IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	**KNOX COUNTY**
v.	)	**No. E2018-01439-SC-R11-CD**
	)	
TYSHON BOOKER,	)	
	)	
Appellant.	)	

ON APPEAL BY PERMISSION FROM THE JUDGMENT
OF THE COURT OF CRIMINAL APPEALS

BRIEF OF THE STATE OF TENNESSEE

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I.

Whether the defendant's mandatory life sentence, which permits his release after 51 years' imprisonment, violates the Eighth Amendment under U.S. Supreme Court precedent outlawing mandatory sentences of life without parole—that is, life without any hope of release—for juvenile offenders.

II.

Whether the defendant's sentence violates the Tennessee Constitution on the theory that article I, section 16 affords broader protections than the identically worded Eighth Amendment.

III.

Alternatively, if the defendant's sentence is unconstitutional, whether the Court should sever Tenn. Code Ann. § 40-35-501(h)(2) as applied to juveniles and instead apply Tenn. Code Ann. § 40-35-501(h)(1), which permits release after as few as 25 years' imprisonment.

STATEMENT OF THE CASE AND FACTS

When he was 16 years old, Tyshon Booker shot and killed G'Metrick Caldwell while they sat in Caldwell's car. (XXX, 1167-68; XXXI, 1210-12; XXXII, 1337.) Booker made off with Caldwell's cell phone. (XXXI, 1213; XXXII, 1337.) He was arrested three days later. (XXXI, 1217.)

After a transfer hearing, the Knox County Juvenile Court transferred Booker to criminal court for prosecution. (I, 13-14.) The Knox County Grand Jury indicted Booker on two counts of felony murder and two counts of especially aggravated robbery. (I, 1-5.)

At trial, the State established that Booker had confessed to a neighbor that he killed Caldwell. (XXIII, 472-76.) The State corroborated this confession with significant forensic and circumstantial proof: Booker's finger- and palm-prints were found inside and outside Caldwell's car (XXI, 209, 211-12, 214, 236-37, 271; Trial Ex. 255); a bullet casing found on the scene was fired from the same gun as casings that were likely fired from Booker's gun (XXIX, 1005; Trial Ex. 282); and a number of phone calls were made from Caldwell's cell phone to Booker's acquaintances the evening of the murder (XXVI, 742-44, 753-54; XXVII, 883; XXVIII, 951, 959; Trial Ex. 276).

Booker himself ultimately admitted, during his trial, to shooting and killing Caldwell. (XXX, 1167-68; XXXI, 1211-12; XXXII, 1337.) But he claimed to have acted in self-defense (XXXI, 1211-12), and the court instructed the jury on self-defense and defense of another (XXXIII, 1467-69).

The jury convicted Booker as charged on all counts. (V, 727; XXXIV, 1517-18.) Since the State had not sought higher sentencing, the trial court immediately imposed mandatory sentences of life imprisonment for the felony-murder convictions, which the court merged. (V, 737-38; XXXIV, 1522.) The court later sentenced Booker to 20 years' imprisonment for especially aggravated robbery to be served concurrently with his life sentence. (VII, 966-67.)

In his motion for a new trial, Booker challenged, among other things, his mandatory life sentence under *Miller v. Alabama*, 567 U.S. 460 (2012). (VII, 971.) At a hearing on the motion, Booker presented the testimony of Dr. Keith Cruise as an offer of proof, establishing what he would have presented had the life sentence not been mandatory. (XXXVIII, 2-5, 19-100; XXXVIX, 101-07.) The trial court took the motion under advisement and ultimately denied it without making any factual findings. (VIII, 1088.)

On appeal, Booker again challenged his sentence under *Miller*. The Court of Criminal Appeals denied relief, noting that it had repeatedly rejected the claim that a juvenile's mandatory life sentence in Tennessee violates *Miller*. *State v. Booker*, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367, at *33 (Tenn. Crim. App. Apr. 8, 2020), *perm. app. granted* (Tenn. Sept. 16, 2020).

Booker filed an application for permission to appeal to this Court, raising, among other claims, his *Miller* challenge. This Court granted review "solely as to the issue of whether the sentence of life imprisonment violates the United States or Tennessee Constitutions." *State v. Booker*, No. E2018-01439-SC-R11-CD (Tenn. Sept. 16, 2020)

(order granting Tenn. R. App. P. 11 application). The Court further ordered the parties "to address what sentencing options may be available under Tennessee law if the sentence of life-imprisonment is improper." *Id.*

STANDARD OF REVIEW

"Because issues of constitutionality and statutory construction are questions of law, [this Court] review[s] them de novo with no presumption of correctness accorded to the legal conclusions of the courts below." *Willeford v. Klepper*, 597 S.W.3d 454, 464 (Tenn. 2020). "The Court must uphold the constitutionality of a statute wherever possible, beginning with the presumption that the statute is constitutional." *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013) (citing *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007)).

ARGUMENT

I. Booker's Life Sentence Does Not Violate the Eighth Amendment.

Under *Miller v. Alabama*, 567 U.S. 460 (2012), a State violates the Eighth Amendment when it subjects a juvenile to a mandatory sentence of life without parole ("LWOP"). Booker was not sentenced to LWOP; he received a life sentence, which is statutorily designated as a term of 60 years' imprisonment. Tenn. Code Ann. § 40-35-501(h)(2). Nevertheless, Booker and his amici urge this Court to extend *Miller* and to declare his sentence—and, in effect, all juvenile life sentences in Tennessee—unconstitutional.

No extension of *Miller* is called for here. Mandatory LWOP sentences are unconstitutional for juveniles because they deprive inmates of any hope of release. That is not true for Booker, who will be released after 51 years' imprisonment if he earns enough sentence credits. Booker and the amici argue that 51 years is too long a term for a juvenile to serve, but that is a policy question better left to the General Assembly, which has considered this issue as recently as the last legislative session. The Court should decline to intervene prematurely into a live policy debate.

A. Because Booker's sentence guarantees his eventual release, it does not violate the Eighth Amendment.

Booker's sentence is not the functional equivalent of LWOP. LWOP ensures that an inmate will never be released. A life sentence, by contrast, guarantees Booker's release after he serves the designated

term lessened by applicable sentence credits, which could be after as few as 51 years. This sentence is constitutional.

1. The Eighth Amendment does not prohibit lengthy juvenile sentences so long as they provide some hope of release.

The U.S. Supreme Court has addressed juvenile LWOP sentences in three recent cases: *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). This trilogy of cases bars only those sentences that eliminate any possibility of release. In these cases, the Court held that LWOP violates the Eighth Amendment for most juveniles because, like the death penalty, LWOP irrevocably deprives an inmate of any hope of release. But these cases do not bar lengthy sentences that nevertheless permit a juvenile inmate's eventual release from custody.

