifying sentences that have not been vacated by an appellate court. But the plain language of *Kan. Stat. Ann. § 60-1507* (Supp. 2019) expressly provides a district court with the authority to vacate a sentence or provide other appropriate relief.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

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

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN19 **Sentencing, Age & Term Limits**

In Miller, the United States Supreme Court holds that a juvenile defendant may be sentenced to life imprisonment without parole but only if the sentencing court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation. The sentencing court may make that

decision only after considering the defendant's youth and its attendant characteristics. Those characteristics include: (1) consideration of the juvenile offender's chronological age and its hallmark features, among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (2) consideration of the family and home environment that surrounds the juvenile offender, and from which the juvenile offender cannot usually extricate himself or herself, no matter how brutal or dysfunctional; (3) consideration of the circumstances of the homicide offense, including the extent of the juvenile offender's participation in the conduct and the way familial and peer pressures may have affected the juvenile offender; (4) consideration of the possibility that the juvenile offender might have been charged and convicted of a lesser offense if not for incompetencies associated with youth; and (5) consideration of the juvenile offender's prospects for rehabilitation.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Penalties

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > ... > Murder > Attempted Murder > Penalties

HN20 **Capital Punishment, Aggravating Circumstances**

Kan. Stat. Ann. § 21-6620(b), *(c)* (Supp. 2013) requires that a jury must find beyond a reasonable doubt that at least one aggravating circumstance exists and that the aggravating circumstances are not outweighed by any mitigating circumstances before the court can enhance the sentence of a defendant convicted of first-degree premeditated murder from a hard 25 to a hard 50 sentence.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

Criminal Law & Procedure > Sentencing > Appeals > Legality Review

HN21 **Corrections, Modifications & Reductions, Illegal Sentences**

A court may correct an illegal sentence at any time while the defendant is serving such sentence. *Kan. Stat. Ann. § 22-3504(a)* (Supp. 2019). Whether a sentence is illegal under *§ 22-3504* is a question of law over which an appellate court has unlimited review.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

HN22 **Corrections, Modifications & Reductions, Illegal Sentences**

A sentence is illegal under *Kan. Stat. Ann. § 22-3504* (Supp. 2019) when: (1) it is imposed by a court without jurisdiction; (2) it does not conform to the applicable statutory provisions, either in character or punishment; or (3) it is ambiguous with respect to the time and manner in which it is to be served.

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Sentencing > Supervised Release

HN23 **Postconviction Proceedings, Parole**

An inmate who has received an off-grid indeterminate life sentence can leave prison only if the Kansas Prisoner Review Board grants the inmate parole. Therefore, a sentencing court has no authority to order a term of post-release supervision in conjunction with an off-grid indeterminate life sentence.

Syllabus

SYLLABUS BY THE COURT

1. The *Eighth Amendment to the United States Constitution* prohibits a mandatory sentencing scheme

that includes a punishment of life in prison without the possibility of parole for a juvenile homicide offender if the sentencing process does not give the sentencing court discretion to consider a juvenile offender's youth and individual attendant characteristics as part of the sentencing process.

2. The constitutional protections afforded under *Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*, are triggered regardless of whether a sentencing scheme is mandatory or discretionary.

3. The constitutional protections afforded under *Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*, are triggered when a juvenile offender convicted of premeditated first-degree murder is subject to a sentence for a term of years that is the functional equivalent to a sentence of life without parole.

4. A hard 50 term of years sentence is the functional equivalent to a sentence of life without parole for purposes of applying the constitutional protections afforded juvenile homicide offenders under *Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*.

5. In deciding whether imposition of a hard 50 sentence on a juvenile offender convicted of premediated first-degree **[*2]** murder is constitutionally disproportionate in violation of the *Eighth Amendment to the United States Constitution*, the sentencing court must consider the offender's youth and attendant characteristics, including the child's diminished culpability and heightened capacity for change.

Counsel: Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, for appellant.

Daniel G. Obermeier, assistant district attorney, Mark A. Dupree Sr., district attorney, and Derek Schmidt, attorney general, for appellee.

Judges: Before STANDRIDGE, P.J., HILL and ATCHESON, JJ.

Opinion by: STANDRIDGE

Opinion

STANDRIDGE, J.: Ronell Williams committed a very serious, violent crime when he was 14 years old and, as a result, was convicted of two counts of premeditated first-degree murder arising from the death of two victims. He is serving two concurrent life sentences without the possibility of parole for 50 years (hard 50). Williams will spend at least a half century in jail before he is eligible to be considered for release.

When the sentences originally were imposed, the trial judge did not consider the characteristics and circumstances attendant to Williams' age. ***HN1***[⬆] In the past decade, however, the United States Supreme Court sent a clear message in that regard: "children are different" when it **[*3]** comes to sentencing, and "youth and its attendant characteristics" must be considered at the time a juvenile is sentenced to life imprisonment without the possibility of parole. *Miller v. Alabama, 567 U.S. 460, 465, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*. The Supreme Court recognized the mitigating qualities of youth and directed that judges in those cases consider a number of factors at sentencing, including immaturity and "failure to appreciate risks and consequences"; "family and home environment"; family and peer pressures; an "inability to deal with police officers or prosecutors" or the juvenile's own attorney; and "the possibility of rehabilitation." *567 U.S. at 477-78*. The *Miller* Court ultimately held that the *Eighth Amendment to the United States Constitution* prohibits a mandatory sentencing scheme that includes a punishment of life in prison without the possibility of parole for a juvenile offender who has been convicted of homicide if the sentencing process does not give the sentencing court the discretion to consider a juvenile offender's youth and individual attendant characteristics as part of the sentencing process. *567 U.S. at 489*.

Citing *Miller* and the sentencing court's failure to consider the characteristics and circumstances attendant to his age, Williams brings this *K.S.A. 60-1507* motion challenging his hard 50 sentence as constitutionally **[*4]** disproportionate under the *Eighth Amendment*. In response, the State argues the holding in *Miller* is inapplicable to the facts of this case because Williams' hard 50 sentence is not equivalent to life without parole and was imposed under a discretionary sentencing scheme. For the reasons stated below, however, we hold (1) the constitutional protections afforded under *Miller* are triggered regardless of

whether the sentencing scheme is mandatory or discretionary, (2) Williams' hard 50 sentence is the functional equivalent of a sentence of life without parole for purposes of the constitutional protections in *Miller*, and (3) Williams was deprived of the constitutional guarantees afforded under *Miller* because the sentencing court failed to fully consider his diminished culpability and heightened capacity for change before imposing the hard 50 sentence on him. As a result, we reverse and remand the case, with specific directions, for resentencing on the premeditated first-degree murder convictions. We also vacate the part of Williams' sentence imposing lifetime postrelease supervision.

FACTS

Highly summarized, the essential facts presented at trial to support the underlying criminal charges against Williams **[*5]** are fairly straightforward. On August 3, 1999, Williams and his twin brother, age 14, stole a gun from a residence and walked away from the crime. After proceeding about a block, they saw Wilbur Williams in his front yard on the way to his mailbox. The brothers forced Wilbur back inside his house where they held him and his wife Wilma prisoner while searching the house for items to steal. Williams' twin brother left the house to drive the victim's vehicle around to the front of the house. While his brother was moving the vehicle, Williams shot and killed Wilbur and Wilma. The victims are not related to the brothers.

The district court authorized the State to prosecute Williams as an adult pursuant to K.S.A. 1999 Supp. 38-1636(f)(1), and a jury later convicted Williams of two counts premeditated first-degree murder, one count aggravated robbery, and one count aggravated burglary. The default sentence for premeditated first-degree murder was life without the possibility of parole for 25 years (hard 25). See K.S.A. 1999 Supp. 21-4706(c); K.S.A. 1999 Supp. 22-3717(b)(1). The sentence was enhanced to a hard 50 sentence if the sentencing judge found that one or more aggravating circumstances existed and that the aggravators were not outweighed by mitigating circumstances. K.S.A. 1999 Supp. 21-4635(c). After **[*6]** hearing the arguments of counsel and the statements from individuals in support of Williams and from the victims' family, the court found that one or more of the statutory aggravating circumstances existed and that the aggravating circumstances were not outweighed by any existing mitigating circumstances. For each of the two first-degree murder charges, the district court imposed a hard 50 sentence. The court also imposed lifetime postrelease supervision. For the aggravated robbery and aggravated burglary convictions, the district court sentenced Williams to 59 months and 32 months, respectively. The court ordered all four sentences to run concurrently. Our Supreme Court affirmed Williams' convictions and sentences on March 19, 2004. State v. Williams, 277 Kan. 338, 85 P.3d 697 (2004).

On March 15, 2005, Williams filed his first motion for relief under K.S.A. 60-1507. See *Williams v. State, 206 P.3d 72, 2009 Kan. App. Unpub. LEXIS 1060, 2009 WL 1140260 (Kan. App. 2009)* (unpublished opinion). In it, Williams claimed his trial counsel was ineffective for failing to request a postinterview report from Dr. Jan Roosa, a clinical psychologist who testified on his behalf at trial. Williams argued counsel's deficient performance prejudiced him by severely limiting Dr. Roosa's ability to testify fully about his expert opinion. The district court held **[*7]** an evidentiary hearing but ultimately denied Williams relief, finding he failed to show that, but for counsel's deficient performance, the result of the trial would have been different. A panel of our court affirmed. See 2009 Kan. App. Unpub. LEXIS 1060, at *11, 2009 WL 1140260, at *8.

In 2012, the United States Supreme Court held in Miller, 567 U.S. at 489, that the Eighth Amendment prohibits a mandatory sentencing scheme that includes a punishment of life in prison without the possibility of parole for a juvenile offender who has been convicted of homicide if the sentencing process does not give the sentencing court the discretion to consider a juvenile offender's youth and individual attendant characteristics as part of the sentencing process. In 2016, the United States Supreme Court decided Montgomery v. Louisiana, 577 U.S. , 136 S. Ct. 718, 732, 193 L. Ed. 2d 599 (2016), which held that the legal principles announced in *Miller* are substantive and therefore retroactive in cases on collateral review.

On September 30, 2016, Williams filed a second pro se K.S.A. 60-1507 motion claiming the sentencing structure under which his hard 50 sentence was imposed violated *Miller*, which means his sentence is now unconstitutional under the Eighth Amendment. Specifically, Williams argued that because his hard 50 sentence is the practical equivalent of a life sentence without parole and it was imposed under **[*8]** a mandatory sentencing scheme, the constitutional findings in *Miller* require that his sentence be vacated and the case remanded so the court can consider his youth and attendant characteristics before resentencing

him. The district court did not reach the merits of Williams' argument and dismissed the habeas motion as untimely and successive.

ANALYSIS

Williams claims the district court erred by summarily denying his motion on procedural grounds because he sufficiently established the manifest injustice and exceptional circumstances necessary to justify his untimely and successive filing. Assuming we find in his favor on this procedural claim of error, Williams asks us to find in his favor on the merits of his claims: that his hard 50 sentence must be vacated and the matter remanded for a new sentencing hearing with directions for the court to consider his youth and its attendant characteristics as set forth in *Miller* before imposing a new sentence. Williams also claims the district court erred by imposing lifetime postrelease supervision as part of his sentence for the premeditated first-degree murder convictions. We address each of Williams' claims in turn.

A. *Summary dismissal on procedural* ***[*9]*** *grounds*

The district court summarily denied Williams' K.S.A. 60-1507 motion on procedural grounds, finding the 2016 motion was successive to his 2005 habeas corpus motion and untimely filed. See K.S.A. 2019 Supp. 60-1507(c), (f). But Williams argues that the Supreme Court's decision in *Miller* is an intervening change in the law that constitutes an exceptional circumstance justifying our consideration of a successive motion. Williams also argues that the one-year time limit should be extended by the court to prevent a manifest injustice; specifically, that the untimely nature of his motion should be excused because *Miller*—the case providing substantive support for the 60-1507 claim that his sentence constitutes cruel and unusual punishment—was not decided until 2012 and was not given retroactive effect until the Supreme Court decided *Montgomery* in 2016.

1. *Exceptional circumstances*

HN2[] When a district court summarily denies a K.S.A. 60-1507 motion, appellate review of that ruling is de novo. See Thuko v. State, 310 Kan. 74, 80, 444 P.3d 927 (2019). The interpretation of statutes and Supreme Court rules involves questions of law reviewable de novo. Stewart v. State, 310 Kan. 39, 43, 444 P.3d 955 (2019).

HN3[] A court is not required to entertain successive motions for similar relief on behalf of the same prisoner. K.S.A. 2019 Supp. 60-1507(c). Nevertheless, our Supreme Court "has decades **[*10]** of caselaw holding that K.S.A. 60-1507's prohibition on successive motions is subject to exceptions." Nguyen v. State, 309 Kan. 96, 107, 431 P.3d 862 (2018). "To avoid having a second or successive K.S.A. 60-1507 motion dismissed as an abuse of remedy, the movant must establish exceptional circumstances." Beauclair v. State, 308 Kan. 284, 304, 419 P.3d 1180 (2018). But cf. Nguyen, 309 Kan. at 108 ("[A] plain reading of [*Supreme Court Rule 183(d)* on successive motions] would suggest that a district court is permitted to decline to consider a successive motion *only* 'when . . . justice would not be served by reaching the merits of the subsequent motion.'"). See *Supreme Court Rule 183(d)* (2020 Kan. S. Ct. R. 223). "'Exceptional circumstances are unusual events or intervening changes in the law that prevented the defendant [from] raising the issue in a preceding [K.S.A.] 60-1507 motion.' The burden to make such a showing lies with the movant. [Citations omitted.]" Beauclair, 308 Kan. at 304.

Applying the legal principles set forth in Beauclair to the facts here, we necessarily conclude that the Supreme Court's decisions in Miller and *Montgomery* are intervening changes in the law under which Williams can now claim an error affecting his constitutional rights and therefore constitute exceptional circumstances justifying our consideration of Williams' second K.S.A. 60-1507 motion. See Dunlap v. State, 221 Kan. 268, 270, 559 P.2d 788 (1977). Given Williams could not have raised a claim that his **[*11]** hard 50 sentence was cruel and unusual punishment until 2016—after *Montgomery* made *Miller* retroactive—we also conclude that justice would be served by reaching the merits of the motion, which excludes his successive claim from the requirement in *Rule 183(d)* that the court not consider it. See *Rule 183(d)* (court may not consider second or successive motion for relief by same movant when ground for relief was determined adversely to movant on merits in prior motion and when justice would not be served by reaching merits of subsequent motion); see also Littlejohn v. State, 310 Kan. 439, 444-45, 447 P.3d 375 (2019) (whether justice would be served by reaching merits of successive motion is part of statutorily driven analysis of whether exceptional circumstances exist).

2. *Manifest injustice*

The mandate in Williams' direct appeal was issued on

April 15, 2004. Williams filed his second habeas motion in September 2016, well past the one-year time limit. HN4[↑] The one-year time limit "may be extended by the court only to prevent a manifest injustice." K.S.A. 2019 Supp. 60-1507(f)(2). Effective July 1, 2016, the Legislature amended subsection (f)(2) and limited the factors a court may consider when determining whether the manifest injustice exception applies to "(1) a movant's reasons for the failure to timely file the motion . **[*12]** . . or (2) a movant's claim of actual innocence." White v. State, 308 Kan. 491, 496, 421 P.3d 718 (2018). We apply the amended statute to Williams because it was in effect when he filed his second habeas motion.

Williams argues his reason for failing to file a timely motion establishes the required manifest injustice. The following chronology is relevant to Williams' argument:

> • On June 25, 2012, the United States Supreme Court decided *Miller*, which held that mandatory life imprisonment without parole for offenders who committed homicide crimes as juveniles violates the Eighth Amendment's prohibition on cruel and unusual punishments.
>
> • On June 5, 2015, the Kansas Supreme Court applied *Miller* to a case on direct appeal, holding that mandatory lifetime postrelease supervision for juveniles who have committed and are later convicted of aggravated indecent liberties categorically constitutes cruel and unusual punishment. See State v. Dull, 302 Kan. 32, 35, 351 P.3d 641 (2015).
>
> • On January 27, 2016, the United States Supreme Court decided *Montgomery*, which held that *Miller* applies retroactively on collateral review of a prisoner's sentence.
>
> • On September 30, 2016, Williams filed his second K.S.A. 60-1507 motion.

From this chronology, we can see that Williams filed his second K.S.A. 60-1507 motion a little over eight months after the United **[*13]** States Supreme Court ruled that the holding in *Miller* applied retroactively and could be raised by a prisoner in a collateral attack of his or her sentence. Williams claims his motion must be considered on the merits to prevent a manifest injustice because he filed it less than one year after relief on his claim became a viable option. We agree and find the facts here present the rare and extraordinary circumstances that justify extending the one-year time limit to prevent a manifest injustice. See K.S.A. 2019 Supp. 60-1507(f)(2); Beauclair, 308 Kan. at 302 (Kansas' manifest injustice exception to procedural bar based on untimeliness should remain rare and be applied only in the extraordinary case).

In sum, we conclude that the intervening change in the law as set forth in Miller and made retroactive in *Montgomery* constitutes a manifest injustice and extraordinary circumstances to justify the untimely and successive nature of Williams' motion under the specific facts presented in this case. Based on our conclusion, we move on to consider the merits of Williams' substantive claims for relief.

B. *The constitutionality of Williams' hard 50 sentence under the rule in* Miller

Williams claims his hard 50 sentence violates the Eighth Amendment's prohibition on cruel **[*14]** and unusual punishments because it was imposed under a sentencing structure that has since been deemed unconstitutional under *Miller*. To provide the proper context for our analysis of Williams' arguments, we start by reviewing the evolution of United States Supreme Court caselaw on issues relating to life sentences for juvenile offenders.

In 1988, the Supreme Court held that the execution of a person under the age of 16 violated the Eighth Amendment's prohibition against cruel and unusual punishment. Thompson v. Oklahoma, 487 U.S. 815, 838, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988). The Court explained that "contemporary standards of decency" inform against executing a person who was under 16 years of age at the time of his or her offense. 487 U.S. at 823. In addition to societal standards, the Court also relied on its past cases for the proposition that adolescents as a class are less mature and responsible than adults; therefore, less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. 487 U.S. at 835.

