No. _____

In the Supreme Court of the United States

Karen Howell,

Petitioner,

v.

State of Tennessee,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner pleaded guilty to felony murder in 1998 and was sentenced to life in prison without parole. Petitioner was 17 at the time of the offenses; the sentencing court found that she had a "fair to guarded" chance of rehabilitation; and she did not kill or intend to kill the victims. The court nevertheless imposed the maximum-allowable sentence of life without parole. The court did not consider Petitioner's youth in setting her sentence.

Petitioner requested a resentencing in light of this Court's holding in *Montgomery v. Louisiana* that the Eighth Amendment forbids sentencing a juvenile offender to life without parole unless "rehabilitation is impossible." 136 S. Ct. 718, 733 (2016). The courts below rejected Petitioner's request, holding that her sentence was lawful because she was permitted to present mitigation evidence of youth (even though that evidence was not actually considered) and because the sentencing court had the discretion to impose a lesser sentence. This holding deepened an extensive divide among the lower courts regarding the scope of the Eighth Amendment protections articulated in *Montgomery*.

This petition presents the following question:

Whether a juvenile facing a sentence of life without parole must receive an individualized sentencing hearing at which the court considers the offender's youth and potential for rehabilitation, to ensure that she receives that sentence only if she is one of "the rare juvenile offender[s] whose crime reflects irreparable corruption." *Id.* at 734.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karen R. Howell respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Tennessee.

OPINIONS BELOW

The Supreme Court of Tennessee's Order denying Petitioner permission to appeal the 2017 Order of the Criminal Court for Greene County denying Petitioner's motion to reopen her post-conviction proceeding ("2017 Order") is unreported but is reproduced at Pet. App. 1a. The Order of the Court of Criminal Appeals of Tennessee denying Petitioner leave to appeal the 2017 Order is unreported but is reproduced at Pet. App. 2a–7a. The 2017 Order is unreported but is reproduced at Pet. App. 8a–11a.

JURISDICTION

The Supreme Court of Tennessee denied Petitioner permission to appeal the 2017 Order on January 18, 2018. This petition is thus timely pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

INTRODUCTION

This case presents a recurring question of exceptional importance regarding the scope of Eighth Amendment protections afforded to juveniles facing sentences of life in prison without the possibility of parole—a question upon which the lower courts are deeply and persistently divided. This Court's intervention is necessary to resolve the confusion and ensure that life-without-parole sentences are not imposed upon juveniles in violation of the Constitution.

Petitioner is currently serving three consecutive terms of life without parole for crimes committed when she was 17 years old. Petitioner was charged as an adult with first-degree felony murder based on her role as an accomplice in the homicides of three individuals in 1998. Following her guilty plea to those charges, the trial court imposed the maximum-allowable sentence of life without parole. The court did so notwithstanding the undisputed facts that (i) at the time of the offenses, Petitioner was a juvenile with an IQ of 78; (ii) Petitioner had a "fair to guarded" chance of rehabilitation with proper treatment; and (iii) Petitioner did not kill or intend to kill the victims.

Under the Eighth Amendment, as interpreted in this Court's recent decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, any juvenile offender facing a sentence of life without parole must be afforded an individualized sentencing hearing so that the sentencing court can determine whether the offender is one of the rare juveniles whose crimes

reflect "irreparable corruption." If the answer to that question is no—that is, if there is some prospect that the offender may be rehabilitated—then a sentence of life without parole is impermissibly disproportionate under the Eighth Amendment. Thus, the Constitution provides a juvenile facing a sentence of life without parole both (i) the procedural protection of a hearing in which the court must consider her youth and its attendant characteristics and (ii) the substantive guarantee that she will be sentenced to life without parole *only* if she is found to be irretrievably depraved.

And so the majority of courts, including the Third Circuit, the Seventh Circuit, and at least nine state courts of last resort, have held. But a significant minority of courts, including the courts below, the Virginia Supreme Court, and the Sixth and Tenth Circuits, have concluded either (i) that the protections announced in *Miller* and *Montgomery* apply only to juveniles sentenced to life without parole under mandatory sentencing schemes, or (ii) that the Eighth Amendment is satisfied so long as the defendant has the *opportunity* to present mitigating evidence of youth—even if that evidence is not in fact considered by the sentencing court. The reasoning in these decisions cannot be reconciled with the analysis set forth in *Miller* and *Montgomery*. And so long as a significant number of courts continue to misapply those precedents, there remains "a grave risk that many [juveniles] are being held in violation of the Constitution." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

The Court's intervention in this conflict of authority is sorely needed. Defendants like Petitioner, whose crimes indisputably do *not* reflect irreparable corruption, are constitutionally entitled to a "hope for some years of life outside prison walls." *Id.* at 737. At the very least, such defendants must be afforded a resentencing hearing at which they are "given the opportunity to show their crime did not reflect irreparable corruption." *Id.* at 736. If denied that opportunity, the majority of these defendants—those who were not at the time of their crimes "permanently incorrigible"—will be subjected to a punishment that "the law cannot impose upon [them]": a lifetime in prison without any hope of reprieve. *Id.* at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)). Our Constitution does not countenance that result.

The petition for certiorari should be granted, and Petitioner's sentence should be vacated and the case remanded for a constitutionally appropriate sentencing.

STATEMENT OF THE CASE

A. Petitioner's Offense Conduct and Initial Sentencing

1. Petitioner was sentenced to three consecutive terms of life imprisonment without the possibility of parole for her role in the murders of three individuals in 1997. *See State v. Howell*, 34 S.W.3d 484, 486–87 (Tenn. Crim. App. 2000) ("*Howell I*"). Howell, who was 17 years old at the time, was traveling from Pikeville, Kentucky, to New Orleans,

Louisiana with five companions—Natasha Cornett, Crystal Sturgall, Joseph Risner, Dean Mullins, and Jason Bryant. *Howell v. State*, 185 S.W.3d 319, 325 (Tenn. 2006) ("*Howell II*"). The group encountered a family of four, the Lillelids, at a rest stop in eastern Tennessee. *Id.* Risner threatened the Lillelids with a gun and forced them to a secluded spot in the woods, where each of the four family members was shot multiple times. *Id.* Three were killed; one survived with serious injuries. *Howell I*, 34 S.W.3d at 489–90.

There is no evidence that Petitioner killed or intended to kill any of the victims. *Howell v. Hodge*, 710 F.3d 381, 394 (6th Cir. 2013) ("*Howell IV*") (Stranch, J., concurring). Five of the defendants stated that Bryant was the shooter, while Bryant maintained that Risner and Mullins were the shooters. *Howell II*, 185 S.W.3d at 325. The six individuals were apprehended several days later while trying to cross the border from the United States into Mexico. *Id.*

2. Owing to Petitioner's age at the time of the offenses, her case was originally assigned to juvenile court, but she was eventually transferred to the Greene County Criminal Court to be tried as an adult. *Id.* at 326.[1]

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[1] The Tennessee Supreme Court would later find that Petitioner received ineffective assistance of counsel in connection with the transfer of her case to criminal court based on her counsel's failure to present evidence that Petitioner was committable to a mental institution (which would have made her ineligible for transfer to criminal court under Tennessee

Following that transfer, the State offered Petitioner and her co-defendants "a 'package plea offer' whereby the State would not seek the death penalty against the four adult co-defendants if [Petitioner] and all of her co-defendants agreed to enter guilty pleas to the offenses." *Id.* at 325. (Petitioner was not herself subject to the death penalty under Tennessee law because she was a juvenile at the time of the offense. Pet. App. 3a n.1.) Petitioner had only two days to decide whether to accept the State's offer. *Howell v. Hodge*, 2010 WL 1252201, at *8 n.3 (E.D. Tenn. Mar. 24, 2010) ("*Howell III*"). She accepted the plea offer during a group plea hearing and pleaded guilty to kidnapping, theft, three counts of felony murder (classified as first-degree murder under Tennessee law), and one count of attempted first-degree murder. *Howell II*, 185 S.W.3d at 325.[2]

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law). *See Howell II*, 185 S.W.3d at 328. But the court ultimately denied relief because it found that Petitioner had "failed to establish prejudice by clear and convincing evidence." *Id.* at 330. Petitioner challenged that finding in a habeas corpus proceeding in federal court, but the Sixth Circuit concluded that the Tennessee Supreme Court had not unreasonably applied federal law in finding a lack of prejudice. *See Howell IV*, 710 F.3d at 387.

[2] Petitioner argued in a petition for post-conviction relief that the coercive nature of the State's package plea offer rendered it constitutionally invalid, but the Tennessee Supreme Court rejected that argument. *See Howell II*, 185 S.W.3d at 333–37. She later raised a similar argument in a habeas petition in federal court, but the district court concluded that the Tennessee Supreme Court did not violate clearly

Tennessee law in effect at the time of Petitioner's guilty plea gave the sentencing court discretion to impose a maximum sentence of life in prison without the possibility of parole for the first-degree murder convictions. *See Howell I*, 34 S.W.3d at 497. The sentencing court found that several mitigating circumstances were applicable to Petitioner: (i) she had no prior record of criminal activity; (ii) she had been a "relatively minor" participant in the crimes; (iii) she was "abused and neglected as a child"; (iv) she had a "borderline retarded IQ of 78"; (v) she "subordinate[d] [her]self to the needs of others in a group"; and (vi) she had "shown remorse." Pet. App. 31a–32a. However, the record contains no indication that the sentencing court considered Petitioner's youth in determining her sentence. Indeed, the sentencing transcript suggests the opposite; in sentencing 14-year-old Jason Bryant, the court explicitly noted Bryant's age as a mitigating factor, *id.* 28a, and the court elsewhere stated that "*[e]verybody was about the same age, except for Jason Bryant*," *id.* 24a (emphasis added).