The Court first addressed the issue of LWOP sentences for juvenile offenders in *Graham*, where it outlawed LWOP sentences for nonhomicide juvenile offenders. As part of its Eighth Amendment analysis, the Court weighed the culpability and characteristics of the offenders (juveniles who committed nonhomicide crimes) against the severity of the punishment (LWOP). *Graham*, 560 U.S. at 67. To address the unique nature of juvenile offenders, the Court turned to its then-recent decision in *Roper v. Simmons*, 543 U.S. 551 (2005), which outlawed the death penalty for juveniles. Juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as

well formed." *Graham*, 560 U.S. at 68 (internal quotation marks omitted). In light of these characteristics, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* And because the juveniles in *Graham* had not committed a homicide, the Court considered them to have a "twice diminished moral culpability." *Id.* at 69.

The Court then weighed juveniles' diminished culpability against the severity of the sentence. LWOP is the "second most severe penalty permitted by law," following only the death penalty. *Id.* Although the death penalty is unique in its severity, LWOP and capital punishment "share some characteristics . . . that are shared by no other sentences." *Id.* Like the death penalty, LWOP imposes an "irrevocable" forfeiture of liberty with no "hope of restoration" because the inmate "will remain in prison for the rest of his days." *Id.* at 69-70 (internal quotation marks omitted). Simply put, LWOP is comparable to a death sentence because the inmate is certain to die in prison. *See id.* at 75 (States are not required to release juveniles during their "natural life"); *id.* (some juveniles may be "deserving of incarceration for the duration of their lives"); *id.* at 79 ("Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release . . . .").

This analogy to capital punishment was critical to the Court's Eighth Amendment analysis. Before *Graham*, the Court had never categorically banned a punishment outside of death-penalty cases. *Id.* at 60-61. But because LWOP is "akin to the death penalty," *Miller*, 567 U.S. at 474-75, the Court took the unprecedented step of categorically banning LWOP for nonhomicide juvenile offenders, *Graham*, 560 U.S.

at 75-79; *see also Miller*, 567 U.S. at 475 ("We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment.").

Two years later, the Court revisited this issue in *Miller*, which addressed LWOP for juvenile murderers. The Court again stressed that LWOP is like a death sentence because it ensures that the juvenile offender will die in prison. *See Miller*, 567 U.S. at 474-75 ("Imprisoning an offender *until he dies* alters the remainder of his life 'by a forfeiture that is irrevocable.'" (quoting *Graham*, 560 U.S. at 69) (emphasis added)); *id.* at 470 ("*Graham* . . . likened life without parole for juveniles to the death penalty itself."). And the Court repeatedly emphasized that LWOP, like death for an adult offender, is the harshest possible penalty a State can impose on a juvenile. *See, e.g.*, *id.* at 489 ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the *harshest possible penalty* for juveniles." (emphasis added)).

But *Miller* did not outlaw LWOP for juvenile murderers. Instead, the Court focused on *mandatory* LWOP sentencing schemes. *Id.* at 465, 474. Once again analogizing LWOP to capital punishment, the Court invoked a line of precedent requiring "individualized sentencing when imposing the death penalty." *Id.* at 475 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). Because a mandatory death sentence is unconstitutional, "a similar rule should apply when a juvenile confronts a sentence of life (*and death*) in prison." *Id.* at 477 (emphasis added). A

sentencer therefore must consider "how children are different" before "irrevocably sentencing them to a lifetime in prison."[1] *Id.* at 480.

Finally, the Court returned to this issue once more in *Montgomery*, again stressing that the flaw in juvenile LWOP sentences was the absence of any hope of release. The Court granted review to decide whether *Miller* "applies retroactively on collateral review to people *condemned as juveniles to die in prison*." *Montgomery*, 136 S. Ct. at 727 (emphasis added); *see also id. at* 736 ("Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison."). *Miller* prohibited mandatory imposition of LWOP, the Court reasoned, because "mandatory [LWOP] sentences for children 'pos[e] too great a risk of disproportionate punishment.'" *Id.* at 733 (quoting *Miller*, 567 U.S. at 479) (alteration in original). *Miller* announced a substantive rule of constitutional law—and therefore one that is retroactive—because it precludes LWOP for most juvenile offenders. *Id.* at 734, 736. According to *Montgomery*, *Miller* means that, if the crime committed by an LWOP-sentenced juvenile did not reflect "irreparable corruption," his "hope for some years of life outside prison walls must be restored." *Id.* at 736-37.

This trilogy of cases therefore bars only those sentences that preclude any *hope* for release; it does not bar sentences—even lengthy sentences—that still permit a juvenile inmate's eventual release from custody.

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[1] The Court is currently considering the extent to which the sentencer must place these findings on the record. *Jones v. Mississippi*, No. 18-1259 (U.S. filed Mar. 29, 2019).

Consider the remedy for a *Graham* violation: only an *opportunity* for release. In *Graham*, the Court stressed that the State must provide a nonhomicide juvenile offender sentenced to LWOP "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75; *see also id.* at 82 (if a juvenile receives a life sentence the State must provide him "with some realistic opportunity to obtain release before the end of that term"). However, no State is required "to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," nor is a State required "to release that offender during his natural life." *Id.* at 75.

The remedy for a *Miller* violation is the same. In *Montgomery*, the Court observed that *Miller*'s retroactivity would not upend all convictions, or even sentences, for juveniles who received mandatory LWOP. 136 S. Ct. at 736. To the contrary, a State that had imposed a mandatory LWOP sentence on a juvenile murderer need do no more than make him parole eligible and thereby restore his "*hope* for some years of life outside prison walls." *Id.* at 736-37 (emphasis added) (citing Wyo. Stat. Ann. § 6-10-301(c) (2013), which provides parole eligibility after 25 years).

If an opportunity for release is all a juvenile must be provided to cure a *Graham* or *Miller* violation, sentences that already provide for release do not violate the Eighth Amendment.[2] As other courts have

[2] Although Booker alleges a *Miller* violation, the question at issue here—whether release after 51 years is constitutionally comparable to LWOP—would be answered the same way if the Court were facing a

held, *Miller* "simply does not cover a lengthy term of imprisonment that falls short of life without parole." *Atkins v. Crowell*, 945 F.3d 476, 478 (6th Cir. 2019) (rejecting a challenge under federal habeas review to Tennessee's life sentence statute); *see also Demirdjian v. Gipson*, 832 F.3d 1060, 1077 (9th Cir. 2016) (release eligibility at 66 years old did not necessarily trigger *Miller*'s requirements). So long as the inmate has "a realistic opportunity to obtain release before the end of his life," his sentence does not violate the Eighth Amendment.[3] *See United States v. Mathurin*, 868 F.3d 921, 934-35 (11th Cir. 2017) (rejecting a *Graham* challenge to a sentence similar to Booker's).

Justice Alito made this point clear in his *Graham* dissent, observing that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Graham*, 560 U.S. at 124 (Alito, J., dissenting); *State v. Slocumb*, 827 S.E.2d 148, 154 (S.C. 2019) (relying in part on this dissent when refusing to extend *Graham*). Even the petitioner in *Graham* conceded that a mandatory minimum term of 40 years' imprisonment, for example, would not violate the Eighth Amendment. *Graham*, 560 U.S.

Graham challenge. Thus, the State relies on cases dealing with both claims.