In 1989, the Supreme Court again referred to contemporary "standards of decency" but came to a different conclusion in holding that the execution of persons who were 16 or 17 years old at the time of their offense did not violate the Eighth Amendment's prohibition against **[*15]** cruel and unusual punishment. Stanford v. Kentucky, 492 U.S. 361, 380, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989). In support of its conclusion, the *Stanford* Court stated it was not persuaded by evidence that 16- and 17-year-old

juveniles possess less developed cognitive skills than adults, are less likely to fear death, or are less mature and responsible. Accordingly, the Court held juveniles who committed crimes when in this narrow age group were as morally blameworthy as adults. *492 U.S. at 377-78*.

In 2005, the Supreme Court overruled *Stanford* and held that the *Eighth Amendment*'s prohibition against "cruel and unusual punishments" categorically precludes the Court from imposing the death penalty on juveniles who committed the offense charged when they were less than 18 years old. *Roper v. Simmons, 543 U.S. 551, 578-79, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*. In support of its holding, the Court pointed to evidence of a developing consensus among the states of "evolving standards of decency" indicating that society had become opposed to the death penalty when the offender was under the age of 18. *543 U.S. at 561, 564-75*. The Court found the source of this consensus was rooted in the undisputed and long held belief that there are major differences between juveniles and adults. The Court found persuasive certain scientific studies examining common characteristics of juvenile offenders. From these studies, **[*16]** the Court recognized that juveniles typically possess three characteristics that make them different than adults and, consequently, less blameworthy: juveniles often are more impetuous and reckless, they often are more vulnerable to negative influences and peer pressure, and their traits are more transitory and less fixed. *543 U.S. at 569-70*. In light of these characteristics, the Court held the usual sentencing justifications for the death penalty—retribution and deterrence—did not provide adequate justification for imposing the death penalty on juvenile offenders. *543 U.S. at 571-72*. The Court concluded that the differences between juveniles and adults "are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *543 U.S. at 572-73*.

In 2010, the Supreme Court extended its reasoning in *Roper* to overturn the sentence of a juvenile offender sentenced to life imprisonment without parole. *Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*. Unlike the holding in *Roper*, the *Graham* Court did not conclude that this punishment was unconstitutional for all juvenile offenders. Instead, the Court drew a distinction between juveniles convicted of homicide and those convicted of offenses other than homicide. The Court held that **[*17]** a sentence of life without parole violates the *Eighth Amendment* only when imposed on a juvenile offender who *did not* commit homicide. *Graham, 560 U.S. at 82*. In doing so, the Court applied the categorical approach to assess the limits of what constitutes cruel and unusual punishment under the *Eighth Amendment*.

The *Graham* Court acknowledged that its cases previously had considered two distinct subsets when adopting categorical rules to define *Eighth Amendment* standards: "one considering the nature of the offense, the other considering the characteristics of the offender." *560 U.S. at 60*.

> "With respect to the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, or whose intellectual functioning is in a low range. [Citations omitted.]" *560 U.S. at 60-61*.

The *Graham* Court began its categorical *Eighth Amendment* proportionality analysis by looking to '"the evolving standards of decency that mark the progress of a maturing society."' *560 U.S. at 58, 62*. In addition to evolving standards of decency, the Court held an *Eighth Amendment* proportionality analysis must also include **[*18]** "consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals." *560 U.S. at 67*. The Court reiterated its analysis in *Roper* that juveniles have "lessened culpability" in comparison to adults. *560 U.S. at 68*. Noting that developments in psychology and brain science continued to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control—the Court reasoned that transient rashness, proclivity for risk, and inability to assess consequences all lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his or her deficiencies will be reformed. *Graham, 560 U.S. at 67-69*. The Court also noted that life without parole is an "especially harsh" sentence for a juvenile defendant as it condemns the juvenile to a larger percentage of the individual's life in prison than a much older individual who receives the same sentence. *560 U.S. at 70*.

The Supreme Court then turned to the "penological

justifications" for imposing **[*19]** a life without parole sentence on juvenile nonhomicide offenders. 560 U.S. at 71. The Court discussed the four common purposes of sentencing schemes: retribution, deterrence, incapacitation, and rehabilitation. 560 U.S. at 71-74. It found retribution was insufficient as justification for a life sentence without parole because "'[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender,'" and that "'the case for retribution is not as strong with a minor as with an adult.'" 560 U.S. at 71. Deterrence could not justify the sentence because the characteristics that make juveniles more likely to make bad decisions also make them less likely to consider the possibility of punishment, which is a prerequisite to a deterrent effect. Incapacitation could not support the sentence because of the difficulty in determining whether a juvenile defendant is incorrigible at the time of sentencing—i.e., "'to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" 560 U.S. at 72-73. Finally, rehabilitation could not justify the sentence because it denies **[*20]** the prisoner the right to "reenter the community [based on] an irrevocable judgment about that person's value and place in society." 560 U.S. at 74.

After considering the especially harsh nature of a sentence of life without parole for juvenile offenders, the lack of penological justifications for the sentencing practice, and the characteristics of youth outlined in *Roper*, the Supreme Court considered several potential procedural solutions. Graham, 560 U.S. at 68-79. The Court concluded that a "categorical rule" was needed to "give[] all juvenile nonhomicide offenders a chance to demonstrate maturity and reform," and held that the Eighth Amendment forbids a sentence of life without parole for a juvenile offender that did not commit homicide. 560 U.S. at 68-82. But the Court noted that its holding does not mean that a state is "required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." 560 U.S. at 79, 82. The Court ultimately held that the Eighth Amendment does not prohibit the states from imposing a life sentence on a juvenile nonhomicide offender so long as the state provides some meaningful opportunity for release during the offender's lifetime based on the offender's demonstrated maturity and rehabilitation, i.e., a meaningful possibility of parole. **[*21]** 560 U.S. at 82.

In 2012—two years after *Graham*—the Supreme Court applied some of the same reasoning to hold that the Eighth Amendment prohibits the punishment of life in prison without the possibility of parole for a juvenile offender *convicted of homicide* under a mandatory sentencing scheme. Miller, 567 U.S. at 489. The Court did not impose a categorical ban to sentencing a juvenile homicide offender to life in prison without the possibility of parole but imposed a requirement that the Court consider a juvenile offender's youth and individual attendant characteristics as part of the sentencing process. 567 U.S. at 489.

At issue in *Miller* was an Eighth Amendment challenge in a consolidated appeal involving two 14-year-old offenders who received mandatory sentences of life imprisonment without the possibility of parole based on their single murder convictions. In both defendants' cases, there was only one possible punishment for the murders: a statutorily mandated sentence of life without the possibility of parole. Based on the mandatory and lifetime nature of those sentences, the Court determined that the sentences implicated "two strands of precedent reflecting [its] concern with proportionate punishment." 567 U.S. at 470.

The Supreme Court began with the first strand of precedent **[*22]** by reaffirming the foundational principle articulated in *Roper* and *Graham*: "children are constitutionally different from adults for purposes of sentencing [b]ecause juveniles have diminished culpability and greater prospects for reform." Miller, 567 U.S. at 471. The Court concluded that the mandatory nature of the sentencing schemes infringe on the constitutional principles announced in *Roper* and *Graham* because the "laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." Miller, 567 U.S. at 474.

With regard to the second strand of precedent that deals with the lifetime nature of the punishment, the Court stated that *Graham*'s treatment of juvenile life without parole sentences as analogous to capital punishment requires individualized sentencing where the judge or jury can assess any mitigating factors—including the mitigating qualities of youth—to ensure that the most severe penalty "is reserved only for the most culpable defendants committing the most serious offenses." 567 U.S. at 475-76. Relying on the analysis in *Graham*, the Supreme Court concluded that the flaw with a mandatory life sentence without parole was that it "preclude[s] a sentencer from taking **[*23]** [into] account . . . an offender's age and the wealth of characteristics and circumstances attendant to it," and "disregards the

possibility of rehabilitation even when the circumstances most suggest it." *Miller, 567 U.S. at 476-78*.

HN5[↑] Dovetailing the two strands of precedent, the Supreme Court ultimately held that the *Eighth Amendment* forbids a sentencing scheme that mandates life in prison without the possibility of parole for a juvenile offender who has been convicted of homicide. The mitigating qualities of youth and its attendant characteristics, the harsh length of the term of imprisonment, and the mandatory nature of the sentencing scheme were key to the Court's decision. Unlike *Roper* and *Graham*, however, the Court expressly declined to impose a categorical ban on sentencing juvenile homicide offenders to life without parole. Instead, the Court required "only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller, 567 U.S. at 483*. So *Miller* does not prohibit a sentencing scheme that includes a punishment of life in prison without the possibility of parole for a juvenile offender who has been convicted of homicide so long as the Court considers a juvenile **[*24]** offender's youth and individual attendant characteristics as part of the sentencing process. *567 U.S. at 479-80*. The Court noted that "sentencing juveniles to this harshest possible penalty will be uncommon," because the sentencer must be able to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *567 U.S. at 479-80*. And the Court clarified that a sentence of life without parole should only be imposed on "the rare juvenile offender whose crime reflects irreparable corruption." *567 U.S. at 479-80*.

Most recently, the Supreme Court decided that **HN6**[↑] the holding in *Miller* "is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided." *Montgomery, 136 S. Ct. at 725*. The State of Louisiana argued that the rule announced in *Miller* was procedural in nature and therefore not retroactive to juvenile offenders whose sentences were final when *Miller* was decided. But the Court disagreed. In its analysis, the Court acknowledged that *Miller*'s holding had both a substantive and a procedural component. The Court deemed *Miller*'s substantive holding to be that mandatory life without parole is an excessive sentence for children whose crimes reflect transient **[*25]** immaturity. But the Court found *Miller*'s requirement that the sentencer consider a juvenile offender's youth and attendant characteristics before deciding that life without parole is a proportionate sentence was simply an attendant procedural process that was necessary to implement the underlying substantive rights under the *Eighth Amendment*. *136 S. Ct. at 734-35*. The Court stated that "[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish" and the required "hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *136 S. Ct. at 735*. The Court ultimately held "that *Miller* announced a substantive rule of constitutional law" that must be applied retroactively in its entirety. *136 S. Ct. at 736*.

Having provided the legal framework for our forthcoming analysis, we turn to the merits of Williams' claim that the mandatory hard 50 life sentence imposed on him as a juvenile constitutes cruel and unusual punishment under the legal principles announced in *Miller*. Williams sets forth three **[*26]** arguments to support his claim. First, Williams argues the constitutional protections afforded under *Miller* are triggered in this case because his hard 50 sentence was imposed under a mandatory sentencing scheme. Second, he argues the constitutional protections afforded under *Miller* are triggered in this case because his hard 50 sentence is the functional equivalent of a life without parole sentence. Third, Williams argues he was deprived of the constitutional guarantees afforded under *Miller* because the sentencing court failed to fully consider his diminished culpability and heightened capacity for change before imposing the hard 50 sentence on him.

1. *The mandatory nature of the hard 50 sentencing scheme*

Williams argues the mandatory nature of the framework under which he was sentenced triggers the constitutional protections afforded under *Miller*. The State disagrees arguing that *Miller* does not apply in this case because the hard 50 sentencing framework provided the court with discretion to determine whether the aggravating circumstances in Williams' case outweighed any mitigating circumstances. See *K.S.A. 1999 Supp. 21-4635(c)* (if sentencing court finds aggravating circumstances are not outweighed by any mitigating **[*27]** circumstances, court shall impose hard 50 sentence instead of hard 25 sentence). We find it unnecessary to resolve this dispute between the parties because, for the reasons stated below, we conclude *Miller* applies regardless of whether a sentencing scheme is mandatory or discretionary.

The states are split over whether the constitutional protections afforded by *Miller* apply when a juvenile defendant is sentenced under a discretionary sentencing framework. There was some hope that the split would be resolved by the United States Supreme Court in the Washington D.C. sniper case, *Mathena v. Malvo*, No. 18-217 (U.S.), which was argued before the Court on October 16, 2019. But before an opinion was issued, Virginia enacted new legislation allowing prisoners serving life sentences without parole for crimes committed as juveniles to be eligible for parole after 20 years of incarceration. The parties in *Malvo* stipulated to dismissal of the case, and the Supreme Court dismissed the appeal on February 26, 2020. *Mathena v. Malvo, U.S., 140 S. Ct. 919, 206 L. Ed. 2d 250 (2020)*. Just over two weeks later, the Court granted certiorari in the case of *Jones v. Mississippi*, No. 18-1259 (U.S.), in which a distinct but related issue was presented: whether *Miller* and **[*28]** *Montgomery* require the sentencing court to find that a juvenile homicide offender is permanently incorrigible before sentencing him or her to a sentence of life without parole. *140 S. Ct. 1293, 206 L. Ed. 2d 374 (2020)*.

So for now, the states remain divided. A majority of states conclude in published opinions that both mandatory and discretionary life sentences for juvenile defendants are disproportionate and violate the *Eighth Amendment* under *Miller* unless the sentencing court considers youth and its attendant characteristics. See *Landrum v. State, 192 So. 3d 459, 466-67 (Fla. 2016)*; *People v. Holman, 2017 IL 120655, 418 Ill. Dec. 889, 91 N.E.3d 849, 861-62 (Ill. 2017)*; *Steilman v. Michael, 2017 MT 310, 389 Mont. 512, 519, 407 P.3d 313 (2017)*; *Garcia v. State, 2017 ND 263, 903 N.W.2d 503, 509 (N.D. 2017)*; *Luna v. State, 2016 OK CR 27, 387 P.3d 956, 961 (Okla. Crim. App. 2016)*; *Aiken v. Byars, 410 S.C. 534, 544, 765 S.E.2d 572 (2014)*; see also *State v. Valencia, 241 Ariz. 206, 208-09, 386 P.3d 392 (2016)*; *People v. Gutierrez, 58 Cal. 4th 1354, 1360-61, 171 Cal. Rptr. 3d 421, 324 P.3d 245 (2014)*; *State v. Riley, 315 Conn. 637, 658, 110 A.3d 1205 (2015)*; *Veal v. State, 298 Ga. 691, 700-03, 784 S.E.2d 403 (2016)*; *Johnson v. State, 162 Idaho 213, 225, 395 P.3d 1246 (2017)*; *State v. Seats, 865 N.W.2d 545, 555-58 (Iowa 2015)*; *Diatchenko v. District Attorney, 466 Mass. 655, 668-71, 1 N.E.3d 270 (2013)* (concluding that discretionary scheme allowing imprisonment without parole for juvenile offender violates state constitution but relying on reasoning of *Graham* and *Roper* in so concluding); *State v. Zuber, 227 N.J. 422, 447, 152 A.3d 197 (2017)*; *State v. Young, 369 N.C. 118, 125-26, 794 S.E.2d 274 (2016)*; *State v. Long, 138 Ohio St. 3d 478, 483-84, 2014- Ohio 849, 8 N.E.3d 890 (2014)*; *White v. Premo, 365 Or. 1, 15-16, 443 P.3d 597 (2019)*; *Commonwealth v. Batts, 640 Pa. 401, 444, 163 A.3d 410 (2017)*; *State v. Ramos, 187 Wash. 2d 420, 440-44, 387 P.3d 650 (2017)*. Some of these courts first addressed the issue of whether the statutory schemes themselves were constitutionally valid before applying the rule in *Miller*. But regardless of the outcome on that issue, these courts ultimately applied the legal principles announced in *Miller* in cases where the trial court had at least some form of sentencing discretion.

A minority of states conclude in published opinions that *Miller* offers no protection if the sentencing court has even nominal discretion. **[*29]** See *Bell v. State, 2017 Ark. 231, 522 S.W.3d 788, 789 n.1 (Ark. 2017)*; *Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012)*; *State v. Williams, 862 N.W.2d 701, 703-04 (Minn. 2015)*; *State v. Nathan, 522 S.W.3d 881, 891 (Mo. 2017)*; *State v. Charles, 2017 SD 10, 892 N.W.2d 915, 920 (S.D. 2017)*; *Jones v. Commonwealth, 293 Va. 29, 40-42, 56-57, 795 S.E.2d 705 (2017)*.

HN7[] After due consideration, we agree with the majority of courts that conclude *Miller* applies to both mandatory and discretionary sentences alike. We see no constitutional reason why a juvenile with the mandated sentence of life should receive a *Miller* hearing, while a juvenile with the discretionary life sentence is deprived of the opportunity to have his or her "youth and attendant characteristics" taken into account. Both *Miller* and *Montgomery* support our conclusion.

HN8[] Supreme Court precedent now firmly establishes that "children are constitutionally different from adults for purposes of sentencing." *Miller, 567 U.S. at 471*. Because juveniles lack maturity, are more vulnerable to negative influences, and have characters that are less well formed, they "are less deserving of the most severe punishments" than adults. *Graham, 560 U.S. at 68* (citing *Roper, 543 U.S. at 569*). For the same reasons, the "penological justifications" for a sentence of life without parole are dramatically weakened for juveniles. *Miller, 567 U.S. at 472-74*. Applying these principles to a sentencing scheme that mandated life without parole, the *Miller* Court concluded that such a scheme "poses too great a risk of disproportionate punishment" to survive constitutional scrutiny. *567 U.S. at 479*. The Court continued: **[*30]**

> "[G]iven all we have said in *Roper, Graham*, and this decision about children's diminished culpability

> and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations omitted.]" *Miller, 567 U.S. at 479-80*.

The *Eighth Amendment* concerns expressed in *Miller* exist regardless of whether the juvenile in question was sentenced pursuant to a mandatory or discretionary sentencing scheme. True, *Miller* involved two juveniles sentenced to life without parole under mandatory sentencing schemes. But the reason the Court invalidated the sentences was not because the juveniles were sentenced under a mandatory sentencing scheme but because the sentencing court did not have an opportunity to distinguish between juveniles whose crimes reflect the transient immaturity of youth from those whose crimes reflect irreparable corruption. The reasoning in *Miller* makes clear that the **[*31]** mere existence of discretion, unguided by the factors relevant to the proportionality of sentences for young offenders, could not save a juvenile sentence of life without parole. ***HN9***[⬆] The *Eighth Amendment* permits sentencing a juvenile defendant to life without parole only after a court affirmatively considers the juvenile's "diminished culpability and heightened capacity for change" and then specifically determines that the juvenile is one of "the rare juvenile offender[s] whose crime reflects irreparable corruption." *Miller, 567 U.S. at 479-80*.