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established federal law or unreasonably apply that law to the facts in concluding that Petitioner's guilty plea was knowing and voluntary. *Howell III*, 2010 WL 1252201, at *6. The court acknowledged that "it might have been advisable to select a different plea acceptance method," but held that Petitioner had failed to meet the stringent requirements for relief applicable to federal habeas petitions. *See id.*; *see also id.* at *8 (noting Petitioner's characterization of the offer as "the equivalent to having a revolver pointed at the heads of her co-defendants to induce her to accept the package plea").

The sentencing court ultimately imposed a sentence of life without parole on Petitioner because, in the court's view, the mitigating circumstances it had identified were outweighed by the nature of the crimes committed, by Petitioner's history of drug use and involvement with "thi[ng]s of the occult nature," and by the evidence that Petitioner had "participated in everything" leading up to the crimes and "did nothing to stop" the murders even though "a weapon was available." *Id.* 32a; *see also Howell I*, 34 S.W.3d at 497, 506. The Court stated that Petitioner was "not likely to be rehabilitated," but it acknowledged and credited the opinion of a clinical psychologist that Howell's "prognosis" for rehabilitation was "fair to guarded," assuming she received treatment. Pet. App. 32a.

B. Petitioner's Post-Conviction Filings Based on *Miller* and *Montgomery*

1. In 2012, this Court held in *Miller v. Alabama* that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. 460, 465 (2012). Following that decision, Petitioner sought post-conviction relief in the Greene County Criminal Court in Tennessee. The trial court rejected Petitioner's arguments for relief in a 2013 order, concluding that the protections announced in *Miller* were inapplicable to juveniles, like Petitioner, who had been sentenced to life without parole under a discretionary sentencing scheme:

> Since the mandatory [*sic*] life sentences without the possibility of parole imposed upon Ms. Howell were not mandatory sentences being imposed upon an offender who committed a crime while a juvenile, and because she received individualized consideration in the sentencing court, her sentences do not run afoul of the Eighth Amendment and the new rule announced by *Miller v. Alabama* does not apply to her case.

Pet. App. 13a. Petitioner appealed the 2013 order, but that appeal was ultimately dismissed as untimely. *Id.* 17a–20a.

2. In 2016, this Court decided *Montgomery v. Louisiana*, which held that *Miller* announced a "substantive rule of constitutional law" that is retroactive to cases on collateral review. 136 S. Ct. at 736. In the course of its analysis, the Court reiterated that "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id.* at 733 (quoting *Miller*, 567 U.S. at 480). *Montgomery* also clarified that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* (quoting *Miller*, 567 U.S. at 479); *see also id.* at 734 ("*Miller* did bar life without parole . . . for all but the rarest of

juvenile offenders, those whose crimes reflect permanent incorrigibility.").

a. Petitioner then moved to re-open her petition for post-conviction relief in light of *Montgomery*, arguing that her sentence violated the substantive Eighth Amendment guarantees articulated in that case.[3] The trial court denied Petitioner's request for reasons similar to those provided in the 2013 order: "*Tennessee's sentencing scheme applicable to [Petitioner's] case did not mandate life without the possibility of parole* and further required the [sentencing court] to conduct a sentencing hearing to determine whether any enhancement factors existed to justify an individual be sentenced [*sic*] to life without the possibility of parole." Pet. App. 8a–9a (emphasis added). The court concluded that the original sentencing court had adequately considered Howell's youth and other mitigating circumstances and determined that "this case clearly fits within the range of cases that the *Miller* and *Montgomery* [C]ourt[s] had in mind where it is appropriate to sentence a juvenile defendant to life without parole." *Id.* 10a.

b. Petitioner applied for permission to appeal the 2017 order to the Court of Criminal Appeals of Tennessee, but the court denied her request in a

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[3] Petitioner's failure to timely appeal the 2013 order did not, as a matter of state procedural law, operate as a bar to her 2016 challenge to the constitutionality of her sentence, in light of this Court's intervening decision in *Montgomery*. *See* Pet. App. 4a (citing Tenn. Code Ann. § 40-30-117(a)(1)). The State has never argued otherwise.

brief order. Pet. App. 2a–7a. The order's reasoning largely tracked the reasoning of the trial court. The appellate court concluded that Petitioner was not entitled to relief because she had been sentenced to life without parole under a discretionary sentencing scheme that afforded her the opportunity to present evidence of "mitigating factors, including those specific to the [her] youth, history of abuse, and mental health." *Id.* 6a. The appellate court also "note[d] the trial court's consideration of the petitioner's potential for rehabilitation and the extreme seriousness of the offense." *Id.*[4]

c. Petitioner then applied to the Tennessee Supreme Court for permission to appeal, arguing, *inter alia*, that, under *Montgomery*, (i) the Greene County Criminal Court did not adequately consider her youth and its attendant characteristics before sentencing her to life without parole, and (ii) she was categorically ineligible for a sentence of life without parole in light of the original sentencing court's finding that she had a "fair to guarded" chance at rehabilitation. The Tennessee Supreme Court denied Petitioner's request in a summary order dated January 18, 2018. Pet. App. 1a.[5]

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[4] It is not entirely clear to what the appellate court was referring when it remarked upon "the trial court's consideration of the petitioner's potential for rehabilitation." As noted above, the trial court found that Petitioner's "prognosis" for rehabilitation was "fair to guarded" but nonetheless imposed the maximum-allowable sentence.

[5] The Tennessee Supreme Court provided no reasons for its denial of Petitioner's application for permission for leave to

This petition for certiorari timely followed.[6]

REASONS FOR GRANTING THE PETITION

State courts of last resort and federal courts of appeals are sharply divided regarding the scope of Eighth Amendment protections required for juveniles facing discretionary sentences of life without parole. This Court in *Montgomery* established that such juveniles have a procedural right to present evidence of youth and potential for rehabilitation at their sentencing hearing and to *have that evidence considered* by the sentencing court. *Montgomery* also established that juveniles have the substantive right to be free from the sentence of life without parole so long as they are not one of the "rare" juveniles "who exhibits such irretrievable depravity that rehabilitation is

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appeal, but under state procedural law, it was required to review the 2017 Order on the merits. *See* Tenn. Sup. Ct. R. 28 § 10(B). Thus, this Court presumes that that court rejected Petitioner's claims on the merits, as did the Tennessee Court of Criminal Appeals. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011); *Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991).

[6] Earlier this year, Petitioner filed a pro se "Motion Under 28 U.S.C. § 2244 For Leave To File A Second Or Successive Petition Under 28 U.S.C. § 2254 By A Person In State Custody" in the Sixth Circuit. *In re Karen Howell*, No. 18-5152 (6th Cir.) (docketed Feb. 14, 2018). She did so to protect her rights under 28 U.S.C. § 2254, because the filing of this petition for certiorari does not toll the applicable statute of limitations. *Holland v. Florida*, 560 U.S. 631, 640 (2010). As of this filing, that motion remains pending.

impossible and life without parole is justified." 136 S. Ct. at 733.

The majority of courts—including the Third Circuit, the Seventh Circuit, and state courts of last resort in Arizona, Florida, Georgia, Idaho, Minnesota, Montana, Pennsylvania, Puerto Rico, and Wyoming—have correctly recognized and applied these teachings. But a significant minority—including the Sixth and Tenth Circuits and state courts of last resort in Virginia and Tennessee—have given them short shrift. This Court's intervention in this conflict of authority is necessary to ensure that all courts provide—and that all juveniles receive—the full scope of Eighth Amendment guarantees articulated in *Montgomery*. This issue is recurring (as the extensive split of authority attests), and it is important: it involves the violation of the fundamental constitutional rights of some of society's most vulnerable members.

The instant case brings the decisional conflict into sharp relief and presents an excellent vehicle for the Court to decide the question presented. The courts below denied Petitioner's request for resentencing even though the sentencing court did not consider Petitioner's youth in setting her sentence, and even though the sentencing court in fact found that Petitioner *was* capable of rehabilitation—or at least had a "fair to guarded" potential for it. In view of the latter finding, the sentence of life without parole should have been categorically unavailable under the Eighth Amendment. At the very least, Petitioner is entitled to a resentencing hearing so that she may present,

and *have considered*, evidence that she is not one of the small class of juvenile offenders whose crimes reflect permanent incorrigibility—and so that her "hope for some years of life outside prison walls [may] be restored." *Id.* at 737.

I. REVIEW IS WARRANTED TO RESOLVE AN IMPORTANT AND RECURRING QUESTION CONCERNING THE SCOPE OF EIGHTH AMENDMENT PROTECTIONS AFFORDED TO JUVENILES SUBJECT TO SENTENCES OF LIFE WITHOUT PAROLE.

This petition squarely presents an important question of constitutional magnitude that has divided the lower courts. In *Miller*, this Court held that the Eighth Amendment prohibits the mandatory imposition of life without parole on juveniles. *Montgomery*, in turn, held that *Miller* announced a substantive rule of constitutional law that prohibits all but a small class of "permanently incorrigible" juveniles from being sentenced to life without parole. *Montgomery* also clarified that sentencing courts must take into account the youth and rehabilitative potential of juveniles facing such sentences in order to ensure that the substantive guarantee of *Miller* is realized.

The majority of courts have correctly recognized these principles and applied them to *all* juveniles subject to sentences of life without parole—even those sentenced under statutory regimes that give the sentencing judge discretion to impose a lesser sentence. *See, e.g.*, *United States v. Grant*, --- F.3d

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A significant minority of courts, however, including the courts below, have concluded otherwise. The courts in the minority have concluded either that (i) *Miller* and *Montgomery* are categorically inapplicable in cases involving discretionary sentencing schemes, or (ii) *Miller* and *Montgomery* are satisfied so long as the defendant has the *opportunity* to present mitigating evidence regarding her youth and potential for rehabilitation (regardless of whether the sentencing court in fact considers that evidence). *See, e.g.*, *In re Harrell*, 2016 WL 4708184 (6th Cir. Sept. 8, 2016); *Cardoso v. McCollum*, 660 F. App'x 678 (10th Cir. 2016); *Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017); *Brown v. State*, 2016 WL 1562981 (Tenn. Crim. App. Apr. 15, 2016).