[3] Some courts have refused to apply *Graham* and *Miller* to term-of-years that arise from multiple convictions regardless of their length. *E.g.*, *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) (60 years before release eligibility); *Wilson v. State*, -- N.E.3d --, No. 19S-PC-548, 2020 WL 6737226, at *8 (Ind. Nov. 17, 2020) (181-year sentence); *State v. Slocumb*, 827 S.E.2d 148, 154-56 (S.C. 2019) (130 year sentence). It is unnecessary for the Court to consider that question in this case.

at 124; *see also id.* at 123 n.13 (Thomas, J., dissenting) (also relying on counsel's concession). And the Court has continued to observe this limitation on *Graham*. *See Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (per curiam) (holding that the Virginia Supreme Court reasonably concluded that Virginia's geriatric release statute, which only permits release for a juvenile offender after at least four decades in custody, satisfied *Graham*).

2. Booker's sentence provides him an opportunity for release and thus satisfies *Miller*.

Booker's sentence does not preclude any hope for release. To the contrary, it permits his release after 51 years' imprisonment, at which time he will be 67 years old. That clearly provides him a realistic opportunity for release as required by the Eighth Amendment.

a. Booker is guaranteed release after he serves his term of imprisonment, which is likely to be 51 years.

A life sentence in Tennessee is a term of 60 years' imprisonment. Tenn. Code Ann. § 40-35-501(h)(1). But an inmate may reduce this term by up to 15 percent through sentence credits, which would lower Booker's effective sentence length to 51 years. *Brown v. Jordan*, 563 S.W.3d 196, 200-201 (Tenn. 2018).[4]

There is good reason to believe that Booker will accrue these credits. An inmate can earn up to eight days of credit per month for

[4] After *Brown*, the General Assembly amended Tenn. Code Ann. § 40-35-501. 2020 Tenn. Pub. Acts, ch. 765, § 1. The amendment occurred more than two years after Booker was sentenced in this case (V, 738), but it made no substantive changes to the statute.

good institutional behavior *alone*.[5] Tenn. Code Ann. § 41-21-236(a)(2)(A). These sentence credits therefore provide Booker a viable opportunity for release after 51 years' imprisonment. *Cf. Mathurin*, 868 F.3d at 935 (concluding that good-time credit satisfies *Graham*'s requirement for a "meaningful opportunity" for release).

In fact, Booker's sentence provides considerably more hope for release than the sentences countenanced by the Supreme Court, which provide mere *eligibility* for parole consideration. *See Montgomery*, 136 S. Ct. at 736 (citing Wyo. Stat. Ann. § 6-10-301(c) (2013)). Unlike those sentences, Booker is *guaranteed* release when he finishes his term. Tenn. Code Ann. § 40-35-501(h)(2) (inmate serving life must serve all his sentence less sentence credits); *Lowe-Kelley v. State*, No. M2015-00138-CCA-R3-PC, 2016 WL 742180, at *8 & n.4 (Tenn. Crim. App. Feb. 24, 2016), *perm. app. denied* (Tenn. June 23, 2016).[6] He need not obtain parole board approval or navigate any similar discretionary release program. *See Lowe-Kelley*, 2016 WL 742180, at *8. Booker's

[5] The Department of Correction awards credit for good behavior at four days per month during the first year of imprisonment and six days per month thereafter unless the inmate is in minimum custody. Tenn. Dep't of Corr., Inmate Rules and Regulations, Policy #505.01 (Aug. 2018). Thus, over the course of a 51-year prison term, an inmate could earn 3,648 days (just shy of 10 years) for good institutional behavior alone.

[6] The Court of Criminal Appeals has recognized this repeatedly. *E.g.*, *State v. Self*, No. E2014-02466-CCA-R3-CD, 2016 WL 4542412, at *62 (Tenn. Crim. App. Aug. 29, 2016), *perm. app. denied* (Tenn. Jan. 29, 2017); *State v. Guerrero*, No. M2014-01669-CCA-R3-CD, 2015 WL 2208546, at *3 (Tenn. Crim. App. May 11, 2015), *perm. app. denied* (Tenn. Sept. 17, 2015).

hope for release is therefore contingent only on his living to his release date.

Despite this certainty of release, Booker argues that his sentence violates *Miller* because it is among the "most severe penalties" available. (Def's Br., at 26-27.) He points to the "foundational principle" outlined in *Miller* that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474.

But he selectively quotes *Miller*. The Court was referring to those penalties that it had already concluded share characteristics no other penalties share: LWOP and death. *See id.* (noting that mandatory LWOP "contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children"). This reading is confirmed by the Court's narrow holding in *Miller*: "By making youth (and all that accompanies it) irrelevant to imposition of that *harshest prison sentence*, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 479 (emphasis added). The Court cautioned as well that "appropriate occasions for sentencing juveniles to this *harshest possible penalty* will be uncommon." *Id.* (emphasis added).

A life sentence in Tennessee is not the "harshest possible penalty" for murder. Although not available for juvenile offenders, the death penalty is available in Tennessee for an adult defendant convicted of murder. Tenn. Code Ann. §§ 37-1-134(a)(1)(B); 39-13-204(a). Short of that, a defendant convicted of murder, including a juvenile offender, may be sentenced to LWOP or life imprisonment. Tenn. Code Ann.

§ 39-13-204(a); *State v. Howell*, 34 S.W.3d 484, 494 (Tenn. Crim. App. 2000). Like the sentencing schemes in *Graham* and *Miller*, LWOP in Tennessee precludes any hope of release. Tenn. Code Ann. § 40-35-501(h)(3). As discussed, Booker's life sentence does not. Thus, Booker's sentence does not trigger the protections of *Miller*. *Cf. State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 60-62 (Mo. 2017) (invalidating the juvenile defendant's life with parole sentence because it was the harshest available sentence other than death).

b. Fifty-one years' imprisonment is not *de facto* LWOP.

Booker and many of the amici contend, however, that his sentence is "*de facto*" LWOP because he may not live long enough to be released. But all the Eighth Amendment requires is a *hope* of release; it does not require certainty of release. *See Montgomery*, 136 S. Ct. at 736-37; *Graham*, 560 U.S. at 75. Thus, a mandatory sentence that an inmate will likely, or even plausibly, survive is not prohibited by *Miller*.

Booker is serving just such a sentence. He has been in custody since November 2015, when he was 16 years old. (V, 737, 738.) Should he earn sufficient sentence credits, he will reach his release date when he is 67 years old. This is an age Booker can reasonably expect to reach. *See State v. Smith*, 892 N.W.2d 52, 66 (Neb. 2017) ("[I]n today's society, it is not unusual for people to work well into their seventies and have a meaningful life well beyond age 62 or even at age 77.").

