No. 17-

In the Supreme Court of the United States

TIMOTHY S. WILLBANKS, Petitioner,

v.

MISSOURI DEP'T OF CORRECTIONS, Respondent.

LEDALE NATHAN, Petitioner,

v.

STATE OF MISSOURI, Respondent.

On Petition for a Writ of Certiorari to the Missouri Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Amendment's limits on sentences of life without parole for juveniles, as set forth in *Graham v. Florida* and *Miller v. Alabama*, apply equally to aggregate term-of-years sentences so lengthy that juveniles will not be eligible for parole during their lifetimes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

PETITION FOR A WRIT OF CERTIORARI

Petitioners Timothy S. Willbanks and Ledale Nathan respectfully petition for a writ of certiorari to review the judgments of the Missouri Supreme Court.

OPINIONS BELOW

The Missouri Supreme Court's opinion in *Willbanks v. Missouri Dep't of Corrections*, App 1a, has not yet been published in the S.W.3d, but is available at 2017 WL 2952445. The Missouri Supreme Court's opinion in *State v. Nathan*, App 66a, has not yet been published in the S.W.3d, but is available at 2017 WL 2952773. The Missouri Court of Appeals' opinion in *Willbanks v. Missouri Dep't of Corrections*, App. 129a, is not published in the S.W.3d, but is available at 2015 WL 6468489. The Missouri Court of Appeals' order in *State v. Nathan*, App. 171a, is not published in the S.W.3d, but is available at 2015 WL 7253338. The Missouri Court of Appeals' memorandum opinion in *State v. Nathan*, App. 173a, is not published in the S.W.3d and is unavailable on Westlaw.

JURISDICTION

The judgments of the Missouri Supreme Court were entered on July 11, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

STATEMENT

In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that the Eighth Amendment prohibits the imposition of a sentence of life without parole on a juvenile nonhomicide offender. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that the Eighth Amendment prohibits mandatory life without parole for juvenile homicide offenders.

But what about aggregate term-of-years sentences so lengthy that they are the functional equivalent of life without parole, in that the juvenile will not be eligible for parole during his lifetime? Despite *Graham*, could a state sentence a juvenile nonhomicide offender, not to *life* without parole, but to *100 years* without parole? Despite *Miller*, could a state sentence a juvenile homicide offender, not to mandatory *life* without parole, but to a mandatory *100 years* without parole?

Over the past few years, a very large lower court conflict has developed over whether the Eighth Amendment limits on juvenile sentencing set forth in *Graham* and *Miller* apply equally to aggregate term-of-years sentences so long that they are the functional equivalent of life without parole. Many jurisdictions have held that *Graham* and *Miller* do apply equally to such sentences of de facto life without parole. But a handful of jurisdictions, now including Missouri, have held that *Graham* and *Miller* do not preclude states from sentencing juveniles to prison terms so long that the juveniles will never be eligible for parole before they die. In these jurisdictions, *Graham* and *Miller* restrict only the form of a sentence, not its substance. If a state wishes to deny

juveniles any chance of parole, the state need only change the wording of its sentences from "life" without parole to "X years" without parole, where X is a number large enough to ensure that the juvenile will die in prison.

In the decisions below, the Missouri Supreme Court joined the minority side of the split. Timothy Willbanks, convicted of nonhomicide offenses he committed at the age of 17, will not be eligible for parole until he is 85. Ledale Nathan, convicted of a homicide and other offenses he committed at the age of 16, will likewise not be eligible for parole until he is in his 80s, despite the sentencing jury's determination that Nathan should not receive life without parole for the homicide conviction. The Missouri Supreme Court, by the same 4-3 vote in both cases, held that these sentences do not run afoul of the principles set forth in *Graham* and *Miller*.

The Court should grant certiorari and reverse.

1. This certiorari petition consolidates two cases raising the same issue that were decided on the same day by the Missouri Supreme Court.

a. Timothy Willbanks was 17 years old when he stole a car and shot the car's owner. App. 2a. He was convicted of seven offenses arising from this incident: one count of first-degree assault, one count of kidnapping, two counts of first-degree robbery, and three counts of armed criminal action. App. 3a. Willbanks was sentenced to life plus 355 years in prison—life for the assault, 100 years for each count of armed criminal action, 20 years for each count of robbery, and 15 years for kidnapping, all to run consecutively. App. 3a. Under Missouri law, Willbanks

will not be eligible for parole until he is 85 years old. App. 6a n.4.

Willbanks' convictions and sentences were affirmed on direct appeal. *State v. Willbanks*, 75 S.W.3d 333 (Mo. Ct. App. 2002). His motion for post-conviction relief was denied. *Willbanks v. State*, 167 S.W.3d 789 (Mo. Ct. App. 2005). He sought a writ of habeas corpus, on the ground that his sentence was the functional equivalent of life without parole and thus forbidden by *Graham*. The trial court denied the writ, App. 3a-4a, as did the Missouri Court of Appeals. App. 129a-170a.

b. Ledale Nathan was 16 years old when he committed a home invasion robbery during which a victim was killed.[1] App. 68a. He was convicted of 26 offenses arising from this incident: one count of first-degree murder, two counts of first-degree assault, four counts of first-degree robbery, one count of first-degree burglary, five counts of kidnapping, and thirteen counts of armed criminal action. App. 68a. Nathan was sentenced to life without parole for the murder, five additional consecutive life sentences, many more concurrent life sentences, and several consecutive 15-year sentences. App. 68a. While his appeal was pending, this Court decided *Miller v. Alabama*. App. 69a. The Missouri Supreme Court remanded the case to the trial court for resentencing under the procedure required by *Miller*. *State v. Nathan*, 404 S.W.3d 253, 269-71 (Mo. 2013).

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[1] It was not clear whether the victim was killed by Nathan or his accomplice, but it made no difference. *State v. Nathan*, 404 S.W.3d 253, 265 (Mo. 2013).

On remand, the jury determined that life without parole would not be an appropriate sentence for Nathan's first-degree murder conviction. App. 69a-70a. The trial court, following the instructions of the Missouri Supreme Court, accordingly vacated that conviction and entered in its place a conviction of second-degree murder. App. 70a.

The trial court imposed a life sentence for the conviction of second-degree murder, to run consecutively to all the other sentences he had already imposed. App. 70a-71a. The result was six consecutive life sentences, plus many more concurrent life sentences, plus several consecutive term-of-year sentences. App. 71a. Nathan will not be eligible for parole until he is in his 80s.[2]

Throughout the case, the trial court repeatedly professed his scorn for *Graham* and *Miller* and declared his intention to impose a sentence equivalent to one prohibited by the two cases. At the original sentencing, the trial court castigated *Graham* as the view "of an elite group of philosopher kings" and criticized the members of the Court who joined the *Graham* opinion as "Eighth Amendment Darwinists" in "judicial ivory towers." Original Trial Legal File 254. He left no doubt of his contrary view by quoting a line from Blackstone's *Commentaries*: "the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment ….

[2] The dissenting opinion below suggests that Nathan will not eligible for parole for more than 300 years, App. 101a, but this appears to be an error. The parties agree that Nathan will be eligible for parole when he is in his 80s. Resp. Mo. Sup. Ct. Br. 25-26.

and in these cases our maxim is, that '*malitia supplet aetatem*.'" *Id.* at 232 (quoting 4 Bl. Comm. *23; the Latin phrase means "malice supplies age").

At resentencing, the trial court continued to discuss his disagreement with *Graham* and *Miller*. When one of the victims expressed unhappiness with having to return for the resentencing required by *Miller*, the trial court stated: "Well, I understand, Miss Whitrock. Perhaps Justice Kennedy and Justice be [sic] Kagan will read your remarks some day." Tr. 1080. (Justices Kennedy and Kagan of course authored the Court's opinions in *Graham* and *Miller*.) The trial court insisted that *Graham* and *Miller* lack "any anchor in the text of the Constitution or any other objective source." Resentencing Legal File 230. He explained that in his view the two cases were a "loss on the Eighth Amendment," but a loss he could overcome, because the cases did "not preclude the entry of consecutive sentences, even if the sum total of those sentences would result in the functional equivalent of life without parole." Tr. 1075.

The Missouri Court of Appeals affirmed. App. 171a-179a.

2. The Missouri Supreme Court affirmed in both cases, by identical 4-3 votes. App. 1a-65a, 66a-128a.

a. In *Willbanks*, the Missouri Supreme Court held that "*Graham* did not address juvenile offenders who, like Willbanks, were sentenced to multiple fixed-term periods of imprisonment for **multiple** nonhomicide offenses." App. 8a. Rather, the court reasoned, "*Graham* concerned juvenile offenders who were sentenced to life without parole for a **single** nonhomicide offense." App. 8a. The court recognized

the conflict among other courts on this issue, App. 10a-12a & n.8, and determined that to apply *Graham* to sentences functionally equivalent to life without parole would be "an extension of the law." App. 16a. The court concluded: "Without direction from the Supreme Court to the contrary, this Court should continue to enforce its mandatory minimum parole statutes and regulations by declining to extend *Graham*." App. 16a.

Judge Stith, joined by Judges Draper and Breckenridge, dissented. App. 17a-65a. She explained: "[T]o grant relief to the petitioner …. does not require extending existing law but merely applying *Graham* to new facts, something courts do every day." App. 19a. She discussed the many state supreme court and federal court of appeals opinions holding that *Graham* applies equally to sentences that are the functional equivalent of life without parole. App. 27a-44a. Judge Stith concluded: "*Graham* bars an aggregate sentence that denies a meaningful opportunity for release." App. 57a.

b. In *Nathan*, the Missouri Supreme Court repeated much of the analysis from its *Willbanks* opinion. App. 72a-78a. The court added that Nathan's sentence was not contrary to *Miller* because Nathan had received the sentencing hearing required by *Miller*, at which the jury considered whether life without parole was the appropriate sentence. App. 79a-90a.

Judge Stith again dissented, again joined by Judges Draper and Breckenridge. App. 92a-128a. She observed that "had the jury found Nathan was irreparably corrupt, that would be the end of the

Eighth Amendment analysis; he could receive LWOP for the homicide offense." App. 95a. But because the jury found that Nathan did not deserve life without parole, she continued, "his position is indistinguishable from that of nonhomicide juvenile offenders." App. 95a. Judge Stith accordingly repeated much of the analysis from her *Willbanks* dissent. App. 97a-128a.

c. In a third case decided the same day, the Missouri Supreme Court held that the Eighth Amendment was violated where a juvenile convicted of homicide received concurrent mandatory sentences of life without the possibility of parole for 50 years. *State ex rel. Carr v. Wallace*, --- S.W.3d ---, 2017 WL 2952314 (Mo. 2017). The court observed: "Here, *Miller* controls because Mr. Carr was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme without the jury having any opportunity to consider the mitigating and attendant circumstances of his youth." *Id.* at *4. The court explained that "[a]lthough this case involves multiple offenses, Mr. Carr's three sentences of life without the possibility of parole for 50 years were all run concurrently. This case does not present the same stacking or functional equivalent sentences issue presented in *Willbanks* … or … *Nathan*." *Id.* at *5 n.7. That is, the reason the court required a jury to consider Carr's youth was not that 50 years is the functional equivalent of life, but rather that his sentence was the harshest available under a mandatory sentencing scheme.

To summarize the view taken by the Missouri Supreme Court in *Willbanks*, *Nathan*, and *Carr*, the Eighth Amendment's limits on juvenile sentences of

life without parole apply to sentences that are literally life without parole, and to mandatory sentences that are the harshest available, but not to aggregate term-of-years sentences that are the functional equivalent of life without parole.

REASONS FOR GRANTING THE WRIT

There is a deep and mature lower court conflict on whether the principles of *Graham* and *Miller* apply to aggregate term-of-year sentences under which juveniles will not be eligible for parole during their lifetimes. The lower courts have written lengthy, thoroughly-reasoned opinions on both sides. Every conceivable argument has been aired. There is nothing to be gained from further percolation.

The majority view is the correct view. *Graham* and *Miller* would be nearly meaningless if states could evade them by changing the wording but not the substance of their sentences. When a sentence is so long that a juvenile will not be eligible for parole until after he is dead, the sentence is, in substance, life without parole. It should be treated as such under the Eighth Amendment.

I. The lower courts are deeply divided over whether the Eighth Amendment limits on juvenile sentences of life without parole, as set forth in *Graham* and *Miller*, apply equally to aggregate term-of-years sentences so long that they are the functional equivalent of life without parole.

Over the last few years a deep conflict has emerged among the lower courts on this question. On one side, eleven state supreme courts and three

federal courts of appeals hold that *Graham* and *Miller* apply to aggregate term-of-years sentences that are the functional equivalent of life without parole. On the other side, five state supreme courts hold that *Graham* and *Miller* apply only to sentences that are literally life without parole. In these states, courts are free to sentence juvenile defendants to aggregate term-of-years sentences so long that juveniles will not be eligible for parole until after they die.

A. Eleven state supreme courts and three federal courts of appeals hold that *Graham* and *Miller* apply to aggregate term-of-years sentences that are the functional equivalent of life without parole.

Eleven state supreme courts have held that the principles of *Graham* and *Miller* apply to aggregate term-of-years sentences that are the functional equivalent of life without parole. In addition, three federal courts of appeals have held, under the deferential AEDPA standard, that this view constitutes clearly established federal law.

California: In *People v. Caballero*, 282 P.3d 291, 293 (Cal. 2012), the juvenile defendant received an aggregate sentence of 110 years to life for three nonhomicide offenses. He would not be eligible for parole for more than 100 years. *Id.* at 295. The California Supreme Court held: "Consistent with the high court's holding in *Graham*, … we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life ex-

pectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." *Id.*

Connecticut: In *State v. Riley*, 110 A.3d 1205, 1206 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016), the juvenile defendant received an aggregate sentence of 100 years without parole for homicide and nonhomicide offenses. The Connecticut Supreme Court held that under *Miller*, the defendant was "entitled to a new sentencing proceeding at which the court must consider as mitigation the defendant's age at the time he committed the offenses and the hallmarks of adolescence that *Miller* deemed constitutionally significant when a juvenile offender is subject to a potential life sentence." *Id. See also Casiano v. Comm'r of Corrections*, 115 A.3d 1031, 1033-34 (Conn. 2015) (holding that *Miller* applies to the imposition of a sentence of 50 years without parole on a juvenile homicide offender), *cert. denied*, 136 S. Ct. 1364 (2016); *id.* at 1045 ("We, too, reject the notion that, in order for a sentence to be deemed 'life imprisonment,' it must continue until the literal end of one's life.").

Florida: In *Henry v. State*, 175 So. 3d 675, 676 (Fla. 2015), *cert. denied*, 136 S. Ct. 1455 (2016), the juvenile defendant received an aggregate sentence of 90 years for several nonhomicide offenses. He was not eligible for parole until he was 95 years old. *Id.* at 680. The Florida Supreme Court held that this "sentence is unconstitutional under *Graham*," because "*Graham* prohibits the state trial courts from sentencing juvenile nonhomicide offenders to prison terms that ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain future early release during their natural lives."

Id. See also Gridine v. State, 175 So. 3d 672, 674-75 (Fla. 2015) (same for a juvenile sentenced to 70 years for a nonhomicide offense), *cert. denied*, 136 S. Ct. 1387 (2016).

Illinois: In *People v. Reyes*, 63 N.E.3d 884, 886 (Ill. 2016), the juvenile defendant received a mandatory aggregate sentence of 97 years for several homicide and nonhomicide offenses. He was not eligible for parole until he had served 89 years. *Id.* The Illinois Supreme Court observed: "A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison." *Id.* at 888. The court accordingly vacated the sentence as "unconstitutional pursuant to *Miller*." *Id.*

Iowa: In *State v. Ragland*, 836 N.W.2d 107, 110-11 (Iowa 2013), the juvenile homicide defendant received a mandatory sentence of life with no possibility of parole for 60 years. The Iowa Supreme Court affirmed the trial court's modification of this sentence, in light of *Miller*, to life with the possibility of parole after 25 years, because "the rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole." *Id.* at 121.

Massachusetts: In *Commonwealth v. Brown*, 1 N.E.3d 259, 261 (Mass. 2013), the juvenile homicide defendant received a mandatory sentence of life without parole. In remanding for resentencing, the

Supreme Judicial Court of Massachusetts instructed the state legislature and the lower courts that under *Miller* they must "avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a life-without-parole sentence." *Id.* at 270 n.11 (citing the California Supreme Court's opinion in *Caballero* and the Iowa Supreme Court's opinion in *Ragland*).

Nevada: In *State v. Boston*, 363 P.3d 453, 454 (Nev. 2015), the juvenile defendant received an aggregate sentence for several nonhomicide offenses under which he would not be eligible for parole for approximately 100 years. The Nevada Supreme Court held that the sentence was contrary to the Eighth Amendment, because "the *Graham* rule applies to aggregate sentences that are the functional equivalent of a sentence of life without the possibility of parole." *Id.* at 457.

New Jersey: In *State v. Zuber*, 152 A.3d 197, 201 (N.J. 2017), *pet. for cert. pending*, No. 16-1496 (filed June 12, 2017), one juvenile defendant received an aggregate sentence for several nonhomicide offenses under which he would be ineligible for parole until he was 72 years old, and another juvenile defendant received an aggregate sentence for homicide and nonhomicide offenses under which he would be ineligible for parole until he was 85 years old. The New Jersey Supreme Court remanded both cases for resentencing. *Id.* at 202. The court held that *Miller* applies "to sentences that are the practical equivalent of life without parole, like the ones in these appeals. The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence." *Id.* at 201.

Ohio: In *State v. Moore*, 76 N.E.3d 1127, 1130 (Ohio 2016), *pet. for cert. pending*, No. 16-1167 (filed Mar. 22, 2017), the juvenile defendant received an aggregate sentence of 141 years for several nonhomicide offenses. He would be 92 years old when he was first eligible for parole. *Id.* at 1133. The Ohio Supreme Court vacated the sentence. *Id.* at 1149. The court held: "We agree with these other state high courts that have held that for purposes of applying the Eighth Amendment protections discussed in *Graham* and *Miller*, there is no distinction between life-without-parole sentences for juveniles and term-of-years sentences that leave a juvenile offender without a meaningful opportunity to demonstrate rehabilitation and growth leading to possible early release within the juvenile offender's expected lifespan." *Id.* at 1146.

Washington: In *State v. Ramos*, 387 P.3d 650, 659 (Wash. 2017), *pet. for cert. pending*, No. 16-9363 (filed May 23, 2017), the Washington Supreme Court declared: "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." The court explained that "[h]olding otherwise would effectively prohibit the sentencing court from considering the specific nature of the crimes and the individual's culpability before sentencing a juvenile homicide offender to die in prison, in direct contradiction to *Miller*. Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same." *Id.* at 660. Because the juvenile defendant had received the

hearing required by *Miller*, the court affirmed his sentence. *Id.* at 661.

Wyoming: In *Bear Cloud v. State*, 334 P.3d 132, 136 (Wyo. 2014), the juvenile defendant received an aggregate sentence for homicide and nonhomicide offenses under which he would be ineligible for parole until he was 61 years old. The Wyoming Supreme Court held "that the teachings of the *Roper*/*Graham*/*Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform' when, as here, the aggregate sentences result in the functional equivalent of life without parole." *Id.* at 141-42 (quoting *Miller*, 567 U.S. at 471). The court explained: "To do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison." *Id.* at 142 (citation and internal quotation marks omitted).

In addition, three federal courts of appeals, applying the deferential AEDPA standard on habeas, have held that this view is not merely correct but constitutes clearly established federal law.[3]

Seventh Circuit: In *McKinley v. Butler*, 809 F.3d 908, 909 (7th Cir. 2016), the juvenile defendant received an aggregate sentence of 100 years without parole for a homicide and a nonhomicide offense. The Seventh Circuit held that this was "a *de facto* life sentence, and so the logic of *Miller* applies." *Id.* at

[3] The Sixth Circuit, by contrast, has held that this view is not clearly established federal law. *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013).

911. The court reasoned that "*Miller v. Alabama* cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life." *Id.*

Ninth Circuit: In *Moore v. Biter*, 725 F.3d 1184, 1186 (9th Cir. 2013), the juvenile defendant received an aggregate sentence of 254 years for several nonhomicide offenses. He would not be eligible for parole until he was 144 years old. *Id.* The Ninth Circuit remanded for the district court to grant a writ of habeas corpus. *Id.* "Moore's sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime," the court explained. *Id.* at 1191. "*Graham*'s focus was not on the label of a 'life sentence'—but rather on the difference between life in prison with, or without, the possibility of parole." *Id.* at 1192.

Tenth Circuit: In *Budder v. Addison*, 851 F.3d 1047, 1049 (10th Cir. 2017), the juvenile defendant received an aggregate sentence for several nonhomicide offenses under which he would be ineligible for parole until he had served 131 years in prison. The Tenth Circuit remanded with instructions to grant a writ of habeas corpus. *Id.* The court held that "the sentencing practice that was the Court's focus in *Graham* was any sentence that denies a juvenile nonhomicide offender a realistic opportunity to obtain release in his or her lifetime, whether or not that sentence bears the specific label 'life without parole.'" *Id.* at 1057.

In these fourteen jurisdictions, the substance of a sentence, not its form, is the relevant consideration for purposes of *Graham* and *Miller*. If a sentence is the functional equivalent of life without parole, the sentence is treated like life without parole.[4]

B. Five state supreme courts hold that *Graham* and *Miller* do not apply to aggregate term-of-years sentences that are the functional equivalent of life without parole.

On the other side of the conflict, four state supreme courts, in addition to the Missouri Supreme Court, have held that the principles of *Graham* and *Miller* do not apply to aggregate term-of-years sentences that are so long that they are the functional equivalent of life without parole.

Colorado: In *Lucero v. People*, 394 P.3d 1128, 1132 (Colo. 2017), the Colorado Supreme Court held that "*Graham* and *Miller* apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense." The court reasoned that "[m]ultiple sentences imposed for multiple offenses do not become a sentence of life without parole, even though they may result in a lengthy term of incarceration." *Id.* at 1133. The court concluded: "Neither *Graham* nor *Miller* concerns or even considers aggregate term-of-years sentences. In both

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[4] The Indiana Supreme Court held that an aggregate sentence of 150 years is contrary to *Graham* and *Miller* because it is equivalent to life without parole, but the court ultimately relied on its authority under state law to revise sentences, so we have not included Indiana in the split. *See Brown v. State*, 10 N.E.3d 1, 6-8 (Ind. 2014).

cases, the Court was assessing the proportionality of a single life without parole sentence imposed for a single conviction." *Id.*

Louisiana: In *State v. Brown*, 118 So. 3d 332, 335 (La. 2013), the juvenile defendant received an aggregate sentence for several nonhomicide offenses under which he would be ineligible for parole until he was 86 years old. The Louisiana Supreme Court held that the sentences were not contrary to *Graham*. "In our view," the court explained, "*Graham* does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime." *Id.* at 341.[5]

Minnesota: In *State v. Ali*, 895 N.W.2d 237, 239 (Minn. 2017), the juvenile homicide defendant received three consecutive mandatory life sentences with the possibility of parole after 30 years on each sentence, which meant he would not be eligible for parole until serving 90 years in prison. The Minnesota Supreme Court affirmed, because *Miller* "involved the imposition of a single sentence of life imprisonment without the possibility of parole and the United States Supreme Court has not squarely addressed the issue of whether consecutive sentences should be viewed separately when conducting a proportionality

[5] In a subsequent case, the Louisiana Supreme Court held that a single sentence of 99 years without parole, for a single offense, was contrary to *Graham*. *State ex rel. Morgan v. State*, 217 So. 3d 266, 271-72 (La. 2016). The Louisiana Supreme Court distinguished *Brown* on the ground that while *Graham* prohibits a single sentence that is equivalent to life without parole, *Graham* does not prohibit multiple sentences that when aggregated are equivalent to life without parole. *Id.*

analyis under the Eighth Amendment." *Id.* The court concluded: "absent further guidance from the Court, we will not extend the *Miller*/*Montgomery* rule to include … juvenile offenders who are being sentenced for multiple crimes." *Id.* at 246.

Virginia: In *Vasquez v. Commonwealth*, 781 S.E.2d 920, 928 (Va. 2016), *cert. denied*, 137 S. Ct. 568 (2016), the Virginia Supreme Court held: "*Graham* does not apply to aggregate term-of-years sentences involving multiple crimes." The court accordingly affirmed a juvenile defendant's aggregate sentence of 133 years for nonhomicide offenses. *Id.* at 924.[6]

In these five states, the form of a sentence, not its substance, is the relevant consideration for purposes of *Graham* and *Miller*. So long as courts avoid literal sentences of life without parole, they are free to lock juveniles away forever.

C. This conflict is ready to be resolved.

The opinions on both sides of this conflict, like the opinions of the Missouri Supreme Court below, devote considerable attention to the issue, far more than can be summarized in this certiorari petition. *See Caballero*, 282 P.3d at 293-96; *id.* at 296-99 (Werdegar, J., concurring); *Riley*, 110 A.3d at 1208-19; *Henry*, 175 So. 3d at 676-80; *Reyes*, 63 N.E.3d at 886-89; *Brown*, 1 N.E.3d at 263-70; *Boston*, 363 P.3d

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[6] It is not yet clear whether Virginia's "geriatric release" program, which allows older inmates to be released under certain circumstances, satisfies the Eighth Amendment constraints on juvenile sentencing discussed in *Graham*. *See Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017).

at 455-59; *Zuber*, 152 A.3d at 204-15; *Moore*, 76 N.E.3d at 1133-47; *Ramos*, 387 P.3d at 658-67; *Bear Cloud*, 334 P.3d at 137-46; *Moore*, 725 F.3d at 1188-94; *Budder*, 851 F.3d at 1052-60; *Lucero*, 394 P.3d at 1131-34; *Brown*, 118 So. 3d at 335-42; *Ali*, 895 N.W.2d at 241-46; *Vasquez*, 781 S.E.2d at 924-28.

Several of these opinions, like those of the Missouri Supreme Court below, have dissents that are just as thorough. *See Riley*, 110 A.3d at 1219-25 (Espinosa, J., dissenting); *Moore*, 76 N.E.3d at 1160-68 (Kennedy, J., dissenting); *id.* at 1168-71 (French, J, dissenting); *McKinley*, 809 F.3d at 914-16 (Ripple, J., dissenting); *Moore v. Biter*, 742 F.3d 917, 917-22 (9th Cir. 2014) (O'Scannlain, J., dissenting from the denial of rehearing en banc, joined by six other judges); *Lucero*, 394 P.3d at 1135-39 (Gabriel, J., concurring in the judgment but disagreeing on the substantive question); *Ali*, 895 N.W.2d at 248-54 (Chutich, J., dissenting).

These are lengthy, thoughtful decisions that air every conceivable argument on both sides. There is nothing to be gained from further percolation.

The more recent decisions consistently note the existence of this conflict. *See* App. 10a-12a & n.8; *Casiano*, 115 A.3d at 1044; *Ragland*, 836 N.W.2d at 120; *Boston*, 363 P.3d at 456-57; *Zuber*, 152 A.3d at 212; *Ramos*, 387 P.3d at 660; *Ali*, 895 N.W.2d at 245.

When this conflict was still in the process of forming, the Court denied certiorari in some of the earlier cases. But the conflict is now fully formed. There is no longer any reason for the Court not to resolve it.

II. The Missouri Supreme Court has joined the erroneous side of this conflict.

The decisions below incorrectly limit the reach of *Graham* and *Miller* to juvenile sentences that are literally worded as life without parole. *Graham* and *Miller* concern the substance of sentences, not their form. They apply equally to juvenile sentences that are the functional equivalent of life without parole.

Graham articulated a "categorical rule" requiring that "all juvenile nonhomicide offenders" must have "a chance to demonstrate maturity and reform." *Graham*, 560 U.S. at 79. The Court reasoned that "the juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* As the Court explained, "[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Id.* Thus the constitutional shortcoming in Graham's sentence was that it "denied him any chance to later demonstrate that he is fit to rejoin society." *Id.*

These concerns would hardly have disappeared if Graham's sentence had been 100 years without parole rather than life without parole, or if the 100 years had been the aggregate of five consecutive sentences of 20 years without parole. Regardless of the sentence's form, its substance would have doomed Graham to die in prison for acts he committed at the age of 16. Whether Graham's sentence was worded as life or as a span of years equivalent to life, wheth-

er it was worded as a single prison term or several consecutive terms, the state would have "guarantee[d] he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Id.*

The Court's focus on the substance of juvenile sentences rather than their form made perfect sense, because otherwise states could easily evade *Graham* by manipulating charging decisions and the structure of sentences. Prosecutors have virtually complete discretion to decide how many counts should arise from a single incident. Trial courts have virtually complete discretion to impose concurrent or consecutive sentences. Under the view adopted by the Missouri Supreme Court below, such decisions would determine which juveniles could be locked away forever for offenses they committed as teenagers.

In *Miller*, the Court likewise addressed the substance of sentences rather than their form. As the Court explained, "*Miller*'s central intuition" was "that children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). The constitutional flaw in a mandatory sentence of life without parole for a juvenile was that it "precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. Mandatory life without parole "prevents taking into account the family and home environment that

surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." *Id.* Not least, "this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 478.

These concerns would have been just the same if Miller had received a mandatory 100 years without parole rather than life without parole, or if the 100 years had been the aggregate of five consecutive mandatory sentences of 20 years without parole. Regardless of the sentence's form, its substance would have precluded the sentencer from considering his immaturity, his home environment, the circumstances of his offense, and the possibility that he might reform as he grew into adulthood. No matter how the sentence was worded, it would have removed "youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult." *Id.* at 474. The constitutional flaw in Miller's sentence was not its form but rather that its substance "contravene[d] *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.*

Graham and *Miller* both rested on the judgment, backed by a large body of scientific research, that "because juveniles have lessened culpability they are less deserving of the most severe punishments." *Graham*, 560 U.S. at 68. That judgment likewise

pertained to the substance of sentences, not their form.

The Court emphasized three respects in which "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. First, "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). Second, "children 'are more vulnerable to negative influences and outside pressures,' including from their family and peers; they have limited 'control over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (quoting *Roper*, 543 U.S. at 569) (ellipses and brackets omitted). Third, "a child's character is not as 'well-formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.'" *Id.* (quoting *Roper*, 543 U.S. at 570) (brackets omitted).

These biological differences between children and adults led the Court to conclude 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.* First, "'the case for retribution is not as strong with a minor as with an adult.'" *Graham*, 560 U.S. at 71 (quoting *Roper*, 543 U.S. at 571). Second, juveniles are "'less susceptible to deterrence'" than adults. *Id.* at 72 (quoting *Roper*, 543 U.S. at 571). Third, the case for incapacitation is weaker with children than with adults, because it is much harder "to make a judgment that the juvenile is incorrigible." *Id.* Finally, the greater capacity of children for

rehabilitation renders it inappropriate for the state to deny them "the right to reenter the community." *Id.* at 74. *See also Miller*, 567 U.S. at 472-73.

These differences between children and adults plainly do not vary depending on whether a sentence is worded as "life without parole" or "100 years without parole," or on whether a juvenile receives a single 100-year sentence or five consecutive 20-year sentences. *Graham* and *Miller* are about substance, not labels. The point of the two cases is that juvenile defendants must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. Juveniles are denied that opportunity when their parole eligibility date will not arrive until after they are dead.

Below, the Missouri Supreme Court reached the opposite conclusion, largely because it placed undue importance on passages in *Graham* and *Miller* in which the Court referred to the sentences at issue in the singular rather than the plural. *See* App. 6a (quoting *Graham*, 560 U.S. at 82: "[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.") (emphasis supplied by the Missouri Supreme Court); App. 8a ("*Graham* concerned juvenile offenders who were sentenced to life without parole for a **single** nonhomicide offense.") (emphasis supplied by the Missouri Supreme Court); App. 86a ("*Miller* did not address the constitutional validity of consecutive sentences, let alone the cumulative effect of such sentences.")

But the Court's use of the singular in *Graham* and *Miller* was hardly an endorsement of the view that states may lock juveniles away for life so long as their sentences are worded in a particular form. The Court used the singular because *Graham* and *Miller* happened to involve singular sentences. The Missouri Supreme Court missed the forest for a single tree.

III. This pair of cases is an ideal vehicle for addressing this question.

This pair of cases has all the normal attributes of an excellent vehicle for resolving the lower court conflict. The question was squarely decided below. Because there were dissenting opinions, both sides of the question were aired at length. There are no procedural or jurisdictional obstacles that could block the Court from reaching the merits. The issue has been decided by so many courts, in so many thoroughly reasoned opinions, that further percolation would be pointless.

But this pair of cases also has an unusual feature that makes it an exceptionally good vehicle. The factual differences between the two cases will allow the Court to answer the question presented with respect to both *Graham* and *Miller*, rather than just one or the other.

Willbanks is a *Graham* case. Timothy Willbanks was convicted only of nonhomicide offenses and received a de facto sentence of life without parole. Our merits argument is that this sentence is contrary to *Graham*.

Nathan is a *Miller* case. Ledale Nathan was convicted of one count of homicide and several nonhomicide offenses. At the sentencing proceeding required by *Miller*, the jury determined that life without parole would not be an appropriate sentence for the homicide conviction, and the trial court accordingly sentenced him to life *with* parole for that conviction. But the trial court then imposed so many other consecutive sentences that in the end Nathan received a de facto sentence of life without parole. Our merits argument is that this sentence is contrary to *Miller*, because Nathan was sentenced to life without parole despite the jury's determination that he should not be.

Of course, our view is that the answer to the question presented is the same—it should be "yes"—with respect both to *Graham* and *Miller*. Under *Graham*, the Eighth Amendment bars the imposition of a de facto sentence of life without parole for a juvenile nonhomicide offender. And under *Miller*, the Eighth Amendment prohibits de facto mandatory life without parole for a juvenile homicide offender. But the factual differences between the two cases will allow the Court to distinguish between *Graham* and *Miller* if it wishes.