This Court's immediate guidance is necessary to resolve this deep and persistent decisional conflict regarding the scope of Eighth Amendment protections articulated in *Miller* and *Montgomery*. The importance of ensuring that individuals currently in prison without any prospect of release

for crimes that they committed as juveniles are not being held in violation of their Eighth Amendment rights can hardly be overstated. This case thus presents "compelling reasons" for this Court's review. Sup. Ct. R. 10.

A. *Miller* and *Montgomery* Establish That No Juvenile May Be Sentenced to Life Without Parole Unless the Sentencing Court Considers Her Youth and Potential for Rehabilitation and Determines That She Is One of the Rare Juvenile Offenders Who Is Permanently Incorrigible.

This Court has repeatedly emphasized that "children are constitutionally different from adults for purposes of sentencing" in light of their lack of maturity, their vulnerability to negative influences, and, most important, their potential for rehabilitation and reform. *Montgomery*, 136 S. Ct. at 733; *Miller*, 567 U.S. at 471–72; *see also Graham v. Florida*, 560 U.S. 48 (2010) (holding that the Eighth Amendment prohibits life-without-parole sentences for juvenile offenders convicted of non-homicide crimes); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits the death penalty for juvenile offenders). These "distinctive attributes of youth" "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. Accordingly, *Miller* held that "the Eighth Amendment forbids a sentencing scheme that

mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 479. That is because "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"—and thus presents too great a risk that juveniles whose crimes reflect merely "'transient immaturity,'" as opposed to "'irreparable corruption,'" will be subjected to a constitutionally disproportionate punishment. *Id.* at 477, 479–80 (quoting *Roper*, 543 U.S. at 573).

Montgomery, in turn, held that *Miller* applies retroactively to cases on collateral review because it announced a "substantive rule of constitutional law": "life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 734–35; *see also id.* at 734 ("Like other substantive rules, *Miller* is retroactive because it necessarily carries a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.") (alterations, citations, and internal quotation marks omitted). As *Montgomery* explained, the Eighth Amendment requires that, before a court sentences a juvenile to life in prison without the possibility of parole, it must "take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id.* at 733 (quoting *Miller*, 567 U.S. at 480); *see also id.* at 734 (court must "consider a juvenile's youth and attendant characteristics before determining that life without

parole is a proportionate sentence"). And "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* at 734 (quoting *Miller*, 567 U.S. at 479).

Taken together, *Miller* and *Montgomery* establish that the Eighth Amendment affords both procedural and substantive protections to *all* juveniles convicted of homicide crimes. Procedurally, these precedents require that juveniles receive an individualized sentencing hearing at which their youth and potential for rehabilitation are taken into account. *See Montgomery*, 136 S. Ct. at 733. In other words, "*Miller* and *Montgomery require a sentencer to ask[]* whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand) (emphasis added) (quoting *Montgomery*, 136 S. Ct. at 734).[7] And substantively, these precedents make the

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[7] To be sure, *Miller* and *Montgomery* do not "impose a formal factfinding requirement" on sentencing courts, but that "does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Montgomery*, 136 S. Ct. at 735. Thus, a trial court that sentences a juvenile to life without parole must provide some indication that it did so only after consideration of her youth and attendant characteristics—otherwise, a reviewing court has no way of determining whether the punishment comported with the substantive guarantees of the Eighth Amendment. *See id.*

sentence of life without parole categorically unavailable for all juveniles *except* those who are irretrievably depraved. *Montgomery*, 136 S. Ct. at 734. Or, as this Court has put it: "In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability," juveniles facing sentences of life without parole "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Montgomery*, 136 S. Ct. at 736–37.

B. The Lower Courts Are Divided Regarding the Proper Interpretation of the Eighth Amendment Protections Announced in *Miller* and *Montgomery*.

Since *Miller* was decided in 2012, a division of authority has developed in the lower courts concerning the scope of Eighth Amendment rights afforded to juveniles facing sentences of life without parole. That split has only become more pronounced since *Montgomery* was decided in 2016. Most decisions—particularly those issued post-*Montgomery*—have correctly concluded that *any* juvenile offender facing life without parole must receive an individualized sentencing hearing so that the court may determine whether the offender is one of the rare juveniles whose irretrievable depravity makes such a sentence constitutionally permissible. A significant minority of courts, however, have concluded that *Montgomery* is satisfied so long as the juvenile has the mere *opportunity* to present

mitigating evidence and the sentencing court has some discretion with regard to the sentence imposed—even if the court does not in fact consider the offender's youth or potential for rehabilitation in arriving at the sentence.

1. The majority of courts have held that *Miller* and *Montgomery* require all juveniles facing a sentence of life without parole to receive an individualized sentencing hearing to determine whether their crimes reflect "irreparable corruption" or merely "unfortunate but transient immaturity."

In light of *Montgomery*'s categorical teachings that (i) sentencing courts *must* consider a juvenile's youth and potential for rehabilitation prior to sentencing her to life without parole, 136 S. Ct. at 733; and (ii) life without parole is unavailable for juveniles who can be rehabilitated, *id.* at 734, most courts—including at least nine state courts of last resort and two federal Courts of Appeals—have correctly concluded that the Eighth Amendment principles articulated in those cases apply to all juveniles sentenced to life without parole, even if the sentencing court had the discretion to impose a lesser sentence.

For example, in *Landrum v. State*, the Florida Supreme Court recognized that the Eighth Amendment categorically prohibits the imposition of life without parole on a juvenile if the trial court

"fail[s] to consider a juvenile's lessened culpability and greater capacity for change." 192 So. 3d 459, 467 (Fla. 2016) (citation and quotation marks omitted). "Therefore, the exercise of a sentencing court's discretion when sentencing juvenile offenders must be informed by consideration of the juvenile offender's 'youth and its attendant circumstances' as articulated in *Miller* . . . . Without this individualized sentencing consideration, a sentencer is unable to distinguish between juvenile offenders whose crimes 'reflect transient immaturity' and those whose crimes reflect 'irreparable corruption.'" *Id.* (quoting *Miller*, 567 U.S. at 465). The *Landrum* court remanded the case for resentencing because it found that "there [was] no indication that the [sentencing] court, when exercising its discretion to sentence Landrum to life imprisonment . . . , considered the 'distinctive attributes of youth' as articulated in *Miller*." *Id.*

The Pennsylvania Supreme Court has reached a similar result. That court concluded that, taken together, *Miller* and *Montgomery* "unambiguously permit the imposition of a life-without-parole sentence upon a juvenile offender *only* if the crime committed is indicative of the offender's permanent incorrigibility" and, accordingly, that "for a sentence of life without parole to be proportional as applied to a juvenile murderer, the sentencing court must first find, based on competent evidence, that the offender is entirely unable to change." *Commonwealth v. Batts*, 163 A.3d 410, 435 (Pa. 2017). *Batts* thus recognizes both the substantive *and* procedural components of *Miller* and *Montgomery*: (i) juveniles

may not be sentenced to life without parole unless they are irreparably corrupt; and (ii) in order to effectuate that substantive guarantee, sentencing courts must undertake an individualized analysis with respect to all juveniles facing such sentences to determine if they fall within that limited class. Applying these constitutional mandates to the facts of Batts's case, the Pennsylvania Supreme Court concluded that Batts's discretionary sentence of life without parole was constitutionally infirm because the sentencing court repeatedly found "that there remained a possibility that Batts could be rehabilitated." *Id.* at 436.

The Third Circuit and the Supreme Courts of Wyoming, Idaho, Arizona, Minnesota, Puerto Rico, Montana, and Georgia, as well as intermediate appellate courts in Oklahoma, Illinois, and Washington, have all reached similar conclusions. These courts have ordered resentencing in cases in which the record did not reflect that the sentencing court had complied with the substantive and procedural guarantees set forth in *Miller* and *Montgomery*. *See, e.g.*, *United States v. Grant*, 2018 WL 1702359, at *13 (3d Cir. Apr. 9, 2018) (recognizing that "juvenile offenders whose crimes reflect the transient immaturity of youth are now a constitutionally recognized class of defendants that are afforded a right to a meaningful opportunity for release," and holding that sentencing courts must "account for this feature once they have determined that a juvenile offender is capable of reform"); *Sam v. State*, 401 P.3d 834, 859 (Wyo. 2017) (finding that defendant's *de facto* sentence of life without parole

was unconstitutional in light of the trial court's finding that defendant was not one of the "rare juveniles" who was permanently incorrigible); *Windom v. State*, 398 P.3d 150, 156 (Idaho 2017) (noting that "*Montgomery* declared that *Miller* was retroactive not only for those juveniles sentenced to a mandatory [sentence] of life without parole, but also for those for whom the sentencing court imposed a fixed-life sentence without considering the distinctive attributes of youth," and ordering a new sentencing hearing because the trial court had not adequately considered the defendant's youth and attendant characteristics); *State v. Valencia*, 386 P.3d 392, 395–96 (Ariz. 2016) (remanding for evidentiary hearing to determine whether defendants' discretionary life-without-parole sentences violated the Eighth Amendment because defendants had made a "colorable" showing that their crimes did not reflect "irreparable corruption"); *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (remanding for resentencing because, while "the trial court appear[ed] generally to have considered [the defendant's] age and perhaps some of its associated characteristics," the court "did not . . . make any sort of distinct determination on the record that [the defendant was] irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment"); *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016) (concluding that the protections announced in *Montgomery* and *Miller* apply to both mandatory and discretionary sentences

of life without parole and remanding for resentencing because original sentencing proceeding was insufficient to determine "whether the crime reflect[ed] [defendant]'s transient immaturity, or an irreparable corruption and permanent incorrigibility warranting the extreme sanction of life imprisonment without parole"); *People v. Nieto*, 52 N.E.3d 442, 454 (Ill. Ct. App. 2016) ("Trial courts must consider a juvenile's special characteristics even when exercising discretion.").[8]

Indeed, even before *Montgomery* clarified that the Eighth Amendment categorically prohibits life-without-parole sentences for juveniles who are not "irretrievably depraved" and "permanently incorrigible," several courts had recognized that the