Montgomery later reinforced the rule in *Miller*. The Court reasoned that the *Miller* rule "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [Citation omitted.]" *Montgomery, 136 S. Ct. at 734*. ***HN10***[⬆] The rule recognized in *Miller* is not about policing formalistic distinctions in state law between mandatory and nonmandatory sentences. Instead, it is a constitutional guarantee designed to protect individual rights by ensuring that any punishment imposed on a certain "class of offenders" (juveniles) satisfies the *Eighth Amendment*'s proportionality requirements. See *Miller, 567 U.S. at 470*; see also *Roper, 543 U.S. at 560* (noting that *Eighth Amendment* "guarantees individuals **[*32]** the right not to be subjected to excessive sanctions"). So when an individual offender falls within the class, the question is not whether a sentencing court has an opportunity to make the constitutionally required inquiry but whether it seized that opportunity and actually provided the individual with the protections that the Constitution requires.

HN11[⬆] Based on the constitutional principles articulated by the United States Supreme Court in *Miller* and *Montgomery*, we hold that the *Eighth Amendment* prohibits sentencing a juvenile to life without parole unless he or she is "the rare juvenile offender whose crime reflects irreparable corruption" and that this prohibition applies regardless of whether the sentencing scheme is construed as mandatory or discretionary. No matter how a state characterizes its sentencing scheme, and no matter what procedures it provides, that scheme must "give[] effect to *Miller*'s substantive holding" to be constitutional. *Montgomery, 136 S. Ct. at 735*. So "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the *Eighth Amendment* for a child whose crime reflects 'unfortunate yet transient immaturity.'" *136 S. Ct. at 734* (quoting *Miller, 567 U.S. at 479*.)

2. *Does the rule announced in* Miller ***[*33]*** *apply to Williams' hard 50 sentence?*

Although acknowledging that the punishment at issue in the *Miller* case was a sentence of life without parole and not a hard 50 sentence, Williams claims the rule in *Miller* is triggered here because his hard 50 sentence is the functional equivalent of a sentence of life without parole. The State disagrees, arguing the *Miller* rule is applicable to only those juveniles who are sentenced to life without *any* opportunity for parole and Williams is eligible for parole after serving 50 years in prison. The parties' dispute requires us to resolve two separate issues. First, we must decide whether a sentence expressed as a term of years, like the hard 50 sentence at issue here, can ever be functionally equivalent to a sentence of life without parole for purposes of applying *Graham* and *Miller*. If so, we must decide whether the lengthy hard 50 sentence imposed here is equivalent to life without parole.

a. *Term of years as the functional equivalent of life without parole*

In support of its argument that *Miller* is inapplicable to any sentence other than one expressly characterized by the sentencing court as a life sentence *without parole*, the State notes that two **[*34]** panels of this court previously held the *Miller* analysis does not apply to a hard 50 sentence. See *Ellmaker v. State, No. 108,728,*

329 P.3d 1253, 2014 WL 3843076 (Kan. App. 2014) (unpublished opinion); *State v. Redmon, No. 113,145, 380 P.3d 718, 2016 WL 5344034 (Kan. App. 2016)* (unpublished opinion). The defendant in *Ellmaker* was convicted of premeditated first-degree murder committed when he was 17 years old. The sentencing court imposed a hard 50 sentence. After his conviction was affirmed on appeal, Ellmaker filed a K.S.A. 60-1507 motion claiming that his hard 50 sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment under *Miller* because it was the functional equivalent of a sentence of life without parole. The district court denied the motion, and a panel of our court affirmed. The court held the *Miller* analysis does not apply to a hard 50 sentence because it is not the literal or functional equivalent of a life sentence without parole. In support of its holding, the panel relied on "the explicit way in which the United States Supreme Court has distinguished life without parole sentences and the death penalty and set them apart from all other sentences." *Ellmaker, 329 P.3d 1253, 2014 WL 3843076, at *10*. Significantly, the panel did not consider the *Miller* case itself before ultimately holding that *Miller* did not apply. Instead, the panel limited its analysis to the categorical **[*35]** proportionality discussion in *Graham*.

Two years later, another panel of this court cited *Ellmaker* approvingly to hold that the *Miller* rule does not apply to a 732-month (61-year) aggregate sentence for rape, aggravated burglary, aggravated robbery, and aggravated intimidation of a witness because the aggregated sentence was not the functional or literal equivalent of a life sentence without parole. *Redmon, 380 P.3d 718, 2016 WL 5344034, at *6*. The *Redmon* panel acknowledged, however, that a split of authority on the issue had become more prevalent since *Ellmaker* was decided, with other jurisdictions concluding that the rationale set forth in *Graham* and *Miller* applies equally to both sentences of life without parole and sentences that are the functional equivalent of life without parole. Nevertheless, the panel ultimately relied on *Ellmaker* to hold that the rule in *Miller* did not apply to a hard 50 sentence. The panel did so without engaging in an analysis of the reasons provided by the *Ellmaker* panel for its decision or engaging in an analysis of the reasons for the mounting split in authority on the issue; the panel simply concluded it would be "reasonable" to go along with the holding in *Ellmaker* until the United States Supreme **[*36]** Court expressly resolved the issue. *380 P.3d 718, 2016 WL 5344034, at *6*.

For the reasons stated below, we respectfully disagree with both the analysis and the holdings in *Ellmaker* and *Redmon*. See *State v. Urban, 291 Kan. 214, 223, 239 P.3d 837 (2010)* (one panel not bound by decision of previous panel). "While we must carefully consider each precedent cited to us, we also must uphold our duty to correctly determine the law in each case that comes before us. In doing so, we sometimes find that we must respectfully disagree with the opinion of another panel." *Uhlmann v. Richardson, 48 Kan. App. 2d 1, 13, 287 P.3d 287 (2012)*.

In *Graham, Miller*, and *Montgomery*, the United States Supreme Court placed constitutional limits on sentences that may be imposed on children. **HN12**[↑] *Graham* held that children convicted of nonhomicide offenses cannot be sentenced to life without parole and must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *560 U.S. at 74-75, 82*. **HN13**[↑] *Miller* and *Montgomery* mandate that the states must provide a juvenile convicted of homicide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation except in the rarest of instances where the child is found to "exhibit[] such irretrievable depravity that rehabilitation is impossible." *Montgomery, 136 S. Ct. at 733*. In light of this mandate, one **[*37]** could not reasonably argue that a sentence fixed for a term of 100 years provides a meaningful opportunity for release, even though it is not characterized as a sentence of life without parole. So, at some point on the sentencing spectrum, a lengthy fixed sentence equates to a fixed life sentence without parole. **HN14**[↑] Because the Supreme Court, *136 S. Ct. at 733*, has "counsel[ed] against irrevocably sentencing [juveniles] to a lifetime in prison" without consideration of the *Miller* factors, we conclude a sentence that fails to provide an opportunity for release at a meaningful point in a juvenile's life triggers Eighth Amendment protections, regardless of whether it is labeled life without parole, life with parole, or a term of years. A contrary conclusion lacks support in reason and practice as it necessarily allows a sentencer to circumvent the Eighth Amendment prohibition against cruel and unusual punishment simply by expressing the sentence in the form of a lengthy term of numerical years rather than labeling for what it is: a life sentence without parole.

And although not a categorical proportionality claim, we find the discussion in *Graham* regarding the absence of any legitimate penological justification for a sentence of life without parole to be just as persuasive **[*38]** in the context of considering whether the rule in *Miller* is

triggered for a lengthy juvenile sentence for a term of years that is the functional equivalent of life without parole. See Graham, 560 U.S. at 71. The Supreme Court considered whether any theory of penal sanction could provide an adequate justification for sentencing a juvenile nonhomicide offender to life without parole and found none. The same test applied to a sentence of a lengthy term of years without eligibility for parole yields the same conclusion. The Graham Court's reasoning regarding retribution is equally applicable to a lengthy term-of-years sentence as it is to one labeled as "life." Sentences must directly relate to the personal culpability of the offender, which is diminished in the case of a juvenile offender who has not committed homicide. 560 U.S. at 71-72. In terms of deterrence, "'the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.'" 560 U.S. at 72. Regardless of what the punishment is, children are "less likely to take a possible punishment into consideration when making decisions," especially "when that punishment is rarely imposed." 560 U.S. at 72. There is no reason to believe **[*39]** that a juvenile would be deterred from crime depending on whether the sentence was life without parole or a number of years that is the functional equivalent of life without parole. Finally, there is no difference in terms of rehabilitation or incapacitation between two sentences that would both incarcerate the defendant for the functional equivalent of the defendant's life. Neither type of sentence contemplates the defendant returning to society for a period of time that is the functional equivalent of a term of life, either as a reformed citizen or as a potential threat.

Most courts that have considered the issue focus not on the label attached to a sentence but instead on whether imposing the sentence would violate the principles *Miller* and *Graham* sought to effectuate. See *Williams v. United States, 205 A.3d 837, 844 (D.C. 2019)*; Henry v. State, 175 So. 3d 675, 680 (Fla. 2015) ("[T]he *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of 'life in prison.'"); State v. Shanahan, 165 Idaho 343, 349-50, 445 P.3d 152, *cert. denied*, *140 S. Ct. 545, 205 L. Ed. 2d 345 (2019)*; People v. Reyes, 2016 IL 119271, 407 Ill. Dec. 452, 63 N.E.3d 884, 888 (Ill. 2016); State v. Null, 836 N.W.2d 41, 70-71 (Iowa 2013); Commonwealth v. Brown, 466 Mass. 676, 691 n.11, 1 N.E.3d 259 (2013); Zuber, 227 N.J. at 448; Ira v. Janecka, 2018- NMSC 027, 419 P.3d 161, 167 (N.M. 2018); State v. Moore, 149 Ohio St. 3d 557, 572-73, 2016- Ohio 8288, 76 N.E.3d 1127 (2016); Premo, 365 Or. at 12-13; Commonwealth v. Foust, 2018 PA Super 39, 180 A.3d 416, 438 (Pa. Super. Ct. 2018); Ramos, 187 Wash. 2d at 438-39; Bear Cloud v. State, 2014 WY 113, 334 P.3d 132, 144 (Wyo. 2014); see also Budder v. Addison, 851 F.3d 1047, 1059-60 (10th Cir. 2017); McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016); United States v. Jefferson, 816 F.3d 1016, 1020-21 (8th Cir. 2016) (although required to weigh statutory sentencing factors "as informed by" *Miller*'s Eighth Amendment jurisprudence, appellate court found no merit to defendant's substantive unreasonableness contention because sentencing court **[*40]** made individualized sentencing decision that took full account of distinctive attributes of youth); Moore v. Biter, 725 F.3d 1184, 1193-94 (9th Cir. 2013); People v. Caballero, 55 Cal. 4th 262, 268-69, 145 Cal. Rptr. 3d 286, 282 P.3d 291 (2012); Riley, 315 Conn. at 660-63; Brown v. State, 10 N.E.3d 1, 8 (Ind. 2014); Parker v. State, 119 So. 3d 987, 999 (Miss. 2013); Steilman, 389 Mont. at 519-20; State v. Finley, 427 S.C. 419, 426, 831 S.E.2d 158 (Ct. App. 2019), *reh'g denied* August 22, 2019.

In applying the rule in *Miller*, we note that some of these courts did not ultimately conclude that the term of years to which the offender was sentenced rose to the level of cruel and unusual punishment under the Eighth Amendment. But critical to the issue presented in answering our question—whether a sentence expressed as a term of years *can ever* be equivalent to a sentence of life without parole—all of the courts applied the legal principles announced in *Graham* and *Miller* to a term of years sentence. In constitutional terms, these courts both explicitly and implicitly agreed that the substantive protections afforded to juveniles in the mandatory life without parole context should similarly flow to juveniles who are sentenced to a term of years that is the functional equivalent of a sentence of life without parole. It stands to reason that, at least for the vast majority of juvenile offenders who are not deemed irredeemable, imposition of a sentence for a term of years that is the functional equivalent of life without parole unconstitutionally thwarts those **[*41]** juveniles' opportunities for release under both *Graham* and *Miller*.

HN15[↑] We are persuaded by our own analysis and the compilation of cases set forth above holding that a sentence expressed as a term of years that fails to provide an opportunity for release at a meaningful point in a juvenile's life triggers the Eighth Amendment protections announced in *Miller*. Nevertheless, we acknowledge that there is a split of authority among the states and the federal circuits on the issue. See United States v. Sparks, 941 F.3d 748, 753-54 (5th Cir. 2019), *cert. denied*, *140 S. Ct. 1281, 206 L. Ed. 2d 264 (2020)*;

Bunch v. Smith, 685 F.3d 546, 550-51 (6th Cir. 2012); State v. Ali, 895 N.W.2d 237, 247-48 (Minn. 2017); Mason v. State, 235 So. 3d 129, 134-35 (Miss. 2017); State v. Zimmerman, 2016- Ohio 1475, 63 N.E.3d 641, 647-48 (Ohio Ct. App. 2016); Lewis v. State, 428 S.W.3d 860, 863-65 (Tex. Crim. App. 2014); Diamond v. State, 419 S.W.3d 435, 440-41 (Tex. App. 2012); Vasquez v. Commonwealth, 291 Va. 232, 241-43, 781 S.E.2d 920 (2016); State v. Gutierrez, 2013 N.M. Unpub. LEXIS 20, 2013 WL 6230078, at *1-2 (N.M. 2013) (unpublished opinion); Grooms v. State, No. E2014-01228-CCA-R3-HC, 2015 Tenn. Crim. App. LEXIS 198, 2015 WL 1396474, at *4 (Tenn. Crim. App. 2015) (unpublished opinion); State v. Williams, 2014 WI App 16, 352 Wis. 2d 573, 842 N.W.2d 536, 2013 WL 6418971, at *2-3 (Wis. Ct. App. 2013) (unpublished opinion). Cf. Lucero v. People, 394 P.3d 1128, 1132-33, 2017 CO 49 (Colo. 2017) (finding that *Miller* does not apply in case where trial court imposed aggregate 84-year sentence on juvenile who committed multiple offenses); Veal v. State, 303 Ga. 18, 19-20, 810 S.E.2d 127 (2018) (declining to extend *Miller* in case where trial court imposed six consecutive life sentences plus 60 additional years on juvenile who committed multiple offenses); Nathan, 522 S.W.3d at 891 ("*Miller* has no application to Nathan's second-degree murder conviction, which does not call for mandatory life in prison without the possibility of parole, or to his multitude of nonhomicide convictions because *Miller* did not address the constitutional **[*42]** validity of consecutive sentences, let alone the cumulative effect of such sentences."); Johnson v. Commonwealth, 292 Va. 772, 780-82, 793 S.E.2d 326 (2016) (finding that *Miller* does not apply in cases where juvenile is ordered to serve aggregate life sentence and has opportunity to be considered for parole).

While acknowledging the split in authority, we find the conclusion in these cases—that *Miller* categorically does not apply to a sentence expressed as a term of years—is inconsistent with the reasoning of *Roper, Graham*, and *Miller*, in which the Supreme Court repeatedly emphasized the lessened culpability of juvenile offenders, the difficulty in determining which juvenile offender is one of the very few that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75. In fact, the fundamental premise underlying the Court's decisions in both *Graham* and *Miller* is the recognition that juveniles are more amenable to rehabilitation than adults because they are less mature and are not fully developed, they lack the same culpability of an adult, and they have behavior that is transient. Those variances do not vanish simply because the sentence is for a lengthy term of years instead **[*43]** of life without parole. The constitutional framework upon which the Court in Graham and Miller constructed its holdings reflects that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible. A juvenile offender sentenced to a lengthy term of years sentence should not be worse off than a juvenile offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*. **HN16**[↑] Accordingly, we hold the constitutional protections afforded under *Miller* are triggered when a juvenile offender convicted of premeditated first-degree murder is subject to a sentence for a term of years that is the functional equivalent to a sentence of life without parole.

b. *Hard 50 sentence is the functional equivalent to life without parole*.

We now must decide whether the hard 50 sentence imposed on Williams is the functional equivalent of a sentence of life without parole. "Courts that have grappled with the issue of how lengthy a sentence must be to trigger the protections of *Miller* often reference *Graham*'s instruction that juvenile offenders must retain a meaningful opportunity for release." Premo, 365 Or. at 14 (citing Null, 836 N.W.2d at 71-72 ["explaining that it does **[*44]** 'not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*'"]); Casiano v. Comm'r of Corr., 317 Conn. 52, 73-75, 115 A.3d 1031 (noting that most courts that have considered the issue have determined that a sentence that exceeds life expectancy or that would make the individual eligible for release near the end of his or her life expectancy is a de facto life sentence).

In this case, Williams must serve a minimum of 50 years in prison for his single conviction before he can be considered for release. We are unaware of any state high court that has found a single sentence in excess of 50 years for a single homicide provides a juvenile with a meaningful opportunity for release. See People v. Contreras, 4 Cal. 5th 349, 369, 229 Cal. Rptr. 3d 249, 411 P.3d 445 (2018) (same for 50-year-to-life sentence); Casiano, 317 Conn. at 73, 79-80 (same for 50-year sentence); Null, 836 N.W.2d at 71 (same for 75-year sentence with parole eligibility after 52.5 years); Zuber, 227 N.J. at 448 (110-year sentence with parole eligibility after 55 years and 75-year sentence with parole eligibility after 68 years and 3 months "is the

practical equivalent of life without parole"); White, 365 Or. at 15 (same for nearly 67-year sentence); Bear Cloud, 334 P.3d at 141-42 (same for 45-year-to-life sentence). In finding that a juvenile defendant's 50-year sentence is equivalent **[*45]** to life without parole for purposes of applying *Miller*, the Connecticut Supreme Court relied on *Miller* and *Graham* to construe the concept of life more broadly than biological survival; specifically, it found that the United States Supreme Court "implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he [or she] will have no opportunity to truly reenter society or have any meaningful life outside of prison." Casiano, 317 Conn. at 78.

We conclude Williams' hard 50 sentence is the functional equivalent to life without parole for purposes of applying the rule in *Miller*.

3. *Individualized consideration of a juvenile's youth and attendant characteristics*

We now address Williams' claim that he was deprived of the constitutional protections afforded by *Miller* when the sentencing court failed to consider his diminished culpability and heightened capacity for change before imposing the hard 50 sentence. The applicable statute required the sentencing court to consider an exclusive set of statutory aggravating circumstances and a nonexclusive set of statutory mitigating circumstances in deciding whether to impose a hard 25 or a hard 50 sentence on Williams. See K.S.A. 1999 Supp. 21-4635(b). This statute applies **[*46]** to adults and juveniles alike, regardless of age. There is an enumerated mitigating circumstance in the statute that prompts the court to consider the "age of the defendant at the time of the crime" but, again, that consideration applies equally to adults and children alike. See K.S.A. 21-4637(g). As the Supreme Court in *Miller* observed, "'youth is more than a chronological fact.'" 567 U.S. at 476. The sentencing court's mere awareness of the fact that Williams was 14 years old at the time he committed the crime does not provide any evidence that the court specifically considered Williams' youth and its attendant characteristics.