CONCLUSION

The petition for a writ of certiorari should be granted.[7]

Respectfully submitted,

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[7] We are aware of two pending certiorari petitions that raise the same issue. *See Ohio v. Moore*, No. 16-1167 (filed Mar. 22, 2017); *New Jersey v. Zuber*, No. 16-1496 (filed June 12, 2017). If the Court grants certiorari in one of these cases but not in ours, our case should be held until the granted case has been decided.

APPENDIX A

Supreme Court of Missouri
en banc

TIMOTHY S. WILLBANKS, Appellant,
v.
MISSOURI DEPARTMENT OF CORRECTIONS,
Respondent.

No. SC 95395
Opinion issued July 11, 2017

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
The Honorable Daniel R. Green, Judge

Mary R. Russell, Judge

Timothy S. Willbanks was 17 years old when he was charged with kidnapping, first-degree assault, two counts of first-degree robbery, and three counts of armed criminal action. He was convicted and sentenced to consecutive prison terms of 15 years for the kidnapping count, life for the assault count, 20 years for each of the two robbery counts, and 100 years for each of the three armed criminal action counts. On appeal, he argues his sentences, in the aggregate, will result in the functional equivalent of a life without parole sentence. He contends Missouri's mandatory minimum parole statutes and regulations violate his right to be free from cruel and unusual punishment as protected under the Eighth Amendment to the United States Constitution in light of *Graham v. Florida*, 560 U.S. 48 (2010).

This Court holds that Missouri's mandatory minimum parole statutes and regulations are constitutionally valid under the Supreme Court of the Unit-

ed States's opinion in *Graham*. *Graham* held that the Eighth Amendment barred sentencing a juvenile to a **single** sentence of life without parole for a nonhomicide offense. 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. The trial court's judgment is affirmed.[1]

Factual and Procedural Background

Willbanks was 17 years old when he devised a plan with two other individuals to steal a car. Carrying a sawed-off shotgun, Willbanks approached a woman in the parking lot of her apartment building. After ordering her to get in the driver's seat of her car, he climbed in the back seat and directed her to drive to an ATM, where he took all the money from her account. When the victim failed to follow Willbanks's driving instructions, he became angry, ordered her to stop the car, and forced her into the trunk.

Willbanks drove to a different location. Once he released the victim from the trunk, he took her jewelry and other belongings. Willbanks told his accomplices, who had followed in a separate car, that he wanted to shoot the victim, but they told him to leave her alone. At Willbanks's direction, the victim began to walk away from them, and as she did, Willbanks shot her four times. Willbanks and his accomplices then left her and drove away. The victim crawled for 40 minutes to get help despite injuries to

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[1] This opinion is limited to cases involving aggregated multiple fixed-term sentences imposed for multiple offenses and does not address cases involving a fixed-term sentence imposed for a single criminal act.

her right arm, shoulder, back, and head. The victim survived the ordeal, but she was left with permanent disfigurement and irreparable injuries.

After the victim picked Willbanks out of a photograph lineup, the police arrested him and his accomplices, and all three gave consistent confessions. A jury convicted Willbanks of one count of kidnapping, one count of first-degree assault, two counts of first-degree robbery, and three counts of armed criminal action. The trial court imposed prison sentences of 15 years for kidnapping, life imprisonment for first-degree assault, 20 years for each robbery count, and 100 years for each armed criminal action count, and set these terms to run consecutively.

Willbanks's convictions and sentences were affirmed on direct appeal, *State v. Willbanks*, 75 S.W.3d 333 (Mo. App. 2002), and his motion for post-conviction relief was overruled. *Willbanks v. State*, 167 S.W.3d 789 (Mo. App. 2005). He then filed a petition for a writ of habeas corpus in the Cole County Circuit Court, arguing his aggregated sentences amounted to the functional equivalent of a life without parole sentence and violated his Eighth Amendment rights under *Graham*. The trial court denied the petition, indicating the proper avenue for the relief Willbanks sought was through a declaratory judgment action.

Accordingly, Willbanks filed another petition, in which he requested a judgment declaring that section 558.019.3[2] and 14 CSR 80-2.010, which require offenders to serve specific percentages of their sentences before they become parole-eligible, are uncon-

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[2] All statutory references are to RSMo Supp. 2013 unless otherwise indicated.

stitutional as applied to him. He alleged, under the current Missouri parole statutes and regulations, he does not have a meaningful opportunity to obtain release because he does not become parole eligible until he is approximately 85 years old. Willbanks requested a hearing to present evidence in support of these allegations.

The Department of Corrections ("DOC") answered the petition and sought judgment on the pleadings. The trial court sustained DOC's motion, finding Willbanks's case was distinguishable from Graham because Graham involved a **single** sentence of life without parole for one offense and Willbanks was convicted of **seven** separate felonies and received seven consecutive sentences as a result. Willbanks appeals.[3]

Standard of Review

The constitutional validity of a statute is a question of law, which this Court reviews *de novo*. *State v. Honeycutt*, 421 S.W.3d 410, 414 (Mo. banc 2013). A statute is presumed to be valid and will not be held unconstitutional absent a clear contravention of a constitutional provision. *Id.*

Legal Background

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. When reviewing whether a punishment is cruel and unusual, "courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham*,

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[3] This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution.

560 U.S. at 58 (citations and quotation marks omitted).

In the last decade, the Supreme Court has issued a series of opinions concerning the constitutional validity of punishments for offenders who were younger than 18 years of age at the time they committed crimes. In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Supreme Court affirmed a holding from this Court that the Eighth and Fourteenth Amendments barred the execution of juvenile offenders. Five years later in *Graham*, the Supreme Court held that the Eighth Amendment barred courts from sentencing juvenile nonhomicide offenders to life without parole. 560 U.S. at 75. *Graham* was expanded to prohibit homicide juvenile offenders from being subject to a mandatory sentence of life without parole in *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). Most recently, the Supreme Court ruled in *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016), that *Miller*'s new substantive rule must be applied retroactively on collateral review for juvenile offenders sentenced to mandatory life without parole.

Analysis

Willbanks argues Missouri's statutes and regulations requiring offenders to serve a percentage of their total sentence before being eligible for parole are unconstitutional when applied to him as he is denied parole eligibility until past his natural life expectancy.[4] According to Willbanks, pursuant to

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[4] Under section 558.019.3, offenders guilty of a dangerous felony – including kidnapping, first-degree assault, and first-degree robbery – become eligible for parole when they have served 85 percent of their sentence or when they have reached the age of 70, provided they have served 40 percent of their

Missouri's parole statutes and regulations, his aggregated sentences for **seven** nonhomicide offenses prevent him from having a "meaningful opportunity to obtain release" as required by *Graham*. 560 U.S. at 75.

Willbanks's argument is misplaced as *Graham* concerned "juvenile offenders sentenced to life without parole solely for **a** nonhomicide offense." *Id.* at 63 (emphasis added). In *Graham*, the juvenile offender was convicted of two nonhomicide crimes, armed burglary and attempted armed robbery, and was sentenced to life imprisonment and 15 years for each respective charge.[5] *Id.* at 57. The Supreme Court held that the Eighth Amendment prohibits juvenile nonhomicide offenders from being sentenced to life without parole. *Id.* at 82. Importantly, "[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.* (emphasis added).

Graham's facts involved (1) a juvenile offender (2) who committed a nonhomicide crime and (3) was sentenced to life without parole. Although Willbanks

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sentence, whichever occurs first. Under 14 CSR 80-2.010(1)(E), offenders guilty of other crimes who are sentenced to 45 years or more become eligible for parole when they have served 15 years. Because Willbanks would be eligible for parole at age 70 for his dangerous felonies plus 15 years for armed criminal action, he will be eligible for parole at approximately age 85. Willbanks's statistical life expectancy, according to the Centers for Disease Control and Prevention, is 79 years.

[5] Absent gubernatorial clemency, Graham had no possibility of parole as the Florida parole system had been abolished. *Graham*, 560 U.S. at 57.

was younger than 18 years old at the time he committed his nonhomicide crimes, he was not sentenced to life without parole. His argument is *Graham* applies to him as he was convicted of multiple crimes and sentenced to multiple fixed-term periods that, in the aggregate, total more than his life expectancy. Willbanks contends, under Missouri's mandatory minimum parole statutes and regulations, his life sentence plus multiple fixed-year terms are the "functional equivalent of life without parole" because they prevent him from being eligible for parole until he is approximately 85 years old.

Whether multiple fixed-term sentences, which total beyond a juvenile offender's life expectancy, should be considered the functional equivalent of life without parole is a question of first impression for this Court. *Graham* prohibits a life without parole sentence because it

> guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.

Id. at 79.

Requiring inmates to serve a mandatory minimum percent of their sentence is not inherently unconstitutional. *See, e.g., State v. Pribble*, 285 S.W.3d 310, 314 (Mo. banc 2009) (holding that a five-year mandatory minimum parole ineligibility period does not "run[ ] afoul of cruel and unusual punishment"). But the Supreme Court has advised states are prohibited by the Eighth Amendment "from making the

judgment at the outset that those offenders never will be fit to reenter society." *Graham*, 560 U.S. at 75. Yet *Graham* did not address juvenile offenders who, like Willbanks, were sentenced to multiple fixed-term periods of imprisonment for **multiple** nonhomicide offenses. Instead, *Graham* concerned juvenile offenders who were sentenced to life without parole for a **single** nonhomicide offense. *Id.* at 63.

In *Graham*, the Supreme Court examined federal and state sentencing laws to see how many jurisdictions permitted juvenile nonhomicide offenders to receive life without parole and how many jurisdictions prohibited such punishments. *Id.* at 62. It also looked at the actual number of juvenile offenders serving life without parole sentences, which totaled only 123 nationwide. *Id.* at 64. Obviously, the number of juveniles with multiple fixed-term sentences would number in the thousands. At no point did the Supreme Court consider a juvenile offender sentenced to multiple fixed-term periods and whether such terms, in the aggregate, were equal to life without parole. In fact, Justice Alito noted in his dissent, **"Nothing in the [Supreme Court's] opinion affects the imposition of a sentence to a term of years without the possibility of parole."** *Id.* at 124 (Alito, J., dissenting) (emphasis added). Justice Thomas also pointed out in his dissent, joined by Justices Scalia and Alito, that **"it seems odd that the [Supreme 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 113 n.11 (Thomas, J., dissenting) (emphasis added).

Although *Graham* found, "[w]ith respect to *life without parole* for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification," *id.* at 71 (majority opinion) (emphasis added) (citation omitted), Willbanks and the dissent have failed to show these penological goals are not served by sentencing juveniles to multiple fixed-term sentences. The effect of an offender's age on these penological concerns is better suited for the General Assembly than this Court.

The dissent does not fully explain the differences it perceives in the pursuit of penological goals when sentencing juvenile nonhomicide offenders to multiple fixed-term sentences as compared with sentencing adults. Nor does the dissent explain why the trial court should be stripped of its authority to decide a juvenile's sentence for multiple nonhomicide offenses that, according to Missouri's sentencing statutes, may justify lengthy consecutive terms of imprisonment. The sentencer in a case (here, the trial court) has a duty to impose a sentence on a case-by-case basis. *State v. Collins,* 290 S.W.3d 736, 746 (Mo. App. 2009). Additionally, "[t]rial courts have very broad discretion in their sentencing function," *id.*, as evidenced in section 558.026.1, which provides that multiple prison terms shall run concurrently "*unless the court specifies that they shall run consecutively*." (Emphasis added). Neither this Court nor the Supreme Court has ruled on the constitutional impact of consecutive sentences. *See United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988).

The General Assembly recently enacted section 558.047, RSMo 2016, which allows juvenile offenders

sentenced to life without parole to apply for parole after serving 25 years. Although the dissent argues this Court should apply this statute to cases in which juvenile offenders were sentenced to multiple fixed-term sentences, the General Assembly chose to limit the statute to those juvenile offenders sentenced to life without parole. This Court declines to extend the statute beyond its terms.

There is a split of authority among the United States Courts of Appeals regarding whether *Graham* applies when a juvenile nonhomicide offender is sentenced to terms of years rather than life without parole. The Fifth Circuit says it does not apply. *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013).[6] The issue of whether the imposition of a sen-

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[6] The dissent here cites a Ninth Circuit case, *Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013), which held that sentencing a juvenile offender to 254 years' imprisonment went against *Graham* and violated the Eighth Amendment because the juvenile offender would not be eligible for parole until age 144. However, the Ninth Circuit also recently held that sentencing a juvenile offender to two consecutive 25-year terms with parole eligibility at age 66 did not violate the Eighth Amendment. *Demirdjian v. Gipson*, 832 F.3d 1060, 1076 (9th Cir. 2016). These holdings suggest the Ninth Circuit believes multiple aggregated sentences become the functional equivalent of life without parole at some point between when a juvenile offender turns 66 and 144 years old. Although the Ninth Circuit's opinions are not mandatory authority for this Court, the holding in this case is not inconsistent with the Ninth Circuit's decisions as Willbanks will be eligible for parole when he turns 85 years old. The same rationale applies to the recent case from the Tenth Circuit, which held that a juvenile offender's sentence was unconstitutional because he would not be eligible for parole until he had served 131.75 years in prison. *Budder v. Addison*, 851 F.3d 1047, 1059 (10th Cir. 2017). *See also State v. Moore*, No. 2014-0120, 2016 WL 7448751, at *22 (Ohio Dec. 22,

tence to a term of years totaling beyond a juvenile offender's life expectancy violates the Eighth Amendment was also addressed by the Sixth Circuit. In *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), the court held that a juvenile offender's multiple fixed-term sentences, totaling 89 years, did not violate the Eighth Amendment in light of *Graham*. *Id.* at 552. The Sixth Circuit acknowledged, "To be sure, [the juvenile offender's] 89-year aggregate sentence may end up being the functional equivalent of life without parole" as he will not be eligible for release until he is 95 years old. *Id.* at 551 & n.1.[7] The court noted, however, the Supreme Court in *Graham* addressed neither sentencing laws nor practices concerning juvenile nonhomicide offenders who were sentenced to multiple fixed-term periods. *Id.* at 552. The Sixth Circuit concluded, "This demonstrates that the [Supreme] Court did not even consider the constitutionality of such sentences, let alone clearly establish

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2016) (holding that a juvenile offender's sentence was unconstitutional because he would not be eligible for parole until he was 92 years old).

[7] Interestingly, *Bunch* and *Moore* concern the same incident. Chaz Bunch was 16 years old at the time of the incident and was sentenced to 89 years' imprisonment. *Bunch*, 685 F.3d at 547. Brandon Moore was 15 years old at the time of the incident and was sentenced to 112 years' imprisonment. *Moore*, 2016 WL 7448751, at *3. The Sixth Circuit held that Bunch's sentence did not violate the Eighth Amendment even though he would not eligible for parole until age 95. *Bunch*, 685 F.3d at 552. However, the Ohio Supreme Court held that Moore's sentence did violate the Eighth Amendment because he would not be eligible for parole until age 92. *Moore*, 2016 WL 7448751, at *22. This discrepancy for the exact same factual situation further illustrates why this Court declines to extend *Graham* without direction from the Supreme Court.

that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments." *Id*.; *see Goins v. Smith*, 556 F. App'x 434, 440 (6th Cir. 2014); *Starks v. Easterling*, 659 Fed. App'x 277, 280 (6th Cir. Aug. 23, 2016).

Seventeen other state supreme courts have considered this issue. Five of them have reached the same conclusion as this Court and held that *Graham* and *Miller* do not apply to prohibit multiple fixed-term sentences for juvenile offenders. *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017) ("Multiple sentences imposed for multiple offenses do not become a sentence of life without parole, even though they may result in a lengthy term of incarceration. Life without parole is a specific sentence, imposed as punishment for a single crime, which remains distinct from aggregate term-of-years sentences resulting from multiple convictions."); *State v. Brown*, 118 So. 3d 332, 342 (La. 2013); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017); *State v. Springer*, 856 N.W.2d 460, 470 (S.D. 2014), *cert. denied*, 135 S. Ct. 1908 (2015); *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011). The remaining 12 state supreme courts that have considered this issue have held that, at *some point*, without uniform agreement as to when, aggregate sentences and parole ineligibility for juvenile offenders constitutes cruel and unusual punishment.[8]

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[8] Two of the cases the dissent relies on reached their conclusions based on their own state constitutions rather than the federal constitution. In *State v. Null*, 836 N.W.2d 41, 70 & n.7 (Iowa 2013), the Supreme Court of Iowa "independently" applied the principles in *Miller* and *Graham* to a juvenile homicide offender's aggregate sentence. It held the sentence violated the Iowa Constitution's prohibition of cruel and unusual pun-

The dissent mischaracterizes this Court's opinion as stating it lacks the power or authority to extend the Supreme Court's holding in *Graham*. Rather, this Court, absent guidance from the Supreme Court, should not arbitrarily pick *the point* at which multiple aggregated sentences may become the functional equivalent of life without parole. The dissent

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ishment rather than the Eighth Amendment to the United States Constitution because the juvenile offender would not be eligible for parole until age 69. *Id.* at 45, 70 n.7, 72 ("A decision of this court to depart from federal precedent arises from our independent and unfettered authority to interpret the Iowa Constitution."). In another case focused on by the dissent, *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014), the Indiana Supreme Court relied on its own state constitution, as opposed to the Eighth Amendment, to reduce a juvenile's sentence. In *Brown*, a juvenile offender was sentenced to 150 years for homicide and robbery. *Id.* The Indiana Supreme Court commented a 150-year sentence is "[s]imilar to a life without parole sentence," but it did not hold such a sentence was a violation of the Eighth Amendment. *Id.* Rather, the court concluded that a sentence of 150 years was "inappropriate" and used its discretion under the Indiana Constitution to revise the sentence to 80 years. *Id.* This reduction seems almost arbitrary as an 80-year sentence likely has the same psychological effect on a juvenile offender as a 150-year sentence. Regardless, the fact that 10 out of 50 states have reached similar conclusions as the dissent and found Eighth Amendment violations is not sufficient to establish a national consensus. *See People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1048 (Conn. 2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016); *Henry v. State*, 175 So. 3d 675, 679-80 (Fla. 2015), *cert. denied*, 136 S. Ct. 1455 (2016); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. Sept. 22, 2016); *Com. v. Brown*, 1 N.E.3d 259, 270 n.11 (Mass. 2013); *State v. Boston*, 363 P.3d 453, 458-59 (Nev. 2015); *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017); *Moore*, 2016 WL 7448751, at *22; *State v. Ramos*, 387 P.3d 650, 660-61 (Wash. 2017); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014).

argues such line drawing is "unavoidable," but "has not been an obstacle to the Supreme Court's recognition of categorical rules." Slip op. at 41 n.26. It points to *Graham*'s holding that created a categorical rule for offenders who were under the age of 18 at the time of their offense. This argument fails to address the fact that *Graham* itself concluded the age of 18 was an appropriate demarcation line for the imposition of life without parole because "18 is the point where society draws the line for many purposes between childhood and adulthood." *Graham*, 560 U.S. at 50 (quoting *Roper*, 543 U.S. at 574). There is no similar clear demarcation line at which point juvenile offenders' time in prison denies them meaningful opportunity to obtain release. As the Sixth Circuit opined in *Bunch*:

> 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? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the *Graham* majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is "life" or 107 years. Without any tools to work with, however, we can only apply *Graham* as it is written.

Bunch, 685 F.3d at 552 (quoting *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012), *decision quashed*, 175 So. 3d 675 (Fla. 2015)). Likewise, this Court applies *Graham* as written and declines to extend its holding.

Over the last decade, the Supreme Court has stated that youth affects the penological considerations for the following: capital punishment, *Roper*, 543 U.S. at 571; mandatory life without parole for homicide offenders, *Miller*, 132 S. Ct. at 2464; and life without parole for nonhomicide offenders, *Graham*, 560 U.S. at 75. But the Supreme Court has not held that multiple fixed-term sentences totaling beyond a juvenile offender's life expectancy are the functional equivalent of life without parole. Warning of "frequent and disruptive reassessments of [the Supreme Court's] Eighth Amendment precedents," the Supreme Court has not looked positively upon lower courts issuing various rulings without precedence from the Supreme Court.[9] *Roper*, 543 U.S. at 594

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[9] As of the date of this opinion, the Supreme Court had not granted certiorari in any of the cases that have addressed this issue. The dissent takes issue with this Court's questioning of the appropriateness of extending *Graham*'s holding by pointing out the Supreme Court has not granted such review for any of the cases that have done what this Court declines to do. Slip op. at 3 n.2, 35-36 & n.23. According to the dissent, the Supreme Court has not found it necessary to correct the other courts that have reached the opposite conclusion as this Court has. *Id.* However, the Supreme Court has also not granted certiorari in any of the cases that have reached the same conclusion as this Court. *See State v. Springer*, 856 N.W.2d 460, 470 (S.D. 2014), *cert. denied*, 135 S. Ct. 1908 (2015). There are numerous factors appellate courts with discretionary review powers consider when deciding whether to review a lower court's decision, and it is inappropriate to extrapolate on a court's

(O'Connor, J., dissenting). "[C]lear, predictable, and uniform constitutional standards are especially desirable" in the area of the Eighth Amendment. *Id.* Extending the Supreme Court's holdings beyond the four corners of its opinions is clearly disfavored.

The Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy is the functional equivalent of life without parole. The dissent acknowledges that its analysis is an extension of the law. Without direction from the Supreme Court to the contrary, this Court should continue to enforce its current mandatory minimum parole statutes and regulations by declining to extend *Graham*.

Conclusion

The trial court did not err in finding Missouri's mandatory minimum parole statutes and regulations do not violate Willbanks's Eighth Amendment rights. The judgment is affirmed.

Fischer, C.J., Wilson and Powell, JJ., concur; Stith, J., dissents in separate opinion filed; Draper and Breckenridge, JJ., concur in opinion of Stith, J.

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opinion when it denies review. The Supreme Court has repeatedly emphasized that "denial of certiorari does not constitute an expression of any opinion on the merits." *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (Stevens and Kennedy, JJ., statement respecting denial of certiorari).

Laura Denvir Stith, Judge

I respectfully dissent. As the majority acknowledges, *Graham v. Florida*, 560 U.S. 48 (2010), held that sentencing nonhomicide juvenile offenders to life without the possibility of parole (LWOP) categorically violates the Eighth Amendment because it offers juvenile offenders no meaningful opportunity for release. Sentencing juvenile offenders to an aggregate term of years that is so long they are likely to die in prison identically gives these juveniles no meaningful opportunity for release. For this reason, the Seventh, Ninth, and Tenth Circuits have held *Graham* must be applied to de facto LWOP aggregate sentences if they do not give the juvenile offender a meaningful opportunity for release. Twelve of the seventeen state supreme courts to decide the issue – including, just in the last few months, the supreme courts of Illinois, New Jersey, Ohio, and Washington – agree the imposition of lengthy aggregate sentences that are the functional equivalent of LWOP violates the juvenile's Eighth Amendment rights because the sentences do not allow a meaningful opportunity for release under the principles set out in *Graham* and *Miller v. Alabama*, 132 S. Ct. 2455 (2012).[1]

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[1] The federal cases include *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013); and *McKinley v. Butler*, 809 F.3d 908, 909 (7th Cir. 2016). The Sixth Circuit case relied on by the majority, *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), did not hold that state courts are not supposed to determine whether *Graham* applies to aggregate sentences until the Supreme Court does. It simply concluded that, under principles of federalism, as a *federal court*, it should not reverse the Ohio courts for refusing to apply *Graham* to aggregate sentences because the issue is not clearly

The majority nonetheless says it would be inappropriate, and looked on with "disfavor" by the Supreme Court, for this Court to apply *Graham*'s principles to Willbanks' sentence before the Supreme Court requires this Court to do so, even if this dissent is correct that aggregate sentences are the func-

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settled. Since *Bunch* was decided, however, the Ohio Supreme Court has added its voice to the growing symphony of state court decisions holding *Graham* unequivocally *does bar* aggregate sentences that are the functional equivalent of LWOP in a case involving the same incident. *State v. Moore*, No. 2016-Ohio-8288, 2016 WL 7448751 (Ohio Dec. 22, 2016). The Ohio court found it was improper to give aggregate sentences to the juvenile who acted with Bunch so he would not be released until age 92, because this would deny him a meaningful opportunity for release. *Id.* This is the ruling to which the Sixth Circuit would have to give deference were it deciding *Bunch* today, and which would result in holding Bunch's sentence violated *Graham* under Ohio law.

State cases finding aggregate LWOP sentences violate *Graham* include the four very recent cases of *State v. Ramos*, 387 P.3d 650, 660 (Wash. 2017), *State v. Zuber*, 152 A.3d 197, 215-16 (N.J. 2017), *Moore*, 2016 WL 7448751, at *23-24, and *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016), as well as *People v. Caballero*, 282 P.3d 291, 293 (Cal. 2012), *State v. Riley*, 110 A.3d 1205 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016), *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1043 (Conn. 2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016), *Henry v. State*, 175 So. 3d 675 (Fla. 2015), *reh'g denied* (Sept. 24, 2015), *cert. denied*, 136 S. Ct. 1455 (2016), *Gridine v. State*, 175 So. 3d 672 (Fla. 2015), *reh'g denied* (Sept. 24, 2015), *cert. denied*, 136 S. Ct. 1387 (2016), *Brown v. State*, 10 N.E.3d 1 (Ind. 2014), *State v. Null*, 836 N.W.2d 41, 45 (Iowa 2013), *State v. Pearson*, 836 N.W.2d 88, 91 (Iowa 2013), *as corrected* (Aug. 27, 2013), *State v. Ragland*, 836 N.W.2d 107, 110 (Iowa 2013), *Commonwealth v. Brown*, 1 N.E.3d 259, 270 n.11 (Mass. 2013), *State v. Boston*, 363 P.3d 453, 454 (Nev. 2015), *as modified* (Jan. 6, 2016), and *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014).

tional equivalent of LWOP. Respectfully, it is this Court's job to determine whether established constitutional principles require us to grant relief to the petitioner, as even one of the state cases on which the majority relies has recognized.[2] To do so does not require extending existing law but merely applying *Graham* to new facts, something courts do every day. As the Tenth Circuit said in applying *Graham* to aggregate sentences, "the Court's holding [in *Graham*] applies, not just to the factual circumstances of Graham's case, but to all juvenile offenders who did not commit homicide, and it prohibits, not just the exact sentence Graham received, but all sentences that would deny such offenders a realistic opportunity to obtain release." *Budder v. Addison*, 851 F.3d 1047, 1053 (10th Cir. 2017). This Court should so hold also, by joining the many well-reasoned decisions holding the Supreme Court did not intend to place form – the label of LWOP – over substance. A sentence that

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[2] *See Vasquez v. Commonwealth*, 781 S.E.2d 920, 928 (Va. 2016) (holding the court had no authority to apply *Graham*); *State v. Brown*, 118 So. 3d 332, 335-42 (La. 2013) (accord). *See also State v. Ali*, 895 N.W.2d 237 (Minn. 2017); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017); *State v. Springer*, 856 N.W.2d 460, 469 (S.D. 2014) (reaching the merits), *cert. denied*, 135 S. Ct. 1908 (2015). Another jurisdiction, Nebraska, noted the issue whether *Graham* applies to aggregate sentences in *State v. Mantich*, 888 N.W.2d 376 (Neb. 2016), but declined to resolve it on the facts of that case. The majority misstates the reason why this dissent says it is important to note that certiorari has been denied in these state court cases invalidating sentences that are the functional equivalent of LWOP. It is not to suggest the Supreme Court has *sub silencio* approved or disapproved of particular dispositions. It is to show the Supreme Court is not disapproving of state supreme courts weighing in on the *Graham* issue, as the majority seems to fear. The majority has not answered that point.

results in no meaningful opportunity for release during the juvenile's lifetime is the functional equivalent of LWOP. These sentences violate the constitutional principles underlying *Graham* and *Miller* and are invalid. The juvenile must be allowed a meaningful opportunity for release.

The majority does not so much deny that some length of aggregate sentence will be found to be too long under *Graham*; rather, it says we cannot know what length is too much and, therefore, should just let all sentences stand until the Supreme Court expressly tells us how much is too much. Respectfully, the Supreme Court has done so already in telling us juveniles must have a "meaningful opportunity for release" prior to death. While the Supreme Court did not set out a specific length of years the juvenile must be afforded the opportunity to live outside prison, we do know keeping the juvenile in prison beyond his life expectancy is too long. Yet, that is what the majority is approving in this case, in which Willbanks received a sentence beyond his life expectancy.

In any event, the legislature already has determined at what point parole consideration should be offered; this Court merely needs to follow its lead. In response to *Miller*, Missouri's legislature adopted section 558.047, RSMo 2016, which provides juvenile offenders sentenced to LWOP may apply for parole after 25 years. This Court has held it will apply this new statute to all juvenile offenders regardless of whether convicted before or after *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *as revised* (Jan. 27, 2016). Like other states facing this issue, this Court similarly can apply time limits identical to those set out in section 558.047 to juvenile offenders who are

serving de facto LWOP through their aggregate sentences. The majority's uncertainty as to where to draw the line when determining if a sentence is too long for aggregate juvenile offenders thereby becomes moot.[3]

The majority also writes as if courts can ignore the essential distinction mandated by the Supreme Court between sentences that are constitutional if imposed on adults and sentences that are *not* constitutional if imposed on juveniles. The majority says, because judges in cases involving adults can impose consecutive sentences, judges must be able to do so in the case of juveniles. Therefore, the majority seems to conclude, if a judge in a juvenile case simply avoids expressly labeling the sentences as "life without possibility of parole," there is no constitutional limitation, even if the judge knowingly imposes the functional equivalent of life without parole by aggregating consecutive sentences in such a way the juvenile will not have a meaningful opportunity for release before his or her death.

It is a fiction to suggest this is just a collateral result of sentencing the juvenile for multiple crimes. Judges impose consecutive sentences cognizant of the overall effect. The Supreme Court has taught us that sentences permissible for adults may not be permissible for juveniles and that we must look at sentences for juveniles as a whole, not sentence by sentence, as discussed below in detail. This means:

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[3] Section 558.047 provides juvenile offenders sentenced to LWOP prior to August 28, 2016, and juvenile offenders sentenced after that date to life with parole or a term of 30 to 40 years may petition for a parole hearing after serving 25 years. § 558.047.1, RSMo 2016.

> states may not circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences. Just as they may not sentence juvenile nonhomicide offenders to 100 years instead of 'life,' they may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule that juvenile offenders who do not commit homicide may not be sentenced to live without the possibility of parole.

Budder, 851 F.3d at 1058.

In other words, substance, not form, should control. Whether labeled "LWOP," the sentences imposed on Willbanks are subject to *Graham*'s categorical rule because like formal LWOP sentences, de facto life sentences also are the "'denial of hope'" and mean "'that good behavior and character improvement are immaterial ... that whatever the future might hold in store for the mind and spirit of [the defendant], he will remain in prison for the rest of his days.'" *Graham*, 560 U.S. at 70, quoting, *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989).

I. THE PRINCIPLES OF *GRAHAM* APPLY TO AGGREGATE SENTENCES THAT ARE THE FUNCTIONAL EQUIVALENT OF LWOP

The great majority of states to reach the issue have determined the fundamental principles underlying *Graham* do apply to aggregate sentences, and such sentences violate the Eighth Amendment when they are of such length that they become a de facto life sentence because the juvenile offender is effectively denied release. To fully understand these courts' reasoning, it is helpful to first examine *Graham* itself in more depth, for it resulted in a radical

change in how juvenile term-of-years sentences are reviewed. It is that radical change that provides the framework for the Supreme Court's decision in that case, as well as in *Miller* and *Montgomery*, and that requires the application of *Graham*'s analysis to aggregate sentences such as those imposed on Willbanks.

A. *Graham* Considers Whether a Category of Sentence Can Be Imposed on Juveniles, Not Whether a Particular Sentence Seems Proportionate

Before turning to the question whether a sentence of LWOP is unconstitutional when a juvenile is convicted of a nonhomicide offense, *Graham* took some time to describe the two broad approaches it applies to Eighth Amendment analysis: the case-by-case approach and the categorical approach. *Graham*, 560 U.S. at 59.

Prior to *Graham*, the Supreme Court said, it had used the case-by-case, sentence-by-sentence approach in considering the constitutional validity of term-of-years sentences, a phrase *Graham* uses to refer to all sentences other than death, including life sentences, both LWOP and life with parole eligibility.[4] Under the case-by-case approach, *Graham* said, a court considers "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Id.* If a defendant claims his or her particular sentence is unduly harsh, "Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative

[4] Other courts generally use the phrase "term-of-years" to distinguish sentences that are not labeled "life," creating further confusion. *E.g., Vasquez*, 781 S.E.2d at 925.

sentence." *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). This is true for adults even when the sentences cumulatively extend to or beyond a defendant's lifetime, what some cases refer to as "discretionary life sentences." *See, e.g., McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016); *State v. Riley*, 110 A.3d 1205, 1213 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016). This traditional analysis begins by "comparing the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at 60. If the punishment seems grossly disproportional to the particular crime, the court then compares the sentence to that of others convicted of similar crimes. *Id.*

By contrast, *Graham* explained, when a defendant in a death penalty case claims he or she categorically is ineligible for death because of the nature of the offense or the characteristics of the offender, then the Supreme Court traditionally uses what it calls the "categorical approach." *Id.* at 61-62. For example, the Supreme Court held nonhomicide crimes such as rape never merit the death penalty because the category of offense just does not merit the ultimate penalty. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008), *as modified* (Oct. 1, 2008), *opinion modified on denial of reh'g*, 554 U.S. 945 (2008). Similarly, the Supreme Court held in *Roper v. Simmons*, 543 U.S. 551, 559-67, (2005), and *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), that a state is barred from imposing the death penalty on offenders who have the characteristics of either youth or mental disability. In such cases, a court has no discretion to impose a death sentence on those categories of offenders. Such a sentence is unconstitutional, and the trial court does not have discretion to impose an unconsti-

tutional sentence. *See Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

Graham, for the first time, applied the categorical approach to a sentence other than death. It held that, while the case-by-case approach is appropriate when determining whether a particular sentencing decision is fair for a single offender, it is inadequate when the claim is that a particular type or category of sentence is unfair for a category of persons. In *Graham*, the defendant claimed LWOP was improper for all nonhomicide offenses committed by juveniles. To determine whether such sentences are indeed unconstitutional, the Supreme Court held it must apply the categorical approach, just as it already did in death penalty cases:

> This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.