Federal and state courts alike have recognized that a sentence like Booker's, albeit lengthy, does not violate *Graham* or *Miller* because it provides a reasonable chance for release. As noted above, the Sixth

Circuit has rejected a *Miller* challenge to a Tennessee inmate's juvenile life sentence in federal habeas corpus review. *Atkins*, 945 F.3d at 478-79. The court noted that, whether one looks at this sentence "formally or functionally," it is not LWOP because it provides release after 51 years. *Id.* at 478. Appellate courts consistently follow this approach when considering federal habeas challenges to long but survivable juvenile sentences.[7] *See LeBlanc*, 137 S. Ct. at 1729; *Demirdjian*, 832 F.3d at 1077 (release eligibility at 66 years old); *see also Sanders v. Eckstein*, -- F.3d --, No. 19-2596, 2020 WL 7018318, at *5 (7th Cir. Nov. 30, 2020) (holding that the state court reasonably concluded that parole eligibility at 51 years old satisfies *Graham* and *Miller*); *Rainer v. Hansen*, 952 F.3d 1203, 1210-11 & n.11 (10th Cir. 2020) (holding that combination of early release program that begins at 42-years old and general parole program that begins at 60-years old satisfies *Graham*).

Although these federal habeas courts deferentially reviewed the decisions of state courts, that is no reason for this Court to hold differently. The Eleventh Circuit—applying no deferential review—has rejected a *Graham* challenge to a sentence that, like Booker's sentence,

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[7] In those cases where federal circuit courts have invalidated lengthy, term-of-years juvenile sentences, the sentences were, like LWOP, impossible to survive. *See Budder v. Addison*, 851 F.3d 1047, 1059-60 (10th Cir. 2017) (131.75 years until parole eligibility); *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (100 years); *Moore v. Biter*, 725 F.3d 1184, 1191-92 (9th Cir. 2013) (127 years). One panel extended *Miller* to a 72-year sentence, but the Third Circuit granted rehearing *en banc* and the case is still pending. *United States v. Grant*, 887 F.3d 131, 150 (3d Cir.), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3d Cir. 2018).

permitted release at age 67 if the defendant earned sufficient good-time credit. *Mathurin*, 868 F.3d at 934-36. In *Mathurin*, by the defendant's own estimation, his remaining prison term was five to 10 years less than his remaining life span. *Id.* at 935. The defendant therefore had "a realistic opportunity to obtain release before the end of his life, as required by *Graham*." *Id.*

State supreme courts have held similarly. For example, the Nebraska Supreme Court concluded that a sentence of 50 years' imprisonment with release eligibility at 67 years old provided a "meaningful and realistic opportunity to obtain release." *State v. Steele*, 915 N.W.2d 560, 567 (Neb. 2018); *see also State v. Russell*, 908 N.W.2d 669, 677 (Neb. 2018) (72 years old upon release); *Smith*, 892 N.W.2d at 66 (62 years old). Further, the Virginia Supreme Court rejected a *Graham* challenge to a life sentence in light of Virginia's geriatric release statute, which generally permits release at 60 years old. *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011); *see also LeBlanc*, 137 S. Ct. at 1729 (rejecting a challenge to this ruling on federal habeas review). Similar release eligibility dates have been approved by the high courts of New Mexico and South Dakota. *Ira v. Janecka*, 419 P.3d 161, 170-71 (N.M. 2018) (release at 62 years old); *State v. Charles*, 892 N.W.2d 915, 920 (S.D. 2017) (release at 60 years old).

Other state high courts have rejected challenges to sentences that require service of at least four decades in prison before release

eligibility,[8] as have several state intermediate appellate courts.[9] Thus, the Court would be in good company to hold that this sentence satisfies *Miller*.

Booker counters that, even if he lives to see his release date, this is not really a "meaningful opportunity" for release because he will be too old to maintain his relationships with family or start a career after he is released. But the "meaningful opportunity" in *Graham* had nothing to do with life *after* release. Rather, it concerned the parole remedy for those juveniles who were unconstitutionally sentenced to LWOP. *See Graham*, 560 U.S. at 75 ("some meaningful opportunity *to obtain* release" (emphasis added)). In other words, a State's parole remedy could not make release a rarity like clemency, *id.* at 69-70, or provide a mere *pro forma* hearing where release is implausible, *see LeBlanc*, 137 S. Ct. at 1728-29; *State v. Springer*, 856 N.W.2d 460, 470

[8] *See Pedroza v. State*, 291 So. 3d 541, 544-45 (Fla. 2020) (40-year sentence with release eligibility at 55 years old); *Lewis v. State*, 428 S.W.3d 860, 861 (Tex. Crim. App. 2014) (affirming mandatory life with parole sentence, which permits parole after 40 years, Tex. Gov't Code Ann. § 508.145(b)); *Davis v. State*, 472 P.3d 1030, 1033-34 (Wyo. 2020) (affirming 42 year sentence with parole eligibility at 60 years old); *see also Steilman v. Michael*, 407 P.3d 313, 320 (Mont. 2017) (upholding 110-year sentence that could be reduced to 55 years with good-time credit and 31.33 years with credit for a concurrent sentence).

[9] *E.g.*, *State v. Redmon*, 380 P.3d 718 (Kan. Ct. App. 2016) (61-year sentence); *State v. Adams*, 285 So. 3d 526, 533 (La. Ct. App. 2019) (50-year sentence); *People v. Washington*, No. 343987, 2019 WL 3369770, at *5 n.2 (Mich. Ct. App. July 25, 2019) (sentence of 40 to 60 years); *Mason v. State*, 235 So. 3d 129, 134 (Miss. Ct. App. 2017) (release eligibility at 57 years old); *State v. Burns*, No. 27374, 2018 WL 1778579, at *4 (Ohio Ct. App. Apr. 13, 2018) (release eligibility at 59 years old).

(S.D. 2014) (interpreting "meaningful" to mean "realistic"). The defendant, on the other hand, is *guaranteed* release after the end of his prison term.

Nor did *Miller* or *Graham* require release so early that Booker could enjoy all the normal aspects of his productive years (the same things, it should be noted, that he irrevocably denied 26-year-old G'Metrick Caldwell). Although he points to *Graham*'s discussion of a "reconciliation" with society, this was a *moral* reconciliation that the Court was concerned a juvenile inmate would have no incentive to make if he were denied any hope of release. *See Graham*, 560 U.S. at 79 ("A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual."); *Smith*, 892 N.W.2d at 66 (*Graham* did not mandate that "defendants have a 'meaningful life outside of prison' in which to 'engage meaningfully' in a career or raising a family"). Booker has a reasonable hope for "some years of life outside the prison walls," *Montgomery*, 136 S. Ct. at 736-37, which provides him the requisite incentive to reconcile with society.

c. Life expectancy data confirm that Booker is likely to live to his release date.

Reliable life expectancy data confirm the commonsense conclusion that Booker can reasonably expect to live to 67 years old. Booker, relying on a handful of studies, argues that his incarceration will diminish his lifetime so much that it likely will be shorter than his sentence. These studies offer him little support.