There is nothing in the hard 50 sentencing scheme that facilitates the court's consideration of the characteristics and circumstances attendant to a juvenile offender's age or the fact that juveniles have diminished culpability and greater prospects for reform. And our review of the sentencing transcript reflects that the sentencing court did not consider any of the unique characteristics attendant to Williams' age, his diminished culpability, or prospects for reform before imposing the hard 50 sentence. We are not surprised by this fact because Williams was sentenced in 2001, which was 11 **[*47]** years before *Miller* established the rule requiring individualized sentencing considerations for juveniles before imposing a sentence of life without parole or, in this case, its functional equivalent. See Miller, 567 U.S. at 489.

The State relied on the existence of four statutory aggravating circumstances to argue in favor of a hard 50 sentence for Williams: (1) he knowingly or purposely killed more than one person, (2) he committed the crime for the purpose of receiving money, (3) he committed the crime to avoid or prevent a lawful arrest or prosecution, and (4) he committed the crime in an especially heinous, atrocious, or cruel manner. K.S.A. 1999 Supp. 21-4636(b), (c), (e), (f).

Defense counsel disputed the existence of any of the statutory aggravating circumstances, except the killing of more than one person. Counsel relied on the expert's trial testimony to argue that the murders were "really a senseless act committed by a person who has a deficiency in understanding what he is doing." Counsel went on to argue that any aggravating circumstances the court found were outweighed by mitigating circumstances: his youth, his mental capacity, and his emotional state at the time of the offense. Counsel referenced the testimony of the clinical **[*48]** psychologist who found Williams had markedly impaired abilities to perceive and conceive of sequence of events. Counsel argued the case boiled down to Williams' inability "to think through the situation, define options, foretell consequences, make enlightened or objective choices, strategize and see those factors as—ahead before acting is deficient. And he is slow in processing, therefore will not examine, observe or—violent thoughts on his own."

People who knew Williams spoke on his behalf, each requesting the court impose a hard 25 sentence instead of a hard 50 sentence. A middle school teacher spoke to the absence of parents or other support systems in Williams' life growing up. An individual who employed Williams over the summer on some property she managed described Williams as respectful, mannerable, very disciplined, and a person with potential. She expressed hope that "he could be put into some type of situation where he's not just thrown away and the key thrown away with him."

The adult child of the two victims killed by Williams spoke on behalf of the family, explaining how wonderful his parents were and the devastating impact his parents' murders had on his adult siblings, **[*49]** their children, and his parents' siblings.

After hearing the arguments of counsel and the statements of these various individuals, the court imposed a hard 50 sentence for each of the two first-degree murder charges. In support of its decision to impose the hard 50 sentence instead of the hard 25 sentence, the court noted that in cases like these, it had a duty to find a middle ground between a defendant's request for mercy and a victim's request for justice. Immediately after framing its duty in this way, the district court judge stated:

> "*The time to have helped Ronnell Williams was before this date, August of 1999. I mean, we talk about and we—we rail about and we—we bemoan the fact that this and that wasn't done for him. And now, you know, when it's too late, you can do something for him*.
>
> "Whatever it was that drew him and his brother to that address on that date and whatever it was that made him do the things that he did, and I confess, I will never know. I mean, I look at you and I—I don't have a clue as to what motivated you. And you've given me absolutely nothing to help me figure out what—what happened. To be honest with you, I frankly don't even think you know or that you have **[*50]** an answer for that." (Emphasis added.)

The court advised Williams that the decision he made on the day of the murders not only ruined his own life but the life of the victims and their surviving family members. The court then made a formal finding that the aggravating factors outweighed any mitigating factors presented.

The sentencing court did not consider any characteristics and circumstances attendant to Williams' age or the fact that, as a child, he was constitutionally different from adults for purposes of sentencing because juveniles have diminished culpability and greater prospects for reform. In fact, the italicized language above reflects that the court considered this 14-year-old boy, a child in middle school with no criminal history, to have zero possibility for reform and therefore was entitled to the most severe sentence that could be imposed (even on an adult) for the crime committed: life without the possibility of parole for 50 years.

We find Williams was deprived of the constitutional protections afforded by *Miller*, which require the sentencing court to consider his diminished culpability and heightened capacity for change before imposing the hard 50 sentence for his **[*51]** conviction of premeditated first-degree murder.

4. *Conclusion*

A sentencing court cannot impose a hard 50 sentence on a juvenile offender convicted of premediated first-degree murder without first considering the offender's youth and attendant characteristics, including the child's diminished culpability and heightened capacity for change, while keeping in mind that such a sentence is constitutionally disproportionate for all but the rarest of children whose crimes reflect irreparable corruption. We emphasize that neither *Miller*, the *Eighth Amendment*, nor our opinion in this case categorically prohibit a sentencing court from imposing a life sentence on a juvenile in all cases. The problem lies not with the potential substance of the sentence but with the procedure by which the court makes its decision to impose it. As *Miller* noted: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *567 U.S. at 480*. Our decision today does not disturb the finality of state convictions. Those juvenile offenders with irretrievable depravity, **[*52]** permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation will continue to serve hard 50 sentences. The opportunity for parole or release before 50 years has passed will be afforded to those who "demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery, 136 S. Ct. at 736*.

C. *Remedy*

Williams asks this court to vacate his hard 50 sentence under *K.S.A. 60-1507* and remand for a new sentencing hearing at which the court would be required to consider his youth and its attendant characteristics as set forth in *Miller*. ***HN17***[↑] Under *K.S.A. 2019 Supp. 60-1507(a)*, "[a] prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States" may "move the court which imposed the sentence to vacate, set aside or correct the sentence." If the court finds that the constitutional rights of the prisoner have been denied or infringed upon so as to render the judgment vulnerable to collateral attack, "the court shall

vacate and set the judgment aside and shall discharge the prisoner or resentence said prisoner or grant a new trial or **[*53]** correct the sentence as may appear appropriate." K.S.A. 2019 Supp. 60-1507(b).

Because Williams was deprived of the constitutional protections afforded by *Miller*, he is entitled to habeas relief in the form of an evidentiary hearing. See K.S.A. 2019 Supp. 60-1507(b). To that end, we remand the matter to the district court to determine whether imposing a hard 50 sentence on Williams for the offense of premeditated first-degree murder was constitutionally disproportionate under the Eighth Amendment. We specifically decline, however, to vacate Williams' sentence. **HN18**[↑] A district court's sentence is final when initially pronounced from the bench. See State v. Guder, 293 Kan. 763, Syl. ¶ 2, 267 P.3d 751 (2012). District courts generally are prohibited from modifying sentences that have not been vacated by the appellate court. State v. Warren, 307 Kan. 609, Syl. ¶ 1, 612-13, 412 P.3d 993 (2018). But the plain language of K.S.A. 60-1507 expressly provides the district court with the authority to vacate the sentence or provide other appropriate relief. See K.S.A. 2019 Supp. 60-1507(a) (habeas prisoner alleging sentence imposed in violation of the Constitution or laws of the United States or Kansas may move the court which imposed the sentence to vacate, set aside, or correct the sentence); K.S.A. 2019 Supp. 60-1507(b) (if habeas court finds that sentence imposed violates constitutional rights of movant, court may correct and resentence prisoner as appropriate). **[*54]** So if the habeas court on remand determines that imposing a hard 50 sentence on Williams for the offense of premeditated first-degree murder is constitutionally disproportionate under the Eighth Amendment, then the unconstitutional hard 50 sentence can be vacated or modified to a constitutionally proportionate sentence by the habeas court.

Finally, we look to *Graham*, *Miller*, and *Montgomery* for guidance in directing the habeas court on remand. **HN19**[↑] In *Miller*, the Supreme Court held that a juvenile defendant may be sentenced to life imprisonment without parole but only if the sentencing court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation. See 567 U.S. at 471-73, 479-80. The sentencing court may make that decision only after considering the defendant's youth and its attendant characteristics. Those characteristics include, but are not limited to, the following:

- Consideration of the juvenile offender's chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences;

- Consideration of the family and home environment that surrounds the juvenile offender—and **[*55]** from which the juvenile offender cannot usually extricate himself or herself—no matter how brutal or dysfunctional;
- Consideration of the circumstances of the homicide offense, including the extent of the juvenile offender's participation in the conduct and the way familial and peer pressures may have affected the juvenile offender;
- Consideration of the possibility that the juvenile offender might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, the juvenile offender's inability to deal with police officers or prosecutors (including on a plea agreement) or the incapacity to assist his or her own attorneys; and

- Consideration of the juvenile offender's prospects for rehabilitation. See *Miller*, 567 U.S. at 477-78.

After identifying these characteristics as relevant considerations to determine a child's diminished culpability and heightened capacity for change, the *Miller* Court stated its belief that imposing a sentence of life without parole on a juvenile after considering these characteristics "will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile **[*56]** offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 567 U.S. at 479-80 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68).

Although we have summarized the list of characteristics identified by the *Miller* Court as relevant to consider before imposing a sentence of life without parole for a juvenile convicted of homicide, we emphasize that this list is not exclusive. At resentencing, the habeas court may consider any characteristic it finds to be relevant in deciding the issue before it: whether imposing a hard 50 sentence on Williams for the offense of premeditated first-degree murder is constitutionally disproportionate under the Eighth Amendment considering Williams' age at the time he committed the crime and its attendant characteristics, including his diminished culpability and heightened capacity for change.

We find additional guidance necessary on three more issues. The first issue relates to the decision of the original sentencing court to run both of Williams' hard 50 sentences concurrent to each other. The concurrent nature of these sentences was not an issue addressed by the parties on appeal, and we expressly exclude it from review on remand for purposes **[*57]** of our mandate.

The second issue concerns the scope of evidence that can be considered by the habeas court in deciding whether the hard 50 sentence imposed on Williams is constitutionally disproportionate given his age at the time he committed the crime and its attendant characteristics, including his diminished culpability and heightened capacity for change. Specifically, whether the court is limited to considering the evidence that was available at the time Williams originally was sentenced or whether the court can consider what has happened since Williams was placed in prison. Under *Miller*, the court must consider youth and its attendant characteristics at the time of sentencing to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller, 567 U.S. at 480*. But *Graham* explains that the Constitution "prohibit[s] States from making the judgment at the outset that [a juvenile] never will be fit to reenter society." *560 U.S. at 475*. The Court later highlighted that Graham's sentence violated the *Eighth Amendment* because the state "denied him any chance to later demonstrate that he is fit to rejoin society." *560 U.S. at 79*. And most significantly, the *Montgomery* ***[*58]*** Court specifically held that the petitioner's submissions regarding his evolution from a troubled, misguided youth to a model member of the prison community are relevant to show an example of one kind of evidence that prisoners might use to demonstrate rehabilitation. *136 S. Ct. at 736* (although factual claims on appeal had not been established at an evidentiary hearing, the Court found relevant for consideration by the district court on remand that since imprisoned, Montgomery had helped establish an inmate boxing team, of which he later became a trainer and coach, that he had contributed his time and labor to the prison's silkscreen department, and that he strived to offer advice and serve as a role model to other inmates).

As noted above, the issue before the court at resentencing will be whether imposing a hard 50 sentence on Williams is constitutionally disproportionate under the *Eighth Amendment* considering his age at the time he committed the crime and its attendant characteristics, including his diminished culpability and heightened capacity for change. In assessing Williams' capacity for change, the court must be able to consider all facts relevant to deciding the issue, including evidence of whether Williams **[*59]** has, in fact, worked toward rehabilitation in the 20-plus years since he committed his crimes. To ignore that evidence in favor of a retrospective analysis of whether Williams had a heightened capacity for change at the time he committed his crime (or on the date of sentencing) is a useless exercise of speculation. If Williams is irretrievably depraved, permanently incorrigible, or irreparably corrupt, evidence from the past 20 years will bear that out.

The third issue provides guidance to the district court in the event it finds Williams' original sentence unconstitutionally disproportionate. At the time Williams was sentenced, the default sentence for premeditated first-degree murder was life without the possibility of parole for 25 years. See *K.S.A. 1999 Supp. 21-4706(c)*; *K.S.A. 1999 Supp. 22-3717(b)(1)*. Williams' sentence was enhanced to a hard 50 sentence based on the sentencing court's finding, by a preponderance of the evidence, that one or more aggravating circumstances existed and that the aggravators were not outweighed by mitigating circumstances. See *K.S.A. 1999 Supp. 21-4635(c)*; *State v. Spain, 263 Kan. 708, 714, 953 P.2d 1004 (1998)* (holding that "the implicit standard of proof for aggravating circumstances under *K.S.A. 21-4635[c]* is preponderance of the evidence").

But in 2013, the United States Supreme Court issued its opinion **[*60]** in *Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)*. *Alleyne* held that the facts a sentencing court relies upon to increase an offense's mandatory minimum sentence are elements of that enhanced offense. As such, those sentence-enhancing facts must be proved to a jury beyond a reasonable doubt to avoid a violation of the defendant's *Sixth Amendment* right to jury trial. *570 U.S. at 114-15*. Following *Alleyne*, the Kansas Legislature held a special session in September 2013 to amend Kansas' hard 50 sentencing scheme. See L. 2013, ch. 1, § 1 (Special Session). ***HN20***[⬆] Relevant here, the amended statute requires that a jury must find beyond a reasonable doubt that at least one aggravating circumstance exists and that the aggravating circumstance(s) are not outweighed by any mitigating circumstances before the court can enhance the sentence of a defendant convicted of first-degree premeditated murder from a hard 25 to a hard 50 sentence. *K.S.A. 2013 Supp. 21-6620(b)*, *(c)*.

On the issue of retroactivity, the amended statute provides that the amendments "shall not apply to cases in which the defendant's conviction and sentence were final prior to June 17, 2013, unless the conviction or sentence has been vacated in a collateral proceeding, including, but not limited to, K.S.A. 22-3504 or 60-1507, and amendments thereto." K.S.A. 2013 Supp. 21-6620(d). The amended **[*61]** statute also provides:

> "(e) Notwithstanding the provisions of subsection (f), for all cases on appeal on or after the effective date of this act, if a sentence imposed under this section, prior to amendment by this act, or under K.S.A. 21-4635, prior to its repeal, is vacated for any reason other than sufficiency of the evidence as to all aggravating circumstances, resentencing shall be required under this section, as amended by this act, unless the prosecuting attorney chooses not to pursue such a sentence.
>
> "(f) In the event any sentence imposed under this section is held to be unconstitutional, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall sentence such person to the maximum term of imprisonment otherwise provided by law." K.S.A. 2013 Supp. 21-6620(e), (f).

Although the Legislature amended the statute in 2014 and again in 2017, the substance of the language quoted above has not changed. See K.S.A. 2019 Supp. 21-6620(f), (g), (h).

Bottom line, in the event the district court finds it necessary to vacate Williams' original sentence because it was unconstitutionally disproportionate, the court must comply with the statutory directives set forth in K.S.A. 2019 Supp. 21-6620(e), (f), (g), and (h) when resentencing Williams. In doing **[*62]** so, the district court should determine in the first instance whether that process will result in a constitutionally satisfactory sentence comporting with *Miller* and, if not, how then to sentence Williams consistent with K.S.A. 2019 Supp. 21-6620.

D. *Lifetime postrelease supervision*

When the sentencing court ordered Williams to serve a hard 50 sentence, it also imposed lifetime postrelease supervision. For the first time on appeal, Williams argues that the district court's imposition of lifetime postrelease supervision renders his sentence illegal.

HN21[↑] "The court may correct an illegal sentence at any time while the defendant is serving such sentence." K.S.A. 2019 Supp. 22-3504(a); see State v. Kelly, 298 Kan. 965, 975-76, 318 P.3d 987 (2014) (defendant may challenge illegal sentence for first time on appeal). Whether a sentence is illegal under K.S.A. 2019 Supp. 22-3504 is a question of law over which an appellate court has unlimited review. State v. Lee, 304 Kan. 416, 417, 372 P.3d 415 (2016).

HN22[↑] "A sentence is illegal under K.S.A. 22-3504 when: (1) it is imposed by a court without jurisdiction; (2) it does not conform to the applicable statutory provisions, either in character or punishment; or (3) it is ambiguous with respect to the time and manner in which it is to be served." State v. Hayes, 307 Kan. 537, 538, 411 P.3d 1225 (2018).

Williams argues that the sentencing court lacked jurisdiction to impose lifetime postrelease supervision. The **[*63]** State agrees. ***HN23***[↑] "An inmate who has received an off-grid indeterminate life sentence can leave prison only if the [Kansas Prisoner Review] Board grants the inmate parole. Therefore, a sentencing court has no authority to order a term of postrelease supervision in conjunction with an off-grid indeterminate life sentence." State v. Cash, 293 Kan. 326, Syl. ¶ 2, 263 P.3d 786 (2011); see State v. Harsh, 293 Kan. 585, 590, 265 P.3d 1161 (2011) (parole is separate and distinct from sentence; if defendant with off-grid indeterminate life sentence ever leaves prison, it will be because parole was granted). Williams' off-grid sentence permits parole eligibility after 50 years have been served, not lifetime postrelease supervision. See State v. Ross, 295 Kan. 1126, 1134, 289 P.3d 76 (2012) (defendant who received off-grid life sentence for felony murder was subject to lifetime parole instead of lifetime postrelease supervision).

Because the sentencing court erred in imposing lifetime postrelease supervision, that portion of Williams' sentence must be vacated. See State v. Johnson, 309 Kan. 992, 997-98, 441 P.3d 1036 (2019) (vacating order of lifetime postrelease supervision rather than remanding case for resentencing); State v. Floyd, 296 Kan. 685, 690-91, 294 P.3d 318 (2013) (same).

CONCLUSION

- We find Williams sufficiently showed the manifest

injustice and exceptional circumstances necessary to justify the untimely and successive filing of his second *K.S.A. 60-1507* motion. Accordingly, **[*64]** we reverse the district court's decision to summarily deny Williams' habeas claim for relief and remand to the district court to hold an evidentiary hearing.