Graham, 560 U.S. at 61-62.

In other words, because the Supreme Court has held juveniles must be placed in a special category based on the "characteristics of the offender" (their youth) and not the "nature of the offense," it is improper in cases involving juveniles merely to weigh a particular sentence against the gravity of the offense in a particular case. *Id*. at 60-61. Rather, "the Court then announced a categorical rule: The constitution prohibits the imposition of a life without parole sen-

tence on a juvenile defender who did not commit homicide." *Budder*, 851 F.3d 1047 (10th Cir. 2017). This categorical approach must be used to determine whether it violates the Eighth Amendment to utilize the sentencing practice being attacked for that category of offender –juveniles. *Id*. at 60-62.

Graham held the unique characteristics of juveniles categorically barred the application of a LWOP sentence for a nonhomicide offense because such sentences are justified by "none of the legitimate goals of penal sanctions –retribution, deterrence, incapacitation, and rehabilitation." *Id*. at 50. Juvenile offenders have lessened culpability and are less deserving of the most severe punishments. *Id*. at 68, *citing, Roper*, 543 U.S. at 569. Lack of maturity and the inability to consider possible punishment make juveniles less susceptible to deterrence. *Id*. at 72. Because it is dubious whether the sentencer can at the outset determine that a juvenile is "irredeemable," interest in incapacitation for fear of recidivism is diminished. *Id*. at 72-73. Finally, LWOP closes the door forever to furthering the goal of rehabilitation. *Id*. at 73-74.

B. Sentences That Are the Functional Equivalent of LWOP Are Categorically in Violation of *Graham* Principles

The majority ignores the categorical approach taken by the Supreme Court in *Graham* and continues to apply a term-of-years, sentence-by-sentence approach as if *Graham* had not changed how juvenile sentences should be analyzed; it simply ignores the lengthy discussion in *Graham*, and in this dissent, of the categorical approach that must be taken when reviewing juvenile sentences.

Fortunately, other courts have followed *Graham* more faithfully by taking its categorical approach in considering whether Eighth Amendment principles bar the imposition of aggregate sentences that cumulatively are so long they are the functional equivalent of LWOP because they allow the juvenile offender no meaningful opportunity for release. As discussed below, the vast majority of these courts have found such aggregate sentences do violate the Eighth Amendment. The reasoning of these cases is so consistent, so persuasive, and so dispositive of the result here that this is the unusual case in which it is appropriate to at least briefly discuss these cases in turn.

Graham itself arose in Florida, so perhaps it is not surprising that the Florida Supreme Court has studied its meaning carefully. Resolving a split in the Florida appellate courts, in *Henry v. State*, 175 So.3d 675 (Fla. 2015), the Florida Supreme Court held in no uncertain terms that *Graham*'s reasoning applies to aggregate or lengthy term-of-years sentences.

The defendant in *Henry* received sentences for multiple nonhomicide offenses that aggregated to 90 years. As in the instant case, the state argued *Graham* applied only to single sentences of LWOP and not to sentences that, considered as an aggregate, were the functional equivalent of life without parole. *Henry* rejected that argument, holding *Graham* said juveniles are categorically different than adults, so:

> the Eighth Amendment prohibits the states from sentencing juvenile nonhomicide offenders to terms of imprisonment in which the states pre-establish that these offenders "never will be fit to reenter society." [*Graham*, 560 U.S.], at 75. ... In so doing, the Supreme Court

> intended to ensure that the states would provide all juvenile nonhomicide offenders who were sentenced to life terms of imprisonment with meaningful future opportunities to demonstrate their maturity and rehabilitation.

Henry, 175 So.3d at 679. Applying this principle, the Florida Supreme Court concluded:

> *Graham* requires a juvenile nonhomicide offender, such as Henry, to be afforded such an opportunity [for release] during his or her natural life. *Id*. Because Henry's aggregate sentence, which totals ninety years, and requires him to be imprisoned until he is at least nearly ninety five years old, does not afford him this opportunity, that sentence is unconstitutional under *Graham*.

Henry, 175 So.3d at 679-80. Therefore, "[i]n light of *Graham*, ... we conclude that the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult." *Id*. at 680.

In 2016, the Florida Supreme Court reaffirmed that, because *Graham* dealt with substance, not labels, "[i]t is thus evident from our case law that this Court has – and must – look beyond the exact sentence denominated as unconstitutional by the Supreme Court and examine the practical implications of the juvenile's sentence, in the spirit of the Supreme Court's juvenile sentencing jurisprudence." *Atwell v. State*, 197 So.3d 1040, 1047 (Fla. 2016) (holding *Miller* applies to any sentence denominated

life and a sentence of LWOP for robbery clearly violated *Graham*); see also *Gridine v. State*, 175 So.3d 672 (Fla. 2015) (*Graham* applies to a single 70-year sentence for attempted murder, which in Florida is a nonhomicide offense, though the sentence is not specifically denominated LWOP).

In one of the most recent cases, the Ohio Supreme Court joined the myriad other state supreme courts holding *Graham* categorically prohibits aggregate term-of-years sentences for multiple nonhomicide convictions that exceed the defendant's life expectancy. *State v. Moore*, No. 2016-Ohio-8288, 2016 WL 7448751 (Dec. 22, 2016).[5] *Moore* held that *Graham's* rationale requires all juvenile defendants be given an actual meaningful opportunity to obtain release and that *Graham* "did not limit that holding to juveniles who were sentenced for only one offense." *Id.* at *15.

As the Ohio Supreme Court so eloquently noted, "The number of offenses committed cannot overshadow the fact that it is a child who has committed them." *Id.* Moore concluded there is no consequential distinction between LWOP and aggregate term-of-years sentences, a fact the Supreme Court itself has

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[5] Moore's sentences aggregated to 112 years based on convictions on 12 counts of assault. He would have been eligible for parole after 77 years, when he would be 92 years old. *Moore*, 2016 WL 7448751, at *6. The majority suggests *Graham* was a single crime case. But *Moore* correctly notes that, although at various points *Graham* states it is dealing with a single sentence, in fact, Graham was convicted of multiple crimes and given multiple concurrent sentences. *Id.* at *14. Because in Florida all life sentences are without parole, the effect is like a single LWOP sentence, and the number of years imposed for the other crimes was irrelevant. *See Graham*, 560 U.S. at 57.

recognized in other contexts. *Id.* at *10-11; *see, e.g., Sumner v. Shuman*, 483 U.S. 66, 83 (1987) ("[T]here is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."). *Graham* recognizes all juveniles are different and have a lesser culpability because of their immaturity. This is why their claims of an Eighth Amendment violation must be considered categorically rather than by a term-of-years, sentence-by-sentence approach, as is done for adult offenders. *Moore*, 2016 WL 7448751, at *7, 14-15.

California took this same approach in *People v. Caballero*, 282 P.3d 291 (Cal. 2012). The defendant in *Caballero* was convicted of three counts of attempted murder (which in California is a nonhomicide offense) as well as assault and a firearms offense. The court imposed consecutive sentences of 15 to 25 years to life, resulting in an aggregate sentence under which the defendant would be imprisoned for 110 years before he would be eligible for parole consideration. *Id.* at 293, 295. The California Supreme Court rejected the state's argument – the same one the State makes here – that each sentence for each crime should be considered individually rather than in the aggregate, and so considered they were not grossly disproportionate to the crimes. *Id.* at 294-95. To the contrary, *Caballero* said, *Miller* instructed:

> "[N]one of what [*Graham*] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific. Those features are evident in the same way, and to the same degree, when

> ... a botched robbery turns into a killing. 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., quoting, *Miller*, 132 S. Ct. at 2465.

Caballero concluded that by this language *Miller*, therefore, "made it clear that *Graham*'s 'flat ban' on life without parole sentences" applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole. *Id* at 294.[6] The *Caballero* majority concluded:

> Defendant ... will become parole eligible over 100 years from now. ... Consequently, he would have no opportunity to "demonstrate

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[6] The concurring opinion in *Cabellero* was equally insightful, stating:

> [T]he purported distinction between a single sentence of life without parole and one of component parts adding up to 110 years to life is unpersuasive. The gist of *Graham* is not only that life sentences for juveniles are *unusual* as a statistical matter, they are *cruel* as well because "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." ... Further, the high court in *Graham* noted, "With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate – retribution, deterrence, incapacitation, and rehabilitation – provides an adequate justification."

Caballero, 282 P.2d at 297-98 (Werdegar, J., concurring), quoting, *Graham*, 560 U.S. at 68. The concurring opinion also noted that the fact the dissents in *Graham* had said *Graham*'s holding was limited to single LWOP sentences was not persuasive, for "[c]haracterization by the *Graham* dissenters of the majority opinion is, of course, dubious authority." *Id*. at 297.

> growth and maturity" to try to secure his release, in contravention of *Graham*'s dictate. ... *Graham*'s analysis does not focus on the precise sentence meted out. Instead, as noted above, it holds that a state must provide a juvenile offender "with some realistic opportunity to obtain release" from prison during his or her expected lifetime.

Id. at 295.

As noted earlier, Nevada also has held *Graham* applies to sentences that are the functional equivalent of a sentence of life without the possibility of parole. *Boston*, 363 P.3d at 457. Were it to adopt the contrary position taken by the state in that case (and by the majority in the instant case), Nevada held:

> [W]e would undermine the [United States Supreme] Court's goal of "prohibit [ing] States from making the judgment at the outset that those offenders never will be fit to reenter society." [*Graham*, 560 U.S.] at 75 .... As this court has previously stated, a sentence of life without the possibility of parole for a juvenile offender "means denial of hope; it means that good behavior and character improvement are immaterial; ...."

Id. at 457. Citing the Ninth Circuit's decision in *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013), the Nevada Supreme Court concluded that treating consecutive aggregate sentences as the functional equivalent of LWOP "best addresses the concerns enunciated by the U.S. Supreme Court and this court regarding the culpability of juvenile offenders and the potential for growth and maturity of these offenders." *Boston*, 363 P.3d at 458.

Iowa is also instructive. The Iowa Supreme Court released a trio of opinions applying *Graham* and *Miller*: *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013), *State v. Ragland*, 836 N.W.2d 107(Iowa 2013), and *State v. Null*, 836 N.W.2d. 41(Iowa 2013). *Pearson* is the most factually similar.[7] The defendant was convicted of first-degree robbery and first-degree burglary for each of two incidents at two different houses on the same day and received consecutive 25-year sentences. *Pearson*, 836 N.W.2d at 89. This brought his cumulative sentence to 50 years with parole eligibility after 35 years. *Id*. at 89, 92-93.

The Iowa Supreme Court held the aggregate sentence imposed was the functional equivalent of LWOP and the underlying principles of *Roper*, *Graham*, and *Miller* applied, stating, "Though *Miller* involved sentences of life without parole for juvenile homicide offenders, its reasoning applies equally to Pearson's sentence of thirty-five years without the possibility of parole for these offenses" even though this was less than the juvenile's life expectancy.

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[7] The other two cases reached similar results, analyzing the cases under *Graham* and *Miller* but deciding them under its comparable state constitutional provision. *Ragland*, 836 N.W.2d at 110, 121-22 (single homicide offense with a lengthy sentence) ("Accordingly, we hold *Miller* applies to sentences that are the functional equivalent of life without parole. The commuted sentence in this case – life with parole eligibility after 60 years – is the functional equivalent of a life sentence without parole."); *Null*, 836 N.W.2d. at 45, 71 (lengthy sentences for homicide and nonhomicide offenses) ("[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.").

Pearson, 836 N.W.2d at 96.[8] Then, extending *Miller* under an Iowa constitutional provision identical to the Eighth Amendment, the court held a *Miller*-type hearing is required before any lengthy aggregate sentence can be imposed on a juvenile so as not to effectively deprive the juvenile of the possibility of a meaningful opportunity for release. *Id*.

The New Jersey Supreme Court is one of the most recent state supreme courts to weigh in, holding juveniles cannot receive consecutive sentences that are the functional equivalent of LWOP. That court found "the force and logic of Miller's concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode," including when "a defendant commits multiple offenses on different occasions." *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017). *Zuber* noted the rationale behind *Roper*, *Graham*, *Miller*, and *Montgomery* depends not on whether a sentence is labeled LWOP but on the characteristics of juveniles and the effect of those characteristics on penological goals. *Id*. at 207-11. It found that to be guided by whether a sentence was labeled LWOP incorrectly elevated form over substance, stating:

> Defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation. The label alone cannot control; we decline to elevate form over substance.

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[8] Indeed, the Iowa Supreme Court has noted one of the *Miller* defendants was convicted of multiple offenses, yet that did not affect the need to meet the requirements of *Graham* and *Miller*. *Null*, 836 N.W.2d at 73.

Id. at 212. Rather, *Zuber* said the relevant question is the practical effect of the aggregate sentences imposed:

> Will a juvenile be imprisoned for life, or will he have a chance at release? It does not matter to the juvenile whether he faces formal "life without parole" or multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life. We believe it does not matter for purposes of the Federal or State Constitution either.

Id. at 211.[9]

Connecticut reasoned consistently in *Riley*, a case involving a juvenile convicted of murder, attempted murder, first-degree assault, and conspiracy to commit murder, and sentenced to a total of 100 years without consideration of age as a mitigating factor. *Riley*, 110 A.3d at 1206-08. The court held this violated *Miller* and ordered resentencing. *Id.* at 1218-19. "It is undisputed that this sentence is the functional equivalent to life without the possibility of parole." *Id.* at 1207. In Connecticut's penal code, a "life sentence" is defined as either LWOP or a definite term of 60 years or more. *Id.* at 1207 n.2. The court explored the *Graham* issue but concluded the issue

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[9] As further discussed in *State v. Nathan*, SC95473, slip op. (Mo. banc 2017) (Stith, J., dissenting), also handed down this date, for the same reasons the New Jersey Supreme Court held in *Zuber* that *Graham* and *Miller* apply to sentences that include punishment for a homicide offense because the focus is not on the offense alone, but principally is focused on the characteristics of the offender, because "youth matters under the Constitution" any time there is a "lengthy sentence that is the practical equivalent of [LWOP]." *Id.* at 212.

was not yet ripe because, on resentencing, Riley may get a *Graham*-compliant sentence. Id. at 1218-19.

Other state supreme courts have been asked to determine the applicability of *Graham* and *Miller* to cases in which the defendant committed homicide and nonhomicide offenses together, as is often the case when a criminal commits a violent crime using a weapon. Most of these courts also have found *Graham* and *Miller*'s requirement that a juvenile defendant be given the opportunity to show he is not in the select few defendants who are so irreparably corrupt they deserve LWOP, applies equally to de facto LWOP sentences imposed for nonhomicide offenses that occurred at the same time as the homicide offense. Although sometimes differing slightly in their reasoning or facts – some involve state constitutional law, others a single longer than life term-of-years sentence – each holds a juvenile cannot be given a sentence that results in a de facto life sentence when the jury does not find the defendant deserves LWOP for his or her homicide offense.

The Indiana Supreme Court used this type of reasoning in reducing a sentence of 150 years to one of 80 years (which, under the court's reasoning, presumably would allow for release during the defendant's lifetime). *Brown v. State*, 10 N.E.3d 1 (Ind. 2014). It held *Roper*, *Graham* and *Miller* had shown juveniles are categorically different than adults, and their special characteristics and immaturity must be taken into account in their sentencing. This applied equally to the consecutive sentences at issue in *Brown* as it did to the single LWOP sentences in *Graham* and *Miller*, the Indiana Supreme Court said, for "[s]imilar to a life without parole sentence, Brown's 150 year sentence 'forswears altogether the

rehabilitative ideal.'" *Brown*, 10 N.E.3d. at 8, quoting, *Graham*, 560 U.S. at 74. It found such a sentence "means denial of hope" and the defendant will remain in prison for the rest of his days. *Id*. The court concluded, in exercising its authority under its state constitution to revise sentences, that when determining whether the sentence was excessive, it should "'focus on the forest – the aggregate sentence – rather than the trees – consecutive or concurrent, number of counts, or length of the sentence on any individual count.'" *Brown*, 10 N.E.3d. at 8, quoting, *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). It reduced the sentence. *Id*.

Wyoming relied on both Iowa and Indiana in reaching a similar result in *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014). Bear Cloud was convicted of first-degree murder and two burglary related charges, for which he received consecutive sentences of life in prison and two 20- to 25-year sentences. *Id*. at 135. His certiorari petition was pending at the Supreme Court when *Miller* was decided, and the Supreme Court vacated the judgment and remanded the case for resentencing in light of *Miller*. *Id*. After some confusion as to how to proceed, a hearing was held, and he was resentenced to life with the possibility of parole after 25 years on the murder charge, to run consecutive to the two 20- to 25-year undisturbed sentences on the two nonhomicide charges, so he would be eligible for release after 45 years, at age 61. *Id*. at 136.

Bear Cloud held these sentences violated *Graham* and *Miller* because the sentences for the nonhomicide offenses had been imposed without considering the factors set out in *Miller*. Sentencing this way was error, because "[t]o do otherwise would be to ig-

nore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile 'die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence [for example, life with the possibility of parole] more appropriate.' " *Id*. at 142, quoting, *Miller*, 132 S. Ct. at 2460. The court concluded, "Like the Indiana Supreme Court, we will 'focus on the forest – the aggregate sentence – rather than the trees – consecutive or concurrent, number of counts, or length of the sentence on any individual count.'" *Bear Cloud*, 334 P.3d at 142, quoting, *Brown*, 10 N.E.3d. at 8.

The Wyoming Supreme Court further held, in determining whether the defendant was one of the rare "'irredeemable'" juveniles "'deserving of incarceration for the duration of their lives,'" *id*. at 144, quoting, *Graham*, 560 U.S. at 75, the categorical considerations laid out in *Graham* and *Miller* must be applied "to the entire sentencing package, when the sentence is [LWOP], or when aggregate sentences result in the functional equivalent of [LWOP]." *Bear Cloud*, 334 P.3d at 144. Moreover, that analysis would not change depending on whether the aggregate sentence is more than or less than the offender's actual life expectancy; the issue is whether he will have a meaningful opportunity for release. *Id*.

The Illinois Supreme Court also recently decided a case holding *Graham* and *Miller* apply to an aggregate sentence for homicide and nonhomicide offenses, stating:

> In this case, defendant committed offenses in a single course of conduct that subjected him to a legislatively mandated sentence of 97

> years, with the earliest opportunity for release after 89 years. Because defendant was 16 years old at the time he committed the offenses, the sentencing scheme mandated that he remain in prison until at least the age of 105. The State concedes, and we agree, that defendant will most certainly not live long enough to ever become eligible for release. Unquestionably, then, under these circumstances, defendant's term-of-years sentence is a mandatory, de facto life-without-parole sentence. We therefore vacate defendant's sentence as unconstitutional pursuant to *Miller*.

People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016).

In January of this year, the Washington Supreme Court similarly held "*Miller*'s reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation." *State v. Ramos*, 387 P.3d 650, 660 (Wash. 2017). In so holding, *Ramos* rejected "the notion that *Miller* applies only to literal, not de facto, life-without-parole sentences" because "youth matters on a constitutional level." *Id.* at 655, 660.

> Holding otherwise would effectively prohibit the sentencing court from considering the specific nature of the crimes and the individual's culpability before sentencing a juvenile homicide offender to die in prison, in direct contradiction to *Miller*. Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same.

Id. at 660. This is because "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*." *Id*., quoting, *Miller*, 132 S. Ct. at 2465 (emphasis added). Every juvenile, therefore, is entitled to a *Miller* hearing.[10]

The Massachusetts Supreme Court similarly cited with approval the decisions in *Caballero*, *Ragland*, and *Null* and directed the legislature to be guided by them in determining what was a constitutional sentence, stating:

> We emphasize, however, that a constitutional sentencing scheme for juvenile homicide defendants must take account of the spirit of our holdings today here and in *Diatchenko*, and avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a sentence of life without parole. See, e.g., *People v. Caballero*, 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291, 295 (2012) (sentence to minimum prison term that exceeds juvenile defendant's natural life expectancy violates Eighth Amendment's

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[10] By contrast to the defendant in *Nathan*, whom the jury found was not irreparably corrupt, the Washington Supreme Court held, after a *Miller* hearing, Ramos was not barred from receiving a lengthy sentence because he failed to show his crime was due to "a lack of maturity and an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking." *Id*. at 667. The opinion also notes, even so, Ramos would have a right under a recent Washington statute to seek release after 20 years if he did not commit a crime as an adult and otherwise met the statutory requirements for early release. *Id*. at 659.

> bar against cruel and unusual punishment); *State v. Ragland*, 836 N.W.2d 107, 111, 121–122 (Iowa 2013) (*Miller* applies to juvenile sentences that are "functional equivalent" of life without parole, and sentence of life with parole eligibility only after sixty years was functional equivalent of life without parole); *State v. Null*, 836 N.W.2d 41, 45, 71 (Iowa 2013) (mandatory seventy-five year sentence resulting from aggregation of two mandatory sentences that permitted parole eligibility only after fifty-two and one-half years for juvenile was "such a lengthy sentence" that it was "sufficient to trigger *Miller*-type protections").

Com. v. Brown, 1 N.E.3d 259, 270 n.11 (Mass. 2013).

C. The Tenth, Ninth and Seventh Circuits Apply Graham to Aggregate Sentences

Like the state supreme court decisions just discussed, three federal courts of appeals also have found *Graham* applies to sentences that aggregate to beyond a juvenile defendant's life expectancy. Most recently, in *Budder*, the Tenth Circuit invalidated three consecutive 45-year sentences for violent non-homicide offenses. It held *Graham*'s categorical rule prohibited the imposition of any sentence on a juvenile offender if it requires the juvenile to spend his or her life in prison, whether that sentence is labeled life without parole or whether it is labeled as multiple term of year sentences. The Tenth Circuit rejected Oklahoma's arguments that aggregate sentences are not barred by *Graham* even if they are the functional equivalent of LWOP, stating:

> Despite Oklahoma's arguments to the contrary, we cannot read the Court's categorical rule

> as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as "life without parole." The Constitution's protections do not depend upon a legislature's semantic classifications. Limiting the Court's holding by this linguistic distinction would allow states to subvert requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life.' The Constitution's protections are not so malleable.

Budder, 831 F.3d at 1056. The Tenth Circuit continued:

> More importantly, the Court did not just hold that it violated the Eighth Amendment to sentence a juvenile nonhomicide offender to life without parole; it held that, when the state imposes a sentence of life on a juvenile nonhomicide offender, it must provide that offender with 'a meaningful opportunity to obtain release.'

Id. at 1056-57. *Graham* "must be read to apply to all sentences that are of such length that they would remove any possibility of eventual release." *Id.*

In *Moore*, 725 F.3d at 1191, the Ninth Circuit held California's affirmance of Moore's 254-year term-of-years sentence "for multiple crimes was contrary to Graham because there are no constitutionally significant distinguishable facts between Graham's and Moore's sentences." *Id.* (internal quotation omitted). The Ninth Circuit concluded Moore's sentence "is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime. Moore's sentence deter-

mines 'at the outset that [Moore] never will be fit to reenter society.' " *Id*., quoting, *Graham*, 560 U.S. at 75.[11]

Aggregate sentences that are the functional equivalent of LWOP are contrary to *Graham*, the Ninth Circuit held, because in *Graham* "the Supreme Court chose a categorical approach, i.e., a flat-out rule that '*gives all juvenile nonhomicide offenders* a chance to demonstrate maturity and reform.'" *Moore*, 725 F.3d at 1193, quoting, *Graham*, 560 U.S. at 79 (emphasis added in *Moore*). *Moore*, therefore, held, "Under *Graham*, juvenile nonhomicide offenders may not be sentenced to life without parole regardless of the underlying nonhomicide crime." *Id*.

And, lest it be suggested that the Ninth Circuit's decision is an outlier, the Seventh Circuit reached a similar result in *McKinley*, 809 F.3d at 911. The Seventh Circuit held that McKinley's two consecutive 50-year sentences, one for first-degree murder and one for armed criminal action, violated *Miller* because he would not be eligible for parole until age 116. *Id*. at 909. In so holding, the Seventh Circuit noted that LWOP or its equivalent can be imposed even in a homicide case only if the trial judge or jury considers the *Miller* factors as to both the homicide and nonhomicide charges, which had not occurred there. *Id*. at 914. The same reasoning necessarily

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[11] On remand, Moore was made eligible for parole at age 62. *People v. Moore*, No. B260667, 2015 WL 8212832, at *1 (Cal. Ct. App. Dec. 8, 2015). The appellate court found his appeal of the new sentence moot due to a statute granting young offenders sentenced to a specific term of years for crimes committed prior to age 23 the right to parole eligibility after 15 years of incarceration. *People v. Moore*, No. B260667, 2017 WL 347460, at *3 (Cal. Ct. App. Jan. 24, 2017).

applied to the 100-year sentence in that case; it was "a *de facto* life sentence, and so the logic of *Miller* applies." *Id*. at 911.[12]

D. Cases Cited by the Majority Opinion Are Not Persuasive

In holding that it would not consider the applicability of *Graham*, the majority cites a few state supreme courts that it suggests "have held that *Graham* does not apply to prohibit multiple fixed-term sentences for juvenile offenders." *Willbanks*, slip op. at 9. A closer look at these cases greatly diminishes their relevance.

In *State v. Brown*, 118 So. 3d 332, 342 (La. 2013), in deciding that it simply did not have the authority to apply *Graham* to aggregate sentences, the Louisiana Supreme Court relied in part on the dissenting opinions in *Graham*, on a Florida appellate court decision that has since been reversed (*Henry v. State*, 82 So.3d 1084, (Fla. Dist. Ct. App. 2012), *reversed by Henry*, 175 So.3d 675), and on its improper reliance on the deferential standard applicable to federal court review of state sentences. For all the reasons noted *infra*, it is wrong. Indeed, it and Virginia are the only state supreme courts to conclude they are powerless to determine the constitutional validity of a sentencing practice under principles enunciated in

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[12] While *Miller* did not involve multiple consecutive sentences, the Seventh Circuit concluded, "A straw in the wind is that the Supreme Court vacated, for further consideration in light of *Miller*, three decisions upholding as an exercise of sentencing discretion juveniles' sentences to life in prison with no possibility of parole." *McKinley*, 809 F.3d at 914. In other words, the Supreme Court had itself indicated by these remands that multiple aggregate sentences needed to be reconsidered in light of *Graham* and *Miller*.

prior Supreme Court cases simply because the Supreme Court has not yet expressly applied those principles to that particular sentencing practice, as described *infra*. In light of these errors, Louisiana's determination that it cannot apply *Graham* to multiple aggregate sentences is not persuasive.

The majority also cites to Virginia's decisions in *Vasquez v. Com.*, 781 S.E.2d 920, 928 (Va. 2016), and *Angel v. Com.*, 704 S.E.2d 386, 401 (Va. 2011). Virginia offers little reasoning other than its summary and incorrect conclusion that applying *Graham* to aggregate sentences would violate its duty to apply "the holdings of the highest court in the land" as set out by the Supreme Court. *Vasquez*, 781 S.E.2d at 926. Again, for the reasons discussed *infra*, that just misunderstands a state supreme court's authority. Moreover, as the concurring opinion notes, Vasquez's sentence did involve a meaningful opportunity for release under Virginia's geriatric release statute, and thus the sentence did not violate *Graham*. Id. at 931 (Mims, J., concurring); *accord, Angel* (no constitutional violation when meaningful opportunity for release provided by the geriatric statute).[13]

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[13] Virginia's "conditional release for geriatric inmates" statute, Va. Code Ann. § 53.1-40.01 provides in its entirety:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed *may petition the Parole Board for conditional release.* The Parole Board shall promulgate regulations to implement the provisions of this section.

Id. (emphasis added).

The majority also relies on *State v. Springer*, 856 N.W.2d 460 (S.D. 2014), *cert. denied sub nom. Springer v. S. Dakota*, 135 S. Ct. 1908 (2015). But *Springer* simply does not involve a sentence that is the functional equivalent of LWOP. While the defendant nominally received a 61-year sentence for a single nonhomicide offense, under South Dakota law he would be eligible for parole in 33 years when he would be 49 years old. Id. at 466-68. This is why *Springer* held the sentence did not violate *Graham*. In fact, in a footnote *Springer* specifically stated, "We are not implying that a lengthy term-of-years sentence, like the 261-year sentence here, can never be a de facto life sentence," and explicitly tied its holding to the fact Springer was not denied a meaningful opportunity for release because he would be parole eligible at age 49. *Id.* at 470 n.8. For similar reasons, neither are the other state cases it cites persuasive.

The majority also relies on the Sixth Circuit's decision in *Bunch v. Smith*, 685 F.3d 546, 549 (6th Cir. 2012), to conclude the Sixth Circuit has determined *Graham* does not apply to aggregate sentences because *Graham* involved a single sentence. It is wrong for multiple reasons.

First, and most basically, the defendant in *Graham did not* receive a de jure sentence of LWOP. Rather, as both the Tenth Circuit and the Ohio Supreme Court have noted, he was convicted of multiple crimes including armed burglary with assault or battery and attempted armed robbery, and he received a simple life sentence for burglary and a 15-year sentence for use of a weapon during the burglary. *Budder*, 851 F.3d at 1055-56 ("In fact, it is important to note that Graham himself was not sen-

tenced to 'life without parole'; he was sentenced to 'life'"); *Moore*, 2016 WL 7448751, at *14 ("We note at the outset that the defendant in *Graham* had committed multiple offenses."), citing, *Graham*, 560 U.S. at 53-54. But, because at that time Florida had abolished parole, the defendant's life and 15-year sentences were, as a practical matter, the functional equivalent of LWOP.[14] *Id*. "In this context, there is no material distinction between a sentence for a term of years so lengthy that it "effectively denies the offender any material opportunity for parole" and one that will imprison him for "life" without the opportunity for parole – both are equally irrevocable." *Budder*, 851 F.3d at 1056.

The Supreme Court, therefore, looked at the reality that Graham's sentence, although not labeled LWOP, in practical effect was LWOP. In other words, *Graham* looked not at the *de jure* label of the sentence imposed as simply "life," but at its *de facto* effect, which was that it was a sentence that "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope," and held it invalid under the Eighth Amendment. *Graham*, 560 U.S. at 79, 82. For this reason, the Tenth Circuit has held the sentencing practice that was the Supreme Court's focus in *Graham* was any sentence that denies a juvenile nonhomicide offender a realistic opportunity to obtain release within his lifetime. *Budder*, 851 F.3d at 1057.

Willbanks simply asks this Court to do the same – to look at the practical reality of his sentence, just as

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[14] That is a matter the legislature can change, however and, in fact, the Florida legislature has done so for life sentences. Fla. Stat. Ann. § 921.1401 (West).

the Supreme Court did in *Graham*. If this Court does so, it will find *Graham*'s reasoning fully applies here. Willbanks received consecutive sentences of 15 years for kidnapping, life imprisonment for assault, 20 years each for two robbery counts, and 100 years each for three associated armed criminal action counts, for an aggregate sentence of life plus 355 years. Under Missouri's rules governing parole, Willbanks would not become eligible for parole until age 85, which is at or beyond what the parties identify as his life expectancy of 79 years, and consequently he would not have a meaningful opportunity for release.[15] His sentence, therefore, is the functional equivalent of LWOP and so is invalid under *Graham*.

Second, the Sixth Circuit did not hold in *Bunch* that *Graham* does not apply to aggregate sentences that are the functional equivalent of LWOP. It simply said, as a federal court, it could not grant habeas

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[15] Under Missouri's mandatory minimum prison term statute, section 558.019, an inmate convicted of a "dangerous felony" must serve either 85 percent of the sentence or until the age of 70 if he has served 40 percent of the sentence. For other felony convictions, the inmate must serve 50 percent of the term or until age 70 if he has served 40 percent of the sentence. For parole eligibility purposes, aggregate term-of-years sentences imposed consecutively for crimes committed "at or near the same time" that come to greater than 75 years are treated as 75 years. Life sentences are defined as 30 years. § 558.019, RSMo Supp. 2013. Willbanks' convictions are all "dangerous felonies" except for the armed criminal action (ACA) charges. Although Willbanks may qualify under the geriatric release provision, Missouri Department of Corrections regulations require an additional 15 years mandatory time served on the ACA charges. Mo. Code Regs. Ann. tit. 14 § 80-2.010(1)(E). The department of corrections agrees that Willbanks will not be eligible for release before the age of 85.

corpus relief from an Ohio state court decision holding *Graham* does not apply to aggregate sentences because federal courts are prohibited by *federalism* principles (as set out in *Teague v. Lane*, 489 U.S. 288 (1989)) and in the Antiterrorism and Expedited Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)), from reversing a state court decision unless the state court decision is "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States."

But the Ohio Supreme Court's recent opinion shows the court did not feel bound or persuaded by the Sixth Circuit opinion in *Bunch*. *Moore*, 2016 WL 74488751. It concluded, contrary to *Bunch*, that *Graham* applies to term-of-years sentences that aggregate to close to or more than the juvenile offender's lifetime. One of the concurring opinions elaborates, explaining (as does this dissent) any limitation on federal courts overturning state decisions has no effect on the authority of *state* courts to do so. *Id*. at *26-27 (O'Connor, C.J., concurring) (noting the federal standard is "so highly deferential to state courts, it is virtually impossible for a federal court sitting in habeas to give relief to a juvenile," but "[w]e who sit at the pinnacle of a state judiciary should be reluctant to adopt the limited standards of federal habeas jurisdiction as a proper proxy for the rigorous constitutional analysis that claims like Moore's deserve").