Initially, many courts have advised caution when using life expectancy data to draw a constitutional line in this context. *See, e.g.*, *Smith*, 892 N.W.2d at 64 ("[W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." (internal quotation marks omitted)); *see also Mathurin*, 868 F.3d at 932-33 (discussing the difficulty of relying on life expectancy data); *Kitchen v. Whitmer*, -- F. Supp. 3d --, No. 18-11430, 2020 WL 5505352, at *8 (E.D. Mich. Sept. 11, 2020) (same, and observing that considering some categories of data like race and gender may be unconstitutional). And even courts that do consider these data acknowledge that the data are not "the sole controlling issue" but rather one factor among many in determining whether a sentence provides a reasonable opportunity for release. *See Smith*, 892 N.W.2d at 64.

In this case, the data establish that Booker's sentence provides for his release within his expected lifetime. A person, like Booker, who turned 19 in 2018—the most recent year for available life expectancy data from the Centers for Disease Control—was expected to live another 61.4 years.[10] United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital

[10] The life expectancy of a Tennessean is similar. Based upon a 2013 report from the Tennessee Department of Health, the life expectancy from birth in Tennessee at the time of the report was around 2.1 years shorter than the national average. (App'x B, at 2.) A Tennessean who reached the age of 65 between 2009 and 2011 could expect to live another 18.3 years. (App'x B, at 2.)

Statistics Reports, Vol. 69, No. 12 (Nov. 17, 2020), (attached hereto as App'x A, Table 1.) This life expectancy is 13 years longer than Booker had remaining on his 51-year prison term at the end of 2018. Further, should Booker reach 67 years old as expected, he would likely live another 18.7 years after his release under current data. *Id.*

The studies Booker cites, on the other hand, offer little assistance. For example, he relies on an affidavit from Dr. Michael Freeman opining that there is only a 1.5 percent chance an inmate will survive 51 years in a Tennessee prison. But Dr. Freeman's analysis establishes no such thing. First, he added 51 years to the average age of a Tennessee inmate (29.5 years) to arrive at a release age of 80.5 years, which is 13.5 years older than Booker will be when he is likely to be released. (Br. of the Tennessee Association of Criminal Defense Attorneys ("TACDL"), *et al.*, App'x B, at 3-4.) Second, in arriving at the 1.5 percent figure, Dr. Freeman simply noted that 98.5 percent of the inmates who happened to die in Tennessee prisons between 1991 and 2015 were younger than 80.5 years old. (*Id.*) Dr. Freeman therefore has merely demonstrated that there is a 1.5 percent chance that any given Tennessee inmate who died in custody between 1991 and 2015 was 80.5 years old or older. This is utterly irrelevant.

Booker also points to two studies involving prison populations of other States. First, he cites an analysis of Michigan inmates prepared by Deborah Labelle, the Project Director for the ACLU of Michigan's Life Without Parole Initiative. *See* Deborah Labelle, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," *available online at* http://www.lb7.uscourts.gov/documents/17-12441.pdf (last

visited December 8, 2020). Ms. Labelle did not show her math on how she arrived at a diminished figure for a Michigan juvenile inmate's life expectancy (50.6 years old), although it appears that, like Dr. Freeman, she merely averaged the ages of inmates who have died in custody. *Id.* at n.1. Regardless, without more information about how she arrived at this figure—not to mention that it analyzed another State's prison population with an admittedly small sample size, *id.* at 2—this study offers little assistance to Booker. *See Kitchen*, 2020 WL 5505352, at *9 (declining to rely on this study because it "does not describe the methodology used and does not appear to have been subject to peer review").

Second, Booker points to a study that, he claims, establishes that each year of incarceration reduces an inmate's life expectancy by two years. But this was a study of New York *parolees* who had served at most 10 years in custody. Evelyn J. Patterson, The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003, 103 Am. J. of Pub. Health 523, 526 (2013), *available online at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673515/ (last visited December 8, 2020). The study's finding was based upon this population's life expectancy after release and, critically, the cause of death of these inmates was unknown. The study's finding therefore has little, if any, relevance here. *See Kitchen*, 2020 WL 5505352, at *9 (concluding that this study's focus on parolees made it irrelevant to a *Miller* claim).

Moreover, as other courts have observed, "although incarceration has its stresses, it may shield inmates from other stresses that would

afflict them outside of prison, including violence, accidents, and poor access to health care." *People v. Contreras*, 411 P.3d 445, 450 (Ca. 2018); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1070 (Conn. 2015) (Espinosa, J., dissenting) ("Although incarceration may lower the life expectancy for an advantaged juvenile, it very well may increase the life expectancy of a juvenile who comes from a disadvantaged economic class and background."). The very same author who wrote the New York parolee study, in fact, has arrived at a similar conclusion. Evelyn Patterson, Incarcerating Death: Mortality in U.S. State Correctional Facilities, 1985–1988, 47(3) Demography 563, 594-99 (2010), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000056/ (last visited December 8, 2020); *see also Kitchen*, 2020 WL 5505352, at *11 (citing this study).

Thus, the only reliable life expectancy data before the Court establish that Booker will likely live to see his release date. And, should he live to that day as expected, he is likely to have nearly two decades of life left after his release.

d. Legislative developments in other States are immaterial to the Eighth Amendment issue before the Court.

Booker and some of the amici point to legislation in other States, concluding that Tennessee's life sentence is among the harshest in the country. (Def's Br., at 30-32; Br. of TACDL, *et al.*, at 22-23; Br. of American Civil Liberties Union of Tennessee ("ACLU"), 9-13, App'x A.) This information is immaterial and overstated.

Critically, Booker is not seeking a categorical ban on 51-year juvenile sentences; he is challenging only the mandatory nature of the sentence.[11] In *Miller*, the Court noted that it typically undertakes this "evolving standard of decency analysis" when considering *categorical* bans. *See Miller*, 567 U.S. at 482. When the Court does not impose a categorical ban and merely extends precedent, it generally does "not scrutinize[] or rel[y] . . . on legislative enactments." *Id.* at 483. An extension of precedent is exactly what Booker seeks here, and these enactments have little, if any, bearing on that claim.

Further, this sentence is not, as Booker and amici suggest, such an outlier. As they concede, Kansas and Alaska have comparable release eligibility provisions for certain offenses. Alaska Stat. Ann. §§ 33-16-090(b)(1)(A), 12.55.125(a) (two-thirds of up to a 99-year sentence)[12]; Kan. Stat. Ann. § 21-6623 ("hard 50" sentence). Three other States have release eligibility laws that require service of 40 years, Colo. Rev. Stat. § 18-1.3-401(4)(c)(I)(A) (40 years less earned time granted); Mich. Comp. Laws Ann. § 769.25(9) (25-40 year minimum);

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[11] He also argues that his sentence is *substantively* unconstitutional as applied to him. As discussed below, this issue is not properly before the Court. But regardless, the legislative enactments of other States are irrelevant to that claim as well.

[12] Although the ACLU cites a 2017 opinion holding that a defendant sentenced for first-degree murder need only serve one-third of his sentence in Alaska, (Br. of ACLU, App'x A, 1 n.3 (citing *Walker v. State*, No. A-11784, 2017 WL 3126747, at *2 (Alaska Ct. App. July 19, 2017)), the statute was amended in 2019 to increase the mandatory service period to two-thirds for first-degree murder, 2019 Alaska Laws 1st Sp. Sess. Ch. 4, § 107.