• We hold the constitutional protections afforded under *Miller* are triggered regardless of whether the sentencing scheme is mandatory or discretionary.

• We find Williams' hard 50 sentence is the functional equivalent of a sentence of life without parole for purposes of the constitutional protections in *Miller*.

• We find Williams was deprived of the constitutional guarantees afforded under *Miller* because the sentencing court failed to fully consider his diminished culpability and heightened capacity for change before imposing the hard 50 sentence on him. Based on this constitutional deprivation, we remand this *K.S.A. 60-1507* matter to the habeas court to hold an evidentiary hearing. At the hearing, the habeas court must specifically consider evidence about whether imposing a hard 50 sentence on Williams for the offense of premeditated first-degree murder is constitutionally disproportionate under the *Eighth Amendment* given Williams' age at the time he committed the crime and its attendant characteristics.

• In considering the evidence presented on remand, the **[*65]** habeas court shall expressly decide whether Williams is irretrievably depraved, permanently incorrigible, or irreparably corrupt beyond the possibility of rehabilitation. In making this decision, the habeas court must consider, at a minimum, the following circumstances with regard to Williams' diminished culpability and heightened capacity for change, while keeping in mind that such a sentence is constitutionally disproportionate for all but the rarest of children whose crimes reflect irreparable corruption:

  ○ Williams' chronological age at the time of the crime and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.

  ○ Williams' family and home environment that surrounded him at the time of the crime.

  ○ The circumstances of the homicide offense, including the extent of Williams' participation in the conduct and the way familial and peer pressures may have affected him.

  ○ The possibility that Williams might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, Williams' inability to deal with police officers or prosecutors (including on a plea agreement) or the incapacity **[*66]** to assist his own attorneys.

  ○ Williams' prospects for rehabilitation at the time of the crime as well as whether Williams has, in fact, worked toward rehabilitation in the 20-plus years since he committed his crimes.

• On remand, the habeas court shall not consider the concurrent nature of Williams' two hard 50 sentences in deciding whether imposing a hard 50 sentence on Williams for the offense of premeditated first-degree murder is constitutionally disproportionate under the *Eighth Amendment* given Williams' age at the time he committed the crime and its attendant characteristics.

• If the habeas court determines on remand that imposing a hard 50 sentence on Williams for the offense of premeditated first-degree murder is constitutionally disproportionate under the *Eighth Amendment*, then the unconstitutional hard 50 sentence is necessarily rendered illegal and the habeas court has jurisdiction to vacate the sentence and set the matter to impose a sentence that complies with the constitutional mandate in *Miller* and with the statutory directives set forth in *K.S.A. 2019 Supp. 21-6620*.

• Both the evidentiary hearing—and any later hearings on sentencing disposition that may be held—must reflect that the habeas court meaningfully engaged in *Miller* ***[*67]*** 's central inquiry.

• That part of Williams' sentence imposing lifetime postrelease supervision is vacated.

Reversed, sentence vacated in part, and case remanded with directions.

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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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As of: November 5, 2020 4:19 PM Z

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.

Notice: SEE RULES OF APPELLATE PROCEDURE, RULE 809.23(3), REGARDING CITATION OF UNPUBLISHED OPINIONS. NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

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

Judges: Before Fine, Kessler and Brennan, JJ.

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.

No. 442P20 DISTRICT 12

SUPREME COURT OF NORTH CAROLINA

* *

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
JAMES RYAN KELLIHER	)	No. COA 19-530

* *

RESPONSE TO STATE'S NOTICE OF APPEAL AND
PETITION FOR DISCRETIONARY REVIEW

* *

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Appellate Rule 15(d), James Kelliher respectfully asks that this Court deny the State's Petition for Discretionary Review, or in the alternative that this Court affirm the decision below. The Court of Appeals issued a thorough and thoughtful opinion on whether a juvenile offender convicted of more than one murder can be held in prison until at least age 67 before even the possibility of release. Chief Judge McGee correctly applied precedent of this Court in *State v. James* and *State v. Young* and the United States

Supreme Court in *Graham v. Florida*, *Miller v. Alabama* and *Montgomery v. Louisiana* in determining that such a sentence does not provide meaningful opportunity for a life outside prison, and is therefore inconsistent with the Eighth Amendment and Article I Section 27 of the North Carolina Constitution.

This Court should endorse that ruling, either by letting the Court of Appeals opinion stand or affirming it. The State's legal arguments are incorrect, for the reasons in the panel opinion. The State's policy arguments are unpersuasive; essentially they are fretting over the possibility of release for juvenile offenders who have committed more than one offense. It is difficult to understand why our Attorney General's Office continues to fight against a humane approach to sentencing for juvenile offenders when the Courts require it and the majority of Americans approve of it.[1] The sky is not falling; rather, our State is beginning to do the necessary, moral, constitutionally required work of treating children justly, rather than reflexively throwing them away.

In support of his response, Mr. Kelliher shows the following:

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[11] See, e.g., https://www.nokidsinprison.org/solutions/what-the-public-says ("National and state polls show that across the country, Americans overwhelmingly support youth rehabilitation over incarceration.")

STATEMENT OF THE CASE

The State presented the procedural history and the facts of the crime. Evidence from the resentencing hearing is described below.

Evidence at resentencing

The fathers of both victims testified about the grief of losing their children. The State did not call any other witnesses.

The defense introduced a stipulation that Mr. Kelliher was 17 at the time of the offense and had no prior record. The defense introduced Mr. Kelliher's prison records, which outline his work and educational accomplishments, and show he had only two non-violent infractions (unauthorized location) from the time of his admission in 2004 until the hearing in 2018.

The defense presented additional mitigating evidence. As a child, Mr. Kelliher had a "difficult" relationship with his father, who was physically abusive. Mr. Kelliher dropped out of school after the ninth grade. Achievement tests he took at age 17 showed he functioned at a sixth grade level. Mr. Kelliher began using drugs and alcohol at age 13. By age 17 he reported being "under the influence all day" from substances including ecstasy, acid, psilocybin, cocaine, marijuana and alcohol. Mr. Kelliher has a history of three suicide attempts: an attempted overdose at age 10; another on the night after the murder; and a third at age 18 while awaiting trial.

Mr. Kelliher was diagnosed with PTSD in prison due to nightmares and persistent thoughts related to these shootings. The defense psychologist conducted multiple tests relevant to future dangerousness, and concluded Mr. Kelliher "had a low risk of future violence." He testified that the Department of Public Safety had made the same determination.

The psychologist testified to Mr. Kelliher's efforts to better himself in prison. He had no "negative behaviors" since being incarcerated. He earned his GED, taught himself Spanish, and took college courses. At the time of the resentencing hearing he was working on a bachelor's degree in ministry.

Dr. Seth Bible, director of prison programs at Southeastern Baptist Theological Seminary, testified about the program Mr. Kelliher had been participating in. The seminary developed this new program to train prisoners to serve their fellow offenders as "field ministers" – they might end up as peer mentors, or working in hospice or with juveniles. Mr. Kelliher was one of 26 students selected from a field of 1300, based on interviews, essays and references. The seminary sought people who had a "desire to see the culture of the prison system changed." Mr. Kelliher was chosen because he demonstrated in his interview and his writing a clear vision of his own goals which matched the goals of the program. Mr. Kelliher was earning As and Bs, had taken on leadership roles, and volunteered for additional programs.

Tonya Newman, the student resource coordinator for the field ministry program, also testified. She was a writing instructor at the prison, and Mr. Kelliher was chosen for an internship to help in the writing center. He worked with other students, giving feedback, tutoring and guidance. He went beyond what she requested, for example helping Spanish-speaking students; helping students others might not associate with due to the nature of their offenses; and writing English grammar guides for other students. She testified Mr. Kelliher demonstrated leadership and integrity.

Pastor Todd Rappe testified he had been visiting Mr. Kelliher once a week for 17 years. He began at the request of Mr. Kelliher's parents, but the relationship deepened over the years. At the visits, he and Mr. Kelliher hold a small religious service and often discuss theology. Pastor Rappe testified he is grateful to Mr. Kelliher, and that Mr. Kelliher in fact consoles him. When asked if he saw something in Mr. Kelliher that is redeemable, the Pastor said, "Oh, good grief, yes, of course."

Mr. Kelliher gave a statement at the close of the hearing:

> I think about Eric, Kelsea, and the child every day wondering who they might be today; the memories that they made, their brotherly love, the raising – the joy of raising their son and the pride felt in his accomplishment. … I failed to do anything resembling the right thing. … The depth of my sorrow and regret cannot … alter the finality … nor … alleviate the past pain that their absence has caused. … Daily I strive to change, to make the right decisions, to promote positive pro social actions in others . ...

> I wish more than anything that I could somehow do something to change the events from August 7, 2001.

REASONS REVIEW SHOULD BE DENIED

Excessive punishment of youthful offenders is a substantial constitutional question.[2] The Court of Appeals correctly decided this case in an opinion that carefully follows United States Supreme Court precedent as well as principles established in this Court's opinions in *State v. James*, 371 N.C. 77, 813 S.E.2d 195 (2018) and *State v. Young*, 369 N.C. 118, 794 S.E.2d 274 (2016). This Court should allow the panel opinion to stand, or affirm it.

For reasons thoroughly discussed in the panel opinion, the State's arguments in its petition – essentially the same as those rejected in the lower court – are unpersuasive. (See slip op. at 25-32) The panel concludes: "Our decision simply upholds the Eighth Amendment's constitutional requirement that Defendant, as a juvenile who is neither incorrigible nor irredeemable, have his 'hope for some years of life outside prison walls . . . restored.'" (Slip op. at 41) (quoting *Montgomery v. Louisiana*).

The panel's ruling is in line with this Court's precedent. This Court requires that irreparable corruption be shown before imposition of a life without parole sentence. *James,* 371 N.C. at 93, 813 S.E.2d at 206-07. This

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[2] In the experience of the undersigned, grants of appeal based on a constitutional question have been exceedingly rare; this Court generally instead accepts review on a party's petition under G.S. 7A-31.

Court recognizes the federal constitutional requirements that a juvenile offender's capacity for change be considered. *Young*, 369 N.C. at 121, 794 S.E.2d at 277. And this Court recognizes the "foundational concern that at some point during the minor offender's term of imprisonment, a reviewing body will consider the possibility that he or she has matured." *Id.*, 369 N.C. at 125, 794 S.E.2d at 279. The panel opinion appropriately applied this law to the situation of two life with parole sentences that preclude the chance of release until age 67.

The State contends that cases about lengthy sentences for juvenile offenders apply only to a sentence denominated 'life without parole.' The panel rejected this "simple formalism": "the court in *Graham* was not barring a terminology – 'life without parole' – but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release." (Slip op. at 28-29) (quoting *State v. Moore*, 76 N.E.3d 1127, 1139-40 (Ohio 2016)).

The State quarrels with the panel's characterization of *de facto* life rulings in other jurisdictions. Whether other jurisdictions' decisions on this issue form a majority, a minority, or something in between, North Carolina must make its own decision. The right decision is to allow juvenile offenders a meaningful opportunity for release before most of their life has passed by. A minimum of twenty-five years of incarceration, with only a possibility of

parole afterward, is a sufficiently severe sentence for any child offender. This is not radical relief; it is reasonable, constitutional relief.

The State fears a flood of other juvenile offenders filing claims. Should new hearings be required for other incarcerated juvenile offenders who are being excessively punished, so be it. Further, "dire warnings are just that, and not a license for us to disregard the law." *McGirt v. Oklahoma,* 207 L.Ed.2d 985, 1015 (2020). The purpose of the court system is to administer justice for every person, and our courts should embrace the opportunity to do so.

The State contends we must maintain the ability of a trial court to impose severe punishments on juvenile offenders at the time of sentencing. Given what we know about young offenders' capacity for change, it is far more sensible to leave this determination to a body, such as the parole commission, that can evaluate the offender's maturity and ability to be law-abiding when his time for potential release nears, rather than when he is a teenager. The panel held, "The applicability and scope of protection found in the Eighth Amendment [under *Graham* and *Miller*] turned on the identity of the defendant, *not* on the crimes perpetrated." (Slip op. at 35, emphasis original) As is recognized in the LWOP jurisprudence, it is nearly impossible to foresee decades into the future to know whether a person will change.

Leaving that determination to a trial court is unwise, and it is poor policy that should not be maintained, but replaced.

Mr. Kelliher's two consecutive life sentences were disproportionate and unconstitutionally harsh and excessive. There is no cause to overturn the panel's decision, nor to deny any other child the relief afforded to Mr. Kelliher – a chance for redemption and release.

CONDITIONAL REQUEST FOR ADDITIONAL ISSUE

Mr. Kelliher argued below that the North Carolina Constitution provides additional protection against cruel or unusual punishment. The panel did not address this argument except to state: "Our Supreme Court 'historically has 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). Our analysis therefore applies equally to both." (Slip op. at 25, n.10) Should this Court accept review, Mr. Kelliher would ask the Court to revisit *Green* and hold that the State Constitution provides broader protection in sentencing juvenile offenders. *See, e.g., Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

Whether Article I Section 27 of the North Carolina Constitution provides greater protection than the Eighth Amendment in the context of sentencing juvenile offenders?

Respectfully submitted this 16th day of November, 2020.

Electronically submitted
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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that I am serving this response today by electronic mail to counsel of record at the following address:

Kimberly Callahan
Assistant Attorney General

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This 16th day of November, 2020.

Electronically submitted
Kathryn L. VandenBerg

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-530

Filed: 6 October 2020

Cumberland County, No. 01 CRS 059934

STATE OF NORTH CAROLINA

v.

JAMES RYAN KELLIHER, Defendant.

Appeal by Defendant from judgments entered 13 December 2018 by Judge Carl R. Fox in Cumberland County Superior Court. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant.

McGEE, Chief Judge.

James Ryan Kelliher ("Defendant"), following a troubled early life marked by physical abuse and substance use, participated in a robbery at age 17 that ended with the murders of a man and his pregnant girlfriend. Defendant was sentenced to two consecutive mandatory punishments of life without parole ("LWOP"). Following the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and the General Assembly's enactment of N.C. Gen. Stat. § 15A-1340.19A, *et seq*. in response, Defendant sought and received a resentencing hearing.

At resentencing, the trial court determined that mitigating factors outweighed the circumstances of the offenses, concluded Defendant was neither "incorrigible" nor "irredeemable," *Graham v. Florida*, 560 U.S. 48, 72, 75, 176 L. Ed. 2d 825, 844, 846 (2010), and resentenced him to two consecutive sentences of life with parole. Under the terms of these sentences, Defendant will not be eligible for parole until he has served 50 years in prison, placing his earliest possible release at age 67. Defendant now appeals, arguing that the consecutive sentences constitute *de facto* LWOP in violation of the Eighth Amendment and Article I, Section 27 of the North Carolina Constitution. We agree with Defendant and reverse and remand for resentencing.

I. FACTUAL AND PROCEDURAL HISTORY

A. Defendant's Early Life

Defendant was born in 1984 as the youngest of three siblings. Though he had good relationships with his mother and older sisters, Defendant's father physically abused him during his childhood. Defendant began abusing substances at an early age; he began drinking alcohol at age 13, was drinking daily and using marijuana at age 15, and was under the continuous influence of some combination of alcohol, marijuana, ecstasy, acid, psilocybin, and cocaine at age 17. Defendant attempted suicide on three occasions: first by overdose at age 10, again at age 17 on the night after the murders, and a final time while awaiting trial. He dropped out of school in the ninth grade, and exhibited the equivalent of a sixth grade education at age 17.

Defendant committed several thefts in his teenage years, breaking and entering into vehicles and stores after they had closed. On one occasion, Defendant stole from a video store with the help of someone named Jerome Branch. Defendant, Mr. Branch, and Joshua Ballard would "hang out" together during this time, drinking alcohol and doing drugs.

B. The Murders

In the days before the murders involved in this appeal, Mr. Ballard suggested to Defendant that they rob a cocaine and marijuana dealer named Eric Carpenter. The two discussed the matter several times, with Mr. Ballard stating in later conversations that he believed he would have to kill Mr. Carpenter in order to avoid being identified as one of the perpetrators of the robbery. Defendant offered to give a firearm he had previously stolen from a pawn shop to Mr. Ballard for this purpose. They continued to plan the robbery over future phone calls, ultimately agreeing that Defendant would serve as the driver while Mr. Ballard killed and robbed Mr. Carpenter. Mr. Branch was later included in the planning, though he was never given a defined role. Defendant also told his friend Liz Perry about the plans to rob and murder Mr. Carpenter.

Mr. Ballard arranged to purchase drugs from Mr. Carpenter behind a local furniture store on 7 August 2001. On the night of the drug deal, Defendant drove Mr. Ballard and Mr. Branch to the furniture store in Mr. Ballard's truck. They met with

Mr. Carpenter when they arrived, but they spotted a marked police vehicle in the parking lot and arranged with Mr. Carpenter to move the deal to his apartment. Carpenter's girlfriend, Kelsea Helton, also lived at the apartment, and was present when the group reconvened in the apartment parking lot a short time later. Following introductions, everyone went inside the apartment and began talking civilly. Ms. Helton left the apartment briefly; when she returned,[1] the conversation turned to her pregnancy. What exactly occurred after that conversation is disputed; what is certain, however, is that when it came time to carry out the robbery, Defendant, Mr. Ballard, or both shot and killed Mr. Carpenter and Ms. Helton.

Defendant, Mr. Branch, and Mr. Ballard met in the parking lot after the shooting and split the drugs they had stolen from the apartment. The three met with another group, which included Defendant's friend, Ms. Perry, at a local park where they drank cognac and smoked marijuana laced with cocaine. At some point during the evening, Defendant told Ms. Perry about the robbery and murders. Defendant, Mr. Ballard and Mr. Branch were later arrested for the murders.

C. Defendant's Plea and Ballard's Trials

Defendant was indicted on two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery

[1] Ms. Helton's father, in his victim impact statement, said Ms. Helton left the apartment to call her sister to finalize plans to vacate Mr. Carpenter's apartment and move in with her sister later that evening because Ms. Helton felt there were "some things that [were] happening [she] d[id]n't like."

with a dangerous weapon by a grand jury on 25 March 2002. He pleaded guilty to all charges in 2004 and was sentenced to two consecutive terms of LWOP for the murders and concurrent terms of years for the robbery and conspiracy convictions.[2] Mr. Ballard was also charged with two counts of first-degree murder but pleaded not guilty.