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[8] *See also Flowers v. State*, 907 N.W.2d 901, 905–06 (Minn. 2018) ("[T]he rule announced in *Miller* categorically prohibits [life-without-parole] sentences for juvenile offenders who are not irreparably corrupt."); *Pueblo v. Alvarez Chevalier*, 2018 WL 1076643, at *9 (P.R. Feb. 12, 2018) ("[*Montgomery*] established that states lack the authority to punish a minor with the penalty of perpetual imprisonment if [her] conduct was the product of transient immaturity that characterizes the person during the minority age."); *Steilman v. Michael*, 407 P.3d 313, 318–19 (Mont. 2017) ("We conclude that *Miller*'s substantive rule requires Montana's sentencing judges to adequately consider the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole, irrespective of whether the life sentence was discretionary."); *State v. Scott*, 385 P.3d 783 (Wash. Ct. App. 2016) ("*Montgomery* clearly indicates that life without parole is unconstitutional for most juveniles, whether imposed under a mandatory or a discretionary sentencing scheme.").

protections articulated in *Miller* are not limited to juveniles sentenced under mandatory sentencing schemes. In *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), for example, Judge Posner explained that "[t]he relevance to sentencing of 'children are different' . . . cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors." *Id.* at 911; *see also State v. Riley*, 110 A.3d 1205, 1216 (Conn. 2015) (similar); *Aiken v. Byars*, 765 S.E.2d 572, 576–77 (S.C. 2014) (similar). The reasoning of these courts echoes the reasoning in *Montgomery* itself: it is a necessary consequence of *Miller* that States are not "free to sentence a child whose crime reflects transient immaturity to life without parole." *Montgomery*, 136 S. Ct. at 735. Thus, a juvenile facing such a sentence must be able to present—and the sentencing court must consider—evidence that the juvenile's "crime did not reflect irreparable corruption"—"and, if it did not, [her] hope for some years outside prison walls must be restored." *Id.* at 735–36.

2. A substantial minority of courts have held that the Eighth Amendment protections recognized in *Miller* and *Montgomery* are inapplicable to juveniles sentenced to life without parole under discretionary sentencing schemes.

The courts below joined a significant minority of courts—including two federal Courts of Appeals and

state courts in Virginia, Tennessee, and Mississippi—that have fundamentally misconstrued the lessons of this Court's recent Eighth Amendment jurisprudence. These courts have held that *Miller* and *Montgomery* do not entitle a juvenile defendant sentenced to life without parole under a discretionary—as opposed to mandatory—sentencing scheme to relief, at least so long as the defendant had the *opportunity* to present mitigating evidence of youth at the sentencing hearing (and regardless of whether the evidence was in fact considered by the court in fashioning its sentence). These holdings honor neither the procedural nor the substantive guarantees of *Miller* and *Montgomery*, because they do not require that the sentencing court actually consider the defendant's youth and potential for rehabilitation in setting a sentence, and they do not ensure that juveniles whose crimes reflect only transient immaturity are not in fact sentenced to life without parole.

The Virginia Supreme Court's decision in *Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017), is representative of the minority approach. *Jones* held that *Miller* and *Montgomery* mean only that "State law cannot impose 'mandatory' penalties that make 'youth (and all that accompanies it) irrelevant' to the decision to imprison a juvenile for life without parole." *Jones*, 795 S.E.2d at 709. Thus, in Virginia, so long as a juvenile defendant has an "opportunity to present mitigation evidence at his sentencing hearing," *Miller* and *Montgomery* are satisfied—even if the sentencing court does not in fact consider the mitigation evidence. *Id.* at 713.

Jones divided even the Virginia Supreme Court, further illustrating the intractable conflict of authority on this issue. Three dissenting Justices would have held that, in view of the Court's reasoning in *Montgomery*, "the Eighth Amendment requires individualized consideration before a juvenile can be sentenced to life in prison without the possibility of parole," regardless of whether the sentence was mandatory or discretionary. *Id.* at 723–24 (Powell, J., dissenting). "In the absence of such a hearing," the dissent maintained, "the sentence is in violation of the juvenile's substantive constitutional rights and a court is without jurisdiction to impose a life sentence without parole on a juvenile offender." *Id.* at 723.

Tennessee has adopted a similar approach to that articulated by the *Jones* majority. In *Brown v. State*, the Tennessee Court of Criminal Appeals held that a juvenile sentence of life without parole complies with *Miller* and *Montgomery* so long as the sentence is "not mandatory" and is imposed "only after a sentencing hearing at which [the defendant is] permitted to present mitigation evidence"—even if there is no indication that the court took that evidence into account in deciding to impose that sentence. 2016 WL 1562981, at *7 (Tenn. Crim. App. Apr. 15, 2016), *application for permission to appeal denied* (Tenn. Aug. 19, 2016). Another post-*Montgomery* decision of the Tennessee Court of Criminal Appeals reached a similar result, categorically stating that the protections announced in *Miller* and *Montgomery* do not apply to discretionary sentences of life without parole

imposed upon juveniles. *See Lowe-Kelley v. State*, 2016 WL 742180, at *9 (Tenn. Crim. App. Feb. 24, 2016), *application for permission to appeal denied* (Tenn. June 23, 2016); *see also Miree v. State*, 2014 WL 891041, at *2 (Tenn. Crim. App. Mar. 6, 2014) (reaching the same conclusion prior to *Montgomery*). The courts below followed these precedents in concluding that Petitioner's sentences did not violate *Miller* and *Montgomery*. *See* Pet. App. 2a–7a (rejecting Petitioner's request for resentencing based on *Brown*).[9]

The Sixth Circuit has engaged in a similar analysis to that of the Virginia and Tennessee courts, categorically stating that "*Miller* and *Montgomery* apply, by their own terms, only to mandatory sentences of life without parole." *In re Harrell*, 2016 WL 4708184, at *2 (6th Cir. Sept. 8, 2016). The Tenth Circuit has suggested agreement with this approach, expressing "skeptic[ism] of any suggestion" that the protections of *Montgomery* and *Miller* extend to juveniles sentenced to life without parole under discretionary sentencing schemes. *Cardoso v. McCollum*, 660 F. App'x 678, 679–81 &

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[9] The appellate court below purported to "note the trial court's consideration of the petitioner's potential for rehabilitation and the extreme seriousness of the offenses." Pet. App. 6a. However, as explained above, *see supra* Statement of the Case § A.2, the record provides no indication that the sentencing court considered Petitioner's *youth* in fashioning her sentence, and the court in fact sentenced Petitioner to life without parole *despite* its finding that she had a "fair to guarded" chance of rehabilitation.

n.2 (10th Cir. 2016); *see also Mason v. State*, 2017 WL 2335516, at *3 (Miss. Ct. App. May 30, 2017) (suggesting that *Miller* and *Montgomery* do not apply to discretionary sentences of life without parole).[10]

This conclusion—that discretionary sentences of life without parole may be constitutionally imposed on juveniles so long as the sentencing court has the mere *opportunity* to consider mitigating evidence of youth—is fundamentally inconsistent with the substantive and procedural guarantees of *Miller* and *Montgomery*. "[T]he Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child 'whose crimes reflect transient immaturity' or is one of 'those rare children whose crimes reflect irreparable corruption' for whom a life without parole sentence may be appropriate." *Tatum*, 137 S. Ct. at 13 (Sotomayor, J., concurring in the decision to grant, vacate, and remand) (quoting *Montgomery*, 136 S. Ct. at 734). The opportunity to present relevant evidence is a hollow right indeed if it is not accompanied by the right to have that evidence

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[10] Several other courts similarly concluded prior to the decision in *Montgomery* that life-without-parole sentences violate the Eighth Amendment only if they are imposed on juveniles pursuant to a mandatory sentencing scheme. *See, e.g.*, *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013); *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014); *Arrendondo v. State*, 406 S.W.3d 300, 306 (Tex. Ct. App. 2013); *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012).

meaningfully inform the result of the proceeding. *Cf. Bell v. Burson*, 402 U.S. 535, 542 (1971) ("[i]t is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision" does not provide adequate process).

C. The Scope of Eighth Amendment Protections Afforded By *Miller* And *Montgomery* Is An Important Issue That Is Worthy Of This Court's Review.

The question presented by this petition is critically important and (as the numerous decisions cited above attest) frequently recurring. "[I]nsuring that a defendant is not sentenced to a term of imprisonment that violates the Eighth Amendment prohibition against cruel and unusual punishment is . . . an issue of 'exceptional importance.'" *United States v. Hashime*, 722 F.3d 572, 572 (4th Cir. 2013) (Gregory, J., concurring in the denial of rehearing en banc). And it is an issue that the lower courts are facing time and time again, with dramatically inconsistent results.

This Court has recognized that the most serious penalties available to sentencers—the death penalty for adults, and life without parole for juveniles—must be imposed consistently and fairly, not arbitrarily or irrationally. *E.g.*, *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (Eighth Amendment forbids "the arbitrary or irrational imposition of the death penalty"); *see also Miller*, 567 U.S. at 475 (noting that capital punishment and juvenile life sentences

are "analogous"). That directive cannot be fulfilled so long as the current state of affairs is allowed to persist. This Court's review is necessary to ensure that *all* juveniles—no matter the State in which they were convicted, no matter the statutory regime applicable to their crime—are afforded the substantive and procedural Eighth Amendment protections articulated in *Miller* and *Montgomery*.

"Trial judges making the determination whether a defendant should be condemned to die in prison have a grave responsibility," because "[i]mprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable." *Campbell v. Ohio*, 2017 WL 4409905, at *1 (2018) (Sotomayor, J., respecting the denial of certiorari) (quoting *Miller*, 567 U.S. at 474–75) (quotation marks omitted); *see also Grant*, 2018 WL 1702359, at *13 ("The distinction between incorrigible and non-incorrigible juvenile homicide offenders is undoubtedly substantive, and we must therefore take great precautions to ensure that courts properly account for this feature once they have determined that a juvenile offender is capable of reform."). It is imperative that this Court provide guidance on this issue to ensure that trial judges will properly fulfill that "grave responsibility" in future sentencing proceedings and that no juvenile is forced to serve a sentence that the Eighth Amendment does not permit.