Tex. Gov't Code Ann. § 508.145(b), while one other requires service of 38 years, Okla. Stat. Ann. tit. 21, § 13.1; *Anderson v. State*, 130 P.3d 273, 282-83 (Okla. 2006).

Moreover, while Booker's sentence may have a longer minimum term than those of some other States, it has a shorter maximum term. Booker's sentence guarantees his release after he serves his term. Many of the States that made changes to their laws after *Miller*, on the other hand, merely grant parole *eligibility* after a juvenile inmate spends decades in prison.[13] Thus, while all these sentences provide the hope for release required by the Eighth Amendment, Tennessee goes a step further and provides more than what is constitutionally required: certainty of release.

B. Judicial extension of *Miller*'s holding would needlessly remove this issue from the democratic process.

As demonstrated by the terms of *Graham*, *Miller*, and *Montgomery*, and by the many courts that have upheld comparable sentences, the Court is not bound to declare Booker's sentence unconstitutional. Instead, Booker and the amici ask for an *extension* of *Miller*, and they rely heavily on a group of state supreme courts that

[13] *E.g.*, Ala. Code § 13A-5-43(e); Ariz. Rev. Stat. Ann. § 13-716; Ark. Code Ann. § 13-751(a)(2)(A); Cal. Penal Code § 3051; Colo. Rev. Stat. § 18-1.3-401(4)(c)(I)(A); Conn. Gen. Stat. Ann. § 54-125a(f)(1); Del. Code Ann. tit. 11, § 4204A(d)(2); Ga. Code Ann. § 17-10-6.1(c)(1); Haw. Rev. Stat. Ann. § 706-656(1); La. Stat. Ann. § 15:574.4(E); Mo. Ann. Stat. § 558.047; N.C. Gen. Stat. Ann. § 15A-1340.19A; Or. Rev. Stat. Ann. § 144.397; Wash. Rev. Code Ann. § 9.94A.730(1); Wyo. Stat. Ann. § 6-10-301(c).

have extended these cases beyond their narrow holdings. This Court should decline to follow that path and should instead leave this issue to the General Assembly, which has considered it as recently as the last legislative session.

1. The state supreme courts that have extended *Miller* and *Graham* have usurped the legislative role and struggled to establish clear guidelines.

The courts that Booker cites have generally held that a sentence of around 50 years or more implicates the protections of *Graham* and *Miller*,[14] but they have struggled to provide clear guidance on what sentences short of that would pass muster. "Indeed, courts that have held de facto juvenile life sentences unconstitutional provide a cautionary tale, as they have invariably usurped the legislative

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[14] By the State's count, there are eight state high courts that have declared sentences similar to Booker's sentence to be unconstitutional as *de facto* life sentences. *See Contreras*, 411 P.3d at 453-55; *Casiano*, 115 A.3d at 1047-48; *People v. Buffer*, 137 N.E.3d 763, 774 (Ill. 2019); *State v. Null*, 836 N.W.2d 41, 70-74 (Iowa 2013); *Carter v. State*, 192 A.3d 695, 734-35 (Md. 2018); *State v. Zuber*, 152 A.3d 197, 212-13 (N.J. 2017); *White v. Premo*, 443 P.3d 597, 605 (Or. 2019); *Bear Cloud v. State*, 334 P.3d 132, 142-43 (Wyo. 2014); *see also Wallace*, 527 S.W.3d at 60-61 (vacating a 50-year sentence under *Miller* because it was the harshest penalty available in the state for juveniles); *State v. Houston-Sconiers*, 391 P.3d 409, 419 (Wash. 2017) (invalidating mandatory juvenile sentences).
On the other hand, as discussed *supra* at 29-32, the U.S. Supreme Court, five federal circuit courts, and six state high courts have affirmed sentences comparable to Booker's. Additionally, although the Supreme Court of Wyoming would invalidate Booker's sentence, *Bear Cloud*, 334 P.3d at 142-43, it would affirm a very similar sentence, *Davis*, 472 P.3d at 1033-34 (affirming a 42-year sentence that permits release at 60 years old).

prerogative to devise a novel sentencing scheme or otherwise delegated the task to trial courts to do so." *State v. Soto-Fong*, 474 P.3d 34, 43 (Ariz. 2020).

Some of these courts "thrust the legislative pen in the trial court's hand" by remanding for the court to consider a set of vague principles. *Id.* at 43 (analyzing the Wyoming Supreme Court's analysis in *Bear Cloud*, 334 P.3d at 142-43). The Iowa Supreme Court's decision in *Null*, perhaps the leading case of this group, is a prime example. After invalidating the defendant's sentence, the court instructed the trial court to "recognize and apply the core teachings of *Roper*, *Graham*, and *Miller* in making sentencing decisions for long prison terms involving juveniles." *Null*, 836 N.W.2d at 74. But the court provided little practical guidance for the sentencing court, as these "core principles" ranged from "children are constitutionally different from adults" to "[youth] is not an excuse." *Id.* at 74-75 (internal quotation marks omitted). The court merely remanded for the trial court to reconsider the sentence, listing a number of critical questions it left unanswered (including whether "lengthy sentences of fifty years in prison or more are categorically banned") and instructing the court not to run the sentences consecutively. *Id.* at 76-77.

Other courts urge the legislature to step in. *See Casiano*, 115 A.3d at 1047-48; *Zuber*, 152 A.3d at 215; *see also Buffer*, 137 N.E.3d at 772-774 (noting that courts have struggled with this question but deferring to a post-*Miller* legislative enactment that made the minimum 40 years). But they offer little guidance on where the legislature would be authorized to set an appropriate sentence. *E.g.*, *Zuber*, 152 A.3d at 215

(noting "serious constitutional issues" with "substantial periods of parole ineligibility" for juveniles and encouraging the legislature to "examine the issue"). Nor is there any clear place to seek such guidance in the wake of these decisions; many of these courts have refused to consider life expectancy data (perhaps because, as in this case, these data establish that a 50-year sentence is not the equivalent of LWOP). *E.g.*, *Null*, 836 N.W.2d at 71-72; *Zuber*, 152 A.3d at 214.

Further, these courts often rely on the faulty premise that no "state high court has found incarceration of a juvenile for 50 years or more before parole eligibility to fall outside the strictures of *Graham* and *Miller*." *Contreras*, 411 P.3d at 455. Not only is this not true, *see Steele*, 915 N.W.2d at 567; *Russell*, 908 N.W.2d at 677, but it also ignores the federal courts that have approved similar sentences, *Mathurin*, 868 F.3d at 934-35, and minimizes the state high courts that have upheld sentences requiring more than 40 years' imprisonment before release eligibility, *e.g.*, *Ira*, 419 P.3d at 170-71.

This Court should decline to follow the path charted by these courts because their reasoning is "completely unmoored from the language of *Miller*." *Wilson*, 2020 WL 6737226, at *8. This Court instead should apply *Miller*'s narrow holding, which permits a mandatory sentence for a juvenile murderer so long as it provides him an opportunity for (or, as here, a guarantee of) release.