Although his plea agreement did not require it, Defendant testified for the State at Mr. Ballard's trial,[3] as did Ms. Perry and a friend of Mr. Ballard, Lisa Boliaris. Defendant testified that he did not shoot either Mr. Carpenter or Ms. Helton, instead stating that Mr. Ballard shot both victims. Ms. Perry offered a different account, stating that Defendant had admitted to killing the couple on the night of the murders. Ms. Boliaris gave yet another recollection of events, testifying that Mr. Ballard told her he shot Mr. Carpenter while Defendant killed Ms. Helton.[4]

Mr. Carpenter was convicted of the killings at the conclusion of his trial. However, his convictions were set aside on appeal and Mr. Ballard was granted a new trial. *Ballard*, 180 N.C. App. at 646, 638 S.E.2d at 481. Defendant again testified for the State on retrial, but Mr. Ballard was ultimately acquitted. The district attorney who secured Defendant's plea and prosecuted both of Mr. Ballard's trials later wrote

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[2] Defendant has since served the terms for robbery and conspiracy.

[3] Mr. Branch pled guilty to accessory after the fact and was sentenced to a six-to-eight-year term of imprisonment. He did not testify against Mr. Ballard.

[4] A more detailed rendition of this testimony is available in this Court's opinion in *State v. Ballard*, 180 N.C. App. 637, 638 S.E.2d 474 (2006).

a letter to Defendant's counsel stating that he believed Defendant "testified truthfully in both trials."

D. Defendant's Resentencing

Defendant filed a motion for appropriate relief ("MAR") in June 2013. In that motion, Defendant asserted that: (1) the United States Supreme Court's decision in *Miller* rendered his LWOP sentences unconstitutional under the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution; (2) resentencing was required under the recently enacted N.C. Gen. Stat. § 15A-1340.19B;[5] and (3) life with the possibility of parole was the appropriate sentence. The MAR was denied by the trial court on the grounds that *Miller* and N.C. Gen. Stat. § 15A-1340.19B did not apply retroactively. That order was subsequently reversed by order of this Court, and Defendant received a resentencing hearing on 13 December 2018.

At the resentencing hearing, Defendant and the State consented to a recitation of the facts surrounding the murders consistent with the above history. The State called the fathers of Mr. Carpenter and Ms. Helton to give victim impact statements. Both testified to the indescribable hardship of losing a child—and future grandchild—

[5] Defendant's MAR sought relief under subsection (a)(1) of the statute, which applies to juvenile felony murder convictions. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2019). Defendant was ultimately resentenced pursuant to subsection (a)(2), which applies to all other juvenile first-degree murder convictions. N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2019). Defendant did not argue the applicability of subsection (a)(1) at resentencing, conceded that this was not a felony murder case before the trial court, and does not raise the issue on appeal.

and the enduring impact on their families. Each expressed their love for their children, their dismay at the loss of life, the sadness of lost opportunities to raise their grandchild, and the lasting emotional trauma inflicted on their families. The State rested its presentation following their testimony.

Defendant presented the testimony of several witnesses in mitigation. A clinical and forensic psychologist who had examined Defendant in January and February of 2019 testified that Defendant suffered from post-traumatic stress disorder as a result of the murders. He further reported that although Defendant had a history of antisocial behavior, Defendant had ceased to exhibit those traits since he had been imprisoned in 2004. The psychologist's report detailed Defendant's childhood physical and drug abuse, his shortened education, and his efforts at self-improvement while in prison. Specifically, the report disclosed that Defendant had earned his GED and was pursuing a bachelor's degree in ministry from Southeastern Baptist Theological Seminary ("the Seminary"). Based on Defendant's history, current diagnoses, and efforts to better himself, the psychologist determined that Defendant presented a low risk of future violence and was neither incorrigible nor irredeemable. This low risk aligned with a separate assessment conducted by the Department of Public Safety.

Defendant offered additional testimony from the director of prison programs at the Seminary. He testified that Defendant was accepted into the four-year

seminary program after a rigorous application process, describing him as an active and very good student. Another witness from the Seminary testified that Defendant assisted other students, was professional in his conduct, and sought to minister to inmates outside the program who were struggling with incarceration. A pastor from Redeemer Lutheran Church in Fayetteville also testified, stating he had visited with Defendant every week since his arrest and had seen a remarkable change: "[T]oday unfortunately [Defendant] makes me ashamed of my own spirituality. . . . [H]e is the one who sometimes comforts me instead of vice versa. . . . He's the one who has consoled me. So, I enjoy immensely our visits because I think frankly I get more out of it than he does."

Defendant also tendered documentary evidence in support of mitigation, including his record of two nonviolent infractions while in prison and the assessments of low risk completed by the Department of Public Safety and Defendant's psychologist. He concluded his presentation of evidence by colloquy, telling the trial court that he knew he had "failed to do anything resembling the right thing" and thought about the victims everyday with sorrow and regret. He stated that although he knew he could never undo the pain caused, he sought to improve himself so that he might help others "as harm reduction." He concluded by telling the court he "wish[ed] more than anything that [he] could somehow do something to change the events from August 7, 2001."

In closing arguments, the State asked the trial court to sentence Defendant to either LWOP, or to consecutive sentences of life with the possibility of parole as an alternative. Defendant argued for concurrent sentences of life with the possibility of parole, requesting that the Department of Correction have the opportunity to review Defendant's eligibility for parole at 25 years rather than 50 years. The trial court then announced its order, which included thirteen findings in mitigation based on Defendant's troubled early life, his immaturity and drug addictions at the time of the offenses, and the substantial evidence of rehabilitation. Based on these findings, the trial court concluded that "[t]he mitigating factors and other factors and circumstances present outweigh all the circumstances of the offense[,]" and "Defendant is neither incorrigible nor irredeemable." The trial court then sentenced Defendant to two consecutive sentences of life with the possibility of parole. Defendant appeals.

II. ANALYSIS

Defendant presents one principal argument on appeal: Defendant's two consecutive sentences, considered in the aggregate, constitute a disproportionate *de facto* punishment of LWOP in violation of the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. More specifically, he contends that because he is a juvenile defendant and is neither incorrigible nor irredeemable, this *de facto* LWOP sentence violates *Miller* and

related United States Supreme Court precedents, as determined by several state and federal courts that have considered the question. The State, in response, contends that Defendant failed to preserve this issue and, in the alternative, asks us to follow a different line of state and federal decisions that have rejected arguments similar to Defendant's. We first address the State's preservation argument before reaching the merits of Defendant's appeal.

A. Preservation

Our Supreme Court has made clear that the North Carolina Rules of Appellate Procedure require constitutional sentencing errors be raised before the trial court in order to be preserved for appellate review. *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018). However, a party is only required to "stat[e] the specific grounds for the ruling the party desired the court to make *if the specific grounds were not apparent from the context*[,]" N.C. R. App. P. 10(a)(1) (2020) (emphasis added), and our Supreme Court has held constitutional arguments "implicitly presented to the trial court" are preserved for review. *State v. Murphy*, 342 N.C. 813, 822, 467 S.E.2d 428, 433 (1996). Defendant insists that his argument was preserved on appeal under these precedents because: (1) his MAR sought a sentence that comported with the Eighth Amendment, *Miller*, and the North Carolina Constitution; and (2) his counsel argued for concurrent sentences based on *Miller* at the resentencing hearing. Reviewing the transcript from the resentencing hearing, Defendant's counsel did

argue that concurrent sentences were appropriate, given the alternative would prohibit parole for 50 years:

> I would just say this as far as the punishment is concerned. I'm 68, if you sentence me to 50 years, I'll do the best I can but I'm going to leave most of that time on the floor. If you sentence me to 25, I may make it.
>
> If you sentence a 17-year old to 25 years, he'll do 100 percent of that sentence probably. But at the end of 25 years if he's serving consecutive sentences, he doesn't get out.
>
> . . . .
>
> And then at some point possibly he'll be paper paroled[6] from the first one and get to serve a minimum of 25 more years before he's reviewed again and then every two years.
>
> . . . .
>
> Now he's going to be in prison for a while. He's only done 17 years. But we're asking the Court to put it in the hands of Department of Corrections [sic] to let them review him as they have scrutinized his life for 17 years and sentence him to life with parole and run the sentences concurrently.

Construed together with his MAR, we hold that Defendant has, at a minimum, raised an implied argument that two concurrent sentences of life—with the possibility of

[6] We note that the practice of issuing "paper parole" is no longer permitted under North Carolina law. *See Robbins v. Freeman*, 127 N.C. App. 162, 165, 487 S.E.2d 771, 773 (1997) ("[W]e can find no statutory authority for [the Department of Correction's and Parole Commission's] practice of issuing 'paper paroles.' "), *aff'd per curiam*, 347 N.C. 664, 496 S.E.2d 375 (1998). We thus understand counsel's argument as asserting that parole is not available under two consecutive sentences for life with the possibility parole until 50 years into a defendant's sentence. Both Defendant and the State agree on appeal that Defendant must serve 50 years before being eligible for parole under the consecutive sentences imposed in this case.

parole after 25 years, as opposed to 50 years—are proportional punishment under the Eighth Amendment, *Miller*, and the North Carolina Constitution. Defendant has therefore preserved his constitutional argument for review.

Although we hold Defendant has preserved his argument, we note that he has requested this Court use its discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and set aside the requirements of Rule 10. *See* N.C. R. App. P. 2 (2020) ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements of any of these rules in a case pending before it[.]"). Assuming *arguendo* that Defendant's constitutional question was not preserved under Rule 10, a discretionary implementation of Rule 2 is warranted under the circumstances. Our Supreme Court has employed the Rule "on several occasions to review issues of constitutional importance." *State v. Mobley*, 200 N.C. App. 570, 573, 684 S.E.2d 508, 510 (2009) (first citing *State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987); and then citing *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002)). Given that multiple state appellate

courts[7] and federal courts of appeal[8] have addressed the constitutional issues presented here—and there are at least four other similar cases presently pending before this Court[9]—Defendant's appeal is certainly of "constitutional importance." *Mobley*, 200 N.C. App. at 573, 684 S.E.2d at 510 (citations omitted). Furthermore, the State's alleged violation of the United States Constitution in resentencing implicates a substantial right supporting application of Rule 2. *See State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (affirming this Court's discretionary invocation of Rule 2 where the trial court "committed error relating to a substantial right," namely the right to be free from unreasonable searches and seizures under the Fourth Amendment). Our Supreme Court has invoked Rule 2 "more frequently in the criminal context when severe punishments were imposed[,]" lending further support to its application here. *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205

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[7] *See Pedroza v. State*, 291 So.3d 541 (Fla. 2020); *State v. Slocumb*, 827 S.E.2d 148 (S.C. 2019); *Carter v. State*, 192 A.3d 695 (Md. 2018); *Veal v. State*, 810 S.E.2d 127 (Ga.), *cert. denied*, ____ U.S. ____, 139 S. Ct. 320, 202 L. Ed. 2d 218 (2018); *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018); *Kinkel v. Persson*, 417 P.3d 401 (Or. 2018), *cert. denied,* ____ U.S. ____, 139 S. Ct. 789, 202 L. Ed. 2d 585 (2019); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017), *cert. denied*, ____ U.S. ____, 138 S. Ct. 641, 199 L. Ed. 2d 544 (2018); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017), *cert. denied*, ____ U.S. ____, 138 S. Ct. 640, 199 L. Ed. 2d 543 (2018); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55 (Mo. 2017); *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017); *State v. Zuber*, 152 A.3d 197, (N.J. 2017); *State v. Ramos*, 387 P.3d 650 (Wash. 2017) (en banc); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State ex rel. Morgan v. State*, 217 So.3d 266 (La. 2016); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *Vasquez v. Commonwealth,* 781 S.E.2d 920 (Va. 2016); *Casiano v. Comm'r of Corr.,* 115 A.3d 1031 (Conn. 2015); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *People v. Caballero,* 282 P.3d 291 (Cal. 2012).

[8] *See United States v. Grant*, 887 F.3d 131, *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3rd Cir. 2018); *Kelly v. Brown*, 851 F.3d 686 (7th Cir. 2017); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *Budder v. Addison*, 851 F.3d 1047 (10th Cir.); *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012).

[9] *See State v. Anderson*, No. COA19-841; *State v. Slade*, No. COA19-969; *State v. Conner*, No. COA19-1087; *State v. Brimmer*, No. COA19-1103.

(2007) (first citing *State v. Moore*, 335 N.C. 567, 612, 440 S.E.2d 797, 823 (1994); then citing *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982); then citing *State v. Poplin*, 304 N.C. 185, 186-87, 282 S.E.2d 420, 421 (1981); and then citing *State v. Adams*, 298 N.C. 802, 804, 260 S.E.2d 431, 432 (1979)). We therefore conclude that, even if Defendant failed to preserve his constitutional argument through valid objection under Rule 10, review of his appeal is appropriate pursuant to Rule 2.

B. The Eighth Amendment and Juveniles

Resolution of this appeal requires consideration of the Eighth Amendment as applied to juveniles under four decisions of the Supreme Court of the United States: *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, ____ U.S. ____, 193 L. Ed. 2d 599 (2016).

1. *Roper* Prohibits Execution of Juveniles

In the first of these cases, the Supreme Court considered "whether it is permissible under the Eighth and Fourteenth Amendments . . . to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." *Roper*, 543 U.S. at 555-56, 161 L. Ed. 2d at 13. It examined the question first by conducting "a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question[,]" before "determinin[ing], in the exercise of our own independent judgment, whether the

death penalty is a disproportionate punishment for juveniles." *Id.* at 564, 193 L. Ed. 2d at 18. The Supreme Court ultimately answered the question in the affirmative, issuing a categorical holding that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.* at 578, 161 L. Ed. 2d at 28.

In conducting the first step of its two-pronged examination, the Supreme Court observed that, in the years leading up to the case, there was a "significant" and "consistent" trend away from the execution of juveniles amongst the States, *id.* at 565-66, 161 L. Ed. 2d at 19-20, leading to the conclusion that "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18[.]" *Id.* at 568, 161 L. Ed. 2d at 21. It then turned to the second step: whether the Eighth Amendment compelled a categorical prohibition against the execution of juveniles. *Id.* The majority found the answer by recognizing that "the death penalty is reserved for a narrow category of crimes and offenders[,]" *id.* at 568-69, 161 L. Ed. 2d at 21, and then discerning that, because of their unique developmental characteristics, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569, 161 L. Ed. 2d at 21. Once these precepts were established, the Supreme Court concluded that "the penological justifications for the death penalty apply to them with lesser force than to adults[,]" *id.* at 571, 161 L. Ed. 2d. at 23, meaning that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of

some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573-74, 161 L. Ed. 2d at 24.

Roper makes clear that its logic is grounded in the fundamental recognition that juveniles are of a special character for the purposes of the Eighth Amendment. In examining juveniles as a class of criminal offenders, the Supreme Court observed that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 570, 161 L. Ed. 2d at 21. Compared to adults, juveniles possess " '[a] lack of maturity and an underdeveloped sense of responsibility . . . . These qualities often result in impetuous and ill-considered actions and decisions.' " *Id.* (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 125 L. Ed. 2d 290, 306 (1993)) (additional citation omitted). Such immaturity "means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' " *Id.* at 570, 161 L. Ed. 2d at 22 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 101 L. Ed. 2d 702, 719 (1988) (plurality opinion)). Juveniles are likewise "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . [J]uveniles have less control, or less experience with control, over their own environment," *id.* at 569, 161 L. Ed. 2d at 22 (citations omitted), providing them "a greater claim than adults to be forgiven for failing to escape negative influences in

their whole environment." *Id.* at 570, 161 L. Ed. 2d at 22 (citation omitted). Lastly, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* (citation omitted). "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* This is no less true of juveniles guilty of "a heinous crime." *Id.* On the whole, juveniles are thus of "diminished culpability[.]" *Id.* at 571, 161 L. Ed. 2d at 23.

These unique qualities and resultant lesser culpability undercut the penological justifications behind the death penalty. *Id.* Death as retribution is disproportionate:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

Id. Deterrence does not even the scales:

> [I]t is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . . [T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life

> imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

Id. at 571-72, 161 L. Ed. 2d at 23. The Supreme Court would later examine exactly when the "severe sanction" of LWOP may be imposed on juveniles in *Graham*.

2. *Graham* Prohibits LWOP for Juveniles in Non-Homicide Cases

In *Graham*, the Supreme Court extended the categorical rationale in *Roper* to hold that juveniles may not be sentenced to LWOP for non-homicide offenses under the Eighth Amendment. 560 U.S. at 61-62, 74, 176 L. Ed. 2d at 837, 845. Taking the same two-pronged approach, the majority first determined that, in light of actual sentencing practices rather than strict consideration of legislative prohibitions, "life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual." *Id.* at 66, 176 L. Ed. 2d at 840. Thus, though the practice was permitted in many states, it was nonetheless "exceedingly rare. And 'it is fair to say that a national consensus has developed against it.' " *Id.* at 67, 176 L. Ed. 2d. at 841 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316, 153 L. Ed. 2d 335, 347 (2002)).

At the second step, the *Graham* Court took *Roper*'s observations about juveniles as foundational precepts:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U.S., at 569. As compared to adults, juveniles have a " 'lack of maturity and an underdeveloped sense of responsibility' "; they "are more vulnerable or

> susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.,* at 569–570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.,* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.,* at 569. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835 (plurality opinion).

Id. at 68, 176 L. Ed. 2d at 841. The Supreme Court then deemed it "relevant to consider next the nature of the offenses to which this harsh penalty [of LWOP] might apply[,]" *id.* at 68-69, 176 L. Ed. 2d at 842, and determined that not only are juveniles fundamentally less culpable, but, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id.* at 69, 176 L. Ed. 2d at 842.

The Supreme Court turned next to the nature of the punishment. "[L]ife without parole is the second most severe penalty permitted by law." *Id.* (citation and quotation marks omitted). LWOP sentences thus:

> share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration[.] . . . [T]his sentence means denial of hope; it means that good behavior and character improvement

> are immaterial; it means that whatever the future might hold in store for the mind and spirit . . . he will remain in prison for the rest of his days.

Id. at 69-70, 176 L. Ed. 2d at 842 (citation and quotation marks omitted). Such lifelong permanence "is . . . especially harsh . . . for a juvenile. . . . A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." *Id.* at 70-71, 176 L. Ed. 2d at 843 (citations omitted).