II. PETITIONER'S SENTENCE DOES NOT COMPORT WITH THE EIGHTH AMENDMENT.

The court at Petitioner's original sentencing hearing *expressly found* that Petitioner had a "fair to guarded" prospect of rehabilitation. In view of that finding, Petitioner's life-without-parole sentence was substantively unconstitutional when it was imposed, and it is substantively unconstitutional now. Petitioner is entitled to a resentencing hearing at which that sentence is off the table altogether. At the very minimum, Petitioner is entitled to a resentencing hearing at which she may show that she is not within the rare class of juvenile offenders who may be sentenced to prison without any prospect for release.

The record in this case is particularly clear as to what precisely the sentencing court considered—Petitioner's "fair to guarded" potential for rehabilitation—and what it did not—Petitioner's youth and its attendant characteristics. That clarity lays bare the nature of the constitutional violation visited upon Petitioner, and it makes this case an ideal vehicle for this Court to clarify and reaffirm the Eighth Amendment protections announced in *Miller* and amplified in *Montgomery*.

A. In Light Of Petitioner's Undisputed Potential For Rehabilitation, Petitioner Is Entitled To A Resentencing Hearing With Instructions That She Is Substantively Ineligible For The Sentence Of Life Without Parole.

Montgomery makes clear that, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, *that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity*,'" rather than "irreparable corruption." 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479) (emphasis added). In this case, the trial court found—and the State has never disputed—that Petitioner had a "fair to guarded" chance of rehabilitation. Pet. App. 32a.[11] It is also undisputed that Howell neither killed nor intended to kill any of the victims. *See Howell IV*, 710 F.3d at 394 (Stranch, J., concurring). That means that she has "diminishe[d] . . . moral culpability" and is "categorically less deserving of the most serious forms of punishment than are murderers." *Miller*, 567 U.S. at 490 (Breyer, J., concurring) (quoting

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[11] This finding is corroborated by the evidence that Petitioner was a "model detainee" while in juvenile detention (prior to her transfer to criminal court); she "never caused a problem while there and always followed the rules." *Howell IV*, 710 F.3d at 390 (Stranch, J., concurring). Moreover, during Howell's two decades in prison, she has received only a handful of disciplinary infractions, has completed numerous academic courses, and has been an active participant in religious activities.

Graham, 560 U.S. at 69). Accordingly, Petitioner's sentences of life without parole violate the Eighth Amendment's substantive guarantee that such sentences are disproportionate for all but "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733.

The Pennsylvania Supreme Court's decision in *Batts* is instructive. There, the defendant's sentencing judge stated that Batts's crime was not the product of "unfortunate yet transient immaturity," yet it also "repeatedly made the conflicting finding that there remained a possibility that Batts could be rehabilitated." *Batts*, 163 A.3d at 436. The court held that, in light of the latter finding, Batts's sentence of life without parole was unconstitutional under *Montgomery* and *Miller*. *Id.* at 439. Here, Petitioner's case for relief is even more clear-cut: the sentencing judge made no finding whatsoever that her crimes reflected permanent incorrigibility, rather than transient immaturity; on the contrary, the judge found that Petitioner's prognosis of rehabilitation was "fair to guarded." Her sentence of life without parole thus violated the Eighth Amendment. *See also Sam*, 401 P.3d at 859–60 (vacating sentence of life without parole in light of trial court's finding that defendant was "not a juvenile so irredeemable that he deserves incarceration for the rest of his life"). Accordingly, Petitioner's sentence should be vacated and her case remanded with instructions that Petitioner is

substantively ineligible for a life-without-parole sentence.

B. In The Alternative, Petitioner Is Entitled To A Resentencing Hearing To Determine Whether She Is One Of The Rare Juveniles Whose Crimes Reflect Irreparable Corruption.

At the very least, Petitioner is entitled to a resentencing hearing at which she has the opportunity to present—and the court has the obligation properly to consider—evidence regarding her "youth and its attendant characteristics" and potential for rehabilitation.

There is no indication that the court at Petitioner's original sentencing considered her youth in determining her sentence. In fact, the transcript of the hearing suggests precisely the opposite. The trial court explicitly mentioned the youth of one of the other defendants (Bryant), Pet. App. 28a, and stated that "[e]verybody was about the same age, except for Jason Bryant," *id.* 24a. But in sentencing Petitioner, the court did not mention her youth at all.[12] And while the trial court mentioned Petitioner's potential for rehabilitation, it in fact found that she had a "fair to guarded" chance of it—

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[12] The court acknowledged that Howell had been "abused and neglected as a child," and it considered other mitigating factors, such as her "borderline retarded IQ of 78," her lack of prior criminal history, her "relatively minor" participation in the crimes, and her showing of remorse. Pet. App. 31a–32a. But it never discussed her age at the time of the offenses.

yet the court nevertheless sentenced Petitioner to life in prison without any possibility of release. *See id.* 32a.

The Eighth Amendment requires more. Petitioner is entitled to "individualized sentencing consideration" that properly takes account of her "youth and attendant characteristics as articulated in *Miller*." *Landrum*, 192 So. 3d at 467 (remanding for resentencing because, while "the sentencing court was aware of Landrum's age and that her family members still considered her 'a child,'" there was no indication in the record that the court actually considered Landrum's youth and potential for rehabilitation in fashioning her sentence). Because Petitioner did not receive such individualized consideration, this case must be remanded for a resentencing that complies with the strictures of the Eighth Amendment.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant the petition for certiorari, vacate Petitioner's sentences, and remand this case for resentencing.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

KAREN R. HOWELL v. STATE OF TENNESSEE

Criminal Court for Greene County
No. 01-CR-39

No. E2017-01064-SC-R11-PC

[January 18, 2018]

ORDER

Upon consideration of the application for permission to appeal of Karen R. Howell and the record before us, the application is denied.

PER CURIAM

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

KAREN R. HOWELL v. STATE OF TENNESSEE

Criminal Court for Greene County
No. 01-CR-39

No. E2017-01064-CCA-R28-PC

[September 21, 2017]

ORDER

On June 16, 2017, the petitioner, Karen R. Howell, through counsel, filed an application for permission to appeal from the May 18, 2017 order of the Greene County Criminal Court denying her "Motion to Reopen Post-Conviction Proceedings." *See* Tenn. Code Ann. § 40-30-117(c); *see also* Tenn. S. Ct. R. 28, § 10(B). The State filed a response to the application on July 17, 2017, and the petitioner filed a reply to the State's response on July 28, 2017.

In March 1998, the petitioner and five codefendants pleaded guilty to three counts of felony murder, one count of attempted first degree murder, two counts of especially aggravated kidnapping, two counts of aggravated kidnapping, and one count of theft of property valued between $1,000 and $10,000 in exchange for the State's withdrawing a notice to seek the death penalty filed against four

codefendants.[1] Pursuant to the plea agreement, the petitioner and her codefendants waived jury sentencing as to the felony murder convictions and submitted to a bench trial concerning sentencing. The trial court found aggravating circumstances to support the imposition of sentences of life without the possibility of parole as to the petitioner and her codefendants. The trial court further found that the aggravating circumstances outweighed any mitigating circumstances specific to each defendant and imposed three life without parole sentences, to be served consecutively, as to each defendant.[2] On direct appeal, this court affirmed the trial court's judgments as to the petitioner. *State v. Howell*, 34 S.W.3d 484 (Tenn. Crim. App.) (reversing only the imposition of consecutive sentences as to codefendant Sturgill), *perm. app. denied* (Tenn. 2000). The petitioner unsuccessfully pursued post-conviction relief, the denial of which was affirmed by

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[1] Because the petitioner was seventeen-years-old at the time of the offenses, she was not subject to the death penalty. However, the State filed notices of its intention to seek the death penalty against four codefendants who were eighteen years of age or older at the time of the offenses. *Howell*, 34 S.W.3d at 489. The fifth codefendant, Jason B. Bryant, was fourteen-years-old at the time of the offenses and, like the petitioner, was not subject to the death penalty. On post-conviction, the Tennessee Supreme Court upheld the use of the "package" plea agreement in this case. *Howell*, 185 S.W.3d at 333-38.

[2] The trial court imposed maximum sentences for the remaining felony counts, to be served concurrently. Neither the petitioner nor her codefendants sought appellate review of the sentencing related to those convictions. *Howell*, 34 S.W.3d at 486, n.1.

the Tennessee Supreme Court. *Howell v. State*, 185 S.W.3d 319 (Tenn. 2006).

On October 19, 2016, the petitioner filed the instant motion to reopen post-conviction proceedings, claiming that the Supreme Court's opinion in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) established that *Miller v. Alabama*, 132 S. Ct. 2455 (2012) announced a new constitutional rule requiring retrospective application precluding her sentences of life without the possibility of parole. Following a hearing, the post-conviction court denied the petitioner's motion. The post-conviction court ruled that, although *Montgomery* established that *Miller* announced a new constitutional rule requiring retrospective application to the petitioner's case, the imposition of life without parole sentences in the petitioner's case did not run afoul of *Miller* and *Montgomery*.

As pertinent to this case, the Post-Conviction Procedure Act of 1995 provides that a motion to reopen a prior post-conviction proceeding may raise a claim "based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." Tenn. Code Ann. § 40-30-117(a)(1). "The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial[.]" *Id.* "[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's

conviction became final and application of the rule was susceptible to debate among reasonable minds." Tenn. Code Ann. § 40-30-122. To further qualify for relief, the post-conviction court must determine whether "[i]t appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." Tenn. Code Ann. § 40-30-117(a)(4).