To the contrary, the Supreme Court specifically held in *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008), that no similar principles "constrain [ ] the authority of state courts to give broader effect to new rules of criminal procedure than" federal courts. *Id*.

at 266.[16] This is because limitations on federal court authority are mandated by comity and federalism and so "are unique to federal habeas review of state convictions." *Id.* at 279. Finality of convictions is a state, not a federal, interest. *Id*. at 280.

As applied here, *Danforth* means, once the Supreme Court rules on the constitutional validity of aggregate sentences that are the functional equivalent of LWOP (and assuming its existing cases do not already effectively decide this issue, as the Ninth and Seventh circuits have held), state courts would have to be uniform in applying that ruling.[17] But, in the absence of such a direct ruling, no principle of federal or state law precludes this Court from reaching and determining whether the principles set out in *Graham*, *Miller*, *Montgomery*, and *Roper* apply to aggregate sentences that are the functional equivalent of LWOP. Indeed, as this Court previously has recognized, that is this Court's job. *State v. Whitfield*, 107 S.W.3d 253, 266 (Mo. banc 2003); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546-47 (Mo. banc 2003).

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[16] Indeed, that was the very heart of its decision in *Danforth*, which involved whether Minnesota had the authority to retroactively apply the "new rule" for Confrontation Clause analysis announced by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 68 (2004), when federal courts were barred from doing so under the narrow retroactivity principles set out in *Teague*.

[17] For example, once *Montgomery* was decided, the Supreme Court enforced the now uniform rule by reversing state cases that had held *Miller* did *not* apply retroactively. *E.g., People v. Carp*, 852 N.W.2d 801, 811 (Mich. 2014), *cert. granted, judgment vacated*, 136 S. Ct. 1355 (2016); *Ex parte Williams*, 183 So. 3d 220 (Ala. 2015), *cert. granted, judgment vacated sub nom. Williams v. Alabama*, 136 S. Ct. 1365 (2016).

Finally, *Bunch* just was wrong in saying it is not clearly established that *Graham* applies to aggregate sentences simply because a few state court cases have found *Graham* does not apply to such sentences. That is like saying a clause is ambiguous if a few judges disagree as to its meaning – a proposition this Court has repeatedly rejected; the conclusion of ambiguity does not follow from honest disagreement. *Ethridge v. TierOne Bank*, 226 S.W.3d 127, 131 (Mo. banc 2007). Similarly, here, as the Tenth Circuit noted, what matters is what *Graham* itself said and whether its principles, in fact, do apply to aggregate sentences. *Budder* concluded, "in light of the clearly established federal law, the state court's judgment 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement,'" that it had to "grant the petitioner's request for habeas relief." *Budder*, 851 F.3d at 1052.

In other words, that a small number of courts disagree as to *Graham*'s meaning does not make its otherwise clear principles ambiguous. Neither is the majority persuasive in attempting to ignore the super-majority of states resolving the issue (12 of 17) that have held *Graham* applicable to aggregate sentences by suggesting we have not yet heard from the other 33. Justice cannot wait for this Court to be the last to recognize an Eighth Amendment violation.

The majority's reticence to act is particularly inappropriate in light of the fact Ohio itself, to which *Bunch* said it had to defer, now recognizes *Graham* applies to aggregate sentence cases, and one of the only two other state court cases *Bunch* cited to support its belief that there was not yet a consensus as to *Graham*'s application to aggregate sentences has

since itself been overruled.[18] *Moore*, 2016 WL 7448751, at *28-29 (O'Connor, C.J., concurring) (noting *Henry v. State*, 82 So.3d 1084 (Fla. Ct. App. 2012), was pending when *Bunch* was decided but has since been quashed, unanimously, by the Florida Supreme Court in *Henry v. State*, 175 So.3d 675 (Fla. 2015)).[19]

Perhaps this is why, as discussed supra, the other three United States Court of Appeals circuits to have

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[18] In fact, even the Sixth Circuit seems equivocal. In *Starks v. Easterling*, 659 Fed. Appx. 277, 280 (6th Cir 2016), the Sixth Circuit said that it believes *Graham* should be applied to aggregate sentences, and it was only because of its narrow reading of its authority as a federal court that it did not grant relief, stating:

> In our view, [*Roper*, *Graham*, *Miller*, and *Montgomery*] illustrate *the Court's growing unease with draconian sentences imposed upon juveniles, even for serious crimes. As this line of jurisprudence continues to evolve, it may well be that the Court one day holds that fixed term sentences for juvenile offenders that are the functional equivalent of life without parole are unconstitutional,* especially if the sentencing court has not taken the defendant's youth into consideration. *That said, it is not our role to predict future outcomes*. Because the Supreme Court has not yet *explicitly* held that the Eighth Amendment extends to juvenile sentences that are the functional equivalent of life, and given the fact that lower courts are divided about the scope of *Miller*, *we hold that the Tennessee courts' decisions were not contrary to, or an unreasonable application of, clearly established federal law as defined by the Supreme Court*.

Id. (emphasis added).

[19] As the Ohio Supreme Court observed, the other state appellate opinion *Bunch* relied on – *Kasic* – is inapposite because the sentence was imposed in part for crimes committed as an adult. *Moore*, 2016 WL 7448751, at *28 (O'Connor, C.J., concurring), *citing*, *State v. Kasic*, 265 P.3d 410, 413 (Ariz. App. 2011).

directly addressed the issue have held *Graham*'s principles *do apply* to aggregate sentences that are so long as to be the functional equivalent of LWOP. See *Moore*, 725 F.3d at 1191; *McKinley*, 809 F.3d at 911-14.

II. THIS COURT HAS THE AUTHORITY TO APPLY THE REASONING OF *GRAHAM* TO NEW SITUATIONS TO WHICH ITS PRINCIPLES APPLY

Despite these holdings by three-fourths of the states to address the issue and by two out of three federal appellate courts, all invalidating sentences that are the functional equivalent of LWOP, the majority says "it is not for this Court to make that decision." Citing a *dissenting* opinion, the majority states that, because the Supreme Court has not yet decided an aggregate sentence case, it might get mad at this Court for applying *Graham* to one, stating:

> But the Supreme Court has not held that multiple fixed-term sentences totaling beyond a juvenile offender's life expectancy are the functional equivalent of life without parole. Warning of "frequent and disruptive reassessments of [the Supreme Court's] Eighth Amendment precedents," the Supreme Court has not looked positively upon lower courts issuing various rulings without precedence from the Supreme Court. *Roper*, 543 U.S. at 594 (O'Connor, J., dissenting). "[C]lear, predictable, and uniform constitutional standards are especially desirable" in the area of the Eighth Amendment. *Id*. Extending Supreme Court holdings beyond the four corners of its opinion is similarly disfavored.

Slip op. at 13-14 (footnote omitted). Respectfully, the majority's reasoning is just wrong for at least two reasons.

First, and most basically, fear of censure should not stay this Court's hand from doing justice. That is this Court's ultimate responsibility as the highest arbiter of Missouri citizens' constitutional rights. Second, this Court's responsibility to do justice is not onerous here, for the majority's stated fear of censure is totally unjustified. The majority cites to Justice O'Connor's opinion in *Roper* as the basis for its fear of disapproval, but (as it acknowledges) Justice O'Connor wrote *in dissent*. While she castigated this Court for its holding in *Roper*, the majority of the Supreme Court certainly did not agree. Rather than censuring this Court, the *Roper* majority quoted this Court's reasoning twice in its decision. *Roper*, 543 U.S. at 559-60, 566-67.[20] It found this Court's analysis, based on an application of the principles set out in *Atkins*, was sound and properly applied to the context of juvenile death sentences, even though *Atkins* itself did not involve a juvenile death sentence.

In other words, this Court did not show disrespect by deciding differently than the Supreme Court had in the earlier case cited by Justice O'Connor, for this Court simply held, reconsidered in light of *Atkins*, Supreme Court precedent called for a different re-

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[20] It cited to *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. banc 2003), for the point that a national consensus had emerged since *Stanford*, and for the point that it would be ironic to allow the execution of juvenile offenders when this national consensus likely developed earlier than the consensus leading to the prohibition on executing developmentally disabled offenders in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Simmons*, 112 S.W.3d at 408 n.10.

sult. All this Court did in *Roper* was what state courts do every day – it applied existing principles of law to new situations.[21] And it was affirmed.

Indeed, were it "disfavored" to "extend" *Graham* (in reality, to apply it) to include aggregate sentences that do not allow for meaningful release, likely to bring down the Supreme Court's ire on this Court, then one would expect the Supreme Court would have granted certiorari in the Seventh or Ninth Circuit's decision in *McKinley* or *Moore*, or in the 12 state supreme court cases that have applied *Graham* or *Miller* in just this way. But it has let all of these decisions stand, for it is the job of state supreme courts to decide constitutional issues such as this by applying the reasoning of Supreme Court cases to new facts. Doing our job is not disfavored.

Similarly, were it disfavored to apply Supreme Court reasoning to new factual situations absent guidance from the Supreme Court as to how to do so –if this were an improper "extension" of Supreme Court law – one would have expected the Supreme Court to have taken certiorari in some of the many state supreme court decisions applying *Miller* retroactively to juvenile LWOP cases long before the Supreme Court held in *Montgomery* that the fundamental principles underlying *Miller* are substantive and must be applied retroactively to all juveniles.[22]

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[21] *See also Roper*, 543 U.S. at 629 (Scalia, J., dissenting) (criticizing adoption of "evolving standard of decency" approach because it invites state courts to strike out on their own in deciding what had evolved, just as Missouri did in applying the principles from Atkins to juvenile offenders).

[22] *See, e.g., Ragland*, 836 N.W.2d at 114; *Horsley v. State*, 160 So. 3d 393, 394 (Fla. 2015); *Aiken v. Byars*, 765 S.E.2d 572, 576 (S.C. 2014), *cert. denied*, 135 S. Ct. 2379 (2015); *Diatchenko v.*

Montgomery, 136 S. Ct. at 727. But, in so holding, *Montgomery* did not criticize the many state courts that already had applied *Miller* retroactively, even though they thereby applied *Miller*'s direct holding to a different situation. *Id*.[23]

Why? Because, for the reasons already noted, "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal quotation and citation omitted); *accord Moore*, 725 F.3d at 1192. Deciding such cases is part of our job description. It is just applying the law to new facts.

Indeed, *Danforth* further rejected the suggestion by the majority in the instant case that uniformity is so desirable that state courts should not act until the Supreme Court leads the way. *Danforth*, 552 U.S. at 290. It specifically held there is no "general, undefined federal interest in uniformity," *id*. at 280, and

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Dist. Attorney for Suffolk Dist., 1 N.E.3d 270, 278 (Mass. 2013); *People v. Davis*, 6 N.E.3d 709, 721 (Ill. 2014), *cert. denied*, 135 S. Ct. 710 (2014); *Mantich*, 842 N.W.2d at 730-31; *Petition of State*, 103 A.3d 227, 236 (N.H. 2014), *cert. denied sub nom. New Hampshire v. Soto*, 136 S. Ct. 1354 (2016); *Jones v. State*, 122 So. 3d 698, 701-02 (Miss. 2013); *State v. Mares*, 335 P.3d 487, 508 (Wyo. 2014); *Kelley v. Gordon*, 465 S.W.3d 842, 845 (Ark. 2015), *reh'g denied* (Sept. 10, 2015), *cert. denied*, 136 S. Ct. 1378 (2016) ("However, while many states have chosen to do so, this court is not required to follow *Teague*.").

[23] The point here is not that by denying certiorari the Supreme Court signaled it agreed with these courts, but rather that it did not find the decisions had to be reviewed because they were improperly failing to pay deference to Supreme Court precedent, as the majority inexplicably seems to fear will occur if this Court grants relief here. This Court can decide based on what it believes is the law, without worrying about whether the Supreme Court will think badly of it for doing so.

the limits imposed on federal courts by section 2254(a) in no way limit what state courts can do.[24]

III. *GRAHAM* BARS AN AGGREGATE SENTENCE THAT DENIES A MEANINGFUL OPPORTUNITY FOR RELEASE

A. Categorical Approach Requires Consideration of Aggregate Sentences

Here, as in *Graham*, the defendant claims the Eighth Amendment categorically bars juvenile offenders from receiving the type of sentence he received. Like the many state supreme courts discussed above, I would hold *Graham* requires, in assessing whether a particular type of sentence is barred because the offender was a juvenile, a categorical rather than a case-by-case approach must be utilized because such a "case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Graham*, 560 U.S. at 61. Use of this categorical approach requires this Court to recognize the characteristics that require treating juvenile nonhomicide offenders differently do not change depending on whether the sentence is denominated LWOP or is an aggregate sentence:

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[24] *Danforth* cited with approval "courts and commentators" who had opined that state courts may apply the Supreme Court's minimum constitutional requirements more broadly, *id*. at 277 n.14, including L. Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U.L.REV. 421, 443 (2004), which discussed Missouri cases applying habeas relief more broadly than do comparable federal courts. As that article notes, "While the underpinning of federal habeas review is to ensure that the states recognize and apply federal statutory and constitutional principles to cases tried in their courts, state courts are not so limited." *Id*. at 448.

> [N]one of what [*Graham*] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific. Those features are evident in the same way, and to the same degree, when ... a botched robbery turns into a killing. So, *Graham*'s reasoning implicates any life without parole sentence imposed on a juvenile ....

Miller, 132 S. Ct. at 2465.

B. Penological Goals of Retribution, Deterrence, Incapacitation, and Rehabilitation Are Not Served by Aggregate Sentences That Are De Facto Life Without Parole

The majority continues to use a sentence-by-sentence approach, perhaps because, like the majority in *State v. Nathan*, SC95473, slip op. (Mo. banc 2017), also handed down this date, it believes it would not serve the deterrent and retributive purpose of the criminal law to impose the same punishment for a single crime as for multiple crimes. It is wrong.[25]

First, *Graham* does not bar the imposition of aggregate sentences for multiple crimes; it simply bars making them of such length that the juvenile is given the functional equivalent of LWOP. Second, the juvenile is not required to be released at the time the

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[25] Despite the following multipage discussion of how penological goals are furthered by treating juvenile sentences categorically and how the goals applicable to adults do not apply to juveniles, the majority criticizes this dissent for not adequately explaining why penological considerations are different for juveniles, although it is the majority that has failed to address the fact that this dissent simply applies the Supreme Court's own explanation in *Graham* and *Miller* of how those goals apply differently to juveniles.

juvenile is first eligible for parole; the juvenile simply must be considered for parole at that time, and the nature of the crimes is a relevant consideration. Of course, that consideration must be genuine. If the juvenile offender is determined to be irreparably corrupt, then he or she may not be granted parole. The Supreme Court requires, however, that the juvenile be given "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75.

The opportunity is required because characteristics of juveniles mean they are less morally culpable and the normal legitimate penological goals of punishment – retribution, deterrence, incapacitation, and rehabilitation – do not justify the harshest of sentences in the case of juveniles. *Moore*, 2016 WL 7448751, at *7-8; *Null*, 836 N.W.2d at 63. Their reduced culpability, the Supreme Court has said, stems from "three significant gaps between juveniles and adults:"

> First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570, 125 S.Ct. 1183.

Miller, 132 S. Ct. at 2464 (alterations in original).

This reduced moral culpability means retribution is not properly served by the imposition of the harshest sentences: "Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Moore*, 2016 WL 7448751, at *8, quoting, *Graham*, 560 U.S. at 71 (internal quotation and alterations omitted). *Moore* also notes that the Supreme Court has found LWOP sentences to be longer and thus harsher when imposed on juveniles: "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." *Moore*, 2016 WL 7448751, at *9, citing, *Graham*, 560 U.S. at 70-71 (alteration in *Moore*).

The characteristics of juveniles also make them less susceptible to deterrence. According to *Roper*, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571. Owing to their "lack of maturity and underdeveloped sense of responsibility," juveniles are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72. The Supreme Court considers the likelihood juveniles weigh such consequences of their acts to be "virtually nonexistent." *Roper*, 543 U.S. at 572.

A juvenile's capacity for change also means the legitimate concern for incapacitation does not justify LWOP. "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." *Graham*, 560 U.S. at 72. Even when the juvenile has commit-

ted a homicide, LWOP is only justified in the rare case when it can be determined at the outset that the juvenile is irreparably corrupt. *Miller*, 132 S. Ct. 2469 ("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.") (internal quotations omitted).

Similarly, a juvenile's capacity for change is why a sentence of LWOP thwarts the goal of rehabilitation. This is central to *Graham*:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.

Graham, 560 U.S. at 79. Indeed, the penological goal of rehabilitation "forms the basis of parole systems." *Id.* at 73.

As in *Graham*, so too here, the Eighth Amendment is violated and *Graham* requires the juvenile be resentenced or be granted reasonable parole consideration.

C. Remedy

Finally, the majority says it is hesitant to apply *Graham* to aggregate sentence cases because it will be difficult to draw an exact line in each case indicat-

ing when an aggregate sentence does not provide a meaningful opportunity for release. But difficulties in fashioning remedies have never stayed this Court's hand from doing justice. They should not do so here.[26] Whatever age is appropriate, we know it must be some age short of the juvenile offender's death, and here Willbanks was sentenced to 355 years and will not be eligible for parole until a date that exceeds his life expectancy. Whatever amount of time constitutes "a meaningful opportunity for release," it is more than zero.

In any event, this Court does not need to set a specific age by which Willbanks or any other juvenile offender must have a parole hearing, or specify the hearing must be held within a certain time period before the end of the inmate's life expectancy. As other state supreme courts have noted, the legislature is free to make a legislative determination of how much is too much, by setting a particular point at which parole consideration must be made available.[27]

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[26] To the extent a concern was raised at oral argument that drawing any line is arbitrary, it is also unavoidable, so that such line drawing has not been an obstacle to the Supreme Court's recognition of categorical rules. For example, a "juvenile" for purposes of the *Graham* category is a person who was younger than 18 years at the time of the offense, even though no one believes there is a light-switch transformation to maturity, judgment, impulse control, ability to resist peer pressure, ability to think through consequences, etc., that happens overnight on the eve of the 18th birthday. As for the line-drawing in *Atkins*, the Supreme Court has largely left the matter to the states, *Atkins*, 536 U.S. at 317, but with some subsequent oversight, *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014).

[27] *Caballero*, 282 P.3d at 296 n.5 (calling on the legislature "to enact legislation establishing a parole eligibility mechanism

This reasoning applies equally to Missouri. This year, the Missouri legislature adopted what is now codified at section 558.047. That statute was adopted by the legislature in response to *Graham*, *Miller*, and this Court's decisions holding the legislature cannot sentence a juvenile homicide defendant to LWOP. *See State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013); *see Order* (Mo. banc Mar. 15, 2016) (granting juveniles unconstitutionally sentenced to LWOP as per *Miller* and *Montgomery* the possibility of parole after 25 years).

This Court withdrew that order once section 558.047 was adopted, for the statute provided a remedy that would apply to all cases. It provides that juvenile offenders sentenced to LWOP prior to August 28, 2016, and juvenile offenders sentenced after that date to life with parole or a term of 30 to 40 years may petition for a parole hearing after serving 25 years. § 558.047.1. It further provides the parole hearing must consider factors evidencing rehabilitation since being incarcerated as well as the *Miller* factors associated with the youth of the offender at the time of the offense. § 558.047.5, incorporating by reference § 565.033. This statute provides a legisla-

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that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity"); *Brown*, 1 N.E.3d at 270 n.11 (leaving to the legislature to establish "the specific contours" of constitutional juvenile sentencing and admonishing it to take into account the functional effect of sentences including aggregate sentences); *State ex rel. Morgan v. State*, 217 So.3d 266, 275-76 (La. 2016) (holding the court must defer to the legislative intent in its "*Miller* fix" statute to punish "intent to kill" armed robbery as a nonhomicide crime and providing parole eligibility after 30 years).

tive definition of when a sentence becomes equivalent to LWOP unless consideration for parole is granted.

Just as in other states, and just as this Court did for the 81 habeas petitioners who asked this Court to apply *Miller* to their sentences, this time standard should apply here in the absence of a different specific statutory rule or specific contrary direction from the Supreme Court. To be clear, this remedy is offered not to suggest this Court should hold the statute applies directly, as the majority appears to interpret this dissent to argue, but rather because the statute sets out what the legislature has defined as a meaningful opportunity for release. This is the approach taken by this Court in a very similar situation in *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003). After Johnson had committed his crime, Missouri adopted section 565.030, RSMo Supp. 2013, which provides persons meeting the definition of mental retardation (since amended to substitute the term "mental disability") shall receive a life sentence rather than the death penalty for murders committed after August 28, 2001. Not long thereafter, the Supreme Court held in *Atkins* that it constitutes cruel and unusual punishment to impose the death penalty on a person who is "mentally retarded." *Johnson*, 102 S.W.3d at 539. Although this Court recognized section 565.030.6 did not directly apply to Johnson's pre-2001 homicide offense, it held:

> Nonetheless, in light of *Atkins*, this Court holds as a bright-line test that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in section 565.030.6, shall not be subject to the death penalty.

Id.

This Court should treat section 558.047 the same way. While section 558.047 directly applies to LWOP cases, its constitutional foundation in Graham's principles means it should be used as a bright line rule to be applied as well to sentences that are the functional equivalent of LWOP.

IV. CONCLUSION

This Court has the authority to apply the principles underlying *Graham* and *Miller* to aggregate sentences. Those principles at their base require that all nonhomicide juvenile offenders are entitled to a meaningful opportunity for release. Aggregate sentences that are the functional equivalent of LWOP fail to provide such a meaningful opportunity for release. Willbanks is a nonhomicide juvenile offender. The aggregate sentence he received would not make him eligible for parole consideration until age 85. That is beyond his life expectancy, beyond an age that would allow him a meaningful opportunity for release, and well beyond the time when Missouri's legislature has determined that even homicide juvenile offenders are entitled to parole consideration. The sentence violates his Eighth Amendment right to be free from cruel and unusual punishment. I would, therefore, reverse Willbanks' conviction and remand for resentencing in accordance with the time standards set out in section 558.047.

APPENDIX B

Supreme Court of Missouri
en banc

STATE OF MISSOURI, Respondent,

v.

LEDALE NATHAN, Appellant.

No. SC 95473

Opinion issued July 11, 2017

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS CITY

The Honorable Robert H. Dierker, Jr., Circuit Judge

Zel M. Fischer, Chief Justice

Ledale Nathan, convicted of crimes he committed as a juvenile, appeals the sentences imposed by the circuit court. Nathan argues the State committed a *Brady*[1] violation that warrants resentencing. He does not argue any punishment or sentence he received violates the constitution but argues the combined effect of his consecutive sentences, which include a homicide offense and several nonhomicide offenses, amount to the functional equivalent of life in prison without the possibility of parole and thereby violate the constitutional prohibition against cruel and unusual punishment, U.S. Const. amend. VIII; Mo. Const. art. I, § 21, and his constitutional right to due process, U.S. Const. amend. XIV, § 1; Mo. Const. art. I, § 10.[2] The dissenting opinion would

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] Nathan does not argue, as some of the defendants did in the cases relied on by the dissenting opinion, that our state constitution provides *more* protection than the United States Constitution. "While provisions of our state constitution may be con-

hold a juvenile can never be sentenced to consecutive, lengthy sentences that exceed his life expectancy no matter how many violent crimes he commits. This suggestion ignores the undeniable truth that this Court's responsibility is "*discere lex, non dare lex*—to declare what the law is, not to make it or decide what it ought to be." *State ex rel. Maggard v. Pond*, 6 S.W. 469, 478 (Mo. 1887). This suggestion also ignores the fact that neither this Court's nor the Supreme Court of the United States' Eighth Amendment jurisprudence has ever addressed the cumulative effect based on constitutionally imposed consecutive sentences because it stands to reason a defendant subjects himself to multiple punishments when he has committed multiple offenses. The circuit court's judgment is affirmed.

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strued to provide more expansive protections than comparable federal constitutional provisions, analysis of a section of the federal constitution is strongly persuasive in construing the like section of our state constitution." *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006) (internal citations omitted). Sections 10 and 21 of the Missouri Constitution are nearly identical to the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's prohibition regarding cruel and unusual punishment, respectively. There is no reason to interpret article I, § 21 of the Missouri Constitution more expansively than the Supreme Court's holdings regarding the Eighth Amendment's prohibition against cruel and unusual punishment. *See State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 478 (Mo. banc 2013); *see also Burnett v. State*, 311 S.W.3d 810, 814 n.3 (Mo. App. 2009) ("Section 21 of the Missouri Constitution provides the same protection against cruel and unusual punishment. Mo. Const. art. I, § 21. We apply the same standard in determining whether a punishment violates the United States Constitution or Missouri Constitution.").

Factual and Procedural History

In connection with a home-invasion robbery and murder, the State charged Nathan, 16 years old at the time of the crimes, with 26 counts: 1 count of first-degree murder, 2 counts of first-degree assault, 4 counts of first-degree robbery, 1 count of first-degree burglary, 5 counts of kidnapping, and 13 related counts of armed criminal action.[3]

Original Trial

After a jury found Nathan guilty in his original trial on all 26 counts, he waived jury sentencing. Pursuant to § 565.020.2,[4] the circuit court then sentenced Nathan to life in prison without the possibility of parole for the first-degree murder conviction. In addition, the circuit court sentenced him to five life sentences and five 15-year sentences for the nonhomicide convictions, all of which were to be served consecutively to each other and to the sentence for first-degree murder, and eleven life sentences for the armed criminal action convictions, all of which were to be served concurrently with the other sentences and to each other. The circuit court dismissed the remaining four counts on which the jury had found Nathan guilty, concluding it had no jurisdiction over those charges. The four counts dismissed included one count of first-degree robbery,

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[3] The full details of these horrific crimes are recited in this Court's opinion in *State v. Nathan (Nathan I)*, 404 S.W.3d 253, 257–58 (Mo. banc 2013).

[4] All statutory citations are to RSMo 2000 unless otherwise noted. The General Assembly has significantly modified the sentencing provisions contained in Chapter 565 in light of holdings by the Supreme Court concerning the constitutional validity of certain sentences imposed on juvenile offenders.

one count of kidnapping, and two related counts of armed criminal action.

Original Appeal

While Nathan's appeal was pending, the Supreme Court of the United States handed down its decision in *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." As this Court explained, *Miller* held "life without parole may not be imposed [for a juvenile offender] unless the sentencer is given an opportunity to consider the individual facts and circumstances that might make such a sentence unjust or disproportionate." *Nathan I*, 404 S.W.3d at 270 (footnote omitted).[5] This Court unanimously held the circuit court erred in dismissing the four counts for lack of jurisdiction and remanded for resentencing on those convictions as well as for resentencing on Nathan's first-degree murder conviction because the original sentence "was imposed with no individualized consideration of the myriad of factors discussed in *Miller*." *Id.* at 260, 270. A majority of this Court further held that Nathan would be entitled to reassert his right to jury-recommended sentencing on remand for the sentences he appealed. *Id.* at 270 n.10.

Retrial of Sentencing

On remand, Nathan invoked his right to jury sentencing on the sentences he originally appealed, and

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[5] The term "sentencer" refers to the entity (i.e., the judge or jury) with the responsibility under state law to determine a defendant's sentence. *See, e.g., State v. Hart*, 404 S.W.3d 232, 234 n.2 (Mo. banc 2013). Here, this Court uses the term "sentencer" to refer to the circuit court.

both the State and Nathan presented evidence for the jury to consider. Because the jury did not unanimously agree to impose life in prison without the possibility of parole solely for the first-degree murder conviction, the circuit court vacated the guilty verdict on that charge and entered a finding of guilt for second-degree murder, in accordance with the procedure outlined by this Court in *Nathan I*. *See id*. at 270–71. As directed by this Court, the circuit court also vacated the armed criminal action conviction in connection with first-degree murder and entered a finding of guilt on armed criminal action in connection with second-degree murder. *See id*. at 271 n.11. The jury then recommended a life sentence for the second-degree murder conviction, a 30-year sentence for the first-degree robbery conviction, a 15-year sentence for kidnapping, and three life sentences for the related armed criminal action convictions.

Following the jury's recommendations, Nathan filed a motion requesting resentencing by a jury on the 20 convictions that were not part of the remand, claiming resentencing was warranted by a *Brady* violation.[6] Specifically, Nathan alleged the State failed to disclose, prior to his original waiver of jury sentencing, a police report detailing an investigation into alleged sexual abuse committed against him. He also filed a motion for a new trial or, alternatively, resentencing in which he again made the same *Brady* claim and further argued the consecutive sentences on the nonhomicide convictions were the equivalent of life in prison without the possibility of

[6] Nathan's right to invoke jury sentencing on remand did not apply to these convictions because he did not challenge them in his original appeal. *Nathan I*, 404 S.W.3d at 271 n.12.

parole and thus unconstitutional. The circuit court rejected these arguments, imposed the jury-recommended sentences, and ordered that the sentences run consecutively to each other and the previously imposed sentences, except for the armed criminal action sentences, which were ordered to run concurrently with their respective related charge. Nathan appealed, and after opinion by the court of appeals, this Court transferred the case pursuant to article V, § 10 of the Missouri Constitution.

Brady Claim

Nathan argues the circuit court erred in overruling his motion for a new sentencing hearing because the State failed to disclose a police report that documented his previously suffered sexual abuse. Such a failure to disclose the police report, Nathan argues, caused his waiver of jury sentencing at his original trial to be made unknowingly, unintelligently, and involuntarily.

The Supreme Court in *Brady* held "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "*Brady*, however, only applies in situations where the defense discovers information after trial that had been known to the prosecution at trial." *State v. Holden*, 278 S.W.3d 674, 679 (Mo. banc 2009). "If the defendant had knowledge of the evidence at the time of trial, the state cannot be faulted for non-disclosure." *Id.* at 679–80.

Here, *Brady* is inapplicable because Nathan disclosed the alleged sexual abuse to a caseworker pur-

suant to a "hotline" investigation before trial and that communication was later placed into the police report and other records from the Missouri Department of Social Services–Children's Division. Clearly then, Nathan had knowledge of the contents of the police report. *See id.* Therefore, the State did not commit a *Brady* violation, and the circuit court did not err in overruling Nathan's motion.

Graham Claim

Nathan argues the circuit court's imposition of consecutive sentences on the homicide conviction along with the several nonhomicide convictions are the functional equivalent of life without possibility of parole and, thereby, violate the constitutional prohibition against cruel and unusual punishment and his constitutional right to due process under *Graham v. Florida*, 560 U.S. 48, 82 (2010). When a criminal defendant alleges his or her constitutional rights have been violated, this Court's review is *de novo*. *State v. Sisco*, 458 S.W.3d 304, 312–13 (Mo. banc 2015).

The Supreme Court in *Graham* held, "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." In the scenario where, like here, a juvenile offender is convicted of both homicide and nonhomicide offenses, the Supreme Court explained:

> Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished

> in part for the homicide when the judge makes the sentencing determination. **The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.**

Id. at 63 (emphasis added).[7] Consequently, what the Supreme Court did not have before it in *Graham*, as this Court currently does, is whether the Eighth Amendment is violated when a juvenile offender like Nathan is sentenced to consecutive, lengthy sentences for committing multiple nonhomicide offenses along with a homicide offense.

The 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.[8]

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[7] The Supreme Court stressed it needed to draw a "clear line" in order to "prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Graham*, 560 U.S. at 74.

[8] *Compare, e.g., Demirdjian v. Gipson*, 832 F.3d 1060, 1076–77 (9th Cir. 2016); *United States v. Walton*, 537 F. App'x 430, 433–37 (5th Cir. 2013) (per curiam); *Bunch v. Smith*, 685 F.3d 546, 547–51 (6th Cir. 2012); *State v. Kasic*, 265 P.3d 410, 415–16 (Ariz. Ct. App. 2011); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011); *State v. Brown*, 118 So. 3d 332, 335, 341 (La. 2013); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 926–28 (Va. 2016), *with Moore v. Biter*, 725 F.3d 1184, 1191–94 (9th Cir. 2013); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1043–48 (Conn. 2015); *Henry v. State*, 175 So. 3d 675, 679 (Fla. 2015); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016); *Brown v. State*, 10 N.E.3d 1, 6–8 (Ind. 2014); *State v. Null*, 836

With no authoritative precedent from the Supreme Court, this Court finds the analysis of *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), most persuasive. There, the state trial court sentenced Bunch, a juvenile offender, to consecutive sentences totaling 89 years' imprisonment for committing multiple nonhomicide offenses. *Bunch*, 685 F.3d at 547. Bunch contested his sentences, arguing they were the functional equivalent of life in prison without the possibility of parole. *Id.* The Sixth Circuit rejected Bunch's constitutional challenge. *Id.* It explained "*Graham* ... does not clearly establish that consecutive, fixed term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." *Id.* It further explained:

> [*Graham*] is not clearly applicable to Bunch's case. It is true that Bunch and Graham were both juvenile offenders who did not commit homicide. But while Graham was sentenced to life in prison for committing one nonhomicide offense, Bunch was sentenced to consecutive, fixed-term sentences—the longest of which was 10 years—for committing multiple nonhomicide offenses. ... The Court **did not address juvenile offenders, like Bunch, who received consecutive, fixed-term sentences for committing multiple nonhomicide offenses**.

Id. at 551 (emphasis added). The Sixth Circuit observed:

N.W.2d 41, 71–74 (Iowa 2013); *State v. Boston*, 363 P.3d 453, 457–58 (Nev. 2015); *Bear Cloud v. State*, 334 P.3d 132, 141–45 (Wyo. 2014).

> The Court [in *Graham*] ... did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders. This demonstrates that the Court [in *Graham*] did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments.

Id. at 552. *See also 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[.]"); *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."). If the Supreme Court 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.[9]

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[9] The Supreme Court expressly limited its holding in *Graham* to "juvenile offenders sentenced to life without parole solely for a nonhomicide offense," 560 U.S. at 63, not those juvenile offenders serving consecutive sentences. That express limitation demonstrates, while the Supreme Court found it less difficult to quantify the number of inmates serving life in prison without the possibility of parole solely for committing a nonhomicide offense as a juvenile, it was not called upon nor did it even suggest to rule on the constitutional validity of consecutive sentences amounting to the functional equivalent of life in prison without the possibility of parole.