As a final consideration, the Supreme Court examined the penological underpinnings as applied to non-homicide juvenile defendants. In rejecting retribution and deterrence as valid objectives, *id.* at 71-72, 176 L. Ed. 2d. at 843-44, the majority relied extensively on *Roper*, reiterating that juveniles' unique qualities render them less culpable and "less likely to take a possible punishment into consideration when making decisions." *Id.* at 72, 176 L. Ed. 2d at 844. Incapacitation, too, was an inadequate justification for related reasons; juveniles are malleable, yet "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. . . . [I]ncorrigibility is inconsistent with youth. . . . [LWOP] improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 72-73, 176 L. Ed. 2d at 844-45 (citation and quotation marks omitted). The Supreme Court further held rehabilitation, a fourth penological

objective, is entirely irreconcilable with LWOP sentences. *Id.* at 74, 176 L. Ed. 2d at 845.

Absent any adequate penological theory, and in light of "the limited culpability of juvenile homicide offenders; and the severity of life without parole sentences[,]" the Supreme Court concluded that a categorical bar akin to *Roper* was required by the Eighth Amendment. *Id.* It further stressed that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [such] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75, 176 L. Ed. 2d at 845-46.

3. *Miller* Prohibits Mandatory LWOP for Juvenile Homicide Defendants

The Supreme Court, relying on *Roper* and *Graham*, held in *Miller* that mandatory LWOP for a juvenile defendant convicted of homicide crimes is a disproportionate punishment under the Eighth Amendment. 567 U.S. at 465, 183 L. Ed. 2d at 414-15. Its ruling was derived from "two strands of precedent reflecting our concern with proportionate punishment." *Id.* at 470, 183 L. Ed. 2d at 417. The first, which included *Roper* and *Graham*, announced categorical prohibitions against certain sentences "based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* (citation omitted). The second line "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities

consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 470, 183 L. Ed. 2d at 418 (citations omitted). Taken together, "these two lines of precedent lead[] to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.*

The Court's analysis in *Miller* began with *Roper* and *Graham*, which "establish that children are constitutionally different from adults for purposes of sentencing." *Id.* at 471, 183 L. Ed. 2d at 418. Reiterating the three differences between adult and juvenile defendants identified in those two cases—immaturity, vulnerability to influence and lack of control, and malleability—as observations based "on common sense . . . [and] science and social science[,]" *id.* at 471, 183 L. Ed. 2d at 418-19, the Court again acknowledged that "those findings . . . both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Id.* at 472, 183 L. Ed. 2d at 419 (citations and quotation marks omitted). It once more stated that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* Also, though it acknowledged *Graham*'s categorical holding applied only to non-homicide offenses, the Supreme Court clarified that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . . So *Graham*'s reasoning implicates any life-

without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.* at 473, 183 L. Ed. 2d at 420.

In considering the penalty itself, *Miller* pulled a flat parallel out of *Graham*: the " '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment.' " *Id.* at 475, 183 L. Ed. 2d at 421 (alteration in original) (quoting *Graham*, 560 U.S. at 89, 176 L. Ed. 2d at 856 (Roberts, C.J., concurring in the judgment)). The Supreme Court thus turned to its line of death penalty cases, which require individualized sentencing "so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." *Id.* at 475-76, 183 L. Ed. 2d at 421 (citations omitted). When that line is considered "[i]n light of *Graham's* reasoning, th[o]se decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders." *Id.* at 476, 183 L. Ed. 2d at 422. Mandatory LWOP sentences for juvenile homicide offenders thus ran afoul of both lines as disproportionate even though such sentences did not fit squarely within their express holdings. *Id.* at 479, 183 L. Ed. 2d at 424.

4. *Montgomery: Miller* Is Substantive Rule of Retroactive Effect

The core question in *Montgomery* was whether *Miller*'s holding announced a substantive rule of retroactive effect. ___ U.S. at ___, 193 L. Ed. 2d at 610. In concluding that it did, the Supreme Court clarified the applicability of *Roper*, *Graham*, and *Miller* in several ways pertinent to this appeal. First, it explained "[t]he

'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles. Those cases include *Graham* . . . and *Roper*." *Montgomery*, ___ U.S. at ___, 193 L. ed. 2d at 618 (citations omitted). Second, and of particular importance to this appeal, it explained that *Miller* announced a categorical prohibition against LWOP sentences for juvenile homicide defendants who are not "irreparably corrupt":

> *Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." *Id.,* [567 U.S. at 472], 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407, 419. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " *Id.,* at [479], 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (quoting *Roper,* 543 U.S., at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " 567 U.S., at [479-80], 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (quoting *Roper, supra,* at 573, 126 S. Ct. 1183, 161 L. Ed. 2d 1), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. *Penry,* 492 U.S., at 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256. As a result, *Miller* announced a substantive rule of constitutional law.

Id. at ___, 193 L. Ed. 2d at 619-20. Thus, *Montgomery*, as a distillation of *Roper*, *Graham*, and *Miller*, made clear that juvenile homicide offenders who are neither

incorrigible nor irreparably corrupt, are—like other juvenile offenders—so distinct in their immaturity, vulnerability, and malleability as to be outside the realm of LWOP sentences under the Eighth Amendment.

C. Defendant's Sentence and De Facto *LWOP*

Defendant's argument asks us to apply the above principle from *Miller*, derived from *Roper* and *Graham* and plainly stated in *Montgomery*, to hold that Defendant's consecutive sentences of life with parole constitute a *de facto* LWOP sentence in violation of those precedents and the Eighth Amendment and Article I, Section 27 of the North Carolina Constitution.[10] Specifically, he contends that because he will not be eligible for parole until age 67, he will not be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 569 U.S. at 75, 176 L. Ed. 2d. at 846, and will suffer "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* at 79, 176 L. Ed. 2d at 848. *See also Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424 (quoting the first excerpt from *Graham*). His ultimate argument thus consists of three constituent questions that do not appear to have been answered by the courts of this State and have caused concern in other jurisdictions: (1) are *de facto* LWOP sentences, as opposed to sentences expressly named as such, cognizable and barred as cruel and

[10] Our Supreme Court "historically has 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). Our analysis therefore applies equally to both.

unusual when applied to redeemable juveniles under the Eighth Amendment; (2) can aggregated punishments, *i.e.* multiple consecutive sentences totaling a lengthy term of years, amount to a *de facto* LWOP sentence; and (3) must a *de facto* LWOP punishment obviously exceed a juvenile defendant's natural life, or does some term of years that may (or may not) fall short of the juvenile's full lifespan nonetheless constitute an impermissible *de facto* LWOP sentence?

1. *De Facto* LWOP Sentences

The question of whether *de facto* LWOP sentences are cognizable as a cruel and unusual punishment barred under *Graham* and *Miller* has been answered by a sizeable number of state appellate courts. Of those identified by this Court as having addressed the issue, these jurisdictions predictably fall into two camps: (1) those that recognize *de facto* LWOP sentences as cognizable and may warrant relief under the

Eighth Amendment;[11] and (2) those that have thus far decided not to do so.[12] A clear majority of these states count themselves among the former.[13] We see considerable reason to join the majority.

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[11] *See People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding consecutive sentences totaling 110-years-to-life was *de facto* LWOP sentence under *Graham*); *State v. Ragland*, 836 N.W.2d 107, 121-22 (Iowa 2013) (holding a life sentence with parole eligibility after 60 years was a *de facto* LWOP sentence in violation of *Miller*); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014) (holding consecutive sentences, including a life sentence for homicide, with parole eligibility after 45 years was *de facto* LWOP controlled by *Miller*); *Casiano v. Comm'r of Corr.,* 115 A.3d 1031, 1047-48 (Conn. 2015) (holding a juvenile's 50 year sentence without possibility of parole was a *de facto* LWOP sentence controlled by *Miller*); *Henry v. State*, 175 So.3d 675, 679-80 (Fla. 2015) (holding 90 year sentence for non-homicide juvenile defendant was unconstitutional under *Graham*); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (holding aggregate sentences for non-homicide offenses placing parole eligibility at 100 years are a *de facto* LWOP sentence in violation of *Graham*); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) (holding mandatory 97 year sentence with parole eligibility after 89 years is *de facto* LWOP and unconstitutional under *Miller*); *State ex rel. Morgan v. State*, 217 So.3d 266, 271 (La. 2016) ("We . . . construe the defendant's 99-year sentence as an effective life sentence, illegal under *Graham*."); *State v. Moore*, 76 N.E.3d 1127, 1140-41 (Ohio 2016) (holding consecutive terms-of-years sentences for non-homicide crimes with parole eligibility after 77 years is an unconstitutional *de facto* LWOP sentence under *Graham*); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55, 63-64 (Mo. 2017) (holding mandatory concurrent sentences with parole eligibility after 50 years constituted a *de facto* LWOP sentence subject to *Miller*'s sentencing requirements); *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017) (holding *de facto* LWOP sentences are subject to constitutional protections of *Graham, Miller,* and *Montgomery*); *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017) (holding "lengthy term-of-years sentences that amount to life without parole" are controlled by *Graham* and *Miller*); *State v. Ramos*, 387 P.3d 650, 659 (Wash. 2017) (en banc) ("We now join the majority of jurisdictions that have considered the question and hold that *Miller* does apply to juvenile homicide offenders facing de facto life-without-parole sentences."); *Commonwealth v. Foust*, 180 A.3d 416, 431 (Pa. 2018) (holding a term-of-years sentence constituting a *de facto* LWOP sentence requires sentencing protections of *Miller*); *Carter v. State*, 192 A.3d 695, 735 (Md. 2018) (100-year aggregate punishment for non-homicide crimes with parole eligibility after 50 years was *de facto* LWOP sentence in violation of *Graham*); *Ira v. Janecka*, 419 P.3d 161, 167 (N.M. 2018) (holding *Roper*, *Graham*, and *Miller* applied to term-of-years sentences); *White v. Premo*, 443 P.3d 597, 604-05 (Or. 2019) (holding juvenile's 800-month sentence for murder with parole eligibility at 54 years was *de facto* LWOP sentence subject to *Miller* protections).

[12] Several state courts appear to have held that *de facto* LWOP sentences are not cognizable under any circumstances. *See State v. Kasic*, 265 P.3d 410, 414 (Ariz. Ct. App. 2011) (holding *Graham* inapplicable to term-of-years sentences); *Hobbs v. Turner*, 431 S.W.3d 283, 289 (Ark. 2014) (holding *Graham* and *Miller* do not apply to a "nonlife sentence"); *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017) (refusing to recognize *de facto* LWOP sentences in part because "[l]ife without parole is a specific sentence"); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) (refusing to apply *Miller* and *Montgomery* to any sentences "other than LWOP"). Another state court appears to have ignored the argument outright. *See Diamond v. State*, 419 S.W.3d 435, 441 (Tex. Ct. App. 2012) (upholding a 99-year

We, like many states in that majority, decline to stand behind the simple formalism that a sufficiently lengthy term-of-years sentence cannot be a sentence of LWOP because it does not bear the name and terminates at a date certain. Rejection of the proposition is, first, a simple "matter of common sense . . . . Otherwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence." *Carter*, 192 A.3d at 725. As was noted in *Miller*, "[t]he Eighth

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sentence imposed on a juvenile without discussing *Graham* despite counsel's argument raising the issue). At least two states seem to have suggested *de facto* LWOP sentences may exist but have yet to hold as such. *See State v. Quevedo*, 947 N.W.2d 402, ___ (S.D. 2020) ("[O]ur cases have seemed to suggest that a juvenile sentence involving a lengthy term of years and the lack of a meaningful opportunity for release could constitute a de facto life sentence and transgress *Graham*'s categorical Eighth Amendment prohibition on life without parole[.]" (citations omitted)); *Mason v. State*, 235 So.3d 129, 134 (Miss. 2017) (suggesting the defendant may have shown a *de facto* life sentence in violation of *Miller* and *Montgomery* had he presented evidence in support, but failure to do so and concession that his life expectancy would extend beyond parole eligibility defeated claim). Another grouping of states has elected not to afford relief under a *de facto* LWOP theory by declining to answer whether aggregated sentences and/or term-of-years sentences violate the Eighth Amendment absent a Supreme Court decision to that express effect. *See State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (declining to recognize aggregated term-of-years sentences as *de facto* LWOP sentences "absent further guidance from the [Supreme] Court" on both aggregation and recognition of *de facto* LWOP); *State v. Slocumb*, 827 S.E.2d 148, 152 (S.C. 2019) (recognizing that *de facto* LWOP punishments, whether as a single sentence or aggregated punishment, exist and may violate *Graham* and *Miller*, but declining to so hold "without further input from the Supreme Court"). Still another category has held that aggregated sentences cannot constitute a *de facto* LWOP sentence and resolved the defendants' appeals on that ground without affirmatively stating whether *de facto* LWOP sentences are otherwise cognizable. *See 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 concluding, without any discussion, that parole eligibility at age 79 offers a "meaningful opportunity to obtain release on parole during [the defendant's] lifetime"); *Vasquez v. Commonwealth,* 781 S.E.2d 920, 926 (Va. 2016) (declining to grant relief under *Graham* to aggregated term-of-years sentence without addressing single term-of-years sentences that exceed natural life).

[13] We note that, in *Slocumb*, the South Carolina Supreme Court stated that "jurisdictions around the country are approximately evenly split" on whether to recognize *de facto* LWOP sentences under *Graham* or *Miller*. 827 S.E.2d at 157 n. 17.

Amendment's prohibition of cruel and unusual punishment '*guarantees* individuals the right not to be subjected to excessive sanctions[,]' " 567 U.S. at 469, 183 L. Ed. 2d at 417 (emphasis added) (quoting *Roper*, 543 U.S. at 560, 161 L. Ed. 2d at 16), and allowing sentencers to so easily avoid its application would render it no guarantee at all. Any holding to the contrary ignores the fact that *Graham* and *Miller* declared cruel and unusual those punishments imposed against redeemable juveniles that deprive them of " 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *Miller,* 567 U.S. at 479, 183 L. Ed. 2d at 424 (quoting *Graham*, 560 U.S. at 75, 176 L. Ed. 2d at 846). Stated differently, "[t]he court in *Graham* was not barring a terminology—'life without parole'—but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release." *Moore*, 76 N.E.3d at 1139-40.

Many of the states that have declined to afford relief to juveniles sentenced to *de facto* LWOP sentences have refused to do so under the rationale that the Supreme Court's decisions in *Graham* and *Miller* were limited to the specific LWOP sentences considered in those cases. *See, e.g., Lucero*, 394 P.3d at 1132 ("*Graham* and *Miller* apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense." (citations omitted)). However, such holdings ignore *Graham*'s own caution against denying the true reality of the actual

punishment imposed on a juvenile when determining whether it violates the Eighth Amendment. In pointing out that adults and juveniles who receive the same sentence of LWOP do not, in fact, receive the same punishment, the majority in *Graham* stated "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. *This reality cannot be ignored*." 560 U.S. at 70-71, 176 L. Ed. 2d at 843 (emphasis added). To hold that the factual equivalent of the punishments prohibited by *Graham* and *Miller* is not actually prohibited by those decisions is to deny the factual reality. *Roper*, *Graham*, and *Miller* are all concerned with "imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472, 183 L. Ed. 2d at 419. A *de jure* LWOP sentence is certainly as "harsh" as its functional equivalent.

The straightforward applicability of *Graham*'s reasoning to *de facto* LWOP sentences is clear from the reasoning itself. Its observations about juveniles' immaturity, underdeveloped self-control, and capacity for change are true independent of any sentence. That those characteristics undermined the punitive justifications of LWOP is thus equally true of *de facto* LWOP sentences. *See Carter*, 192 A.3d at 726 ("The same [penological] test [from *Graham*] applied to a sentence of a lengthy term of years without eligibility for parole yields the same conclusion [as *Graham*]."). Retribution concerns must be measured against the culpability of defendants, and, because juveniles—"even when they commit terrible crimes"—are

inherently less culpable regardless of the sentence imposed, " 'the case for retribution is not as strong with a minor as with an adult.' " *Miller*, 567 U.S. at 472, 183 L. Ed. 2d at 419 (quoting *Graham*, 560 U.S. at 71, 176 L. Ed. 2d at 883). A *de facto* LWOP sentence is no more of a deterrent to a juvenile than its *de jure* equivalent because, in either case, "their immaturity, recklessness, and impetuosity[ ]make them less likely to consider potential punishment." *Id.* (citing *Graham*, 560 U.S. at 72, 176 L. Ed. 2d at 844). *De jure* and *de facto* LWOP sentences are also equally incapacitating; if incapacitation is inadequate to justify the former, *id.* at 472-73, 183 L. Ed. 2d at 419, then logic dictates it is inadequate for the latter. This same logic applies to rehabilitative concerns that are in irreconcilable conflict with LWOP sentences. *Id.* at 473, 183 L. Ed. 2d at 419-20. In sum, "none of what [*Graham*] said about children . . . is crime-specific. . . . So *Graham*'s reasoning implicates *any* life-without-parole sentence imposed on a juvenile[.]" *Id.* at 473, 183 L. Ed. 2d at 420 (emphasis added).

The other authorities relied upon by those state courts that do not recognize *de facto* LWOP challenges do not dissuade us of this holding. Several rely on language from Justice Alito's dissent in *Graham* for the proposition that it was a narrow decision. *See, e.g., Vasquez*, 781 S.E.2d at 925 (" 'Nothing in the Court's opinion [in *Graham*] affects the imposition of a sentence to a term of years without the possibility of parole.' " (quoting *Graham*, 560 U.S. at 124, 176 L. Ed. 2d at 877 (Alito, J., dissenting))). However, as other Supreme Court Justices have noted, a dissent from

a singular justice is not binding on the application of Supreme Court precedent. *Georgia v. Public.Resource.Org, Inc.*, ___ U.S. ___, ___, 206 L. Ed. 2d 732, 748 (2020) ("As every judge learns the hard way, 'comments in [a] dissenting opinion' about legal principles and precedents 'are just that: comments in a dissenting opinion.' " (quoting *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177 n. 10, 66 L. Ed. 2d 368, 377 n. 10 (1980)). *See also Moore*, 76 N.E.3d at 1157-58 (O'Connor, C.J., concurring) (observing Justice Alito's dissent in *Graham* is not controlling in the application of the majority's decision). Justice Thomas's observation in a footnote to his dissent in *Graham* that the majority did not include term-of-years sentences in calculating how many juveniles nationwide had been sentenced to life without parole is similarly unpersuasive. 560 U.S. at 113 n. 11, 176 L. Ed. 2d at 870 n. 11 (Thomas, J., dissenting). We note that a narrow reading of both *Roper* and *Graham* was expressly rejected in *Miller*; there, the Arkansas Supreme Court denied a defendant's Eighth Amendment challenge on the grounds that "*Roper* and *Graham* were 'narrowly tailored' to their contexts," and the Supreme Court reversed. 567 U.S. at 467, 183 L. Ed. 2d at 416. Our Supreme Court has also instructed this Court that we must "examine each of defendant's [Eighth Amendment and analogous state Constitution] contentions *in light of the general principles enunciated* by [the North Carolina Supreme] Court and the Supreme Court [of the United States] guiding cruel and unusual punishment analysis." *Green*, 348 N.C. at 603, 502 S.E.2d at 828 (emphasis

added). The "general principles enunciated" in *Graham*, *Miller*, and *Montgomery* are, as explained above, applicable to *de facto* LWOP sentences even if the specific facts of those decisions did not involve them.