In *Miller*, the United States Supreme Court held that the Eighth Amendment forbids a mandatory sentence of life in prison without the possibility of parole for juvenile offenders. *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012). Rather than categorically rejecting the imposition of a life without the possibility of parole sentence for juvenile offenders, the Court concluded that the imposition of such a sentence on a juvenile offender requires consideration of mitigating factors specific to the offender's youth. *Id*. at 2471. In January 2016, the Court held that the ruling announced in *Miller* should be applied retroactively to convictions that were final when *Miller* was decided. *Montgomery*, 136 S.Ct. at 732. Based upon this precedent, the petitioner argues that her sentences of life imprisonment without the possibility of parole are unconstitutional.

The petitioner's argument is, however, inapt. As held by this court in *Jacob Brown v. State of Tennessee*, No. W2015-00887-CCA-R3-PC (Tenn. Crim. App., at Jackson, Apr. 15, 2016) *perm. app. denied* (Tenn. Aug. 19, 2016):

> To be sure, the petitioner's sentence of life without parole was not mandatory and was not imposed automatically. Instead, the petitioner was sentenced by a jury to life without parole only after a sentencing hearing at which he was permitted to present mitigating evidence, *see* T.C.A. § 39-13-204(c), including, . . . evidence that emphasized his youth, [and] immaturity . . . . The question that must be answered by this court is whether that procedure was sufficient to protect the petitioner's constitutional rights in light of the expanded reading of *Miller* offered in *Montgomery*. We hold that it was.

Jacob Brown, slip op. at 10-11. Likewise, the imposition of sentences of life without parole in this case was done only after the presentation and consideration of mitigating factors, including those specific to the petitioner's youth, history of abuse, and mental health. Further, we note the trial court's consideration of the petitioner's potential for rehabilitation and the extreme seriousness of the offenses. Thus, the sentences of life without parole satisfy the constitutional requirements discussed in *Miller* and *Montgomery*.

Therefore, we conclude that the trial court properly denied the appellant's motion to reopen post-conviction proceedings. The petitioner's application for permission to appeal from the order of the Criminal Court for Greene County dismissing the petitioner's "Motion to Reopen Post-Conviction Proceedings" is hereby DENIED. Because the

petitioner is indigent, the costs of this proceeding are taxed to the State of Tennessee.

PER CURIAM
(Thomas Ogle, Montgomery, JJ.)

APPENDIX C

IN THE CRIMINAL COURT FOR
GREENE COUNTY, TENNESSEE

State of Tennessee

vs. Case No.: 01 CR 39,
97 CR 411, 13 CR 283

Karen R. Howell

[May 18, 2017]

ORDER

This matter came before the Court to be considered on April 25, 2017, upon petition to re-open post conviction relief filed by Ms. Karen R. Howell. The Court reviewed the petition in its entirety as well as the cases cited by the Petitioner, the response filed by the State of Tennessee, the transcript of the guilty plea and sentencing hearing, the court files, and listened to oral argument. The Court makes the following findings:

1. The Court finds that the Petitioner's original guilty plea and sentencing hearing complies with all the requirements of Montgomery v. Louisiana, 136 S.Ct. 718 (2016) and Miller v. Alabama, 132 S.Ct. (2012). As a preliminary matter, the Court notes that Tennessee's sentencing scheme applicable to her case did not mandate life without the possibility of parole and further required the Trial Court to conduct a sentencing hearing to determine whether any enhancement factors existed to justify an

individual be sentenced to life without the possibility of parole. This case has an extensive record not only at the trial level but on the appellate level as well. See State v. Howell, 34 S.W.3d 484 (Tenn. Crim. App. 2000). This extensive record establishes in detail all of the evidence and sentencing considerations that Judge James Eddie Beckner applied when he sentenced the petitioner. The combined guilty plea and sentencing hearings took an entire week to conduct. While it is true that terms such as "Transient Immaturity" were not directly mentioned by Judge Beckner during the sentencing hearing, the requirements of Montgomery and Miller are more fundamental than just some "Magic Words" but go to the heart of the evidence and sentencing factors actually considered by the trial court. The record is abundantly clear that Judge Beckner took into consideration the petitioner's youth and the attendant circumstances associated with youth when he sentenced her. The transcript of the sentencing hearing makes it clear that not only did Judge Beckner consider her youth but also considered her mental evaluation and IQ, her risk to reoffend, the horrendous nature and circumstances of the crime during which three people were brutally murdered and another, a small child, was shot and left for dead in the mud. The petitioner testified during the sentencing hearing and the Court considered in detail the facts she had related about her childhood, family life, social history, intelligence, and educational background. See Transcript of guilty plea and sentencing hearing; see also Howell, at 495. The record in this case is so extensive and properly documented that including additional details about the heinous nature of these crimes or the other

sentencing considerations applied by Judge Beckner is not necessary particularly given the fact that the complete plea and sentencing hearing was made an exhibit to this hearing. It is the opinion of the Court that this case clearly fits within the range of cases that the Miller and Montgomery court had in mind where it is appropriate to sentence a juvenile defendant to life without parole and that all the necessary considerations applicable to sentencing juveniles to such a sentence were properly analyzed. Therefore, the Petitioner's request to reopen her post-conviction petition is denied.

2. In addition, the Court further finds there is a second basis to deny Petitioner's request to reopen because this issue has been previously ruled on by Judge Tom Wright in case number 13 CR 283 when the Petitioner filed essentially the same petition back in June of 2013 citing Miller. The Supreme Court set out the considerations that have to be evaluated by the trial judge to properly sentence a juvenile to life without parole in Miller. The Supreme Court further decided in Montgomery that this Miller analysis is to be applied retroactively; however, the State of Tennessee at least in this case has already agreed that Miller constituted a new rule of constitutional law that requires it to be applied retroactively long before Montgomery was decided. Petitioner's counsel argued in oral argument that this foresight on behalf of the State of Tennessee was a legal nullity and did not operate to impact another hearing on the same issues. This Court cannot accept the argument of petitioner's counsel. Therefore, Petitioner's petition to reopen her post conviction has already been properly denied

applying the appropriate Miller factors. Judge Wright found that "[s]ince the . . . life sentences without the possibility of parole imposed upon Ms. Howell were not mandatory sentences being imposed upon an offender who committed a crime while a juvenile, and because she received individualized consideration in the sentencing court, her sentences do not run afoul of the Eighth Amendment and the new rule announced by Miller v. Alabama does not apply to her case." Ms. Howell was represented by counsel during the petition before Judge Wright, and she is just now attempting to get a second bite at the proverbial apple by claiming the State of Tennessee's foresight in granting her a Miller hearing was a legal nullity because Montgomery had not yet been decided to require such a hearing. As pointed out above, this Court does not accept that argument. However, in the interest of judicial economy, this Court did conduct another full hearing applying Miller and Montgomery and concludes as set out in the previous paragraph.

Considering the petition and all cited authority before the Court and the record as a whole, the Court finds that there is no basis to grant Ms. Howell any form of relief; thus, her petition to re-open her post-conviction petition is denied and dismissed.

ENTER this the 17 day of May, 2017.

s/ Alex Pearson
Alex E. Pearson, Circuit Judge

APPENDIX D

TRANSCRIPT OF PROCEEDINGS

April 21, 2017

IN THE CRIMINAL COURT FOR GREENE COUNTY, TENNESSEE

KAREN R. HOWELL, Petitioner, v. STATE OF TENNESSEE, Respondent.	:	No. 97411D

THE HONORABLE ALEX E. PEARSON, PRESIDING JUDGE

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[16]

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[THE COURT:]

Ms. Howell's sentencing court had the discretion in determining whether she merited a life sentence without the possibility of parole, see State v. Howell, 34 S.W.3d 484 (Tenn. Crim. App. 2000), permission to appeal denied. Far from being mandatory, Tennessee's sentencing scheme affords substantial

discretion to a sentencing judge in a case such as Ms. Howell's. And that's located at page 494. Since the mandatory life sentences without the possibility of parole imposed upon Ms. Howell were not mandatory sentences being imposed upon an offender who committed a crime while a juvenile and because she received individualized consideration in the sentencing court her sentences do not run afoul of the Eighth Amendment and the new rule announced by Miller v. Alabama does not apply to her case. Since the new rule of constitutional law is inapplicable to her case, there is no basis upon which Ms. Howell may [17] reopen her previous petition for post-conviction relief, TCA 40-30-102 and 117. Accordingly, pursuant to TCA 40-30-109, it is hereby ordered that the petition is dismissed with the costs taxed to the petitioner. So, then, of course, that went up on appeal and it was ultimately dismissed.

So, my question is, or I'm getting back to what I asked early, aren't all of these issues already determined? Hasn't this previously been determined by Judge Wright back in 2013 when he reviewed her record and looked at all of it and went ahead, based on the state's concession, and determined that while there was no Montgomery case at that point in time, they were just going to go ahead and say, we believe, the State of Tennessee believes that Miller should be retroactive and went ahead and gave effect to that case and then made a decision back in 2013 that addresses all of these issues. I mean, that is very concerning to me because, I mean, Miller specifically addresses the factors that you are talking about, about youthfulness, and transient immaturity and all those things that are necessary to make a

sentence of life without the possibility of parole for a juvenile. So, I guess your argument is, is that Montgomery expands the law and doesn't just [18] make it retroactive and so we need to have a new evaluation of all of that again; is that your position?

MR. THOMAS: Well, I guess I have two responses, Your Honor. It was very prescient on the state's part to acknowledge that Miller was going to be held retroactively applicable, I guess, three years in advance, but the fact was that no appellate court had held Miller retroactively applicable at that point. And so, Ms. Howell's pro se filing was a nullity. I mean, it was a legal nullity. It counted for nothing. But B, I spent -- I spent -- I took the time so I could be able to say I had done it, I read the thousand plus pages of transcript. And I can represent to the Court, that there is nothing in that transcript that went to her youth and its attendant characteristics. I mean, there's a lot of background information but there's nothing that went to her youth and attendant characteristics or, on the other side of the coin, her permanent incorrigibility, her irreparable corruption or her irretrievable depravity.