Even putting the Sixth Circuit's analysis in *Bunch* aside for one moment, this Court has clear guidance from the Supreme Court that its holding in *Graham* does not apply to Nathan's sentences. As mentioned above, the Supreme Court in *Graham* did not address whether consecutive sentences imposed on a juvenile offender who committed multiple nonhomicide offenses along with a homicide offense, are unconstitutional pursuant to the Eighth Amendment.[10] This is a legally significant distinguishing factor from *Graham* and an additional reason why Nathan's sentences do not run afoul of *Graham*.

The dissenting opinion cites, among other cases, the Supreme Court of Ohio's decision in *State v. Moore*, ___ N.E.3d ____, 2016 WL 7448751 (Ohio 2016), in support of its position that Nathan's sentences are unconstitutional pursuant to *Graham*. The dissenting opinion's reliance on *Moore*, however, is misplaced. There, the juvenile offender was sentenced to consecutive, lengthy sentences after being convicted of multiple nonhomicide offenses. *Moore*, 2016 WL 7448751, at *2. The court in *Moore* held

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[10] To demonstrate just how limited *Graham* is, the Supreme Court found it rather easy to quantify the number of juvenile offenders nationwide serving life in prison without the possibility of parole solely for committing a nonhomicide offense (i.e., 123 total juvenile offenders). The Supreme Court did not quantify the number of juvenile offenders serving consecutive, lengthy sentences for committing multiple nonhomicide offenses, let alone quantify the number of juvenile offenders serving consecutive, lengthy sentences for committing multiple nonhomicide offenses along with a homicide offense. Certainly, such a task would be quite onerous, and perhaps that is why neither the dissenting opinion nor any court that agrees with the dissenting opinion's result oriented conclusion even attempts to do so.

"*Graham*'s categorical prohibition of sentences of life imprisonment without the possibility of parole for juveniles **who commit nonhomicide crimes** applies to juvenile nonhomicide offenders who are sentenced to term-of-years sentences that exceed their life expectancies." *Id.* at *22 (emphasis added). The court explained *Graham* applied because the juvenile offender, like the juvenile offender in *Graham*, "was convicted of **nonhomicide offenses** that he committed as a juvenile[.]" *Id.* at *10 (emphasis added). The court in *Moore* further explained that "*Graham* cannot stand for the proposition that juveniles **who do not commit homicide** must serve longer terms in prison than the vast majority of juveniles **who commit murder**," and that a juvenile offender who "did not commit the ultimate crime of murder" would be serving an unconstitutional sentence pursuant to *Graham*. *Id.* at *13 (emphasis added).

Moore is distinguishable from this case because Nathan committed not only multiple nonhomicide offenses, but a *homicide offense as well*. *See Graham*, 560 U.S. at 69 (distinguishing nonhomicide offenses from homicide offenses "in a moral sense" because nonhomicide juvenile offenders "are categorically less deserving of the most serious forms of punishment **than are murderers**") (emphasis added). The dissenting opinion ignores not only this eloquent reasoning from the Supreme Court of Ohio, but also ignores the clearest guidance this Court has from the Supreme Court of the United States that its holding in *Graham* does not apply to the case at bar. See *id.* at 63 ("The instant case concerns only those juvenile

offenders sentenced to life without parole solely for a nonhomicide offense.").[11]

Furthermore, reliance by the dissenting opinion on the Supreme Court of New Jersey's decision in *State v. Zuber*, 152 A.3d 197 (N.J. 2017), is misplaced and is not persuasive because unlike Nathan, Zuber was not convicted of a homicide offense along with multiple nonhomicide offenses, *see id.* at 202–03, placing Nathan's sentence outside the contours of *Graham*.

Graham is limited to "juvenile offenders sentenced to life without parole **solely for a nonhomicide offense**." *Id.* at 63 (emphasis added). Unlike in *Graham*, Nathan was found guilty of second-degree murder along with multiple nonhomicide offenses.[12] Therefore, Nathan's claim under *Graham* is denied.

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[11] Indeed, the dissenting opinion does not even acknowledge this passage in *Graham*.

[12] The dissenting opinion's reliance on the Supreme Court of Louisiana's decision in *Morgan* is unavailing for two reasons. First, that case is distinguishable from this one because the juvenile offender there did not commit multiple nonhomicide offenses along with a homicide offense as Nathan did. *State ex rel. Morgan v. State*, 217 So. 3d 266 (La. 2016). Second, the dissenting opinion overlooks a key distinction between two of the court's decisions over the application of *Graham*. The court found *Morgan*:

> distinguishable from [*State v. Brown*, 118 So. 3d 332 (La. 2013)] and construe[d] the defendant's 99-year sentence as an effective life sentence, illegal under *Graham*. Whereas Brown was convicted of five offenses resulting in five consecutive sentences which, when aggregated, resulted in a term pursuant to which he would have no opportunity for release; **here, the defendant was convicted of a single offense and sentenced to a single term which affords him no opportunity for release**. In declining to extend *Gra-*

Miller Claim

Nathan argues the circuit court's imposition of consecutive sentences for a homicide conviction along with several nonhomicide convictions are the functional equivalent of life in prison without the possibility of parole and, thereby, violate the constitutional prohibition on cruel and unusual punishment and his constitutional right to due process under *Miller*.[13] This Court explained in *Hart*, which was handed down contemporaneously with *Nathan I*, that:

> Unlike *Roper*'s unqualified prohibition against sentencing a juvenile offender to death, *Miller* does not categorically bar sentencing a juvenile offender who commits first-degree murder to life without parole. Instead, *Miller* holds that such a sentence is constitutionally permissible as long as the sentencer determines it is just and appropriate in light of the defendant's age, maturity, and the other factors discussed in *Miller*. This distinction is so critical to a proper understanding and application of *Miller* that it bears additional scrutiny. Rather than attempt to characterize or paraphrase this essential point, however, it is better to let *Miller* speak for itself:
>
> > [T]he Eighth Amendment forbids a sentencing scheme that mandates life in pris-

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ham to modify any of Brown's term-of-years sentences, we were most influenced by the fact that his actual duration of imprisonment would be so lengthy **only because he had committed five offenses**.

Id. at 271–72 (emphasis added).

[13] This Court's review of this claim is *de novo*. *Sisco*, 458 S.W.3d at 312–13.

> on without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. ... **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.

404 S.W.3d at 237–38 (quoting *Miller*, 132 S. Ct. at 2469). Moreover, *Miller*:

> **does not categorically bar** a penalty for a class of offenders or type of crime—as, for example, [it] did in *Roper* or *Graham*. **Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.**

132 S. Ct. at 2471 (emphasis added). Furthermore, the Court in *Miller* concluded that:

> *Graham*, *Roper*, and [its] individualized sentencing decisions make clear that a **judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles**. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate

> this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Id. at 2475 (emphasis added). *See also id.* at 2460, 2466, 2468–69 (cataloging age-related factors that the sentencer must be allowed to consider before the Eighth Amendment will permit a juvenile offender to be sentenced to life in prison without the possibility of parole); *Hart*, 404 S.W.3d at 234–35 (stating *Miller* "holds only that life without parole may not be imposed unless the sentencer is given an opportunity to consider the individual facts and circumstances that might make such a sentence unjust or disproportionate.") (footnote omitted).

Following the Supreme Court's decision in *Miller*, this Court in *Hart* instructed:

> [I]f the sentencer conducts the individualized assessment required by *Miller* and is persuaded beyond a reasonable doubt that sentencing [a juvenile offender] to life in prison without parole is just and appropriate under all the circumstances, the trial court must impose that sentence. If the sentencer is not persuaded that this sentence is just and appropriate, section 565.020 is void as applied to [the juvenile offender] because it fails to provide a constitutionally permissible punishment [for the crime it purports to create]. In that event, [the juvenile offender] cannot be convicted of first-degree murder and the trial court must find him [or her] guilty of second-degree murder [under section 565.021.1(1)] instead. In addition, the trial court must vacate [his or her] conviction for armed criminal action that was predicated on [the juvenile offender] being

> guilty of first-degree murder and, instead, find [him or her] guilty of armed criminal action in connection with that second-degree murder. ...
> ...
> After the trial court enters these findings, the sentencer will determine [the juvenile offender's] sentences within the statutory range applicable to these crimes. See §§ 558.011.1(1) (range applicable to second-degree murder is 10 to 30 years or life (with parole)) and 571.015.1 (range applicable to armed criminal action is a minimum of three years with no upper limit). [I]f [the juvenile offender] does not waive his [or her] right to jury sentencing on remand, [his or her] sentences for second-degree murder and armed criminal action also will be determined by the jury under section 557.036.3, and the instructions in this regard are the "additional instructions" the jury was told it would be given if it was not persuaded that life without parole is a just and appropriate sentence for [the juvenile offender] under all the circumstances. Conversely, if [the juvenile offender] waives jury sentencing such that the trial court must make the determination required by *Miller*, the trial court will determine [his or her] sentences for second-degree murder and armed criminal action in the event it determines that life without parole is not a just and appropriate sentence for first-degree murder.

404 S.W.3d at 235, 243 (footnotes omitted). This Court provided identical instructions in *Nathan I*:

> As set forth in *Hart*, if the sentencer on remand is persuaded beyond a reasonable doubt

> that sentencing Nathan to life without parole for first-degree murder is **just and appropriate under all the circumstances**, that sentence is constitutional and must be imposed. If the state fails to persuade the sentencer on this point, however, then section 565.020—as applied to Nathan—does not provide a constitutionally permissible punishment. In that event, the trial court must set aside the jury's verdict finding Nathan guilty of first-degree murder and **enter a finding that Nathan is guilty of second-degree murder. Nathan then should be sentenced for second-degree murder within the statutorily authorized range of punishments for that crime.**

404 S.W.3d at 270–71 (emphasis added) (footnotes omitted).

Nathan's sentences do not run afoul of *Miller*.[14] On remand, both the State and Nathan presented evidence for the jury to consider at sentencing. Nathan, in particular, provided evidence of his mitigating circumstances—such as age-related characteristics, his below-average IQ, and his chaotic and abu-

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[14] The dissenting opinion's reliance on the Supreme Court of Indiana's decision in *Brown v. State*, 10 N.E.3d 1 (Ind. 2014), is misplaced. The court did not say Brown's aggregate sentence violated *Miller*. Rather, the court said that "[t]he trial court certainly acted well within its broad discretion in imposing this sentence. ... However, '[e]ven where a trial court has not abused its discretion in sentencing, the Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision.'" *Brown*, 10 N.E.3d at 4. The court then held Brown's sentence was "inappropriate" but not unconstitutional. *Id*. at 8.

sive upbringing—as mandated by *Miller*. Because the jury did not unanimously agree to impose life in prison without the possibility of parole for the first-degree murder conviction, which was mandated by § 565.020 before *Miller*, the circuit court vacated the guilty verdict on that charge and entered a finding of guilt for second-degree murder, in accordance with the procedure outlined by this Court in *Nathan I*. *See id*. As directed by this Court, the circuit court also vacated the armed criminal action conviction in connection with first-degree murder and entered a finding of guilt on armed criminal action in connection with second-degree murder. *See id*. at 271 n.11. The jury then recommended a life sentence for the second-degree murder conviction, a 30-year sentence for the first-degree robbery conviction, a 15-year sentence for kidnapping, and three additional life sentences for the related armed criminal action convictions.

Before imposing the sentences subject to retrial and determining whether the previously imposed sentences not appealed should run consecutively or concurrently, the circuit court considered victim impact statements, Nathan's mitigation evidence (including age-related characteristics, his below-average IQ, and his chaotic and abusive upbringing), and evidence presented at the original trial. The circuit court found, among other things:

• Nathan did not suffer from any mental disease or defect that diminished his criminal responsibility;

• The original jury found Nathan acted deliberately in the murder;

• Nathan was armed and threatened to kill one or more victims;

• Nathan attempted to aid another while an officer was being shot;
• Nathan fled the scene and attempted to dispose of evidence; and
• Nathan's overall participation in the crimes was "active," "direct," and "substantial."

The circuit court then concluded it was appropriate to impose consecutive sentences on Nathan. The circuit court, therefore, imposed the jury-recommended sentences and ordered they run consecutively to each other and the previously imposed sentences, except the sentences for the armed criminal action counts were ordered to run concurrently to their associated charge.[15]

Miller only applies to cases in which a sentencing scheme "mandates life in prison without possibility of parole for juvenile offenders." 132 S. Ct. at 2469. Here, after the jury could not unanimously agree to impose life in prison without the possibility of parole solely for the first-degree murder conviction, the circuit court set aside Nathan's first-degree murder conviction and instead found he was guilty of second-degree murder. Once mandatory life in prison without the possibility of parole was off the table (the "harshest" sentence, so to speak), Nathan was to be sentenced for second-degree murder within the stat-

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[15] Neither the dissenting opinion nor Nathan claim, nor could it be argued, that any one of these particular sentences violates the Eighth Amendment. The circuit court did not impose *more* punishment than what the jury recommended. "[T]he trial court may not impose a greater sentence than the punishment assessed and declared by the jury (provided it was within the authorized range) and, if the jury assesses and declares a punishment below the lawful range, the trial court must impose the minimum lawful sentence." *Hart*, 404 S.W.3d at 234 n.2.

utorily authorized range of punishments (10 to 30 years or life for second-degree murder). *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 validity of consecutive sentences, let alone the cumulative effect of such sentences.[16]

Furthermore, reliance by the dissenting opinion on *Zuber* is misplaced and is not persuasive because with respect to Comer, who, like Nathan, was convicted of a homicide offense along with multiple nonhomicide offenses, the Supreme Court of New

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[16] Even assuming, for the sake of argument, that *Miller* applies to consecutive sentences that amount to the functional equivalent of life in prison without the possibility of parole, the circuit court provided Nathan with the full benefits of *Miller*'s individualized sentencing by considering all the mitigating factors set out in *Miller* prior to sentencing him on remand. *See State v. Ramos*, 387 P.3d 650, 666–67 (Wash. 2017). The dissenting opinion's reliance on *State v. Riley*, 110 A.3d 1205 (Conn. 2015), *State v. Null*, 836 N.W.2d 41 (Iowa 2013), *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014), *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016), and *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) is unpersuasive because all those cases can be distinguished from this one for the mere fact that the juvenile offenders in those cases were not afforded individualized sentencing that considered the mitigating factors set out in *Miller*, whereas Nathan did receive individualized sentencing because consideration of the *Miller* factors were made by the sentencer prior to sentencing on remand. It is for this same reason that the Supreme Court remanded the cases cited by the dissenting opinion in footnote 1; *Miller* had not been handed down at the time of their sentences so the juvenile offenders in those cases had not received individualized sentencing. The dissenting opinion seems to suggest that even though Nathan received that relief, his sentence should nonetheless be vacated.

Jersey recognized repeatedly that *Miller* applies to a sentencing scheme that *mandates* life in prison without the possibility of parole, 152 A.3d at 210–11, yet it failed to discuss whether its sentencing scheme in fact mandated life in prison without the possibility of parole in violation of *Miller*. And perhaps it was unnecessary for the court to do so because,

> [w]hen Comer was first sentenced in 2004, the trial judge was not required to evaluate the mitigating effects of youth, which *Miller* later addressed. In a detailed written opinion, the same trial judge concluded in 2014 that, because he had not considered the *Miller* factors, Comer was entitled to be resentenced.

Id. at 204. The Supreme Court of New Jersey agreed with the trial court's finding, *id.* at 216, and "affirm[ed] and remand[ed] Comer's case" for individualized sentencing pursuant to *Miller*. *Id.*

The dissenting opinion concedes that its conclusion is not required by *Miller* or *Graham* and that its position—that consecutive sentences for multiple crimes in excess of a juvenile offender's life expectancy is the functional equivalent of life in prison without the possibility of parole—is indeed an extension of law.

The dissenting opinion diminishes the state of Missouri's penological justifications for permitting a circuit court to impose consecutive sentences on a juvenile offender who commits multiple violent nonhomicide offenses along with a brutal homicide offense. Nathan did not receive the harshest sentence available. The jury, rather, recommended a life sentence for the murder and also recommended sentences for the other violent crimes Nathan committed within the statutory range for those violent

crimes. The Supreme Court has never suggested that multiple sentences for multiple crimes is impermissible. To do so would defy logic. Furthermore, while the Supreme Court has said youth diminishes the penological justifications for penalties such as capital punishment, *Roper v. Simmons*, 543 U.S. 551, 571 (2005), life in prison without the possibility of parole solely for a nonhomicide offense, *Graham*, 560 U.S. at 71, and *mandatory* life-in-prison-without-the-possibility-of-parole sentencing schemes, *Miller*, 132 S. Ct. at 2466, it has never applied that rationale to a justice system that recognizes multiple violent crimes deserve multiple punishments. Therefore, Missouri is permitted to enforce its current sentencing scheme and this Court is obligated to enforce it until the Supreme Court of the United States extends its Eighth Amendment jurisprudence to prohibit what is currently permitted. *See Graham*, 560 U.S. at 71 ("Criminal punishment can have different goals, and choosing among them is within a legislature's discretion.").

In this case, the circuit court did consider all of the circumstances (mitigators and aggravators alike) prior to imposing the jury-recommended sentences and ordering most of them to run consecutively to each other. The circuit court ultimately concluded consecutive sentences were appropriate for Nathan after consideration of all relevant factors.[17] Nothing

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[17] The dissenting opinion argues because Nathan was a juvenile, "it is the jury, not the judge, who must decide whether [he] is to die in prison, and it said *no*." Op. at 12 (Stith, J., dissenting). The record shows the circuit court recognized the jury did not find Nathan deserved life in prison without the possibility of parole for the murder conviction alone, but rather a life sentence plus additional sentences, within the statutory range, for

in *Miller* or *Graham* takes away a sentencer's (the circuit court in this case) authority to run sentences consecutively for a homicide offense along with multiple nonhomicide offenses.[18] That power remains

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the other violent crimes he committed. The circuit court thoughtfully considered the jury-recommended sentences and concluded it was acting within the boundaries of *Graham* and *Miller* by imposing the consecutive sentences. This Court agrees with that conclusion.

[18] The dissenting opinion asserts the circuit court imposed consecutive sentences "solely for the purpose of denying Nathan a reasonable opportunity for release." Op. at 11 (Stith, J., dissenting). The dissenting opinion also asserts life in prison without the possibility of parole "was the intent, and the effect, of the sentences" imposed, citing a reference to associate justices Elena Kagan and Anthony Kennedy that the circuit court made during a sentencing hearing for support. *Id*. at 3. In the interest of completeness, here is that exchange:

> **Ms. Rose Whitrock**: [W]hen the United States Supreme Court ruled that the defendant was going to get another -- well, I just assumed that he would get another -- a retrial. You know, I just -- it's been really hard because I just think that he is being treated like the victim instead of all of us. You just don't get second chances. And I really want to forgive you, I do, but I can't. And I want to feel sorry for you, but I don't. I feel sorry for me, and I -- but mostly I feel sorry for my grandsons. And your family, you have a good family. And in spite of all the bad things that happened to you, your mom loves you. And she -- she loves her kids. That's what I got. Yeah, she -- she's not perfect, but mother's [sic] aren't. I don't know what else you can do to this man that hasn't already been done. I'm thinking he's probably going to spend the rest of his life in jail. And I hope, like Isabella said, that you in some way can be a role model. I think I would have appreciated it if in the last trial that you would have at least tried to defend yourself or showed some remorse or apologized to all of us. Something. I mean, my boys, my grandsons, they -- they don't want him to ever get out of jail. I don't

with the circuit court. Section 558.026.1 ("Multiple sentences of imprisonment shall run concurrently **unless the court specifies that they shall run consecutively** [.]") (emphasis added). Therefore, Nathan's claim under Miller is denied.[19]

Conclusion

The circuit court did not err by denying Nathan's *Brady* claim. Moreover, there is nothing unconstitutional about Nathan's sentences pursuant to *Graham*, *Miller*, this Court's or any of the Supreme

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> know that we would be safe if he was out of jail. So -- you could have left my house. I begged you. You could have had everything in that house, everything, every single thing. I begged you to leave. And you just -- you just wouldn't. You just wouldn't. So ... I hope we're not back here again, Your Honor, because I don't think I could do it again. I really want to find some peace and I just have not been able to do that.
>
> **The Court**: Well, I understand, Miss Whitrock. Perhaps Justice Kennedy and Justice be [sic] Kagan will read your remarks some day.
>
> **Ms. Rose Whitrock**: I just -- I can't -- I just can't sit through this again.

Sentencing Proceedings, Tr. at 1078–80 (July 25, 2014). The circuit court's comments could more simply draw the inference that constantly changing the law in this area in making the new rules retroactively apply revictimizes those whose family members have been deliberately murdered by a juvenile offender.

[19] The dissenting opinion pretends there is authority for this Court to enter an order in this proceeding awarding Nathan with parole after 25 years based on a March 15, 2016, order granting such relief. The dissenting opinion conspicuously fails to mention that virtually every petitioner and the state of Missouri requested this Court to vacate those orders because it lacked authority to enter those orders and, in fact, every such order entered on March 15, 2016, was subsequently vacated by this Court.

Court's current Eighth Amendment jurisprudence. 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. *See Moore v. Biter*, 742 F.3d 917, 920 n.3 (9th Cir. 2014) (O'Scannlain, J., dissenting) ("Moreover, even courts that have applied *Graham* to aggregate term-of-years sentences have recognized they are extending the case beyond its 'clearly established' holding."). This Court declines to do so.[20] The circuit court's judgment is affirmed.

Wilson, Russell and Powell, JJ., concur; Stith, J., dissents in separate opinion filed; Draper and Breckenridge, JJ., concur in opinion of Stith, J.

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[20] Contrary to the dissenting opinion's assertion that "[t]his Court has held that it will apply [§ 558.047, RSMo Supp. 2016] to all juvenile offenders regardless of whether they were convicted before or after *Montgomery*[,]" Op. at 6 (Stith, J., dissenting), this Court has made no such holding, and the dissenting opinion provides no authority to support such a proposition. Section 558.047 was enacted in response to *Miller*'s prohibition of "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 132 S. Ct. at 2469. That statute applies to juvenile offenders sentenced to life in prison without the possibility of parole and juvenile offenders found guilty of first-degree murder, neither of which concern Nathan. Section 558.047.1(1)-(2).

Laura Denvir Stith, Judge

While I concur with the majority's denial of Nathan's claim that his rights under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), were violated, I respectfully dissent from the majority's rejection of Nathan's Eighth Amendment claim.

For the reasons noted below and in my separate opinion in *Willbanks v. Department of Corrections*, SC95395, slip. op. (Mo. banc 2017) (Stith, J., dissenting), also issued today, most state supreme courts to face the issue, including most recently the Supreme Court of New Jersey in *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017), and the Supreme Court of Washington in *State v. Ramos*, 387 P.3d 650, 660 (Wash. 2017), as well as two federal courts of appeals have held the principles set out in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), prohibit the imposition of sentences that aggregate to a term of years that approaches or exceeds the juvenile's life expectancy absent a determination by the jury that the juvenile is irredeemably corrupt. The majority is incorrect in stating these decisions reached their results only by extending *Graham*. While *Graham* itself addressed the situation of a life without possibility of parole (LWOP) sentence for a single nonhomicide offense, *Miller*, relying on principles from *Graham*, remanded cases involving multiple offenses –including nonhomicide offenses – for reconsideration in light of its decision,[1] and, indeed, Graham himself had committed multiple offenses. Subsequent state and federal

[1] *Bear Cloud v. Wyoming*, 133 S. Ct. 183 (2012); *Blackwell v. California*, 133 S. Ct. 837 (2013); *Guillen v. California*, 133 S. Ct. 69 (2012); *Whiteside v. Arkansas*, 133 S. Ct. 65 (2012).

cases have found *Graham* applies to multiple consecutive sentences that aggregate to the functional equivalent of LWOP, not because these courts have chosen to extend *Graham* beyond what they believe the Supreme Court intended when writing it but because the reasoning in *Graham* requires them to reach this result. This does not require extending existing law but merely applying *Graham* to new facts, something courts do every day. This Court should join the many well-reasoned decisions holding the Supreme Court did not intend to place form – the label of LWOP – over substance. A sentence that results in no meaningful opportunity for release during the juvenile's lifetime is the functional equivalent of LWOP.

Graham holds juveniles are categorically different and sentences imposed on them must be considered as a whole, not merely crime-by-crime. It is uncontested that Nathan was not an adult. He was a juvenile at the time of his offenses. The Supreme Court has clearly and repeatedly recognized the special vulnerability and immaturity of juveniles, and has specifically held the penological justifications for imposing lengthy sentences – deterrence, retribution, incapacitation, and rehabilitation – simply do not apply in the same way to juveniles due to their still-developing character and understanding. Because juveniles as a whole are categorically different than adults, the Supreme Court has said the propriety of imposing LWOP on a juvenile must be considered as a categorical issue, based on the youth of the offender rather than on the nature of the particular crimes charged. *Graham*, 560 U.S. at 60-62, 75; *Miller*, 132 S. Ct. at 2465-66, 2475. While the majority suggests this fails adequately to recognize a judge's sentenc-

ing discretion, judges will have the same sentencing discretion they always have had; sentencing discretion never has extended to imposing a cruel and unusual sentence. Under *Graham*, sentencing judges simply must take the added step of ensuring a juvenile who is not irreparably corrupt has a meaningful opportunity for release. There is no exception to this categorical approach when sentencing a juvenile for multiple crimes.

To the extent the majority suggests otherwise, and reasons as if courts can ignore the essential distinction mandated by the Supreme Court between sentences that are constitutional if imposed on adults and sentences that are *not* constitutional if imposed on juveniles, it is just wrong. The majority nonetheless says if a judge – like the sentencing judge below – simply avoids expressly labeling the sentences "life without possibility of parole," then the judge can reach the same result by aggregating consecutive sentences even though the cumulative effect of these sentences is that the juvenile will not have a meaningful opportunity for release before his or her death. It is a fiction to suggest this is just a collateral result of sentencing the juvenile for multiple crimes. Here, the judge below even made it specifically clear on the record he wanted Nathan to die in prison and, for that reason, he was making the sentences consecutive. In other words, the judge imposed consecutive sentences precisely because he wanted to impose the functional equivalent of LWOP. The Supreme Court has taught us that sentences permissible for adults may not be permissible for juveniles and that we must look at sentences for juveniles as a whole, not crime-by-crime.

Substance, not form, should control. Whether labeled "LWOP," the sentences imposed on Nathan are subject to *Graham* and *Miller* because, like a formal LWOP sentence, de facto life sentences also are the " 'denial of hope'" and mean "'that good behavior and character improvement are immaterial ... that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'" *Graham*, 560 U.S. at 70, *quoting*, *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989).

Of course, Nathan also committed a homicide. The majority suggests I would hold "a juvenile can never be sentenced to consecutive, lengthy sentences that exceed his life expectancy no matter how many violent crimes he commits." *Nathan*, slip op. at 2. That is just not the case. Clearly, under *Miller* and *Graham*, had the jury found Nathan was irreparably corrupt, that would be the end of the Eighth Amendment analysis; he could receive LWOP for his homicide offense, and it would not violate the Eighth Amendment were he to receive multiple consecutive sentences for his nonhomicide offense that exceeded his life expectancy.

But the jury found Nathan was not irreparably corrupt. Once that finding was made, then his position is indistinguishable from that of nonhomicide juvenile offenders for purposes of Eighth Amendment analysis. If a juvenile cannot be given LWOP or its functional equivalent for homicide, he certainly cannot be given LWOP or its functional equivalent for his nonhomicide offenses. Such juveniles fall into the category of all other juvenile offenders who may not be given LWOP for their homicide offense, as their crime is considered attributable in part to "un-

fortunate yet transient immaturity." *Miller*, 132 S. Ct. at 2469 (internal citations omitted).

Yet, apparently without perceiving the anomaly, the majority nonetheless would hold that the whole is greater than the sum of its parts and that Nathan can be sentenced to the functional equivalent of LWOP on his nonhomicide offenses because of his homicide offense, even though he cannot receive LWOP for his homicide offense or, if *Graham* applies, for his nonhomicide offenses considered separately. There is a perverse irony in holding, as would the majority, that a juvenile offender can be more harshly sentenced for less serious crimes than he can for homicide. As recognized in both *Peters v. State*, 128 So.3d 832, 837 (Fla. App. 2013), and *State ex rel. Morgan v. State*, 217 So.3d 266 (La. 2016), a sentencing scheme that would allow this anomaly is both irrational and contrary to Eighth Amendment principles of proportionality, and to the principles set out in *Graham* and *Miller*. *Cf. Solem v. Helm*, 463 U.S. 277, 291 (1983) (concluding when a less serious crime is punished the same as or more harshly than a more serious crime, this indicates the punishment for the less serious crime is likely excessive).

This is why so many state supreme courts to have considered the issue have held it violates *Graham* and *Miller* to impose de facto LWOP sentences on juveniles convicted of both homicide and nonhomicide offenses. This Court should hold likewise and vacate Nathan's sentences.

While the majority has expressed concern that the State cannot know how to determine what length of sentence provides a meaningful opportunity for release, we know it is something short of the juvenile

offender's life expectancy. In any event, the legislature already has determined when parole consideration should be offered; this Court merely needs to follow its lead. In response to *Miller*, Missouri's legislature adopted section 558.047, RSMo 2016, which provides that juvenile offenders sentenced to LWOP may apply for parole after 25 years. This Court has held it will apply this new statute to all juvenile offenders regardless of whether they were convicted before or after *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *as revised* (Jan. 27, 2016).[2] This Court can and should apply time limits identical to those set out in section 558.047 to juvenile offenders who are serving de facto LWOP through their aggregate sentences.

I. *MILLER* AND *GRAHAM* APPLY TO AGGREGATE SENTENCES THAT INCLUDE A HOMICIDE FOR WHICH LWOP MAY NOT BE IMPOSED

The majority says that to apply the principles from *Miller* and *Graham* to an aggregate sentence would be to enter "uncharted waters." *Nathan*, slip op. at 22. But this route has been charted and navigated without difficulty by the great majority of state supreme courts to have addressed the question. As discussed below, these courts have held the principles set out in *Miller* and *Graham*, including the requirement that juveniles be granted a meaningful opportunity for release from prison if not irreparably

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[2] Section 558.047 provides that juvenile offenders sentenced to LWOP prior to August 28, 2016, and juvenile offenders sentenced after that date to life with parole or a term of 30 to 40 years may petition for a parole hearing after serving 25 years. § 558.047.1, RSMo 2016.

corrupt, apply to all juvenile sentences because the different culpability of juveniles as compared to adults remains no matter the crime committed. The Eighth Amendment, therefore, bars an aggregate sentence that is the functional equivalent of LWOP even when one of the crimes involved was a homicide so long as the homicide is one for which LWOP may not be imposed.[3]

The majority comes to a contrary conclusion because it believes it can simply treat Nathan the same way it would treat an adult defendant and just compare each part of the aggregate sentences he received to each crime. If *Graham* and its progeny had not been decided, the majority's approach would have been the correct one. Prior to *Graham*, if a defendant claimed his or her particular sentence was unduly harsh, and it was not a death penalty case, then "Eighth Amendment analysis focuse[d] on the sentence imposed for each specific crime, not on the

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[3] *State v. Zuber*, 152 A.3d 197, 210-12 (N.J. 2017); *State v. Ramos*, 387 P.3d 650, 660 (Wash. 2017); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016); *State v. Riley*, 110 A.3d 1205, 1207 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016); *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014); *State v. Null*, 836 N.W.2d 41, 45 (Iowa 2013); *Commonwealth v. Brown*, 1 N.E.3d 259, 270 n.11 (Mass. 2013). Additionally, the Seventh Circuit found an aggregate sentence of 100 years violates *Miller*. *McKinley v. Butler*, 809 F.3d 908, 909 (7th Cir. 2016). *State v. Brown*, 118 So.3d 332, 342 (La. 2013), is not persuasive or well-reasoned in reaching a contrary result, for it relied in part on the same mistake made by the majority in *Willbanks*: that finding the aggregate sentence is not contrary to clearly established federal law precludes a state court from applying the underlying constitutional principles to aggregate sentences because the Supreme Court has not yet decided such a case. *Id.*; see also *State v. Mantich*, 888 N.W.2d 376 (Neb. 2016) (refusing to apply *Miller*).

cumulative sentence." *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988).[4]

By contrast, *Graham* explained, in a death penalty case, the Supreme Court traditionally has used what it calls a "categorical approach" under which it determines whether death is categorically unavailable for a particular category of offense, such as a crime not resulting in a death, or for a particular category of offender, such as juveniles or the intellectually impaired.[5] *Graham*, 560 U.S. at 61-62. In cases that fall under such categories, the death sentence is unconstitutional. The trial court does not have discretion to impose an unconstitutional sentence. *See Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

A. The Categorical Approach Must Be Used for All Juveniles

Graham, for the first time, applied the categorical approach to all juveniles and held the usual sen-

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[4] Under the sentence-by-sentence approach, *Graham* held a court considers "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Graham*, 560 U.S. at 59. This is true for adults even when the sentences cumulatively extend to or beyond a defendant's lifetime, what some cases refer to as "discretionary life sentences." *See, e.g., McKinley*, 809 F.3d at 911; *Riley*, 110 A.3d at 1213. This traditional analysis would begin by "comparing the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at 60. If the punishment seemed grossly disproportional to the particular crime, the court would then compare the sentence to that of others convicted of similar crimes. *Id.*

[5] *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008), *as modified* (Oct. 1, 2008), *opinion modified on denial of reh'g*, 554 U.S. 945 (2008) (nonhomicide cases do not merit death penalty); *Roper v. Simmons*, 543 U.S. 551, 559-67 (2005) (juveniles cannot be sentenced to death); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (mentally impaired cannot be sentenced to death).

tence-by-sentence approach is inadequate when the challenge:

> implicates a particular type of sentence as it applies to *an entire class of offenders who have committed a range of crimes*. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here, in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*.