Those states in the minority of jurisdictions have likewise relied on federal court decisions holding *Graham* and *Miller* do not apply to term-of-years sentences. *See, e.g., Vasquez*, 781 S.E.2d at 926 (relying on *Bunch v. Smith*, 685 F.3d 546 (6th. Cir. 2012)). *Bunch*, however, dealt with *Graham* in a specific context: whether, under the deferential standard of collateral habeas review applicable to the Antiterrorism and Effective Death Penalty Act of 1996, an Ohio court[14] that sentenced a defendant to a lengthy term-of-years sentence acted contrary to "clearly established federal law." 685 F.3d at 549. That standard presents a markedly different legal question than the one considered here. *See Atkins v. Crowell*, 945 F.3d 476, 480 (6th Cir. 2019) (Cole, C.J., concurring) (noting that *Miller* and *Graham* compelled the conclusion that a *de facto* LWOP sentence was unconstitutional but denying habeas relief because "[o]n occasion, AEDPA's onerous standards require us to deny . . . relief even though the sentence . . . is unconstitutional").

2. Aggregate Sentences As *De Facto* LWOP Sentences

[14] Ohio's highest court later recognized *de facto* LWOP sentences imposed on juveniles as violative of the Eighth Amendment in an appeal brought by Bunch's codefendant. *Moore*, 76 N.E.3d at 1139.

Having held that *de facto* LWOP sentences for redeemable juveniles are unconstitutional under *Graham, Miller,* and *Montgomery*, we next address whether an *aggregate* punishment of concurrent sentences may amount to that unlawful punishment. Again, state courts are sharply divided on the issue. Some states that recognize *de facto* LWOP sentences do so only when imposed as a single sentence.[15] Others who have rejected recognition of *de facto* LWOP sentences have done so on the ground that aggregated sentences do not present such a circumstance.[16] However, a majority of courts again favor recognition of aggregated sentences as *de facto* LWOP punishments subject to *Graham, Miller,* and *Montgomery*.[17]

We also hold that aggregated sentences may give rise to a *de facto* LWOP punishment. As other courts have observed, "[n]owhere in the *Graham* decision does the Supreme Court specifically limit its holding to offenders who were convicted for a *single* nonhomicide offense[.]" *Boston*, 363 P.3d at 457. That decision granted Eighth Amendment protection to a juvenile irrespective of his numerous offenses:

> [O]ne cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, *serious crimes* early in his term of supervised release and

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[15] *See State v. Brown*, 118 So.3d 332, 342 (La. 2013) (holding *Graham* does not apply to multiple term-of-years sentences leading to release at age 86); *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 246 (Mo. 2017) (en banc) (declining to extend *de facto* LWOP recognition to aggregated term-of-years sentences); *Foust*, 180 A.3d at 434 (same).

[16] *Martinez*, 442 P.3d at 156-57; *Vasquez*, 781 S.E.2d at 926; *Ali*, 895 N.W.2d at 246.

[17] Reviewing cases from those jurisdictions cited *supra* nn. 11-12, we identify 11 states that have rejected aggregation and 13 that have recognized it. Maryland's highest court's observation that "[m]ost of the decisions in other jurisdictions applying *Graham* and *Miller* to sentences expressed in a term of years have actually involved stacked sentences" still appears true. *Carter*, 192 A.3d at 732-33.

> despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an *"escalating pattern of criminal conduct,"* but it does not follow that he would be a risk to society for the rest of his life.

Graham, 560 U.S. at 73, 176 L. Ed. 2d at 844 (emphasis added) (citation omitted). As for *Miller*, one of the appellants in that case was also convicted of two felonies, with no apparent impact on the ultimate holding. 567 U.S. at 466, 183 L. Ed. 2d at 415.

The applicability and scope of protection found in the Eighth Amendment under both decisions turned on the identity of the defendant, *not* on the crimes perpetrated. *Graham*, which followed the categorical approach used in *Roper* to invalidate death penalties against minors, noted that such categorical cases "turn[] on the characteristics of the offender[.]" 560 U.S. at 61, 176 L. Ed. at 837. Although *Graham* itself stated that "the age of the offender and the nature of the crime each bear on the analysis[,]" 560 U.S. at 69, 176 L. Ed. 2d at 842, the identity of the offender as a juvenile was of primary importance as recognized in *Miller* and *Montgomery*: "The 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate *when applied to juveniles*. . . . *Miller* took as its starting premise the principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.' " *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 618 (emphasis added) (citations omitted). *Miller* appropriately recognized that "none of what [*Graham*] said

about children . . . is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile[.]" 567 U.S. at 473, 183 L. Ed. 2d at 420. That is, the categorical prohibition is principally focused on the offender, not on the crime or crimes committed.

The states that have not recognized aggregate punishments as *de facto* LWOP sentences have done so on grounds that we hold distinguishable. For example, Pennsylvania rejected the argument on the basis that its caselaw "has long disavowed the concept of volume discounts for committing multiple crimes." *Foust*, 180 A.3d at 436. North Carolina law is not so averse. To be sure, our Supreme Court has held that "[t]he 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 act which he commits." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983) (citations omitted). However, such consecutive sentences are not "standing alone" when they also involve a juvenile defendant. *Cf. Graham*, 560 U.S. at 70-71, 176 L. Ed. 2d at 843 ("A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." (citations and quotations omitted)). We note our own caselaw and statutes compel the State to consider consecutive sentences as a single punishment. *See* N.C. Gen. Stat. 15A-1354(b) (2019) ("In determining the effect of consecutive

sentences . . . , the Division of Adult Correction and Juvenile Justice of the Department of Public Safety must treat the defendant as though he has been committed for a single term[.]"); *Robbins*, 127 N.C. App. at 165, 487 S.E.2d at 773 (holding parole eligibility for consecutive sentences must be calculated as if serving a single term).

Other states have found persuasive the following non-binding *dicta* from the Supreme Court's decision in *O'Neil v. Vermont*: " [']It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.['] " 144 U.S. 323, 331, 36 L. Ed. 450, 455 (1892) (quoting the Vermont Supreme Court). We do not deem this language adequate to counter *Roper, Graham, Miller*, and *Montgomery*; needless to say, *O'Neil* did not involve juveniles, and long predated the express adoption of categorical Eighth Amendment prohibitions in juvenile cases that primarily focus not on the crimes committed but instead "turn[] on the characteristics of the offender." *Graham*, 560 U.S. at 61, 176 L. Ed. 2d at 837; *see also Moore*, 76 N.E.3d at 1142 ("Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability." (emphasis in original)).

In short, "*O'Neil* . . . does not indicate anything about the Supreme Court's view on the matter." *Ira*, 419 P.3d at 166.

3. Defendant's Sentences Are an Unconstitutional *De Facto* LWOP Punishment

The final question posed by Defendant's argument is whether his consecutive sentences, which place his eligibility for parole at 50 years and earliest possible release at age 67, are sufficiently lengthy to constitute an unconstitutional *de facto* LWOP punishment in light of the trial court's determination that he is neither irredeemable nor irreparably corrupt. Though the issue of identifying *de facto* LWOP sentences certainly presents some practical challenges, we hold that Defendant's consecutive sentences of life and parole eligibility at 50 years constitute a *de facto* LWOP punishment.

Several courts have held *de facto* LWOP sentences that do not conclusively extend beyond the juvenile's natural life are nonetheless unconstitutional sentences, and many of them have found such sentences to exist when release (either through completion of the sentence or opportunity for parole) is only available after roughly 50 years, and sometimes less.[18] Those states have adopted differing methods for their

[18] *See Zuber*, 152 A.3d at 212-13 (55 years); *State ex rel. Carr*, 527 S.W.3d at 57 (50 years); *People v. Contreras*, 411 P.3d 445, 446 (Cal. 2018) (50 years); *Carter*, 192 A.3d at 734 (50 years); *Casiano*, 115 A.3d at 1035 (50 years); *Bear Cloud*, 334 P.3d at 136 (45 years); *People v. Buffer*, 137 N.E.3d 763, 774 (Ill. 2019) (40 years). Courts that have not identified an exact point at which a *de facto* LWOP sentence arises have indicated that 50 years is close to the limit. *See, e.g., Ira*, 419 P.3d at 170 ("Certainly the fact that Ira will serve almost 46 years before he is given an opportunity to obtain

delineations, *see Carter*, 192 A.3d at 727-28 (surveying decisions and identifying five different means). Though the State rightly points out that the task of demarcating the bounds of a *de facto* LWOP sentence may be difficult, the task is not impossible.

For example, retirement age has been used to discern whether a sentence is a *de facto* LWOP punishment. *Id.* at 734. North Carolina's Constitution provides that persons' "inalienable rights" include the "enjoyment of the fruits of their own labor," N.C. Const. Art. I, § 1, and our Supreme Court has recognized that "a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary harmless occupations of life . . . is legal grotesquery." *State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940). It is difficult, then, to deny 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*. *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 623. Stated differently:

> [T]he language of *Graham* suggests that the high court envisioned more than the mere act of release or a de minimis quantum of time outside of prison. *Graham* spoke of the chance to rejoin society in qualitative terms—"the rehabilitative ideal" ([*Graham*] at 130 S. Ct. 2011)—that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry. The

release is the outer limit of what is constitutionally acceptable." (citation omitted)). The 50-year mark identified by several courts "seems consistent with the observation of the *Graham* Court that the defendant in that case would not be released 'even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.' " *Carter*, 192 A.3d at 728-29 (quoting *Graham*, 560 U.S. at 79, 176 L. Ed. 2d at 848).

> "chance for reconciliation with society" (id. at 130 S. Ct. 2011), "the right to reenter the community" (id. at 130 S. Ct. 2011), and the opportunity to reclaim one's "value and place in society" (*ibid.*) all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement. . . . Confinement with no possibility of release until age 66 or age 74 seems unlikely to allow for the reintegration that *Graham* contemplates.

Contreras, 411 P.3d at 454. To release an individual after their opportunity to directly contribute to society—both through a career and in other respects, like raising a family—"does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." *Null*, 836 N.W.2d at 71 (quoting *Graham*, 560 U.S. at 74, 176 L. Ed. 2d at 845-46). Lastly, we observe that our General Assembly has elsewhere defined what an appropriate life with parole sentence in compliance with *Miller* looks like; N.C. Gen. Stat. § 15A-1340.19A (2019), the statute enacted for that purpose, provides that " 'life imprisonment with parole' shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole."[19]

[19] Defendant asserted at oral argument, that, as a matter of statutory construction, juveniles sentenced to first-degree murder under N.C. Gen. Stat. § 15A-1340.19A, *et seq.* must be given parole eligibility at 25 years. Defendant never raised the issue before the trial court, nor did he brief any statutory interpretation arguments; any arguments as to the purported construction and interpretation of N.C. Gen. Stat. § 15A-1340.19A, *et seq.* have not been presented in this appeal. *See* N.C. R. App. P. 28(a) (2020) ("Issues not presented and discussed in a party's brief are deemed abandoned."). We therefore do not address the statutory construction of N.C. Gen. Stat. § 15A-1340.19A and instead look to it as an expression of the General Assembly's judgment on what constitutes a constitutionally permissible juvenile life sentence following *Miller*—an issue that *was* expressly argued and addressed by the parties in their briefs.

A holding that Defendant's sentences constitute a *de facto* LWOP sentence is in line with the above; his ineligibility for parole for 50 years falls at the limit identified by numerous other jurisdictions as constituting an unconstitutional *de facto* LWOP sentence, and it affords him release only at or after retirement age. *See United States v. Grant*, 887 F.3d 131, 151 (surveying various means of calculating retirement age and observing "by all accounts, the national age of retirement to date is between sixty-two and sixty-seven inclusive"), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3rd Cir. 2018).

As far as identifying what a sentence that would *not* amount to a *de facto* LWOP punishment, our General Assembly has offered some indication. *See* N.C. Gen. Stat. § 15A-1340.19A. The definition provided therein is not strictly limited to single offenses: "If 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." N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2019). Defendant here has clearly abandoned any assertion that he was convicted under the felony murder rule. But N.C. Gen. Stat. § 15A-1340.19B(a)(1) nonetheless indicates 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*. *See, e.g., Ramos*, 387 P.3d at 661-62 (noting that "[s]tate legislatures are . . . allowed some flexibility in fashioning the methods for fulfilling *Miller*'s substantive

requirements, so long as the State's approach does not 'demean the substantive character of the federal right at issue.' " (quoting *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 621)). This Court has twice held that life with the possibility of parole after 25 years does not constitute a *de facto* LWOP sentence subject to *Miller*. *See State v. Jefferson*, 252 N.C. App. 174, 181, 798 S.E.2d 121, 125 (2017) ("Defendant's sentence is neither an explicit nor a *de facto* term of life imprisonment without parole. Upon serving twenty-five years of his sentence, Defendant will become eligible for parole[.]"); *State v. Seam*, 263 N.C. App. 355, 361, 823 S.E.2d 605, 609-10 (2018) (holding *Miller*'s individualized sentencing requirement inapplicable to a single sentence of felony murder carrying mandatory punishment of life imprisonment with the opportunity for parole after 25 years), *aff'd per curiam*, 373 N.C. 529, 837 S.E.2d 870 (2020).

We stress, as the Supreme Court did in *Graham*, that nothing in our decision compels the State to actually release Defendant after 25 years. The Post-Release Supervision and Parole Commission will ultimately decide whether Defendant may be released in his lifetime. Our decision simply upholds the Eighth Amendment's constitutional requirement that Defendant, as a juvenile who is neither incorrigible nor irredeemable, have his "hope for some years of life outside prison walls . . . restored." *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 623.

III. CONCLUSION

The facts, the law, and all that results in this appeal are difficult. As shown by the victim impact statements offered at resentencing, the murders of Mr. Carpenter and Ms. Helton—two teenagers who were soon to be parents—caused irreparable loss and irrevocable harm to victims and their families. Defendant was shaped by what was a profoundly troubled childhood, leading him to actively participate in these truly heinous crimes. These facts have led this Court in reviewing Defendant's constitutional claims that have divided courts nationwide, to discuss the difficult subject of sentencing, for outrageous acts, a juvenile offender who is inherently less culpable than adults and was found by the trial court to be redeemable. "Few, perhaps no, judicial responsibilities are more difficult than sentencing." *Graham*, 560 U.S. at 77, 176 L. Ed. 2d at 847. This case is certainly no exception, as the trial court explained following resentencing: "[T]hese are real tragedies. . . . [T]hey don't put [you] in positions like this because you're weak or because you're a coward. If you can't, you know, make hard decisions, you will never last as a judge and you will never last as a prosecutor or a defense lawyer." Indeed, when it comes to sentencing juveniles for the most egregious crimes, these difficulties are heightened; in such circumstances, the (in)humanity of the perpetrator, the victims, the crimes, and the punishment are inseparable under the Eighth Amendment.

This Court's duty is to uphold the federal and state Constitutions irrespective of these difficulties. In determining Defendant's appeal, we hold under Eighth Amendment jurisprudence: (1) *de facto* LWOP sentences imposed on juveniles may run afoul of the Eighth Amendment; (2) such punishments may arise out of aggregated sentences; and (3) a sentence that provides no opportunity for release for 50 or more years is cognizable as a *de facto* LWOP sentence. Consistent with the Eighth Amendment as interpreted by *Roper, Graham, Miller,* and *Montgomery*, these holdings compel us to reverse and remand Defendant's sentence. Under different circumstances, we would leave resentencing to the sound discretion of the trial court. *See, e.g., State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) (remanding for resentencing and noting that, on remand, "[w]hether the two sentences should run concurrently or consecutively rests in the discretion of the trial court"). Here, however, we hold that of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional. We therefore instruct the trial court on remand to enter two concurrent sentences of life with parole as the only constitutionally permissible sentence available under the facts presented.

REVERSED AND REMANDED.

Judges BRYANT and HAMPSON concur.

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

JAMES RYAN KELLIHER

From N.C. Court of Appeals
(19-530)
From Cumberland
(01CRS59934)

O R D E R

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the State on the 6th of November 2020 in this matter pursuant to G.S. 7A-30 (substantial constitutional question), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the notice of appeal is

"Dismissed ex mero motu by order of the Court in conference, this the 10th of March 2021."

s/ Berger, J.
For the Court

Upon consideration of the petition filed by the State on the 23rd of October 2020 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 10th of March 2021."

s/ Berger, J.
For the Court

Upon consideration of the petition filed on the 6th of November 2020 by the State in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 10th of March 2021."

s/ Berger, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15 (g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th of March 2021.

.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Ms. Kathryn L. VandenBerg, Assistant Appellant Defender, For Kelliher, James Ryan - (By Email)
Mr. Robert C. Ennis, Assistant Attorney General, For State of North Carolina - (By Email)
Mr. Glenn gerding, Appellate Defender, For Kelliher, James Ryan - (By Email)
Ms. Kimberly N. Callahan, Assistant Attorney General, For State of North Carolina - (By Email)
Mr. William R. West, District Attorney
Hon. Lisa Scales, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

JAMES RYAN KELLIHER

From N.C. Court of Appeals
(19-530)
From Cumberland
(01CRS59934)

O R D E R

Upon consideration of the conditional petition filed on the 16th of November 2020 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 10th of March 2021."

s/ Berger, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March 2021.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
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