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APPENDIX E

IN THE CRIMINAL COURT FOR THIRD JUDICIAL DISTRICT OF TENNESSEE, AT GREENEVILLE, TENNESSEE

KAREN RENEE HOWELL Petitioner, vs. STATE OF TENNESSEE, Respondent.	§ § § § § § §	No. 13CR283

[September 5, 2013]

ORDER OF DISMISSAL

This matter is before the court on Karen Renee Howell's Petition for Post-Conviction Relief filed June 3, 2013. Her petition is based upon the June 25, 2012 U.S. Supreme Court decision Miller v. Alabama, 132 S.Ct. 2455. Petitioner contends that the Miller decision created a new rule of constitutional law requiring retroactive application to her case. The state concedes that Miller created a new rule of constitutional law; and, that it will require retroactive application in appropriate cases. However, the state denies that Miller is applicable to Petitioner's case.

Miller holds "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendments prohibition on 'cruel and unusual punishment.'" 132 S.Ct. at 2460.

While there is no question that Ms. Howell received a sentence of life without possibility of parole, she did not received that sentence without individualized consideration in sentencing nor as a result of a *mandatory* penalty scheme as was at issue in Miller. Ms. Howell's sentencing court had discretion in determining whether she merited a life sentence without the possibility of parole. See, State v. Howell, 34 S.W.3d 484(Tenn. Crim. App. 2000), perm. app. denied. Far from being "mandatory," Tennessee's sentencing scheme affords "substantial discretion" to a sentencing judge in a case such as Ms. Howell's. id. at 494.

Since the mandatory life sentences without the possibility of parole imposed upon Ms. Howell were not mandatory sentences being imposed upon an offender who committed a crime while a juvenile, and because she received individualized consideration in the sentencing court, her sentences do not run afoul of the Eighth Amendment and the new rule announced by Miller v. Alabama does not apply to her case. Since the new rule of constitutional law is inapplicable to her case, there is no basis upon which Ms. Howell may reopen her previous Petition for Post-Conviction Relief. T.C.A. §40-30-102, 117. Accordingly, pursuant to T.C.A. §40-30-109 it is hereby ORDERED that this Petition is DISMISSED with costs taxed to Petitioner.

Enter:

s/ Tom Wright
Tom Wright
Circuit Court Judge

APPENDIX F

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT KNOXVILLE

KAREN RENEE HOWELL v.
STATE OF TENNESSEE

Criminal Court for Greene County
No. 13CR283

No. E2013-02773-CCA-MR3-PC

[January 13, 2014]

ORDER

On December 19, 2013, the petitioner, through appointed counsel, filed a Motion and Declaration in Support of Request for Leave to File Late Notice of Appeal. The petitioner seeks an appeal as of right from the Greene County Criminal Court's September 4, 2013 order dismissing her petition for post-conviction relief. *See* Tenn. R.App. P. 4(a) (providing for a waiver of the filing of a notice of appeal in criminal cases when the interest of justice so requires). The petitioner asserts that she did not learn that the court had filed the order of dismissal until November 12, 2013.

On June 3, 2013, the petitioner filed a petition for post-conviction relief, alleging that the Supreme Court's ruling in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) established a new constitutional rule requiring retrospective application in the petitioner's

case. In the petition, the petitioner acknowledged that the pleading was the "second post-conviction petition" filed challenging the validity of the petitioner's 1998 convictions of three counts of first degree murder and related offenses. The trial court treated the petition as a motion to reopen post-conviction proceedings and summarily dismissed the pleading, determining that the *Miller* holding was inapplicable to the sentences imposed in the petitioner's case.

Tennessee Code Annotated section 40-30-102(c) "contemplates the filing of only one (1) petition for post-conviction relief [and] [i]n no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." Tenn. Code Ann. § 40-30-102(c). The petitioner filed her first petition for post-conviction relief in 2001, and the supreme court affirmed the trial court's denial of post-conviction relief on direct appeal. *Howell v. State*, 185 S.W.3d 319 (Tenn. 2006). Because the Post-Conviction Procedure Act precludes the filing of a second petition for post-conviction relief, the petition, as filed, was subject to summary dismissal.

In this case, however, the trial court treated the petition as motion to reopen. *See* Tenn. Code Ann. § 40-30-117(a)(1) (allowing a petitioner to file a motion to reopen a previous petition in limited circumstances, including allegations based upon "a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required"). As such, the appellant should have filed an application for permission to appeal from the trial court's denial of a

motion to reopen post-conviction proceedings. Tenn. Code Ann. § 40-30-117(c); *see also* Tenn. S. Ct. R. 28 §10(B). "A petitioner has no appeal as of right from a lower court's denial of his motion to reopen a post-conviction petition." *Charles W. Elsea, Jr. v. State*, E2012-01661-CCA-R3-PC, slip op. at 3 (Tenn. Crim. App., at Knoxville, Mar. 28, 2013); *see also* Tenn. R. App. P. 3(b). The appellant, however, failed to seek permissive review of the order denying the motion to reopen pursuant to Rule 28 and erroneously sought an appeal as of right pursuant to Rule 3(b)of the Tennessee Rules of Appellate Procedure. Accordingly, we determine that the interest of justice does not require a waiver of the notice of appeal in this case.

Furthermore, we note that the petitioner included in her pleading substantive argument relative to the application of *Miller* to her case. In that sense, this court could construe the Motion and Declaration in Support of Request for Leave to File Late Notice of Appeal as an application for permissive review of the trial court's order via Rule 28. If treated as such, however, the application would still be dismissed as untimely because the petitioner filed the pleading on December 19, 2013 – more than 30 days from the September 4, 2013 entry of the trial court's order, as well as more than 30 days from the November 12, 2013 discovery of the filing date of the order. Tenn. Code Ann. § 40-30-117(c) (stating that "[i]f the motion is denied, the petitioner shall have thirty (30) days to file an application in the court of criminal appeals seeking permission to appeal"); *see also* Tenn. Sup. Ct. R. 28 §10(B).

For these reasons, the petitioner's motion is DENIED.

It appearing that the Petitioner is indigent, costs of this appeal are taxed to the State of Tennessee.

s/ Joseph M. Tipton
JOSEPH M. TIPTON, PRESIDING JUDGE

s/ James Curwood Witt, Jr.
JAMES CURWOOD WITT, JR., JUDGE

s/ D. Kelly Thomas, Jr.
D. KELLY THOMAS, JR., JUDGE

APPENDIX G

IN THE CRIMINAL COURT FOR
THE STATE OF TENNESSEE

3RD JUDICIAL DISTRICT,
SITTING AT GREENEVILLE

STATE OF TENNESSEE	
VS	#97-CR-411
JOSEPH LANCE RISNER	
EDWARD DEAN MULLINS	#97-CR-411A
NATASHA WALLEN CORNETT	#97-CR-411B
CRYSTAL STURGILL	#97-CR-411C
KAREN HOWELL	#97-CR-411D
JASON BRYANT	#97-CR-411E

TRANSCRIPT OF PLEAS AND
SENTENCING HEARING

VOUME 7 OF 7 VOLUMES

February 20, 1998

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[1031]

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(SENTENCING OF CRYSTAL STURGILL)

THE COURT: Crystal Sturgill, you have pled guilty to the attempted first degree murder of Peter Lillelid, Count #17, to the first degree murders of Delfina, Vidar and Tabitha Lillelid, in Counts #18, #19 and #20. It is my duty to impose a sentence in the case.

First, as to the attempted first degree murder of Peter Lillelid, in Count #17, the range of punishment is from a minimum of 15 years to a maximum of 25 years. The presumed sentence is 20 years. Whether it's greater or smaller depends upon enhancement and mitigating factors. I find that there are enhancement factors under 40-35-114. Number four is applicable, that the victim of the offense was particularly vulnerable because of age. Number five, that you treated or allowed the victim to be treated with exception cruelty during the commission of the offense, and number nine, that a firearm was possessed or employed during the commission of the offense. I find those to be very strong enhancement factors, that would take the sentence to the top of the range. I find that there are no statutory mitigating factors or other mitigating factors that would apply and, therefore, the sentence is 25 years. I find that the sentencing [1032] considerations under 40-35-102 and 103 are not . . . are moot in this proceeding and that is the sentence in that case, that count.

As to the three first degree murder convictions, in Counts #18, #19 and #20, I find that the State has proven the following listed statutory aggravating circumstances beyond a reasonable doubt: Number one, only as to Count #20, and as to Tabitha Lillelid, that the murder was committed against a person less that 12 years of age and that the defendant was 18 years of age or older. I find that the State has proven circumstance number two, beyond a reasonable doubt, that the murder was especially heinous, atrocious or cruel, and that it involved torture or serious physical abuse beyond that necessary to produce death. I find that true in Count #18, of Delfine Lillelid, who cried and begged and pleaded before she was killed, at least for her children, if nothing else, and then was run over while she was still alive, deliberately. I find that in Count #20, that it applies to Tabitha Lillelid, because she was . . . she watched her mother and father being shot before she was shot, and also was treated cruelly on the way to that event.

I find, beyond a reasonable doubt, that the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another. That's indicated by every action that everyone took [1033] after these murders and that applies to Counts #18, #19 and #20, and I find that the defendant committed mass murder, beyond a reasonable doubt, which is defined as the murder of three or more persons within the State of Tennessee within a period of 48 months and were perpetrated in a similar fashion, in a common scheme or plan, and I find that that applies to Counts #18, #19 and #20.

And I find that Count #18 has three statutory aggravating circumstances, Count #19, two, and Count #20, four.

I find that the State has proven, beyond a reasonable doubt, that these statutory aggravating circumstances outweigh any mitigating circumstances.

There are some mitigating circumstances in your case, and perhaps more than for some other defendants. I find that you had no significant history of prior criminal activity. That as much as it can be said for this case, that you were an accomplice in a murder committed by another person and that your participation was relatively minor. I agree with everybody that no participation in these events can be described as minor.

I think that without any question, you have a mitigating circumstance of having suffered a childhood of abuse and neglect. That you have a mitigating circumstance based upon your clinical depression and borderline disorder. I agree with someone who said that at least you didn't testify falsely.