Graham, 560 U.S. at 61-62 (emphasis added).

Miller took this same approach when addressing the constitutional validity of LWOP for juveniles found guilty of a homicide offense. While the Supreme Court in *Miller* did rule it is permissible to sentence juveniles to LWOP, it limited that ruling to cases in which the court finds the juvenile is one of the "'rare juvenile offender[s] whose crime reflects irreparable corruption.'" *Miller*, 132 S. Ct. at 2469, *quoting*, *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 73. All other juvenile offenders are categorically barred from receiving LWOP because their crimes may be attributable to "unfortunate yet transient immaturity." *Miller*, 132 S. Ct. at 2469 (internal citations omitted). In other words, any sentence imposed on those who are immature rather than irreparably corrupt must provide the juvenile with a meaningful opportunity for release. *Id*.

The majority does not deny this law but rather argues it is inapplicable here because Nathan committed more than one crime at the same time, and when that is the case, all bets are off, and the juvenile may be sentenced without regard to his imma-

turity and youth, as if he were an adult. To adhere to the majority's approach is to ignore the Supreme Court's categorical rules regarding sentencing juveniles to life in prison and leads to the anomalous result that a juvenile may be imprisoned longer for nonhomicide crimes than for homicide.

The majority's approach also ignores the reality that the sentencing judge was fully cognizant of and intended the aggregate effect of Nathan's sentences. The judge's comments at sentencing, in his memorandum and order, and at resentencing demonstrate he did not intend for Nathan ever to have a meaningful opportunity for release even though the jury determined he was not one of the rare irreparably corrupt juvenile offenders who deserve LWOP.

In the order issued upon resentencing after remand by this Court pursuant to *Miller*, the judge was forced to sentence Nathan to second-degree murder and life with parole because the jury had failed to find Nathan was irreparably corrupt. Nathan, therefore, was entitled to have a meaningful opportunity for release on the murder charge. But the judge again imposed consecutive sentences on the nonhomicide charges, which, in aggregate, do not allow for parole for more than 300 years.

The judge made it clear in imposing these lengthy consecutive sentences that his specific purpose was to circumvent the restrictions on LWOP set out in *Miller* and instead see that Nathan never had a meaningful opportunity for release. His reason was he thought the reliance in these cases on the "evolving standards of decency" approach "lack[s] ... any anchor in the text of the Constitution or any other objective source." He further stated what he called the "loss on the Eighth Amendment" caused by *Mil-*

ler and *Graham* did not preclude him from imposing the sentences consecutively "even if the sum total of those sentences would result in the functional equivalent of life without parole."

The judge made no pretense about the fact he felt a personal stake in being able to sentence juveniles to life without parole and took *Miller* and *Graham* as personal "losses." But he was telling Nathan he could get around his "losses" by imposing multiple distinct sentences for the purpose of their aggregate effect in keeping Nathan in prison forever. The judge further emphasized he was trying to send a message to the authors of *Roper* and *Miller* with his sentences when he said (in response to a victim's statement that she hoped she would not have to go through another resentencing), "Perhaps Justice Kennedy and Justice Kagan will read your remarks someday." Perhaps they will, but only because the consecutive sentences were imposed consecutively solely for the purpose of denying Nathan a meaningful opportunity for release.[6]

At least two courts have expressly disapproved the type of lengthy aggregate sentences for juveniles imposed here precisely because it is simply an end run around *Graham* and *Miller*. The Louisiana Supreme Court found it a "paradox" that a juvenile offender who could not constitutionally be sentenced to LWOP for more serious felonies could be sentenced to the functional equivalent of LWOP for lesser

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[6] The majority says, considered in context, this was not the judge's intent and, instead, he was trying to respond to the victim's concern about having to go through sentencing yet again. The best way to avoid resentencing is, of course, to impose a legitimate and constitutional sentence in the first instance, something the trial judge chose not to do.

crimes. *Morgan*, 217 So.3d at 274. It resolved the paradox "in favor of common sense and morality," holding the Supreme Court's categorical rules apply even to sentences not labeled "life" if they are its functional equivalent. *Id*.[7]

Peters v. State, 128 So.3d 832, 852 (Fla. Dist. Ct. App. 2013), further explained this anomaly, noting a sentencing procedure that allows for de facto life sentences in cases in which *Graham*'s categorical rule prohibits LWOP leads to a "statutory anomaly" in which a juvenile convicted of a "life felony" may not be given more than a 40-year sentence, but a juvenile convicted of lesser felonies may be sentenced, effectively, to a longer term. The court observed, under that scheme, "Peters would have been better situated had he committed a life felony, a more serious crime under the legislative framework, than the crimes he committed." *Id*. at 855. Applying Eighth Amendment jurisprudence, the court concluded, "This is an affront to the Constitution that cannot stand." *Id*.

The majority spends substantial effort showing *State v. Hart*, 404 S.W.3d 232, 235 n.2 (Mo. banc 2013), contemplated the juvenile would be sentenced on each additional crime on remand, and the resentencing here was individualized in accord with that approach and did not exceed the jury's recommenda-

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[7] Oddly, the majority criticizes this dissent for citing *Morgan* as it involved a single 99-year sentence, not aggregate sentences. *Morgan* is not being cited for the issue of aggregate sentences, however, but for the point it is paradoxical to provide for a functional life sentence for a nonhomicide offense when that length of sentence could not be imposed for a homicide offense, a holding *Morgan* clearly makes and the reasoning of which is directly applicable.

tion for each individual crime. Again, for the many reasons already discussed above, that misses the point.

Each individual sentence, when considered alone, may be just fine and consistent with the jury's recommendation. And, when sentencing adults, judges have the authority to determine whether each sentence will be served consecutively or concurrently. But the majority overlooks the critical fact that Nathan is a juvenile and the result of the individualized sentencing Nathan received was that the jury found he *was not irreparably corrupt* and therefore did not merit LWOP. As this is not in accord with its desired outcome, the majority relies on the *judge's* individualized determination that Nathan deserved to die in prison, not that of the jury.

Because the defendant was a juvenile, it is the jury, not the judge, who must decide whether Nathan is to die in prison, and it said *no*. The trial judge, and the majority, err in substituting their judgment on irredeemability for that of the jury. The jury found Nathan was not irretrievably lost, and, therefore, the trial judge was required to consider the aggregate effect of the sentences if imposed consecutively. Because the aggregate effect of these sentences would not give this not-irreparably-corrupt juvenile a meaningful opportunity for release, the judge violated *Graham* by imposing the sentences consecutively.

This Court should reject the majority's anomalous approach and follow the many state supreme courts to have held *Graham* and *Miller* apply to aggregate sentences regardless of whether one of the crimes committed is a homicide.

B. *Miller*'s Companion Case Itself Involved a Defendant Convicted of Both a Homicide and Nonhomicide Crime

Miller itself appears to have rejected the majority's position, for the defendant in the consolidated case, *Jackson v. Hobbs*, similar to Nathan, was convicted of capital felony murder and aggravated robbery in a single robbery-gone-wrong incident. *Jackson v. Hobbs*, 2012 WL 94588, *7-8 (U.S. Jan. 9, 2012) (Joint Appendix). Like Nathan, Jackson was convicted even though he did not fire the gun. *Id*. at *8. The trial judge decided to "merge" the two convictions for sentencing purposes because there was no need for separate sentencing on the robbery charge, given the automatic LWOP, so in effect "there's only one sentence." *Id*. at *54. This "merged" sentence of LWOP imposed for both convictions was what the Supreme Court found unconstitutional. *Miller*, 132 S. Ct. at 2475.[8]

So too, here, the fact Nathan was convicted of both homicide and nonhomicide offenses does not make *Graham* and *Miller* any less applicable. Like Jackson, Nathan's conviction arose from a single robbery incident involving another juvenile. And like Jack-

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[8] Although *Graham* was a nonhomicide case, in *Graham* the defendant was convicted of multiple crimes involving a robbery attempted with other juveniles. *Graham*, 560 U.S. at 53. Graham pled guilty to charges of armed burglary with assault or battery and attempted armed robbery. *Id*. at 54. Following a probation revocation, he was sentenced to life for the armed burglary and 15 years for the attempted armed robbery. *Id*. at 55-57. The sentence was effectively LWOP because Florida had abolished its parole system. *Id*. at 57. The Supreme Court vacated the judgment below even though Graham was convicted of multiple crimes. *Id*. at 82.

son, Nathan did not himself fire the gun that led to the homicide. Because the jury did not find Nathan was irreparably corrupt, he is entitled to have a meaningful opportunity for release, and this right was violated by the imposition of aggregate sentences intended to keep Nathan in prison for the remainder of his life.

II. THIS COURT SHOULD JOIN THE VAST MAJORITY OF COURTS IN HOLDING *MILLER* APPLIES TO AGGREGATE SENTENCES THAT ARE DE FACTO LWOP SENTENCES

A. Most State Supreme Courts Apply *Miller* in Cases Such as Nathan's

At least eight state supreme courts and the Seventh Circuit have taken the categorical approach in *Graham* and *Miller* and found the principles set out in those cases bar the imposition of aggregate sentences that cumulatively are so long they are the functional equivalent of LWOP, even where one of the crimes for which the defendant was sentenced was a homicide, unless the *Miller* requirements are satisfied. Such sentences impermissibly fail to take into consideration the special immaturity and special nature of a juvenile offender. No matter how bad the crime, unless the juvenile offender is found to be irreparably corrupt there is always hope for rehabilitation, and the juvenile offender must have a meaningful opportunity for release. Where a term-of-years sentence is so long as to deny the juvenile such an opportunity for release, these cases hold the sentence violates the Eighth Amendment. The reasoning of these cases is so consistent, so persuasive, and so dispositive of the result here that these cases are discussed in turn.

The Connecticut Supreme Court took up the issue in *State v. Riley*, 110 A.3d 1205, 1206-08 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016), a case involving a juvenile convicted of murder, attempted murder, first-degree assault, and conspiracy to commit murder, and sentenced to a total of 100 years without consideration of age as a mitigating factor. The court held this violated *Miller* and ordered resentencing. *Id*. at 1218-19. "It is undisputed that this sentence is the functional equivalent to life without the possibility of parole." *Id*. at 1207. In Connecticut's penal code, a "life sentence" is defined as either LWOP or a definite term of 60 years or more. *Id*. at 1207 n.2. While *Miller* specifically addressed mandatory LWOP sentences, Connecticut found "This [aggregate] penalty is no less harsh if imposed pursuant to an exercise of discretion." *Id*. at 1214. It found the sentence invalid.

The New Jersey Supreme Court is one of the most recent to weigh in, holding juveniles who committed a homicide offense as well as other offenses cannot receive consecutive sentences that are the functional equivalent of LWOP when not irreparably corrupt. That court found "the force and logic of *Miller*'s concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode," including when "a defendant commits multiple offenses on different occasions; and to homicide and non-homicide cases." *Zuber*, 152 A.3d at 212.

Zuber noted the rationale behind *Roper*, *Graham*, *Miller*, and *Montgomery* depends not on whether a sentence is labeled LWOP but on the characteristics of juveniles and the effect of those characteristics on penological goals. *Id*. at 207-11. It found that to be

guided by whether a sentence was labeled LWOP incorrectly elevated form over substance, stating:

> Defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation. The label alone cannot control; we decline to elevate form over substance.

Id. at 212. Rather, *Zuber* said the relevant question is the practical effect of the aggregate sentences imposed:

> Will a juvenile be imprisoned for life, or will he have a chance at release? It does not matter to the juvenile whether he faces formal "life without parole" or multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life. We believe it does not matter for purposes of the Federal or State Constitution either.

Id. at 211. For the same reasons, *Zuber* held that *Graham* and *Miller* apply to sentences that include punishment for a homicide offense because the focus is not principally on the offense alone but on the characteristics of the offender, because "youth matters under the Constitution" any time there is a "lengthy sentence that is the practical equivalent of [LWOP]." *Id.* at 212. *Zuber* concluded that the state law governing consecutive sentences for adult multi-episode crimes were insufficient for juvenile offenders. *Id.* at 213-14. The court remanded both cases for resentencing in light of these constitutional principles. *Id.* at 215-16.

The majority suggests *Zuber* is distinguishable because Zuber was not convicted of "a homicide offense along with multiple nonhomicide offenses." *Na-*

than, slip op. at 12. But as the majority later notes, *Zuber* involved both Zuber and the consolidated case of defendant Comer, who indeed was convicted of a homicide offense along with multiple nonhomicide crimes. *Nathan*, slip op. at 18; *Zuber*, 152 A.3d at 203-04.[9] The New Jersey Supreme Court made very clear that the principles of *Graham* – which are at the heart of *Miller* – apply even when one of the convictions is homicide because the focus is on the characteristics of the offender. *Zuber*, 152 A.3d at 212. Similarly, the majority's attempt to distinguish *Zuber* on the basis the trial court in Zuber had not yet had an opportunity to consider and apply the *Miller* factors ignores the point, repeatedly made in this dissent, that yes, here the jury did have an opportunity to consider the *Miller* factors on remand *and determined they were not met*. Had the jury found otherwise, then *Miller* would not bar a sentence of life without parole. Because the jury found Nathan did not qualify as irredeemably corrupt, the trial court was barred from reaching its contrary finding. *Zuber* fully supports this result.

Iowa's approach also is instructive. The Iowa Supreme Court released a trio of opinions applying *Graham* and *Miller* to sentences deemed the functional equivalent of LWOP: *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013), *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013), and *State v. Null*, 836 N.W.2d. 41 (Iowa 2013). *Null*, like the instant case,

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[9] The facts of Comer's crimes are remarkably familiar: Comer participated in a series of burglaries one night, acting with other juveniles. *Id.* at 203. When one of the burglaries went wrong, one of Comer's accomplices shot and killed a victim, making Comer guilty of felony murder. *Id.*

involved both homicide and nonhomicide offenses. Null, who was 16 years old at the time of the crimes, pleaded guilty to second-degree murder and first-degree robbery in exchange for dismissal of a first-degree murder charge. *Null*, 836 N.W.2d at 45. His aggregate 75-year sentence would require him to serve 52.5 years before being eligible for parole, at which time he would be more than 69 years old. *Id.*

While recognizing *Miller* did not specifically address term-of-years sentences that were not labeled "life," *id.* at 67, the court found the principles of *Miller* applied. It found, although Null's sentence was "not technically a life-without-parole sentence," it was so long that it triggered Miller protections. *Id.* at 71. It chose to apply those protections under article I, section 17 of the Iowa Constitution, which is a word-for-word identical analog of the Eighth Amendment, stating "*Miller*'s principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*." *Id.* at 72.

The Indiana Supreme Court used this type of reasoning in reducing an aggregate sentence of 150 years to one of 80 years (which, under the court's reasoning, presumably would allow for release during the defendant's lifetime). *Brown v. State*, 10 N.E.3d 1 (Ind. 2014). It held *Roper*, *Graham*, and *Miller* had shown that juveniles are categorically different than adults, and their special characteristics and immaturity must be taken into account in their sentencing. This applied equally to the consecutive sentences at issue in Brown as it did the single

LWOP sentences in *Graham* and *Miller*, for "[s]imilar to a life without parole sentence, Brown's 150 year sentence 'forswears altogether the rehabilitative ideal.'" *Brown*, 10 N.E.3d at 8, *quoting*, *Graham*, 560 U.S. at 74. Applying its state constitutional authority to revise sentences, it concluded this categorical approach requires courts to focus "'on the forest – the aggregate sentence – rather than the trees –consecutive or concurrent, number of counts, or length of the sentence on any individual count.'" *Brown*, 10 N.E.3d at 8, *quoting*, *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). It held an aggregate sentence longer than the prisoner's life violates *Miller* because it "means denial of hope" and that the defendant will remain in prison for the rest of his days. *Brown*, 10 N.E.3d at 8.[10]

Wyoming relied on both Iowa and Indiana in reaching a similar result in *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014). Bear Cloud was convicted of first-degree murder and two burglary related charges, for which he received consecutive sentences of life in prison and two 20- to 25-year sentences. *Id*. at 135. His certiorari petition was pending at the Supreme Court when *Miller* was decided, and the Supreme Court vacated the judgment and remanded the case for resentencing in light of *Miller*. *Id*. After some confusion as to how to proceed, a hearing was held, and Bear Cloud was resentenced to life with

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[10] The majority is correct that Indiana reached this result in part under its own constitutional authority to revise sentences. But, as discussed above, its reasoning in so doing was based on and fully consistent with *Graham* and *Miller*, focusing on the differences of juveniles as compared to adults and on the inapplicability of rehabilitative principles to sentences that offer no hope of release.

possibility of parole after 25 years on the murder charge, to run consecutive to the two 20- to 25-year undisturbed sentences on the two nonhomicide charges, so he would be eligible for release after 45 years, at age 61. *Id*. at 136.

Bear Cloud held these sentences violated *Graham* and *Miller* because the sentences for the nonhomicide offenses had been imposed without considering the factors set out in *Miller*. Sentencing this way was error because "[t]o do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile 'die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate.' " *Id*. at 142, *quoting*, *Miller*, 132 S. Ct. at 2460. The court concluded, "Like the Indiana Supreme Court, we will 'focus on the forest – the aggregate sentence – rather than the trees – consecutive or concurrent, number of counts, or length of the sentence on any individual count.'" *Bear Cloud*, 334 P.3d at 142, *quoting*, *Brown*, 10 N.E.3d. at 8.

The Wyoming Supreme Court further held that in determining whether the defendant was one of the rare "'irredeemable'" juveniles "'deserving of incarceration for the duration of their lives,'" *Bear Cloud*, 334 P.3d. at 144, *quoting*, *Graham*, 560 U.S. at 75, the categorical considerations laid out in *Graham* and *Miller* must be applied "to the entire sentencing package, when the sentence is [LWOP], or when aggregate sentences result in the functional equivalent of [LWOP]." *Bear Cloud*, 334 P.3d at 144. Moreover, that analysis would not change depending on wheth-

er the aggregate sentence was more than or less than the juvenile offender's actual life expectancy; the issue is whether he will have a meaningful opportunity for release. *Id*.

The Illinois Supreme Court also recently decided a case holding *Graham* and *Miller* apply to an aggregate sentence for homicide and nonhomicide offenses, stating:

> In this case, defendant committed offenses in a single course of conduct that subjected him to a legislatively mandated sentence of 97 years, with the earliest opportunity for release after 89 years. Because defendant was 16 years old at the time he committed the offenses, the sentencing scheme mandated that he remain in prison until at least the age of 105. The State concedes, and we agree, that defendant will most certainly not live long enough to ever become eligible for release. Unquestionably, then, under these circumstances, defendant's term-of-years sentence is a mandatory, *de facto* life-without-parole sentence. We therefore vacate defendant's sentence as unconstitutional pursuant to *Miller*.

People v. Reyes, 63 N.E.3d 884 (Ill. 2016).

In January of this year, the Washington Supreme Court similarly held "*Miller*'s reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation." *Ramos*, 387 P.3d at 660. In so holding, *Ramos* rejected "the notion that *Miller* applies only to literal, not de facto, life-without-parole sentences" because "youth matters on a constitutional level." *Id*. at 660, 655.

> Holding otherwise would effectively prohibit the sentencing court from considering the specific nature of the crimes and the individual's culpability before sentencing a juvenile homicide offender to die in prison, in direct contradiction to *Miller*. Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same.

Id. at 660. This is because "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*." *Id*., *quoting*, *Miller*, 132 S. Ct. at 2465 (emphasis added in *Ramos*). Every juvenile, therefore, is entitled to a *Miller* hearing.[11]

The Massachusetts Supreme Court similarly cited with approval the decisions in *People v. Caballero*, 282 P.3d 291 (Cal. 2012), *Ragland*, and *Null* and directed the legislature to be guided by them in determining that a defendant sentenced for first-degree murder and three related weapons charges had to be sentenced to life with parole. While due to the nature of the issues raised the court found it premature

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[11] In contrast to Nathan, whom the jury found was not irreparably corrupt, the Washington Supreme Court held, after a *Miller* hearing, Ramos was not barred from receiving a lengthy sentence because he failed to show his crime was due to "a lack of maturity and an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking." *Ramos*, 387 P.3d at 667. The opinion also notes, even so, Ramos would have a right under a recent Washington statute to seek release after 20 years if he did not commit a crime as an adult and otherwise met the statutory requirements for early release. *Id*. at 659.

to specifically rule on what type of aggregate sentence might be constitutional for the weapons convictions in this homicide case, it said an aggregate sentence that was the functional equivalent of LWOP would violate the Eighth Amendment. *Com. v. Brown*, 1 N.E.3d 259, 270 n.11 (Mass. 2013).[12]

In *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), the Seventh Circuit held McKinley's two consecutive 50-year sentences, one for first-degree murder and one for armed criminal action, violated *Miller* because he would not be eligible for parole until age 116. *Id.* at 909. In so holding, the Seventh Circuit noted LWOP or its equivalent can be imposed even in a homicide case only if the trial judge or jury considers the *Miller* factors as to both the homicide and nonhomicide charges, which had not occurred there. *Id.* at 914. The same reasoning necessarily applied to the 100-year sentence in that case; it was "a *de facto* life sentence, and so the logic of *Miller* applies." *Id.* at 911.[13]

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[12] At the time, the murder statute required mandatory LWOP as the only sentencing option. *Brown*, 1 N.E.3d at 261. Prior to sentencing, however, *Miller* was decided. The trial judge sentenced Brown to life with parole under the second-degree murder statute, a decision of which the Massachusetts Supreme Court approved. *Id.* at 263. In dicta, however, the court made clear it would apply the principles of *Graham* and *Miller* to aggregate sentences that are the functional equivalent of LWOP even in cases involving both homicide and nonhomicide convictions. *Id.* at 270 n.11.

[13] *Cf. Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013). Although not a homicide case, it is noteworthy that the Ninth Circuit held California's affirmance of Moore's 254-year term–of-year sentence "for multiple crimes was contrary to *Graham* because 'there are no constitutionally significant distinguishable facts' between Graham's and Moore's sentences" because

B. *Bunch* is Both Wrongly Decided and Not Applicable to State Courts

In contrast to this vast array of authority, the majority relies on the Sixth Circuit's opinion in *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012). As discussed at length in my dissent in *Willbanks*, Bunch does not aid the majority. It did *not* decide that *Graham* and *Miller* do not apply to aggregate sentences. Rather, it held only that *federal* courts are prohibited by *federalism* principles (as set out in *Teague v. Lane*, 489 U.S. 288 (1989), and in the Antiterrorism and Expedited Death Penalty Act of 1996, 28 U.S.C. § 2254(d)), from reversing a state court decision unless

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"Moore's sentence determines 'at the outset that [Moore] never will be fit to reenter society.' " *Id.* at 1191, quoting *Graham*, 560 U.S. at 75. *Moore*, therefore, held, "Under *Graham*, juvenile nonhomicide offenders may not be sentenced to life without parole regardless of the underlying nonhomicide crime." 725 F.3d at 1193; *see also Demirdjian v. Gipson*, 832 F.3d 1060, 1063-64 (9th Cir. 2016), in which the Ninth Circuit grappled with whether a state court's imposition of two consecutive terms of 25 years to life on a juvenile offender convicted of two counts of first-degree murder with intent to torture was the functional equivalent of LWOP. The Ninth Circuit was limited to finding whether the sentence was "'contrary to, or involved an unreasonable application of' clearly established Supreme Court authority." *Demirdjian*, 832 F.3d at 1066, *quoting*, 28 U.S.C. § 2254(d)(1). In addition, the petitioner would have to prove *Miller*'s principles were clearly established at the time the sentence was affirmed in state court, which occurred six years prior to *Miller*. *Demirdjian*, 832 F.3d at 1076. Even though the court concluded the petitioner could not discharge these burdens, *id.*, what really distinguishes this case from *Miller* is that the sentence provides for parole eligibility when the inmate would be 66 years old – a sentence that does not "'share [any] characteristics with death sentences'" and therefore "does not necessarily trigger *Miller*'s requirements." *Id.* at 1077, quoting *Miller*, 132 S. Ct. at 2466 (alteration in original).

the state court decision is "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States."

Bunch concerned a federal habeas petition filed by an Ohio juvenile offender. It reached its result out of deference to what it believed to be Ohio law. It is ironic, then, that in a case involving a codefendant of Bunch, the Ohio Supreme Court recently rejected *Bunch* and found it did not state Ohio law. *State v. Moore*, No. 2016-Ohio-8288, 2016 WL 7448751 (Dec. 22, 2016). *Moore* held *Graham*'s rationale requires all juvenile defendants be given an actual meaningful opportunity to obtain release and *Graham* "did not limit that holding to juveniles who were sentenced for only one offense." *Id.* at *15. As the Ohio Supreme Court so eloquently noted, "The number of offenses committed cannot overshadow the fact that it is a child who has committed them." *Id. Moore* concluded there is no consequential distinction between LWOP and aggregate term-of-years sentences. *Id.* at *10-11.

The Ohio Supreme Court's opinion shows it was not bound to follow *Bunch*, and, in fact, it reached the conclusion, despite *Bunch*, that *Graham* does apply to aggregate sentences. As further explained by one of the concurring opinions in *Moore* (and as also explained below), *Bunch* is neither binding nor persuasive as to the application of *Graham* to consecutive sentences. It was based on federalism principles that have no application to state supreme courts, and "[w]e who sit at the pinnacle of a state judiciary should be reluctant to adopt the limited standards of federal habeas jurisdiction as a proper proxy for the rigorous constitutional analysis that

claims like Moore's deserve." *Id.* at *27 (O'Connor, C.J., concurring).

Moore's analysis was correct. *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008), specifically holds that federalism-based limits such as those relied on in *Bunch* apply only to federal courts. State supreme courts *are not subject* to any of these same restrictions. *See* L. Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U.L.REV. 421, 443, 449 (2004) (discussing the differences between state and federal habeas). As the lengthy discussion above demonstrates, state courts are free to apply established constitutional principles to new facts without waiting for the Supreme Court to direct them to do so in a case on all fours with their own facts.

Even under the federal courts' strict federalism standard, the Seventh and Ninth circuits have held *Graham* is so clearly applicable it is error not to apply its principles to aggregate sentences that are the functional equivalent of LWOP. In *Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013), the Ninth Circuit held that California's affirmance of Moore's 254-year term-of-years sentence "for multiple crimes was contrary to *Graham* because there are no constitutionally significant distinguishable facts between Graham's and Moore's sentences." (Quotation omitted). The Ninth Circuit concluded Moore's sentence, therefore, "is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime. Moore's sentence determines 'at the outset that [Moore] never

will be fit to reenter society.'" *Id.*, *quoting Graham*, 560 U.S. at 75.[14]

Aggregate sentences that are the functional equivalent of LWOP are contrary to *Graham*, the Ninth Circuit held, because in *Graham* "the Supreme Court chose a categorical approach, i.e., a flat-out rule that '*gives all juvenile nonhomicide offenders* a chance to demonstrate maturity and reform.'" *Moore*, 725 F.3d at 1193, *quoting*, *Graham*, 560 U.S. at 79 (emphasis added in *Moore*). *Moore*, therefore, held, "Under *Graham*, juvenile nonhomicide offenders may not be sentenced to life without parole regardless of the underlying nonhomicide crime." *Moore*, 725 F.3d at 1193.

And lest it be suggested the Ninth Circuit's decision is an outlier, the Seventh Circuit reached a similar result in *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016). The Seventh Circuit held McKinley's two consecutive 50-year sentences, one for first-degree murder and one for armed criminal action, violated *Miller* because he would not be eligible for parole until age 116. *Id.* at 909. In so holding, the Seventh Circuit noted LWOP or its equivalent can be imposed even in a homicide case only if the trial judge or jury considers the *Miller* factors as to both the homicide and nonhomicide charges, which had not occurred there. *Id.* at 914. The same reasoning nec-

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[14] On remand, Moore was made eligible for parole at age 62. *People v. Moore*, No. B260667, 2015 WL 8212832, at *1 (Cal. Ct. App. Dec. 8, 2015). The appellate court found his appeal of the new sentence moot due to a statute granting offenders sentenced to a specific term of years for crimes committed prior to age 23 the right to parole eligibility after 15 years of incarceration. *People v. Moore*, No. B260667, 2017 WL 347460, at *3 (Cal. Ct. App. Jan. 24, 2017).

essarily applied to the 100-year sentence in that case; it was "a *de facto* life sentence, and so the logic of *Miller* applies." *Id*. at 911.[15]

Even the Sixth Circuit, which decided *Bunch*, recognized state courts were not acting improperly in applying *Graham* to aggregate sentences, stating in *Starks v. Easterling*, 659 Fed. App'x. 277, 280 (6th Cir. 2016):

> In our view, [*Roper*, *Graham*, *Miller*, and *Montgomery*] illustrate the Court's growing unease with draconian sentences imposed upon juveniles, even for serious crimes. As this line of jurisprudence continues to evolve, it may well be that the Court one day holds that fixed term sentences for juvenile offenders that are the functional equivalent of life without parole are unconstitutional, especially if the sentencing court has not taken the defendant's youth into consideration. That said, it is not our role to predict future outcomes.

C. Penological Goals of Retribution, Deterrence, Incapacitation, and Rehabilitation Are Not Served by Aggregate Sentences That Are De Facto LWOP

The majority continues to use a sentence-by-sentence approach, perhaps because like the majori-

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[15] While *Miller* did not involve multiple consecutive sentences, the Seventh Circuit concluded, "A straw in the wind is that the Supreme Court vacated, for further consideration in light of *Miller*, three decisions upholding as an exercise of sentencing discretion juveniles' sentences to life in prison with no possibility of parole ...." *McKinley*, 809 F.3d at 914. In other words, the Supreme Court had itself indicated by these remands that multiple aggregate sentences needed to be reconsidered in light of *Graham*.

ty in *Willbanks*, also handed down this date, it believes it would not serve the deterrent and retributive purpose of the criminal law to impose the same punishment for a single crime as for multiple crimes. It is wrong.

First, *Graham* does not bar the imposition of aggregate sentences for multiple crimes; it simply bars making them of such length that the juvenile is given the functional equivalent of LWOP. Second, the juvenile is not required to be released at the time the juvenile is first eligible for parole; the juvenile simply must be considered for parole at that time and the nature of the crimes is then a relevant consideration. Of course, that consideration must be genuine. If the juvenile offender is determined to be irreparably corrupt, then he or she may not be granted parole. The Supreme Court requires, however, that other juvenile offenders be given "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75.

The opportunity is required because characteristics of juveniles mean they are less morally culpable and the normal legitimate penological goals of punishment – retribution, deterrence, incapacitation, and rehabilitation – do not justify the harshest of sentences in the case of juveniles. *Moore*, 2016 WL 7448751, at *7-8; *Null*, 836 N.W.2d at 63. Their reduced culpability, the Supreme Court has said, stems from "three significant gaps between juveniles and adults:"

> First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183. Second, children "are more vul-

> nerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid*. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id*., at 570, 125 S.Ct. 1183.

Miller, 132 S. Ct. at 2464 (alterations in original).

This reduced moral culpability means retribution is not properly served by the imposition of the harshest sentences: "Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Moore*, 2016 WL 7448751, at *8, *quoting*, *Graham*, 560 U.S. at 70-71 (internal quotation and alterations omitted). *Moore* also notes that the Supreme Court has found LWOP sentences to be longer and thus harsher when imposed on juveniles: "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." *Moore*, 2016 WL 7448751, at *9, *citing*, *Graham*, 560 U.S. at 70-71 (alteration in *Moore*).

The characteristics of juveniles also make them less susceptible to deterrence. According to *Roper*, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571. Owing to their "lack of maturity and underdeveloped sense of responsibility," juveniles are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 560

U.S. at 72. The Supreme Court considers the likelihood juveniles weigh such consequences of their acts to be "virtually nonexistent." *Roper*, 543 U.S. at 572.

A juvenile's capacity for change also means the legitimate concern for incapacitation does not justify LWOP. "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." *Graham*, 560 U.S. at 72. Even when the juvenile has committed a homicide, LWOP is only justified in the rare case when it can be determined at the outset that the juvenile offender is irreparably corrupt. *Miller*, 132 S. Ct. 2469 ("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.") (internal quotations omitted).

Similarly, a juvenile's capacity for change is why a sentence of LWOP thwarts the goal of rehabilitation. This is central to *Graham*:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.

Graham, 560 U.S. at 79. Indeed, the penological goal of rehabilitation "forms the basis of parole systems." *Id.* at 73.

For all these reasons, this Court should hold the principles and categorical approach set out in *Graham* and *Miller* apply to all juvenile sentences, whether explicitly labeled LWOP or whether de facto LWOP due to the length of the aggregate sentences imposed, and whether the crimes are all nonhomicide crimes or whether they are homicide and nonhomicide crimes mixed together.

Here, the jury did not find Nathan was irreparably corrupt, and, therefore, he could not receive LWOP for his homicide offense. He also could not receive LWOP for his nonhomicide offenses, and for the reasons I set out at length above and in my dissenting opinion in *Willbanks*, neither could he receive consecutive sentences that aggregate to the functional equivalent of LWOP. It makes no sense that, simply because he was tried for the homicide and nonhomicide crimes together, he can be given such lengthy and consecutive aggregate sentences that he will serve the rest of his natural life in prison without a meaningful opportunity for release.

D. Remedy

There need be no hesitancy to apply *Graham* to aggregate sentence cases. Difficulties in fashioning remedies have never stayed this Court's hand from doing justice. They should not do so here. Whatever age the Supreme Court had in mind, it is clear its outer limit was some time before the juvenile offender's death, and here Nathan received a sentence that is far beyond his life expectancy. Under any standard, it is too long where, as here, the juvenile has not

been found to be irredeemably corrupt. In any event, this Court does not need to set a specific age by which Nathan or any other juvenile offender must have a parole hearing or specify the hearing must be held within a certain time period before the end of the inmate's life expectancy. As other state supreme courts have noted, the legislature is free to make a legislative determination of how much is too much, by setting a particular point at which parole consideration must be made available.[16]

This reasoning applies equally to Missouri. In 2016, the Missouri legislature adopted what is now codified at section 558.047. That statute was adopted by the legislature in response to *Graham*, *Miller*, and this Court's decisions holding the legislature cannot sentence a juvenile homicide defendant to LWOP. *See Hart*, 404 S.W.3d 232; *see Order* (Mo. banc Mar. 15, 2016) (granting juveniles unconstitutionally sentenced to LWOP as per *Miller* and *Montgomery* the possibility of parole after 25 years).