2. The Court should let the General Assembly decide the appropriate length of a juvenile murderer's sentence.

Booker and the amici also urge the Court to extend *Miller* on policy grounds. Booker, for example, notes that his sentence is too long to allow him to start a career or a family. (Def's Br., at 27-28.) The amici argue this sentence precludes restorative justice efforts,[15] violates religious teachings and principles,[16] ignores the potential for juveniles to reform,[17] and exacerbates racial disparities.[18] They also point to other state legislatures that have made changes to their sentencing schemes after *Graham* and *Miller*, and they decry Tennessee's life sentence as an "outlier."[19]

But these are ultimately legislative issues. *See State v. Burdin*, 924 S.W.2d 82, 87 (Tenn. 1996) ("The power to . . . assess punishment for a particular crime is vested in the legislature."); *see also Soto-Fong*,

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[15] Br. of the Raphah Institute, at 18-21.

[16] Br. of the American Baptist College, *et al.*, at 14-17.

[17] Br. of the Campaign for the Fair Sentencing of Youth, *et al.*, at 18-21.

[18] Br. of the Campaign for the Fair Sentencing of Youth, *et al.*, at 21-24; Br. of the Tennessee Conference for the NAACP, at 21-24. The Tennessee Conference of the NAACP also discusses at length implicit bias in judges and prosecutors as well as specific issues with the Shelby County Juvenile Court. These arguments have little relevance to the limited question on which the Court granted review: whether the sentence imposed on this particular defendant, who has raised no equal protection challenge, is unconstitutional.

[19] Br. of ACLU, at 9-14; Br. of TACDL, *et al.*, at 22-23.

474 P.3d at 42 (noting that judicial line-drawing in this context "would invariably require us to assume the legislative prerogative to establish criminal sentences"). And the legislature is, in fact, already considering juvenile life sentences. As one of the amici notes, Tennessee's juvenile life sentence has been the subject of considerable local and national attention recently.[20] The General Assembly has taken notice: just last session, a bipartisan bill was introduced to permit release eligibility for juvenile inmates after 30 years' imprisonment or 20 years' imprisonment in certain circumstances. H.B. 876, 111th General Assembly (2020).

The amici are clearly frustrated with the pace of legislative development. But this impatience is hardly a good reason for the Court to draw an arbitrary constitutional line amid a live policy debate. Instead, the Court should permit that debate to continue in the legislature where it belongs. The General Assembly is best equipped to hear input on this issue from a broad array of community leaders, including these amici as well as those who advocate for the victims of violent crime. The amici can and should direct their advocacy to the General Assembly, which has the power to change the law.

C. The "substantive" constitutionality of Booker's sentence is not properly before the Court.

Booker also argues that his sentence is "substantively" unconstitutional because he is not incorrigible. (Def's Br., at 40-44.) On this point, the Supreme Court has held that, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that

[20] Br. of TACDL, *et al.*, at 21.

sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." *Montgomery*, 136 S. Ct. at 734 (internal quotation marks omitted).

But no court *has* considered Booker's age or whether he is incorrigible before sentencing him in this case. Although Booker made an offer of proof via Dr. Cruise's testimony before the trial court, that court never addressed this question and made no findings on this issue. The Court therefore has nothing to review absent a remand. *See Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 162 n.12 (Tenn. 2017) ("[T]his Court's jurisdiction is appellate only, and this Court cannot itself find facts." (internal quotation marks omitted)).

No remand is called for here. If the Court finds that Booker's sentence is the constitutional equivalent of LWOP, it is unconstitutional because it is mandatory. *See Miller*, 567 U.S. at 465. If the Court finds, as the State argues, that the sentence is not the constitutional equivalent of LWOP, then Booker's "incorrigibility" is irrelevant. *See Montgomery*, 136 S. Ct. at 734-35. Thus, the Court need not and should not address the "substantive" constitutionality of the sentence.

II. Booker's Sentence Does Not Violate the Tennessee Constitution.

Booker and an amicus argue that his sentence violates the Tennessee Constitution. (Def's Br., at 44-54; Br. of TACDL, *et al.*, at 17-33.) They primarily rely on article I, section 16, which forbids "cruel and unusual punishments," as well as two other provisions that address the treatment of incarcerated individuals, *see* Tenn. Const. art. I, §§ 13, 32. But they offer no reasoned basis to interpret article I, section 16 more broadly than the identically worded Eighth Amendment. Moreover, the test they invoke under article I, section 16 does not apply in this context and would not help Booker even if it did. And the other constitutional provisions they rely on impose no limits on the severity of a criminal sentence.

A. There is no basis to interpret article I, section 16 more broadly than the Eighth Amendment.

Even if his sentence is not cruel and unusual under the Eighth Amendment, Booker and an amicus urge this Court to hold that the sentence is cruel and unusual under Article I, Section 16 of the Tennessee Constitution. But there is no basis in text, history, or precedent to extend this identically worded state constitutional provision beyond its federal counterpart.

The United States and Tennessee Constitutions prohibit the infliction of "cruel and unusual punishments" using *identical* language. *Compare* U.S. Const. amend. VIII, *with* Tenn. Const. art. I, § 16. The constitutional text is a critical factor in determining whether these parallel provisions afford the same protections. *See Phillips v.*

Montgomery Cnty., 442 S.W.3d 233, 243 (Tenn. 2014) ("We thus begin with a comparison of the text of the federal and state provisions."). The identical language in these provisions is no accident, and it strongly supports interpreting them to provide the same protections.

Tennessee adopted its identically worded Cruel and Unusual Punishments Clause in 1796, just a few years after the Eighth Amendment was ratified. *See* Tenn. Const. art. XI, § 16 (1796). This textual duplication and temporal proximity provide good reason to infer that the two provisions encompass the same protections. As this Court explained when interpreting another provision in Tennessee's Declaration of Rights, "the language now appearing in article I, section 10 was adopted in 1796 only five years after ratification of the Fifth Amendment. It is logical to infer from the similarity of the language of the two provisions and the temporal proximity of their adoption that the drafters of article I, section 10 were aware of, and influenced by, the Double Jeopardy Clause of the Fifth Amendment." *State v. Watkins*, 362 S.W.3d 530, 555 (Tenn. 2012) (footnotes omitted). And as the U.S. Supreme Court has repeatedly observed, if a word is "obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (cleaned up); *cf.* *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989) (relying on English precedent to interpret the Eighth Amendment because that Amendment "was based directly on Art. I, § 9, of the Virginia Declaration of Rights, which adopted verbatim the language of the English Bill of Rights" (cleaned up)). Accordingly, there

is no sound reason to depart from Eighth Amendment precedent when interpreting article I, section 16.