[1034]

Youth has been suggested by several as a mitigating circumstance. Everybody was about the same age, except for Jason Bryant. You know, as hard as it is, the awful experiences that some of those over 18 had should matured you more than the average person, and one has to wonder, if you were suffering from the trauma of abuse, how could you, in any way, tolerate the killing of two children, one being left for dead, a baby.

The mitigating circumstances are rebutted. There was a lot of talk in Kentucky about death and killing, before you set out from Kentucky. You told Dr. Engum that at various times, Natasha had stated the desire to kill somebody and start Armageddon. You knew that when you set out with her. You told somebody on the telephone that Natasha said you were getting ready to get messed up and kill somebody. You said you didn't take it seriously. You should have. You were present when everything was happening in Kentucky, the Colley Motel, the rituals, the burglarizing, the stealing, getting the guns, preparing. You knowingly went in the car following the van from the rest area to that place. Tabitha and Delfina were crying even before they left the picnic table. Just like I told Mr. Mullins, you may not have pulled the trigger. You may have been horrified by this, but everything that you did showed that you adopted this and gave it your name. You were certainly a willing participant in the getaway and the cover [1035] up. You had many chances to get away, many chances to report to authority. You had . . . you left a baby for dead at the scene of this crime. You had on you particles consistent with gunshot primer residue, on your shirt, and you've had a history of drug and alcohol abuse that has contributed to all of this.

The only sentence I can impose in each of these three first degree murder counts is one of life without the possibility of parole, and under 40-35-115, I believe that they should be served consecutively, as multiple convictions, as a dangerous offender. Under the authority of State vs. Woods and other cases, you qualify for consecutive

sentencing, and again, I would reiterate that it would seem unjust to do anything but impose such a sentence.

You're rendered infamous, you're given credit for all time you've served, and you're remanded to custody to serve your sentence.

I appoint the Public Defender's office to represent you in the appeal of this sentence which has been imposed.

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[1035]

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(SENTENCING OF JASON BRYANT)

THE COURT: Jason Bryant, you pled guilty, in Count #17, to the attempted first degree murder of Peter Lillelid, and in Counts #18, #19 and #20, to the first degree murders of Delfina, Vidar and Tabitha Lillelid. It's my duty to impose a sentence.

In Count #17, the possible punishment is from a minimum of 15 years to a maximum of 25 years. The presumed sentence is 20 years. Whether it's above that or below that depends upon enhancement factors, mitigating factors. I find that there are enhancement factors under Tennessee Code Annotated 40-35-114. Number four, the victim of the offense was particularly vulnerable, because of his age. Number five, the defendant treated or allowed the victim to be treated with exceptional cruelty during the commission of the offense. Number nine, you employed or possessed a firearm during the commission of the offense. Very strong enhancement factors, which take the sentence to the

top of the range, without any question. There are no mitigating factors under 40-35-113 or [1037] other places. The sentence is 25 years. The other sentencing considerations under 40-35-102 and 103 do not . . . well, they apply, but they're moot.

As to Counts #18,, #19 and 20, the three counts of first degree murder, I find, beyond a reasonable doubt, that the State has proven the following statutory aggravating circumstances. The State's number two . . . number one does not apply to you. The State's number two, the murder was especially heinous, atrocious or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death. That's true as to Count #18, regarding Delfina Lillelid. That's true as to Count #20, involving Tabitha Lillelid. The reason that it's true, beyond a reasonable doubt, is because I find, beyond a reasonable doubt, that before these people were killed, they begged and pled and cried and sang, but more importantly, as to this enhancement factor, that Delfina was still alive when she was run over and she was run over purposely, and that Tabitha was alive and not shot until her mother and father were shot in her presence. I find that the State's number three, beyond a reasonable doubt, the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another. I think the evidence in this case speaks for itself with regard to that and that applies to all counts, #18, #19 and #20. I find, beyond a reasonable doubt, the [1038] State's number four has been proven, that the defendant committed mass murder, which is defined as the

murder of three or more persons within the State of Tennessee within a period of 48 months and perpetrated in a similar fashion, in a common scheme or plan, and again, I think the proof is evidence of that.

So, Count #18 has three, Count #19, two, Count #20, three statutory aggravating circumstances.

I find that the State has proven, beyond a reasonable doubt, that the statutory aggravating circumstances outweigh any mitigating circumstances. I do find that you have some mitigating circumstances in the case. Number one, that you had no significant history of prior criminal activity, and because you were only 14 years of age, I find that number seven applies, in the statutory list, that your youth at the time of the crime was a mitigating factor. Duress, I find is not supported by the proof. You have a low average IQ, as found by the experts, and I find that to be a mitigating factor. However, I find that all mitigating factors are rebutted and outweighed by the credible evidence in this case, which shows that you had a history of anti-social conduct before the events began. That you participated in all the things that happened in Kentucky, leading up to this trip to Tennessee, involving the stealing of guns, the burglary of motels, rituals, occult rituals. I find that you were aggressively urging others on to [1039] do things at that time, that you personally carried one of the guns. That, in fact, you were a shooter. I don't know who all were the shooters. I think there was more than one.

I have seen no real remorse or emotion displayed by you. I find the evidence shows that you were aggressive in the killings, that you helped use a gun to kidnap the Lillelids in the first place. There's evidence that you wanted to do a robbery after these killings. You had gunshot residue all over you. You were in the van for two days with Lillelid property all around you and under your feet, including a baby seat and baby's toys. You bragged about the crime in jail in Arizona. You have a history of drug abuse and a callous attitude.

I find the sentences in Counts #18, #19 and #20 must be life imprisonment, without the possibility of parole, and I find that these sentences should be consecutive and consecutive with Count #17, the attempted murder, because under 40-35-115, you meet all the guidelines and qualifications of a dangerous offender and you meet the requirements of State vs. Woods, as a dangerous offender, and other cases.

You're rendered infamous, you're given credit for all time you have served. Mr. Jessee is appointed to represent you in the appeal of this sentence. You're remanded to custody.

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(SENTENCING OF KAREN HOWELL)

THE COURT: Karen Howell, you have pled guilty to the [1040] attempted first degree murder of Peter Lillelid, Count #17, and in Counts #18, #19 and #20, to the first degree murder of Delfina, Vidar and Tabatha Lillelid. It's my duty to impose a sentence in the case.

First, in Count #17, the range of punishment is from a minimum of 15 years to a maximum of 25 years. The presumed sentence is 20 years. The sentence can be greater or less, depending upon enhancement factors and mitigating factors. Under Tennessee Code Annotated 40-35-114, I find that there are enhancement factors. Number four, that the victim of the offense was particularly vulnerable because of his age. Number five, that the defendant treated or allowed the victim to be treated with exceptional cruelty during the commission of the offense, and number nine, that a firearm was possessed or employed during the commission of the offense. There are strong mitigating factors . . . strong enhancement factors. They raise, without any question, the sentence to the maximum sentence, and there are no mitigating factors under 40-35-113, or from any other source. So, therefore, the sentence is 25 years, Range 1, standard offender.

As to Counts #18, #19 and #20, I find, beyond a reasonable doubt, that the State has proven the following listed statutory aggravating circumstances: Number one did not apply to you. So, number two is that the murder was especially heinous, atrocious or cruel and that it involved torture or [1041] serious physical abuse, beyond that necessary to produce death. That applies to Counts #18, involving Delfina Lillelid, and in Count #20, involving Tabitha Lillelid. The victims were abused greatly, from the time they left the picnic table to the time they were . . . mentally, until they reached their death. But in Count #18, I find, beyond a reasonable doubt, that Delfina was alive when she was run over, deliberately, and in Count #20, that Tabitha had not

been shot and was alive when she saw her parents shot and fall to the ground.

I find, beyond a reasonable doubt, that the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another. Again, the record speaks for itself as to that, but it applies to all three counts, #18, #19 and #20.

I find, beyond a reasonable doubt, the defendant committed mass murder, which is defined as the murder of three or more persons within the State of Tennessee within a period of 48 months, and perpetrated in a similar fashion, in a common scheme or plan. Again , the record clearly proves that, and it applies to all counts, #18, #19 and #20.

Count #18 has three aggravating factors, Count #19, two, or circumstances, and Count #20, three.

I further find that the State has proven, beyond a reasonable doubt, that the statutory aggravating circumstances outweigh any mitigating circumstances. I do find that there [1042] are some mitigating circumstances that you have proven or have been raised, that the State has failed to rebut. Number one, no significant history of prior criminal activity under the statute. Number five, the defendant was an accomplice in a murder committed by another person and the defendant's participation was relatively minor. I'll say again that no part in this horrible crime can be minor, but it's purely a relative statement.

I also find that in mitigation, that you were abused and neglected as a child. That you have a

borderline retarded IQ of 78. That you subordinate yourself to the needs of others in a group, and that you have shown remorse.

All those, though, are overcome by and rebutted by the credible facts of the case, that for a long time before this occurred, you had been doing drugs and doings this of occult nature, and the occult mark continued on this case throughout the events that transpired. It's signature is throughout the case.

You participated in everything in Kentucky. You helped steal guns and money. You helped initiate the plans for the trip with Ms. Cornett. You were at the picnic table at the rest area with the Lillelids when they were kidnapped, when they were crying. You were outside the van watching the Lillelids being murdered. You did nothing to stop, when a weapon was available. You deliberately and knowingly participated in [1043] every aspect of the killings and the things that led to them, including the getaway and the cover up.

According to Dr. Miller, you're not likely to be rehabilitated. At least, the prognosis is fair to guarded, at best, even with extended treatment.

For all those reasons, I find the sentences must be in the case, for Counts #18, #19 and #20, in each count, I sentence you to serve a sentence of life imprisonment, without the possibility of parole, and I find that those sentences should be served consecutively and consecutively with Count #17.

Under Tennessee Code Annotated 40-35-115, you qualify, under all circumstances, as a dangerous

offender, as expanded by State vs. Woods, all those considerations.

You're rendered infamous and given credit for all time that you've served. I appoint Mr. Leonard to represent you in the appeal. You're remanded to custody.

***