Contrary to the implication of the majority, this Court has never suggested it had no authority to re-

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[16] *People v. Caballero*, 282 P.3d 291, 296 n.5 (Cal. 2012) (calling on the legislature "to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity"); *Brown*, 1 N.E.3d at 270 n.11 (leaving to the legislature to establish "the specific contours" of constitutional juvenile sentencing and admonishing it to take into account the functional effect of sentences including aggregate sentences); *State ex rel. Morgan v. State*, 217 So.3d 266, 275-76 (La. 2016) (holding the court must defer to the legislative intent in its "*Miller* fix" statute to punish "intent to kill" armed robbery as a nonhomicide crime and providing parole eligibility after 30 years).

vise the sentences of those affected by *Miller*, as it had voted unanimously to do in light of *Montgomery*. The language of the Court's order vacating their resentencing so they could instead be made subject to the just-passed alternative sentencing mechanism adopted by the legislature in what is now section 558.047, suggests otherwise. In any event, there is no question this Court has exercised its authority to make that statute applicable to all LWOP juvenile offenders, and that statutory definition of the point at which an LWOP juvenile offender must be given a meaningful opportunity for release is the governing law.

Similarly, section 558.047 provides an appropriate mechanism for determining when a juvenile offender is entitled to be considered for release. It provides that juvenile offenders sentenced to LWOP prior to August 28, 2016, and juvenile offenders sentenced after that date to life with parole or a term of 30 to 40 years may petition for a parole hearing after serving 25 years. § 558.047.1. It further provides the parole hearing must consider factors evidencing rehabilitation since being incarcerated as well as the *Miller* factors associated with the youth of the offender at the time of the offense. § 558.047.5, incorporating by reference § 565.033. This statute provides a legislative definition of when a sentence becomes equivalent to LWOP and entitles the juvenile offender to a meaningful opportunity to be considered for release on parole.

Just as in other states, and just as this Court did for the 81 habeas petitioners who asked this Court to apply *Miller* to their sentences, this time standard should apply here in the absence of a specific statutory rule or specific contrary direction from the Su-

preme Court. To be clear, this remedy is offered not to suggest this Court should hold the statute applies directly but rather because the statute sets out what the legislature has defined as a meaningful opportunity for release.

This is the approach taken by this Court in a very similar situation in *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003). After Johnson had committed his crime, Missouri adopted section 565.030, RSMo Supp. 2013, which provides that persons meeting the definition of "mental retardation" (since amended to substitute the term "intellectual disability") shall receive a life sentence rather than the death penalty for murders committed after August 28, 2001. Not long thereafter, the Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), it constitutes cruel and unusual punishment to impose the death penalty on a person who is "mentally retarded." *See also Johnson*, 102 S.W.3d at 538. Although this Court recognized section 565.030.6 did not directly apply to Johnson's pre-2001 homicide offense, it held:

> Nonetheless, in light of *Atkins*, this Court holds as a bright-line test that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in section 565.030.6, shall not be subject to the death penalty.

Id. at 540.

This Court should treat section 558.047 the same way. While section 558.047 directly applies to LWOP cases, its constitutional foundation in *Graham*'s principles means it should be used as a bright line rule to be applied as well to sentences that are the functional equivalent of LWOP.

III. CONCLUSION

On resentencing, the jury found Nathan was not one of the rare irreparably corrupt juvenile offenders who can constitutionally be sentenced to LWOP. The consecutive imposition of sentences requiring 300 years in prison without the possibility of parole has the same aggregate effect as LWOP. This longer-than-life-expectancy sentence violates the principles of *Graham* and *Miller* and violates Nathan's Eighth Amendment right to be free from cruel and unusual punishment, for it denies him any meaningful opportunity for release on his nonhomicide crimes simply because they were imposed at the same time as a non-LWOP sentence was imposed for a homicide crime. I, therefore, would reverse Nathan's conviction and remand for resentencing that provides a meaningful opportunity for release and pursuant to the legislature's 2016 adoption of section 558.047.

APPENDIX C

Missouri Court of Appeals,
Western District.

Timothy S. WILLBANKS, Appellant,
v.
MISSOURI DEPARTMENT OF CORRECTIONS,
Respondent.

WD 77913
OPINION FILED: October 27, 2015

Motion for Rehearing and/or Transfer to Supreme Court Denied November 24, 2015
Sustained and Cause Ordered Transferred April 5, 2016

Appeal from the Circuit Court of Cole County, Missouri, The Honorable Daniel R. Green, Judge

Before Division Three: Karen King Mitchell, Presiding Judge, and Lisa White Hardwick and Anthony Rex Gabbert, Judges

Karen King Mitchell, Presiding Judge

Timothy Willbanks appeals the grant of the Department of Corrections (DOC) motion for judgment on the pleadings in his declaratory judgment action. Willbanks sought a declaration that Missouri statutes and regulations imposing mandatory minimum prison terms before parole eligibility are unconstitutional, as applied to juveniles, under the United States Supreme Court's holding in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), when the statutes and regulations operate to deny a juvenile a parole eligibility date outside of his natural life expectancy. Because *Graham* is inappli-

cable to Willbanks's multiple, consecutive, term-of-years sentences, the trial court committed no error in granting DOC's motion for judgment on the pleadings.[1]

Background

On January 28, 1999, Willbanks (then age 17) approached the victim, a 24–year–old woman just returning home from work, in the parking lot of her apartment complex. Willbanks was carrying a sawed-off shotgun. When the victim saw it, she begged him to take her car, her purse, and her money, but to leave her alone. Willbanks ordered the victim back into the driver's seat of her car, while he sat in the back seat and directed her to drive to an ATM, where, using the victim's card and number, Willbanks removed all of the money from her account. The victim repeatedly begged Willbanks not to hurt her, and he responded by threatening to do just that if she continued begging.

After leaving the ATM, Willbanks directed the victim to drive toward the river, but when she reached a "Y" intersection, she turned the wrong way, and Willbanks became angry and told her to stop the car. Willbanks then forced the victim into the trunk so that he could drive. Willbanks drove recklessly, causing the victim to be tossed about the trunk; Willbanks yelled at her to stop moving around so much. Willbanks then ate some fast food the victim had in the car and criticized the victim, saying, "bitch, there's nothing on this cheeseburger."

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[1] This decision is limited to cases involving multiple term-of-year sentences imposed for multiple offenses and does not address cases involving a single term-of-year sentence imposed for only one offense.

While in the trunk, the victim removed her jewelry and tried to hide it, in hopes that Willbanks would not find it. After Willbanks finally stopped the car, he let the victim out of the trunk and demanded that she turn over her jewelry. When the victim indicated that she wasn't wearing any, Willbanks made her climb back into the trunk and retrieve the jewelry she had hidden. Willbanks also took her coat, purse, wallet, phone, credit cards, driver's license, and social security card.

Two other individuals (then ages 19 and 20), who had been at the victim's apartment parking lot with Willbanks, had followed Willbanks and the victim in their own car. Willbanks told the other two men that he wanted to shoot the victim, but the other two wanted to leave her alone. Nevertheless, Willbanks directed the victim to turn around and walk toward a tree; as she walked, Willbanks shot her four times, striking her right arm, shoulder, lower back, and head. The victim fell on the river bank, and Willbanks left her for dead. Willbanks later told a friend that he had shot as many times and as fast as he could and that he liked the way the victim screamed.

Despite receiving numerous severe injuries, the victim was able to crawl for forty minutes to find help. Though she survived, she suffered many disfiguring and irreparable injuries.

Willbanks was apprehended, and he was charged and convicted by a jury of one count of kidnapping, one count of first-degree assault, two counts of first-degree robbery, and three counts of armed criminal action. The court sentenced Willbanks to consecutive terms of fifteen years for kidnapping, life imprisonment for assault, twenty years for each robbery count, and one hundred years for each armed crimi-

nal action count, for an aggregate sentence of life plus 355 years. According to Willbanks, because of both statutory and regulatory mandatory minimum sentencing requirements preceding parole eligibility, he will not be eligible for parole until he is approximately 85 years old. According to actuarial statistics from the Center for Disease Control, a person with Willbanks's characteristics is not expected to live beyond age 79.5.

Willbanks's convictions and sentences were affirmed on direct appeal, *State v. Willbanks*, 75 S.W.3d 333 (Mo. App. W.D. 2002); as was the denial of his post-conviction relief motion under Rule 29.15, *Willbanks v. State*, 167 S.W.3d 789 (Mo. App. W.D. 2005).

Beginning in 2005, the United States Supreme Court issued a series of opinions addressing the constitutionality of various sentencing practices as they related to juvenile offenders. The first in the series was *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), wherein the Court declared that the execution of those who were under the age of 18 at the time of their crimes violated the Eighth and Fourteenth Amendments. The Court expanded its traditional "death is different" analysis and determined that juveniles are also different and, therefore, "cannot with reliability be classified among the worst offenders." *Id.* at 569, 125 S.Ct. 1183. The Court identified three specific factors that made juveniles distinct: (1) juveniles generally lack maturity and have an underdeveloped sense of responsibility, which often leads to "impetuous and ill-considered actions and decisions"; (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3)

"the character of a juvenile is not as well formed as that of an adult," and "[t]he personality traits of juveniles are more transitory, less fixed." *Id.* Based upon all of these factors, the Court reasoned that juveniles, as a class, had a greater capacity for reform than adults and, correspondingly, a lessened culpability; accordingly, the Eighth and Fourteenth Amendments precluded the State from "extinguish[ing] [a juvenile offender's] life and his potential to attain a mature understanding of his own humanity." *Id.* at 574, 125 S.Ct. 1183.

In 2010, the Court decided the second in the series: *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), which held that the Eighth Amendment prohibits sentencing juvenile offenders to life without parole (LWOP) for nonhomicide offenses. The Court relied on its analysis in *Roper* determining that juveniles are different, analogized an LWOP sentence to the death penalty, and recognized that the death penalty is not permitted for nonhomicide offenses. *Id.* at 68–75, 130 S.Ct. 2011. The Court held that, while "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime[,] ... [it must] give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75, 130 S.Ct. 2011.

Following Graham, the Court issued its third in the series of juvenile-related sentencing decisions: *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), which held that mandatory LWOP sentences imposed upon juvenile homicide offenders violated the Eighth and Fourteenth Amendments. The Court first recognized the determination in *Roper* and *Graham* "that children are

constitutionally different from adults for purposes of sentencing." *Id.* at 2464. The Court then noted that, while "*Graham*'s flat ban on [LWOP] applied only to nonhomicide crimes, ... none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id.* at 2465. Thus, the Court posited, "*Graham*'s reasoning implicates any [LWOP] sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.* The Court then discussed the nature of mandatory penalties, noting that they, "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. The Court criticized mandatory sentencing schemes for treating every juvenile the same, despite varying degrees of culpability, such as those between "the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Id.* at 2467–68. Accordingly, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. The Court noted, "Although we do not foreclose a sentencer's ability to make th[e] judgment [that a juvenile offender deserves an LWOP sentence] 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." *Id.*

In 2012, four months after the decision in *Miller* was handed down, Willbanks filed a petition for a writ of habeas corpus with the Missouri Supreme Court; the petition was denied without prejudice. In

2013, he filed a petition for a writ of habeas corpus with the Cole County Circuit Court, arguing that, because of the mandatory minimum sentencing requirements preceding parole eligibility, he was subject to a de facto LWOP sentence, which was precluded by the holding in *Graham*. The circuit court denied Willbanks's petition, indicating that his proper avenue for seeking relief was through a petition for declaratory judgment.

Accordingly, in April 2014, Willbanks filed a petition for declaratory judgment, imploring the court "to enter a judgment declaring that Missouri State Statutes and Regulations which require offenders to serve specific percentages of their sentences before they become eligible for parole are unconstitutional as applied to juvenile offenders, such as Mr. Willbanks," because they violated *Graham*'s mandate that juvenile offenders be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The circuit court granted DOC's motion for judgment on the pleadings, finding *Graham* inapplicable to Willbanks's multiple, consecutive, parole-eligible, non-LWOP sentences. Willbanks appeals.

Analysis

Willbanks raises a single claim on appeal. He argues that the court below erred in granting judgment on the pleadings because the holding in *Graham* applies to de facto life sentences, such as his, where his parole-eligibility date exceeds his life expectancy.

A. Jurisdiction

Willbanks's point on appeal states:

> The trial court clearly erred in granting [DOC]'s Motion for Judgment on the Pleadings, because Willbanks was entitled to a declaration that **Missouri Statutes and Regulations requiring offenders to serve specific percentages of their sentence before becoming parole eligible are unconstitutional as applied to juveniles like Willbanks was when he committed the crimes**, because such application violates Willbanks'[s] constitutional rights to protection against cruel and unusual punishment as guaranteed by the 8th and 14th Amendments to the United States Constitution, and Article I, § 21 of the Missouri Constitution, in that his 385–year sentence constituted a de facto life sentence since under Missouri Statutes and Regulations he will be ineligible for parole until about age eighty-five no matter how much he has matured and rehabilitated, which is well-beyond his life expectancy, and thus he will not receive a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, which is required by *Graham v. Florida* and the Eighth Amendment.

(Emphasis added.) The bolded portion of Willbanks's claim leads us to question our jurisdiction over this matter.

Article V, § 3, of the Missouri Constitution vests exclusive appellate jurisdiction with the Missouri Supreme Court "in all cases involving the validity ... of a statute or provision of the constitution of this state." Here, Willbanks appears to challenge the constitutionality of both statutes and regulations.

The Supreme Court has held that its exclusive jurisdiction over the validity of statutes does not extend to constitutional challenges to administrative regulations. *Adams Ford Belton, Inc. v. Mo. Motor Vehicle Comm'n*, 946 S.W.2d 199, 201 (Mo. banc 1997). Nevertheless, even if only "one of the issues involves the validity of a statute, th[e Supreme] Court has jurisdiction of the entire case." *Lester v. Sayles*, 850 S.W.2d 858, 861 (Mo. banc 1993). Thus, when a party raises a constitutional challenge to the validity of a statute, the court of appeals generally lacks jurisdiction to decide the case and must transfer the matter to the Supreme Court.

There are, however, two exceptions to the Supreme Court's exclusive jurisdiction: (1) if the constitutional claim is not properly preserved for review; or (2) if the claim is merely colorable as opposed to real and substantial. *See State v. Bowens*, 964 S.W.2d 232, 236 (Mo. App. E.D. 1998) (because constitutional claims are waived if not presented at the first opportunity, a party's failure to preserve a constitutional challenge takes that issue out of the case, leaving only matters that are not reserved for the exclusive jurisdiction of the Missouri Supreme Court); *Tadrus v. Mo. Bd. of Pharmacy*, 849 S.W.2d 222, 225 (Mo. App. W.D. 1993) (if a constitutional challenge is "merely colorable," jurisdiction remains in the court of appeals).

Here, though both parties advise that jurisdiction is proper in the court of appeals, "'appellate jurisdiction cannot be conferred by waiver, acquiescence, or even express consent.'" *Boone v. Boone*, 438 S.W.3d 494, 497 (Mo. App. W.D. 2014) (quoting *Ruestman v. Ruestman*, 111 S.W.3d 464, 477 (Mo. App. S.D. 2003)). Thus, we must examine the two exceptions to

the Supreme Court's exclusive jurisdiction to discern whether we may decide this case.

1. Preservation

"To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process." *Sharp v. Curators of Univ. of Mo.*, 138 S.W.3d 735, 738 (Mo. App. E.D. 2003). "Further, 'in order for the issue of the constitutional validity of a statute to be preserved for appellate review, the issue must not only have been presented to the trial court, but the trial court must have ruled thereon.'" *Id.* (quoting *Estate of McCluney*, 871 S.W.2d 657, 659 (Mo. App. W.D. 1994)). "And, the point raised on appeal must be based upon the theory advanced at the trial court." *Id.*

As presented to us, Willbanks has fully preserved his constitutional challenge to the validity of a Missouri statute. In his declaratory judgment petition, Willbanks argued that the mandatory minimum prison terms required by § 558.019[2] were unconstitutional, as applied to him, under the holding in *Graham*. This is the same theory he presents to us now, and it is the same theory that was ruled on and rejected by the trial court. Thus, his constitutional challenge to § 558.019, as raised in his declaratory judgment action, is preserved.[3]

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[2] All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

[3] For purposes of a habeas corpus writ petition, preservation would not be an issue with this court, as the matter is considered for the first time by the court wherein the petition is filed. In the habeas context, the concern would be whether the claim was procedurally defaulted.

2. Willbanks's claim is not real and substantial.

To begin, "'[t]he simple fact that a constitutional right has been denied does not take a case out of the jurisdiction of our courts of appeals. The construction of the Constitution must be involved. The denial of such a right is error, to be sure, but the language of the Constitution is plain, and mere error, however, grave, does not vest jurisdiction in th[e Missouri Supreme C]ourt.'" *Knight v. Calvert Fire Ins. Co.*, 260 S.W.2d 673, 675 (Mo. 1953) (quoting *Wolf v. Hartford Fire Ins. Co.*, 304 Mo. 459, 263 S.W. 846, 847 (1924)); *accord McNeal v. McNeal–Sydnor*, SC 94435, —— S.W.3d ——, ——, 2015 WL 5239878, at *1 (Mo. banc Sept. 8, 2015) ("This Court's exclusive appellate jurisdiction is not invoked simply because a case involves a constitutional issue.").

"The grant of authority to [the Missouri Supreme] Court to exercise exclusive appellate jurisdiction over questions involving the validity of a statute or constitutional provision is limited to claims that the state law directly violates the constitution—either facially or as applied." *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 912 (Mo. banc 1997). "'To present a constitutional question for review on the ground that a statute is unconstitutional, the constitutionality of the statute must be directly challenged. To say that a statute would be unconstitutional *if construed in a certain manner* does not meet the requirement.'" *Knight*, 260 S.W.2d at 675 (quoting *Phillips Pipe Line Co. v. Brandstetter*, 363 Mo. 904, 254 S.W.2d 636, 637 (1953)) (emphasis added). In other words, conditional challenges to the constitutionality of a statute do not invoke the Missouri Supreme Court's exclusive jurisdiction. *See Whitaker v. City of Springfield*, 889 S.W.2d 869, 875 (Mo. App.

S.D. 1994) (rejecting suggestion that constitutional challenge came within the Supreme Court's exclusive jurisdiction because the challenge "would have been conditional depending upon the manner in which the statute was construed"); *see also Forbis v. Assoc. Wholesale Grocers, Inc.*, 513 S.W.2d 760, 767 (Mo. App. 1974) ("an unconditional challenge is required since a contention that a statute would do violence to a constitutional proviso only if [the statute were] construed in a certain way does not raise a constitutional issue"), *overruled on other grounds by Lewis v. Wahl*, 842 S.W.2d 82, 84 (Mo. banc 1992).

"[T]he allegation concerning the constitutional validity of the statute must be real and substantial for jurisdiction to vest in the Supreme Court." *Sharp*, 138 S.W.3d at 738.

> A claim is substantial when "upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but, if such preliminary inquiry discloses the contention is so obviously unsubstantial and insufficient, either in fact or law, as to be plainly without merit and a mere pretense, the claim may be deemed merely colorable."

Id. (quoting *Estate of Potashnick*, 841 S.W.2d 714, 718 (Mo. App. E.D. 1992)). "'One clear indication that a constitutional challenge is real and substantial and made in good faith is that the challenge is one of first impression....'" *Id.* (quoting *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 52 (Mo. banc 1999)).

Willbanks argues that, because the mandatory minimum prison term he must serve, under his particular sentence, before being eligible for parole ex-

ceeds his life expectancy, he has received a de facto LWOP sentence for nonhomicide offenses. And, because he was a juvenile at the time of his crimes, he argues that, under *Graham*, his sentence is a violation of the Eighth Amendment.

We have found only one Missouri case addressing a similar issue, but it concluded that Graham did not apply to a lengthy, but non-LWOP, term-of-years sentence. *State v. Denzmore*, 436 S.W.3d 635 (Mo. App. E.D. 2014). In *Denzmore*, the defendant raised a claim of plain error, arguing that his forty-four-year sentence violated the Eighth Amendment insofar as it constituted a de facto life sentence for a nonhomicide offense because it exceeded his life expectancy. *Id.* at 643–45. Though the Eastern District discussed *Graham* in rejecting the defendant's claim, because his claim involved only a single sentence, there was no discussion of the defendant's parole eligibility date or the cumulative effect of mandatory minimum prison terms on the defendant's claimed de facto life sentence. Rather, the court simply concluded that *Graham* was inapplicable because "the trial court sentenced Defendant to a term-of-years sentence [and] not life without parole." *Id.* at 645. Though Willbanks's claim involves multiple sentences imposed for multiple convictions, *Denzmore* is nevertheless instructive and suggests that the question raised in this appeal is not an issue of first impression.

Willbanks's claim is not real and substantial because his basic constitutional challenges are already well settled. To begin, there is nothing inherently unconstitutional about mandatory minimum time requirements preceding parole eligibility. *See State v. Pribble*, 285 S.W.3d 310, 314 (Mo. banc 2009)

(finding no merit in claim that mandatory minimum of five years before parole eligibility on the crime of enticement of a child constituted cruel and unusual punishment); *see also Harmelin v. Michigan*, 501 U.S. 957, 995, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) ("There can be no serious contention ... that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'"). Nor is there anything patently unconstitutional in the fact that multiple sentences are run consecutively. *State v. Neal*, 514 S.W.2d 544, 549 (Mo. banc 1974) ("where a defendant is convicted of separate offenses and the sentences imposed are within statutory limits, as in this case, [the] consecutive effect of such sentences does not constitute cruel and unusual punishment"), *abrogated on other grounds by State v. McTush*, 827 S.W.2d 184 (Mo. banc 1992). Finally, there is no constitutional violation simply because multiple consecutive sentences result in a sentence longer than a person's life expectancy. *See, e.g., State v. Wallace*, 745 S.W.2d 233 (Mo. App. E.D. 1987) (holding that consecutive sentences totaling life plus 190 years did not constitute cruel and unusual punishment).

Thus, the only way Willbanks's challenge can be successfully levied is if the holding in *Graham* applies to multiple, consecutive, non-LWOP sentences whose cumulative effect is a parole eligibility date outside of Willbanks's life expectancy. But the question of whether *Graham* applies to Willbanks's sentence does not present a constitutional challenge. *See, e.g., Goins v. Smith*, 2012 WL 3023306, *7 (N.D. Ohio July 24, 2012) ("Without the ability to rely on *Graham*, Goins's Eighth Amendment claim evaporates."), *aff'd*, 556 Fed.Appx. 434 (6th Cir. 2014),

cert. denied, sub nom. Goins v. Lazaroff, ——U.S. —— –, 135 S.Ct. 144, 190 L.Ed.2d 46 (2014). In other words, Willbanks's challenge to the constitutionality of the statutes and regulations at issue is conditional upon a *non-constitutional* determination that Graham applies to sentences like his. Accordingly, because his constitutional challenge is conditional, it is therefore not real and substantial such that it falls within the exclusive jurisdiction of the Missouri Supreme Court. *See State v. Perdomo–Paz*, —— S.W.3d ——, ——— n. 3, 2015 WL 4240751, *8 n. 3 (Mo.App.W.D. July 14, 2015) (holding that the appellant's challenge to the constitutionality of § 565.020 was not real and substantial where the appellant was seeking to expand *Miller*' s holding to cover 18–year–old offenders). Accordingly, we have jurisdiction to decide Willbanks's claim.

B. Willbanks's claim should have been brought in a petition for a writ of habeas corpus.

Though this case comes to us as an appeal from the denial of a petition for a declaratory judgment, we believe it is better suited for a habeas action.

"Under § 527.010 of the Declaratory Judgment Act, circuit courts have the 'power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.'" *Shelter Mut. Ins. Co. v. Vulgamott*, 96 S.W.3d 96, 101 (Mo. App. W.D. 2003) (quoting *People ex rel. Small v. Harrah's N. Kansas City Corp.*, 24 S.W.3d 60, 64 (Mo. App. W.D. 2000)). The Declaratory Judgment Act "specifically provides that declaratory judgments are a proper vehicle for testing the validity of statutes or ordinances." *Northgate Apartments, L.P. v. City of North*

Kansas City, 45 S.W.3d 475, 479 (Mo. App. W.D. 2001) (citing § 527.020).[4]

> Nonetheless, in order to maintain a declaratory judgment action, a petitioner must satisfy four requirements. First, the petitioner must demonstrate a justiciable controversy exists which presents a real, substantial, presently-existing controversy as to which specific relief is sought, as distinguished from an advisory decree offered upon a purely hypothetical situation. Second, the petitioner must demonstrate a legally protected interest consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief. Third, the question presented by the petition must be ripe for judicial determination. A petitioner who satisfies all three of these elements must also demonstrate that he or she does not have an adequate remedy at law.

Charron v. State, 257 S.W.3d 147, 151–52 (Mo. App. W.D. 2008) (quoting *Northgate Apartments*, 45 S.W.3d at 479).

Willbanks's petition sought a declaration that Missouri's mandatory minimum percentages for service of prison terms before parole eligibility, as provided through both statute and regulation, are unconstitutional as applied to those who were juveniles at the time of the underlying offense(s). This matter

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[4] Section 527.020, provides, in pertinent part: "Any person ... whose rights, status or other legal relations are affected by a statute, [or] municipal ordinance ... may have determined any question of construction or validity arising under the ... statute, [or] ordinance ... and obtain a declaration of rights, status or other legal relations thereunder."

was initially (and properly) pursued in a petition for writ of habeas corpus, but at the suggestion of DOC and judgment of the Cole County Circuit Court, Willbanks abandoned his pursuit of a habeas writ in favor of seeking a declaratory judgment. The rationale for that decision appears to have been in accordance with DOC's assertion that Willbanks is neither challenging his specific sentence nor seeking immediate release; thus, the matter is not appropriate for a writ of habeas corpus. This Court's prior holding in *Charron*, however, refutes DOC's contention.

"The Declaratory Judgment Act 'is neither a general panacea for all legal ills nor a substitute for existing remedies. It is not to be invoked where an adequate remedy already exists.'" *Charron*, 257 S.W.3d at 153 (quoting *Cooper v. State*, 818 S.W.2d 653, 654 (Mo. App. W.D. 1991)). "The post-conviction rules provide the exclusive remedy for challenges to the validity of a sentence or conviction on grounds of violation of state statute or the federal or state constitutions." *Id*. "If an inmate fails to file a timely motion for post-conviction relief, he 'may merit habeas relief by demonstrating cause for the failure to timely raise the claim at an earlier juncture and prejudice resulting from the error that forms the basis of the claim.'" *Id*. (quoting *State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801 (Mo. banc 2004)). "Thus, at the very least, a declaratory judgment action is improper to challenge the validity of a sentence or conviction where any of these avenues is available." *Id.*

In *Charron*, the appellant claimed "that he asked the trial court to address 'enforcement of the prison term imposed' and to declare that the sentences are not 'authorized by law,' or not enforceable." *Id.* This

Court held that those challenges were "clearly an attack on the 'validity of his sentence,' which [wa]s inappropriate for a declaratory judgment action." *Id.* In rejecting the appellant's claim that he was not attacking the validity of his sentence, the court relied on the dictionary definition of "valid," which was "as, among other things, 'authorized by law' or 'incapable of being rightfully overthrown or set aside.'" *Id.* at 153 n. 5 (quoting BLACK'S LAW DICTIONARY 1550 (6th ed. 1990)).

Here, Willbanks alleged that his sentences are the functional equivalent of life without parole because ***his*** parole eligibility date exceeds ***his*** life expectancy, and therefore the aggregate term of imprisonment constitutes cruel and unusual punishment, as determined by the United States Supreme Court in *Graham*. In other words, Willbanks alleged that *his particular sentence* is unconstitutional and, therefore, invalid. This is a claim falling within the post-conviction rules.

Though DOC is correct that Willbanks has not asked for either his sentence to be vacated or resentencing, the same was true in *Charron*. There, the appellant argued that he was not levying an attack on his particular sentence because "he d[id] not request that any of the sentences be vacated or set aside," which he argued rendered "his claims appropriate for a declaratory judgment action." *Id.* at 153, 154. This Court rejected that argument, noting that the appellant "cite[d] no authority for this contention, and we found none in our independent research." *Id.* at 154. Furthermore, this Court noted that "there is no indication in the record that Appellant (or any of the other allegedly similarly situated inmates) has been foreclosed from the other avenues

for challenging the validity of his sentences, and Appellant does not make this argument." *Id.*

Accordingly, it appears that Willbanks's claims were improperly brought under the Declaratory Judgment Act. Normally, that would be an alternative basis for this Court to affirm the lower court's dismissal. *State ex rel. Feltz v. Bob Sight Ford, Inc.*, 341 S.W.3d 863, 868 n. 3 (Mo.App.W.D.2011) (appellate courts are concerned with the correctness of the lower court's result rather than its rationale and will affirm under any available theory). But Willbanks's choice to pursue a declaratory judgment, rather than a habeas writ, was based—at least in part—on DOC's suggestion, adopted by the trial court, that his claims were more suitable for a declaratory judgment petition. Thus, it seems unjust to affirm the dismissal below where the error was brought about by Willbanks's efforts to comply with DOC's assertions.

"[I]n limited circumstances, th[e appellate c]ourt will treat improper appeals as applications for original writs, if writ is available to a movant." *State v. Larson*, 79 S.W.3d 891, 893 (Mo. banc 2002); *see also In re N.D.C.*, 229 S.W.3d 602, 604 (Mo. banc 2007) (same). Before we may consider doing so, however, we must determine whether a writ is available to Willbanks. Though Willbanks previously filed writ petitions in both Cole County Circuit Court and the Missouri Supreme Court, he has never filed such a petition with this court. Though "[s]uccessive *habeas corpus* petitions are, as such, not barred[,] ... the opportunities for such relief are extremely limited." *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. banc 2001).

The prior filings do not bar our consideration. Though we recognize that Rule 91.22 provides that "[w]hen a petition for a writ of habeas corpus has been denied by a higher court, a lower court shall not issue the writ," the rule does not apply where "the order in the higher court denying the writ is without prejudice to proceeding in a lower court." The Missouri Supreme Court's denial of Willbanks's habeas petition was specifically "without prejudice."[5] Accordingly, we are not barred by Rule 91.22 from treating this appeal as an original writ petition.

Further, Willbanks was not required to appeal the denial of his writ petition in Cole County Circuit Court. *Ferguson v. Dormire*, 413 S.W.3d 40, 50–51 (Mo. App. W.D. 2013). Rather, "[a] petitioner's remedy where a petition for writ of habeas corpus is denied is to file a new writ petition in a higher court." *Garner v. Roper*, 224 S.W.3d 623, 623 n. 1 (Mo. App. E.D. 2007). Accordingly, Willbanks's prior writ petitions do not bar us from treating this appeal as an original petition for writ of habeas corpus.

The next question is whether, and under what circumstances, we should treat an appeal as an original writ petition.

> Cases should be heard on the merits if possible, construing the court rules liberally to allow an appeal to proceed. While not condoning noncompliance with the rules, a court will generally, as a matter of discretion, review on

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[5] Though the Court's order specifically stated, "without prejudice," we do not rely upon that language, as the denial would have been assumed to have been without prejudice, absent language to the contrary. *McKim v. Cassady*, 457 S.W.3d 831, 839 (Mo. App. W.D. 2015).

> the merits where disposition is not hampered by the rule violations.

Larson, 79 S.W.3d at 894 (quoting *Brown v. Hamid*, 856 S.W.2d 51, 53 (Mo. banc 1993)). We will treat an appeal as an original petition for writ of habeas corpus if doing so is "'[i]n the interest of avoiding delay and further duplication of effort which would be involved in dismissing this appeal and then having a new proceeding started by the filing of a new application for writ of habeas corpus in this court,'" *id.* at 893 n. 8 (quoting *Jones v. State*, 471 S.W.2d 166, 169 (Mo. banc 1971)), and the relevant issues are sufficiently delineated in the briefs to permit us to decide them. *Brown*, 856 S.W.2d at 53.

Here, the parties have provided sufficient record and briefing on issues pertaining to the propriety of considering a habeas corpus writ petition, and a dismissal here would simply create unnecessary delay and duplication of effort. Thus, we will treat this appeal as an original petition for a writ of habeas corpus.

C. Willbanks's claim falls within the sentencing-defect exception, permitting habeas review.

"Relief in habeas corpus is available 'when a person is held in detention in violation of the constitution or laws of the state or federal government.'" *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516 (Mo. banc 2010) (quoting *Jaynes*, 63 S.W.3d at 214). "[I]f a petitioner fails to raise a claim for relief that could have been asserted in an appeal or in a post-conviction motion, the petitioner normally is barred from raising the claim in a subsequent petition for writ of habeas corpus." *Id.* Willbanks concedes that

he did not raise any challenges to the mandatory minimum terms he would have to serve before being parole eligible either on direct appeal or in a post-conviction motion.

"In limited circumstances, however, the failure to timely raise a claim under Rule 24.035 or Rule 29.15 does not bar subsequent habeas relief." Id.

> This occurs when the petitioner can demonstrate: "(1) a claim of actual innocence or (2) a jurisdictional defect[6] or (3)(a) that the procedural defect was caused by something external to the defense—that is, a cause for which the defense is not responsible—and (b) prejudice resulted from the underlying error that worked to the petitioner's actual and substantial disadvantage."

Id. at 516–17 (quoting *Brown v. State*, 66 S.W.3d 721, 731 (Mo. banc 2002)). "Cases in which a person received a sentence greater than that permitted by law traditionally have been analyzed under the second of these exceptions." *Id.* at 517. And "where a court 'imposes a sentence that is in excess of that authorized by law, habeas corpus is a proper remedy.'" *Id.* (quoting *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995)).

Willbanks argues that his sentence violates the Eighth Amendment, as construed by the Supreme Court in *Graham*. DOC claims that this challenge does not fall within the sentencing-defect exception because Willbanks does not allege that the sentence

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[6] The Court, in *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516 (Mo. banc 2010), clarified that this exception is no longer properly considered a "jurisdictional" defect; rather, it is merely a sentencing defect.

was in violation of a *statute*, which it claims is the only basis for applying the sentencing-defect exception. We find this argument to be without merit.

In *State v. Whitfield*, 107 S.W.3d 253, 269 n. 19 (Mo. banc 2003), the Court held that habeas relief would be appropriate under a sentencing-defect theory where the defendant, though sentenced in compliance with Missouri statute, was sentenced in violation of the Eighth Amendment, as interpreted in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which was handed down after the defendant's direct and post-conviction appeals were final. The same is true here. Willbanks's sentences comply with Missouri statutes, but he claims that they are in violation of the Eighth Amendment, as interpreted by *Graham*. This argument falls within the sentencing-defect exception and permits us to review the merits of his claim.

D. *Graham* does not apply to Willbanks's sentence.

Graham held that LWOP sentences violate the Eighth Amendment when imposed upon juvenile, nonhomicide offenders. *Graham*, 560 U.S. at 74, 130 S.Ct. 2011. Thus, for *Graham* to apply to Willbanks's sentences, he must establish: (1) that he was a juvenile at the time he committed the crimes; (2) that he was convicted of solely nonhomicide offenses;[7] and

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[7] The Court in *Graham* noted that its holding "concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense" because "[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." *Graham*, 560 U.S. at 63, 130 S.Ct. 2011.

(3) that he received a sentence of life without the possibility of parole.

There is no quarrel about whether Willbanks was a juvenile at the time of his crimes; he was born on October 29, 1981, and the crimes were committed on January 28, 1999. Thus, at the time, Willbanks was seventeen years old.

Whether Willbanks was convicted of solely non-homicide offenses poses a more interesting question. One of Willbanks's convictions was for first-degree assault. In Missouri, first-degree assault is defined as an "*attempt[ ] to kill* or knowingly cause[ ] or attempt[ ] to cause serious physical injury to another person." § 565.050.1 (emphasis added).

"The *Graham* opinion failed to clarify where attempted murder falls along the homicide/nonhomicide divide." Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 376 (2011). There is language in the opinion supporting both views. *Id.*

> On the one hand, some language points to the consequence (death) as decisive. The astute observation that "'[l]ife is over for the victim of the murderer,'" which the Court contrasts with the victim of "even a very serious non-homicide crime," would seem to categorize "attempted murder," whose victim, of course, survives, as a nonhomicide. Other language, however, focuses on the intentions of the offender and appears to include those who actually kill someone with those who intended to kill, grouping these offenders together as "categorically ... deserving of the most serious forms of punishment." The latter view is per-

> haps more strongly supported in the text, as in the blanket statement, "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or *intend to kill* has a twice diminished moral culpability."

Id. (quoting *Graham*, 560 U.S. at 69, 130 S.Ct. 2011) (emphasis added) (footnotes omitted); *see also* Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One–Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 424–25 (2011) ("the definition of what qualifies as a nonhomicide offense is not yet clear").

Though many courts addressing the question believe that assault with intent to kill (or the similar crime of attempted murder) is a nonhomicide offense under *Graham* because there is no death involved, there are others suggesting otherwise and evaluating claims like Willbanks's under *Miller*, which bars mandatory LWOP sentences for juvenile homicide offenders.[8] *Compare, e.g., Bramlett v. Hobbs*, 463 S.W.3d 283, 286–87 (Ark. 2015) (attempted capital murder is a nonhomicide offense under *Graham*); *Gridine v. State*, —— So.3d ——, —— – ——, 2015 WL 1239504, *2–3 (Fla. Mar. 19, 2015) (attempted first-degree murder is a nonhomicide offense under

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[8] In *State v. Nathan*, 404 S.W.3d 253, 256 (Mo. banc 2013), addressing a claim arising under *Miller v. Alabama*, —— U.S. —— –, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the Missouri Supreme Court referred to first-degree assault as a "non-homicide crime[ ]." The Court, however, was distinguishing the assault charge (and other felonies) from the defendant's additional first-degree murder charge; thus, though suggestive, we do not believe this is a clear statement from the Missouri Supreme Court that first-degree assault (charged as attempt to kill) would be a nonhomicide offense for purposes of *Graham*.

Graham); *with Twyman v. State*, 2011 WL 3078822, *1 (Del. July 25, 2011) ("under *Graham*, Attempted Murder in the First Degree appears to fall within the category of crimes for which a life sentence without parole may be imposed upon a juvenile," i.e., a homicide offense); *see also People v. Gipson*, 393 Ill.Dec. 359, 34 N.E.3d 560, 576 (Ill.App.Ct.2015) ("We find it unclear whether attempted murder is governed by the holding of *Graham* or the holding of *Miller*...."; "In the context of the eighth amendment, we seriously question whether attempted murder constitutes a nonhomicide offense."); *Cervantes v. Biter*, 2014 WL 2586884, *4–5 (C.D. Cal. Feb. 7, 2014) (noting that though "neither *Graham* nor *Miller* addressed the issue, ... there is good reason to believe that the United States Supreme Court, if it were to address the issue, would conclude that attempted murder is a homicide offense" (citing *Graham*)); *People v. Rainer*, 2014 WL 7330977, *1 (Colo. Dec. 22, 2014) (in granting petition for writ of certiorari, framing issue as: "Whether a conviction for attempted murder is a non-homicide offense within the meaning of *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).").

This distinction could be vital to Willbanks's claim, for if first-degree assault constitutes a homicide offense, then, under *Miller*, an LWOP sentence (assuming Willbanks's consecutive term-of-years sentences are equivalent to a single LWOP sentence) was an available option to the court, so long as the court considered Willbanks's youth as a mitigating factor. *Miller*, 132 S.Ct. at 2475. *Graham*, on the other hand, forbids a court from making a determination *at the outset* that a juvenile nonhomicide offender is incorrigible; thus, imposing an LWOP sen-

tence is problematic, even if it was discretionary and the court considered Willbanks's youth a mitigating factor. *Graham*, 560 U.S. at 72–73, 130 S.Ct. 2011.

The question related to the homicide/nonhomicide distinction, however, is somewhat pedantic here—and one we need not answer—because Willbanks's seven consecutive term-of-years sentences are not the same as a single LWOP sentence.

Willbanks received seven distinct sentences for seven different convictions. None of his sentences were life imprisonment without parole, and none of them—standing in isolation—come even close to imprisoning Willbanks for his natural lifetime without the possibility of parole. Willbanks's longest sentence was, in fact, life *with* the possibility of parole. And each of his remaining sentences contains the possibility of parole at some point before the full sentence is served.[9] Thus, even though Willbanks was a juvenile at the time of his offenses, and even though his offenses could all be considered to be nonhomicide offenses, he fails to come within the holding of *Graham* for the same reason as the defendant in *Denzmore*—because "the trial court sentenced Defendant to a term-of-years sentence [and] not life without parole." *Denzmore*, 436 S.W.3d at 645.

E. *Graham* should not be extended to aggregate sentences like Willbanks's.

Having determined that *Graham* does not apply to Willbanks's sentences, we turn now to the question of whether *Graham*'s holding should be extend-

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[9] *Graham*'s mandate requires a "realistic opportunity to obtain release before the end of th[e] term." *Graham*, 560 U.S. at 82, 130 S.Ct. 2011.

ed to include aggregate sentences like Willbanks's, which he characterizes as a de facto LWOP sentence.

The parties agree that the cumulative effect of § 558.018.3 and 14 C.S.R. § 80–2.010 on Willbanks's seven consecutive sentences is that Willbanks will not be parole eligible until he is close to 85 years old. Willbanks argues that, because actuarial statistics suggest that he cannot expect to live past age 79.5, he has effectively received an LWOP sentence, given that he is not parole eligible within his natural lifetime. He then relies on the holding in *Graham* that the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juvenile nonhomicide] offenders never will be fit to reenter society," and, accordingly, "the State must ... give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 130 S.Ct. 2011.

This holding, however, begs the question of whether Willbanks is a "defendant [ ] like Graham," and thus entitled to the same constitutional protections. Though he is certainly like Graham insofar as he was a juvenile at the time he committed his offenses, and he is like Graham insofar as his offenses were arguably nonhomicide offenses, we think he is unlike Graham in the fact that he received multiple sentences for multiple offenses, none of which were LWOP. And this distinction is one that counters against expanding *Graham*'s holding.

1. Willbanks has failed to properly support his independent categorical challenge.

Graham involved "a categorical challenge to a term-of-years sentence"—"an issue the [Supreme]

Court ha[d] not considered previously." *Id.* at 61, 130 S.Ct. 2011. Like Graham, Willbanks raises his claim as a categorical challenge. Under the categorical approach to analyzing the claimed Eighth Amendment violations, *Graham* first examined whether there were "objective indicia of national consensus" against imposing LWOP sentences on juvenile nonhomicide offenders. *Id.* at 62, 130 S.Ct. 2011. The Court concluded that "in proportion to the opportunities for its imposition, 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, 130 S.Ct. 2011.

The Court then applied its independent judgment to consider "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Id.* at 67, 130 S.Ct. 2011. The Court determined that, in accordance with its holding in *Roper*, juveniles, as a class, "have lessened culpability," and are therefore "less deserving of the most severe punishments." *Id.* at 68, 130 S.Ct. 2011. The Court recognized, however, that "status of the offenders" was not the only relevant consideration; "it is [also] relevant to consider ... the nature of the offenses to which this harsh penalty might apply." *Id.* at 68–69, 130 S.Ct. 2011. After noting that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability," the Court evaluated "[t]he penological justifications for the sentencing practice" and concluded that "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Id.* at 69, 71, 74, 130 S.Ct. 2011.

Here, Willbanks argues that de facto LWOP sentences, like true LWOP sentences, should also be

categorically banned for juvenile nonhomicide offenders. But unlike Graham, Willbanks has made no effort to demonstrate that there is any national consensus, whatsoever, against imposing de facto LWOP sentences against juvenile nonhomicide offenders. Though there are certainly some jurisdictions that agree with Willbanks's position,[10] they

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[10] *See, e.g., Henry v. State*, —— So.3d ——, ——, 2015 WL 1239696, *4 (Fla. Mar. 19, 2015) (holding that "*Graham* prohibits the state trial courts from sentencing juvenile nonhomicide offenders to prison terms that ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain future early release during their natural lives based on their demonstrated maturity and rehabilitation"); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) (quoting *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455, 2458, 183 L.Ed.2d 407 (2012)) ("The juvenile who will likely die in prison is entitled to the Eighth Amendment's presumption 'that children are constitutionally different from adults for sentencing purposes,' and that they 'have diminished culpability and greater prospects for reform.'"); *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (holding that the Iowa constitution "requires an individualized sentencing hearing where, as here, a juvenile offender receives a minimum of thirty-five years imprisonment without the possibility of parole for these offenses and is effectively deprived of any chance of an earlier release and the possibility of leading a more normal adult life*"); People v. Caballero*, 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291, 295 (2012) ("sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment"); *but see Bunch v. Smith*, 685 F.3d 546, 553 (6th Cir. 2012) (holding that *Graham* does not apply to "juvenile offenders ... who received consecutive, fixed-term sentences for committing multiple nonhomicide offenses"), *cert. denied, sub nom. Bunch v. Bobby*, —— U.S. ——, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013); *State v. Brown*, 118 So.3d 332, 341 (La. 2013) ("In our view, *Graham* does not prohibit consecutive term of year sentences for multi-

hardly evidence the kind of "objective indicia of national consensus" traditionally used in the categorical approach to claimed violations of the Eighth Amendment. And, as Willbanks himself points out, many of those cases fail to identify any national consensus either. Thus, Willbanks has failed to properly assert a categorical challenge to de facto LWOP sentences for juvenile nonhomicide offenders.[11]

2. Even if viewed as a proper categorical challenge, it is simply unworkable.

Setting aside the formalities of a proper categorical challenge, the larger problem with Willbanks's claim is that his proposed categorical approach is unworkable for a variety of reasons, ranging from the inherent difficulty of defining a de facto LWOP sentence to the implicit conflict it creates with the dictates of *Miller* and the Eighth Amendment's bar on the arbitrary imposition of severe penalties.

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ple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime...."); *State v. Kasic*, 228 Ariz. 228, 265 P.3d 410, 415, 416 (App. 2011) (distinguishing *Graham*: "Here, unlike Graham, who was sentenced to life without parole for one felony conviction, Kasic was convicted of thirty-two felonies involving multiple victims and the jury determined the majority of the offenses were of a dangerous nature"; and holding "that the Eighth Amendment does not prohibit Kasic's sentences for the crimes he committed as a juvenile"); *Middleton v. State*, 313 Ga.App. 193, 721 S.E.2d 111, 112–13 (2011) (quoting *Adams v. State*, 288 Ga. 695, 707 S.E.2d 359 (2011)) ("'nothing in [*Graham*] affects the imposition of a sentence to a term of years without the possibility of parole.'").

[11] This serves as yet another indication that Willbanks's claim is not real and substantial and, therefore, does not fall within the Missouri Supreme Court's exclusive jurisdiction.

At the outset, we find it difficult—at best—to define what constitutes a de facto LWOP sentence. Willbanks suggests that a de facto LWOP sentence exists in any situation where the offender's parole eligibility date lies beyond his life expectancy. But, as one court recognized, "applying the holdings of *Graham* and *Miller* to term-of-[years] sentences could create difficulty in the close cases such as when life expectancy and age at the time of release are nearly equal." *Boneshirt v. U.S.*, 2014 WL 6605613, *9 (D.S.D. Nov. 19, 2014). We find Willbanks's approach too simplistic because it fails to account for a variety of factors. For example, it does not take into consideration the age of the offender at sentencing, or what factors or sources are to be used in determining life expectancy.

The age of a juvenile offender at sentencing is often, though not always, that of a young adult. Section 556.036.1 provides that "A prosecution for murder, rape in the first degree, forcible rape, attempted rape in the first degree, attempted forcible rape, sodomy in the first degree, forcible sodomy, attempted sodomy in the first degree, attempted forcible sodomy, or any class A felony may be commenced at any time." In some instances, a crime or crimes will go unsolved for a period of time and become cold cases, until a subsequent DNA hit is retrieved from CODIS,[12] identifying a potential perpetrator. In sit-

[12] "CODIS is the acronym for the 'Combined DNA Index System' and is the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to ran these databases." FED. BUREAU OF INVESTIGATION, FREQUENTLY ASKED QUESTIONS (FAQS) ON THE CODIS PROGRAM AND THE NATIONAL DNA INDEX SYSTEM M, *https://www.fbi.gov/about-*

uations such as these, the offender may have been a juvenile at the time of the crime's commission, but could very well be middle-aged or older by the time of apprehension, trial, and sentencing. This could create a disparity wherein a particular sentence for a particular crime constitutes a de facto LWOP sentence for one juvenile offender but not for another.

For example, assume that two young men, both age 16, forcibly raped two separate women in unconnected crimes in 2011. The first young man is captured, tried, convicted, and sentenced by the end of 2014 when he is 19 years old. The second young man, however, evades detection for a number of years and ultimately is not tried, convicted, and sentenced until 2045 (when he is 50 years old) after being picked up for an unrelated crime and being matched to the victim of the 2011 rape through a DNA hit. Both men are sentenced to 30 years for their respective offenses. Because forcible rape is a dangerous felony, both are required by § 558.019.3 to serve a minimum of 25.5 years before becoming eligible for parole. This means that the first man was not only eligible for parole but also completed his sentence before the second man was ever discovered. But, if the second man's life expectancy is less than age 75.5, under Willbanks's theory, his 30–year sentence becomes a de facto LWOP sentence which would be categorically barred because he was a juvenile at the time he committed the offense. This discrepancy is difficult to justify.

Furthermore, there are a number of variables that go into calculations of life expectancy, as well as a

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us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Oct. 21, 2015).

variety of sources used for the determination. Willbanks's approach fails to account for these variables or the potential disparate results from using actuarial data as the measuring stick.

"The issue of where to draw the line on when an individual's life will end presents a daunting and, more than likely, improbable task." Therese A. Savona, *The Growing Pains of* Graham v. Florida*: Deciphering Whether Lengthy Term–of–Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life Without the Possibility of Parole*, 25 ST. THOMAS L. REV. 182, 209 (Spring 2013). "It is impossible to determine precisely how long any one person has to live, but the question comes up regularly enough in several areas of law that government agencies have adopted standard actuarial tables for determining the life expectancy of a person." *Boneshirt*, 2014 WL 6605613 at *10.

> For determining the number of years left in a life annuity, the IRS expects an eighteen-year-old male to live nearly fifty-four more years to around age seventy-two. 26 C.F.R. § 1.72–9 at tbl.I. Another IRS table sets the life expectancy for an eighteen-year-old at another sixty-five years, living to be eighty-three. 26 C.F.R. § 1.401(a)(9)–9. The Social Security Administration has its own actuarial tables, which, in 2010 predicted that an eighteen-year-old male would live an average of another 58.9 years, to almost age seventy-seven. *Actuarial Life Table*, SSA, http://www.ssa.gov/oact/STATS/table4c6.html # ss (last visited Oct. 31, 2014). And ... the Sentencing Commission has apparently found federal inmates, at least those incarcerated at

> age thirty-six, to have a life expectancy of seventy-five years.

Id. Thus, according to Willbanks's argument, an offender's sentence may or may not be a de facto life sentence, depending upon which actuarial tables are used.

Countless factors affect life expectancy; for example, the National Longitudinal Mortality Study[13] considers the following factors, among others: geography, gender, age, birth information, race, ethnicity, marital status, household characteristics, education, socioeconomic status, and health. U.S. CENSUS BUREAU, *National Longitudinal Mortality Study Reference Manual* (July 1, 2014), https://www.census.gov/did/www/nlms/publications/reference.html. The NLMS, however, does not consider institutionalization, which has also been shown to be a factor affecting life expectancy. *People v. Sanders*, 2014 WL 7530330, *10–11 (Ill. App. Ct. Sept. 23, 2014). Many of these are "factors that sentencing courts are generally prohibited from taking into consideration."[14] Krisztina Schlessel, *Graham's Ap-*

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[13] "The National Longitudinal Mortality Study (NLMS) consists of a database developed for the purpose of studying the effects of demographic and socio-economic characteristics on differentials in U.S. mortality rates. The NLMS is a unique research database in that it is based on a random sample of the non-institutionalized population of the United States." U.S. CENSUS BUREAU, NATIONAL LONGITUDINAL MORTALITY STUDY, *Description of Project, https://www.census.gov/did/www/nlms/about/projectDescription.html* (last visited Oct. 21, 2015).

[14] Proper sentencing considerations are "*the nature and circumstances of the offense and the history and character of the defendant*." § 557.036.1 (emphasis added). To afford these considerations any meaning, nearly every statutory crime in Missouri

plicability to Term–of–Years Sentences and Mandate to Provide a "Meaningful Opportunity" for Release, 40 FLA. ST. U. L. REV. 1027, 1056 (Summer 2013). "Indubitably, accounting for such factors would be impractical, if not impossible, for it would create a new line of problems and transform the life determination into a trial of its own." *Id*. And, because so many different factors affect life expectancy, it may very well be that the same sentence imposed on offenders of different races or genders could have different effects. In other words, while a 30–year sentence might constitute a de facto LWOP sentence for a black male, it may not be the same for a white female. Again, it is difficult to justify this disparity, especially given the fact that it would be imposed based, in part, upon protected and immutable characteristics.[15]

An additional problem arises from Willbanks's suggested categorical approach: it hamstrings Mis-

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contains a range of punishment, within which the court may sentence the defendant. § 558.011.1. And with the exception of certain sexual offenses, § 558.026.1, the sentencing court also has the discretion to ran multiple sentences concurrently or consecutively, again based upon the factors identified in § 557.036.1. And, since the Court's decisions in *Roper*, *Graham*, and *Miller*, determining that, for sentencing purposes, children are different, it is beyond dispute that one of the mitigating circumstances a court must now consider under § 557.036.1 is the offender's youth.

[15] Even some courts that support Willbanks's argument have refused to rely on actuarial data to do so. *See Bear Cloud*, 334 P.3d at 142 (quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)) ("Like the Iowa Supreme Court, 'we do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates.'").

souri's existing method of discretionary sentencing and creates an implicit conflict with the dictates of *Miller*, as well as the Eighth Amendment. Willbanks's approach fails to consider not only factors affecting the definition of a de facto LWOP sentence but also the relative culpability of the offender, such as the number of crimes at issue, whether the series of crimes occurred in a single event or over a period of time, the number of victims involved, and the offender's role in the crimes.

In *Miller*, the Court rejected the application of a mandatory LWOP sentence for juvenile homicide offenders expressly because it curtailed the discretion sentencers generally have to consider mitigating factors, such as youth, in deciding the sentence to impose. *Miller*, 132 S.Ct. at 2467–68. More specifically, the Court identified a veritable continuum of culpability that a sentencer is precluded from considering when bound by mandatory sentencing schemes:

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.

Id. Accordingly, the Court emphasized the need for discretion. And, as the Court has recognized, "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more se-

verely it ought to be punished." *Tison v. Arizona*, 481 U.S. 137, 156, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

If de facto LWOP sentences (as defined by Willbanks) are categorically barred, a sentencer will lack the discretion to impose a sentence adequately tailored to *both* the nature and circumstances of the offense(s) and the history and character of the offender, as required by § 557.036.1 and *Miller*. Instead, the sentencer must elevate the status of the offender (age at time of offense and sentencing) above the nature and circumstances of the offense(s) committed and above the history and character of the offender, because, regardless of the offender's level of involvement, and regardless of the severity of the crime(s), if the offender was a juvenile at the time of the offense(s), he or she is categorically barred from receiving a term of imprisonment beyond his or her life expectancy. Practically speaking, this means that the more serious offender—the one who commits more crimes with higher felony classifications—is more likely to receive an "invalid" de facto LWOP sentence than the less serious and less culpable offender.

Though Willbanks does not directly state the remedy he is seeking,[16] if the mandatory minimums are unconstitutional, it would seem that the only remedy available would be to make him immediately parole eligible. Again, it would be difficult to justify the fact that a more serious and culpable offender gets the benefit of immediate parole eligibility while a less serious and less culpable offender does not.

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[16] He does, however, state that he is *not* seeking resentencing to concurrent terms.

For example: assume that two young women (both age 17) commit criminal offenses. The first young woman commits a single crime of the class C felony of second-degree arson, and she is sentenced to the maximum of seven years' imprisonment. Under 14 C.S.R. § 80–2.010, she must serve at least 33% (or 2.31 years) of her sentence before becoming parole eligible. The second young woman, however, commits a series of offenses, including kidnapping, first-degree assault, first-degree robbery, and armed criminal action and receives a sentence much like Willbanks's, rendering her ineligible for parole until her life expectancy has elapsed. If the remedy under Willbanks's argument is immediate parole eligibility, the second—and undeniably more culpable—young woman becomes parole eligible immediately upon her commitment to DOC; whereas the first young woman must spend a minimum of 2.31 years incarcerated before even being considered for parole. This results in yet another unjustifiable disparity.

Were we to accept Willbanks's argument, we would be injecting a level of arbitrariness into the sentencing of juvenile offenders, given that the offender's sentence (or associated parole eligibility date) might hinge on factors such as the offender's gender, race, ethnicity, socioeconomic status, or age at sentencing, just to name a few. None of those are relevant to the proper exercise of discretion at sentencing.

> In determining whether a punishment comports with human dignity, ... the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a

> severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments.

Furman v. Georgia, 408 U.S. 238, 274, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring).

The crux of Willbanks's plea for expansion of *Graham* is the Court's mandate that, though "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime[, w]hat [it] must do ... is give defendants like Graham some *meaningful opportunity to obtain release* based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 130 S.Ct. 2011 (emphasis added).

Though we recognize that a parole eligibility date set beyond an offender's life expectancy likely fails to provide a meaningful opportunity for release, *Graham*'s mandate was limited to the context of a single LWOP sentence imposed for a single conviction:

> 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.

Graham, 560 U.S. at 82, 130 S.Ct. 2011 (emphasis added). It did not create a separate categorical bar for all terms of imprisonment extending a juvenile

offender's parole eligibility date beyond his or her life expectancy. *See Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (recognizing that the juvenile offender's 89–year sentence "may end up being the functional equivalent of life without parole," but rejecting the offender's claim that this violated *Graham*'s mandate for a "meaningful opportunity to obtain release" because *Graham*'s mandate applied only "if a state imposes a sentence of 'life.'"), *cert. denied, sub nom. Bunch v. Bobby*, ——U.S. ——, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013). And, for all the inherent difficulties and potential sentencing disparities described above (as well as others not discussed),[17] we believe the Court's limitation was intentional. If this belief is incorrect, we are certain the High Court will let us know. Accordingly, we decline to extend *Graham*'s holding to multiple, consecutively imposed, non-LWOP, term-of-years sentences.

Willbanks's claim is denied.

Conclusion

Willbanks's aggregate term of imprisonment of life plus 355 years, for which he will not be parole eligible until he is approximately 85 years old, does not violate the Supreme Court's holding in *Graham*. Therefore, his appeal is dismissed, and his petition for writ of habeas corpus is denied.

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[17] For example, it is unclear whether a juvenile offender who receives a constitutionally permissible sentence, but is subsequently sentenced for an unrelated crime, is forever precluded from receiving a consecutively imposed sentence that would effectively guarantee that he would not be released within his lifetime.

Lisa White Hardwick and Anthony Rex Gabbert, Judges, concur.

APPENDIX D

Missouri Court of Appeals,
Eastern District.

STATE of Missouri, Respondent,
v.
Ledale NATHAN, Appellant.

ED 101806
FILED: November 17, 2015

Motion for Rehearing and/or Transfer to Supreme Court Denied January 4, 2016
Sustained and Cause Ordered Transferred April 5, 2016

Appeal from the Circuit Court of St. Louis City, Honorable Robert Dierker, Judge

ORDER

PER CURIAM

Ledale Nathan ("Defendant") appeals from his convictions, following a jury trial, of one count of second-degree murder, in violation of Section 565.021, RSMo (2000); two counts of first-degree assault, in violation of Section 565.050; four counts of first-degree robbery, in violation of Section 569.020; one count of first-degree burglary, in violation of Section 569.160; five counts of kidnapping, in violation of Section 565.110; and thirteen counts of armed criminal action, in violation of Section 571.015. We have reviewed the briefs of the parties and the record on appeal and find no error of law. No jurisprudential purpose would be served by a written opinion. However, the parties have been furnished with a memorandum for their information only, setting forth the facts and reasons for this order.

The judgment is affirmed pursuant to Rule 30.25(b).

APPENDIX E

Missouri Court of Appeals,
Eastern District.

STATE of Missouri, Respondent,
v.
Ledale NATHAN, Appellant.

ED 101806
FILED: November 17, 2015

Appeal from the Circuit Court of St. Louis City, Honorable Robert Dierker, Judge
Before Robert G. Dowd, Jr., P.J., Mary K. Hoff, J., and Roy L. Richter, J.

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 30.25(b)

This memorandum is for the information of the parties and sets forth the reasons for our order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO RHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Ledale Nathan ("Defendant") appeals from his convictions, following a jury trial, of one count of second-degree murder, in violation of Section 565.021,

RSMo (2000)[1]; two counts of first-degree assault, in violation of Section 565.050; four counts of first-degree robbery, in violation of Section 569.020; one count of first-degree burglary, in violation of Section 569.160; five counts of kidnapping, in violation of Section 565.110; and thirteen counts of armed criminal action, in violation of Section 571.015. Defendant received six sentences of life in prison, one sentence of thirty years in prison, and six sentences of fifteen years in prison. We affirm.

I. Background

The parties are familiar with the facts; thus we proceed directly to Defendant's allegations of error.

II. Discussion

Defendant raises two points on appeal. First, Defendant alleges the trial court erred in ordering his sentences to run consecutively because the combination of all the sentences together is the functional equivalent of life in prison without the possibility of parole. Defendant argues that due to his juvenile status when he committed the crimes, such a sentence violates his constitutional rights to be free from cruel and unusual punishment.

Second, Defendant alleges the trial court erred in denying his motion to grant a new sentencing hearing on all non-homicide offenses because the State of Missouri ("State") failed to disclose to Defendant's trial counsel a police report documenting Defendant's past suffering from sexual abuse. Defendant claims this nondisclosure was a *Brady* violation, which caused Defendant's waiver of jury sentencing

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[1] All further statutory references are to RSMo (2000) unless noted otherwise.

to be not knowingly, intelligently, and voluntarily made.

I. Consecutive Sentences

A. Standard of Review

When a Defendant alleges his constitutional rights have been violated, our review is *de novo*. *State v. Sisco*, 458 S.W.3d 304, 312-13 (Mo. banc 2015).

B. Analysis

Defendant argues his constitutional rights to be protected from cruel and unusual punishment have been violated by the imposition of multiple consecutive life sentences. As the basis for this claim, he cites to *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). However, both cases are distinguishable from the case at hand.

In *Graham*, the Supreme Court held that the imposition of a sentence of life-without-parole for a juvenile who committed a nonhomicide offense was unconstitutional. 560 U.S. at 74. However, the Court pointed out that "while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life." *Id.* at 75.

The holding in *Graham* specifically applies to juveniles who committed nonhomicide offenses.

> Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of

> homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Id. at 63. Thus, *Graham* is inapplicable here, as Defendant was convicted of second-degree murder, a homicide offense, on top of his other nonhomicide offenses.

In *Miller*, the Supreme Court held that even for juveniles who commit a homicide, a mandatory sentence of life-without-parole is unconstitutional as violating the Eighth Amendment. 132 S. Ct. at 2469. The Court also stated that a trial court must consider the juvenile's youth and circumstances before imposing a life-without-parole sentence for a homicide offense. *Id.*

Here, Defendant was not sentenced to life-without-parole. The jury was given the opportunity to sentence Defendant to life-without-parole, but could not reach a unanimous verdict to do so. The trial court considered Defendant's age and circumstances, and explicitly referred to the Supreme Court cases upon which Defendant attempted to base his argument. The trial court decided, and we agree, that it did not violate *Miller* to impose consecutive life sentences on Defendant.

Defendant contends that because the consecutive life sentences will exceed his life expectancy, it constitutes a *de facto* life-without-parole sentence. However, as emphasized in *Graham*, which again only refers to juveniles who commit *nonhomicide* offenses:

> [W]hile the Eighth Amendment prohibits a State from imposing a life without parole sen-

> tence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

Graham, 560 U.S. at 75.

This is a case where Defendant's crimes can readily be described as "truly horrifying." He and an accomplice approached two people standing outside while brandishing weapons and demanding money and the victims' belongings. Then, Defendant and his accomplice forced them inside, where several other victims were sleeping. Defendant rounded all of them up while his accomplice held the initial two victims at gunpoint.

They proceeded to take jewelry and money while threatening to kill the victims and pointing their guns in the victims' faces. Defendant and his accomplice then started forcing the victims to the basement, where several of the victims said they assumed they would be raped and killed. Then, when one of the victims rushed Defendant's accomplice to defend herself and the rest of the victims, she was shot five times, another victim was shot three times, and yet another victim was shot and killed.

Police ultimately recovered a handgun from Defendant's accomplice's car that had Defendant's DNA

on the grip. After testing it was confirmed that all the bullets removed from the victims and the seven shell casings found in the home came from this gun.

In summary, we find that sentencing Defendant to several consecutive sentences of life in prison did not constitute cruel and unusual punishment, even when considering his juvenile status when the crimes were committed. We find the trial court did not err in imposing consecutive life sentences on Defendant for his homicide and nonhomicide offenses. Defendant's first point is denied.

II. Alleged *Brady* violation

Second, Defendant claims the trial court erred in denying his motion for a new sentencing hearing because the State failed to disclose a police report that documented Defendant's previously suffered sexual abuse, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

A. Standard of Review

Defendant's claim of error has not been properly preserved for review. "To preserve a claim for appellate review, the appellant is required to make an objection at the trial, and raise the same objection in his motion for a new trial." *State v. Cook*, 339 S.W.3d 523, 527 (Mo. App. E.D. 2011). Defendant made no objection at trial about any alleged *Brady* violation regarding a police report documenting a possible history of sexual abuse. Only after the guilt-phase trial, a prior direct appeal, and second penalty-phase trial did Defendant raise his claim about an alleged *Brady* violation. Defendant did file a motion for new trial on these grounds.

While Defendant's claim is not properly preserved for appellate review, plain error review is still avail-

able pursuant to Rule 30.20. To gain reversal on plain error review, Defendant "bears the burden of demonstrating that the action of the trial court was not only erroneous, but that the error so substantially impacted upon his rights that manifest injustice or a miscarriage of justice will result if the error is left uncorrected." *Cook*, 339 S.W.3d at 527, citing *State v. Broom*, 281 S.W.3d 353, 358-59 (Mo. App. E.D. 2009).

B. Analysis

Defendant's claim of plain error is without merit. No *Brady* violation occurred in this proceeding. "*Brady* applies only to those situations where the defense discovers information after the trial that the prosecution knew before trial." *Cook*, 339 S.W.3d at 527, citing *State v. Bynum*, 299 S.W.3d 52, 62 (Mo. App. E.D. 2009). Here, Defendant was well aware of the contents of the report beforehand, as he had possession of the police report and Children's Division records prior to trial. Thus, Defendant could not have been prejudiced by the State's failure to disclose information he himself already had.

We find the trial court's denial of Defendant's motion for a new sentencing hearing was not clearly erroneous, and resulted in no manifest injustice or miscarriage of justice. Defendant's second point is denied.

III. Conclusion

The judgment of the trial court is affirmed pursuant to Rule 30.25(b).

PER CURIAM.