This Court's precedents lead to the same conclusion. The Court has repeatedly stressed that it "will not interpret a state constitutional provision differently than a similar federal constitutional provision unless there are sufficient textual or historical differences, or other grounds for doing so." *Phillips*, 442 S.W.3d at 243; *accord State v. Pruitt*, 510 S.W.3d 398, 415 (Tenn. 2016). Most significantly, this Court has on multiple occasions refused to interpret the *very provision* at issue here more broadly than the Eighth Amendment. *See Abdur'Rahman v. Parker*, 558 S.W.3d 606, 618 (Tenn. 2018) (holding in method-of-execution context that there was "no difference in language between the [Eighth Amendment] and [Article I, Section 16] which would warrant application of a different standard under the Tennessee Constitution" (cleaned up)); *West v. Schofield*, 519 S.W.3d 550, 568 n.16 (Tenn. 2017) (same); *Cozzolino v. State*, 584 S.W.2d 765, 767 (Tenn. 1979) (holding in death-penalty context that Article 1, Section 16 "places no greater restriction on the punishments that may be imposed by this state than does the federal constitution").

The Court has consistently applied this principle even when the parallel constitutional provisions were only "[s]imilar[]" and not, as here, deliberately *identical*. *See, e.g.*, *State v. McElrath*, 569 S.W.3d 565, 570, 578 (Tenn. 2019) (adopting the federal good-faith exception to the exclusionary rule because "Tennessee's search and seizure provisions are identical in intent and purpose with the . . . Fourth Amendment" (cleaned up)); *State v. Decosimo*, 555 S.W.3d 494, 506, 514

(Tenn. 2018) (holding that federal and state due process protections are "synonymous" and refusing to interpret them differently absent "any textual, historical, or other basis"); *Pruitt*, 510 S.W.3d at 416 ("There is simply nothing in the text of our constitution nor in our history [to support] that the meaning of 'ex post facto' in Tennessee is more expansive than the [federal] definition . . . ."); *State v. Reynolds*, 504 S.W.3d 283, 312 (Tenn. 2016) ("[W]e discern no textual, historical, or other basis on which to part company with the United States Supreme Court on this issue." (cleaned up)); *State v. McCormick*, 494 S.W.3d 673, 686 (Tenn. 2016) (declining to adopt a different community-caretaking doctrine under the Tennessee Constitution because the state provision "is identical in intent and purpose to the Fourth Amendment" (cleaned up)); *State v. McCoy*, 459 S.W.3d 1, 13-14 (Tenn. 2014) ("[A]rticle I, section 9 does not impose any restrictions on admitting hearsay statements beyond those of the Sixth Amendment . . . ."); *Phillips*, 442 S.W.3d at 243-44 (declining to adopt divergent interpretations of similar federal and state Takings Clauses); *Watkins*, 362 S.W.3d at 555 (explaining that "careful study has revealed no textual, historical, or other basis" for interpreting the federal and state Double Jeopardy Clauses differently). [21]

[21] An amicus cites several cases that it characterizes as extending the Tennessee Constitution beyond parallel provisions of the United States Constitution. (Br. of Foundation for Justice, Freedom and Mercy, *et al.*, at 8-9.) But most of those cases have been subsequently abrogated or limited. *See Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000), *abrogated by* Tenn. Const. art. I, § 36; *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989), *overruled by State v. Tuttle*, 515

The State is aware of only one instance[22] in which this Court has interpreted article I, section 16 more broadly than then-existing Eighth Amendment precedent. *See Van Tran v. State*, 66 S.W.3d 790, 800-01 (Tenn. 2001) (holding, before the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), that article I, section 16 bars the execution of the intellectually disabled). But *Van Tran* offers no basis to extend article I, section 16 in this context for at least two reasons.

S.W.3d 282, 305-08 (Tenn. 2017) (adopting the federal standard for search-warrant affidavits under the state constitution); *State v. Deuter*, 839 S.W.2d 391 (Tenn. 1992), *limited by McCoy*, 459 S.W.3d at 12-16 (distinguishing *Deuter* and observing that it was "decided under pre-*Crawford* standards, which no longer apply to our analysis of confrontation rights"). And others involved parallel constitutional provisions with material differences in text and history. *E.g.*, *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) ("The equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically distinct."). Thus, these cases provide no basis to interpret article I, section 16 differently than the identically worded Eighth Amendment.

[22] The defendant and an amicus suggest *State v. Harris*, 844 S.W.2d 601 (Tenn. 1992), as a second instance, but they are mistaken. (Def's Br., at 45; Br. of TACDL, *et al.*, at 15.) *Harris* did not extend article I, section 16 beyond the Eighth Amendment but merely "clarif[ied] [its] reach" in the face of "unclear" federal precedent regarding proportionality review. 844 S.W.2d at 602. The amicus asserts that *Harris* was more protective than the federal constitution because contemporary federal precedent "limited the right to proportionality review to capital cases" (Br. of TACDL, *et al.*, at 15), but that is incorrect. *See Solem v. Helm*, 463 U.S. 277, 284-90 (1983) (applying proportionality review in a non-capital case); *Harmelin v. Michigan*, 501 U.S. 957, 1001-05 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (same).

First, *Van Tran* was decided after the U.S. Supreme Court had "granted certiorari [in *Atkins*] to revisit its five to four . . . decision" in *Penry v. Lynaugh*, 492 U.S. 302 (1989), which held that the Eighth Amendment did not categorically bar the execution of the intellectually disabled. *Van Tran*, 66 S.W.3d at 800. The grant of certiorari provided good reason to think that the U.S. Supreme Court might abrogate *Penry*, but no similar evidence exists to think that the U.S. Supreme Court will extend *Miller* as Booker requests. To the contrary, multiple Justices of the U.S. Supreme Court have cautioned against further extending *Miller*. *See, e.g.*, Transcript of Oral Argument at 19, *Jones v. Mississippi*, 140 S. Ct. 1293 (2020) (No. 18-1259) (question of Alito, J.) ("What would you say to any members of this Court who are concerned that we have now gotten light years away from the original meaning of the Eighth Amendment and who are reluctant to go any further on this travel into space?"); *Miller*, 567 U.S. at 502-03 (Thomas, J., dissenting) (explaining that *Roper*, *Graham*, and *Miller* are not "consistent with the original understanding of the Cruel and Unusual Punishments Clause"). This Court should be similarly reticent to extend the Tennessee Constitution.

Second, *Van Tran* relied heavily on the General Assembly's decision to prohibit the execution of the intellectually disabled following the U.S. Supreme Court's decision in *Penry*. *Van Tran*, 66 S.W.3d at 804-05 (citing Tenn. Code Ann. § 39-13-203 (1991)). The Court stressed that the General Assembly "speaks for the people on matters of public policy of the state" and that its actions were compelling evidence "that the societal view in Tennessee is against the execution of the mentally

retarded." *Id.* (cleaned up); *see also State v. Black*, 815 S.W.2d 166, 189 (Tenn. 1991) (relying on the views of the General Assembly to interpret article I, section 16 because the legislature is "most representative of and responsive to the views of the people of this state"). But no similar evidence suggests that Tennesseans view lengthy but survivable sentences for juvenile murderers as cruel and unusual. And critically, what matters under the Tennessee Constitution are the views of "contemporary Tennesseans," as expressed through their elected representatives, *Black*, 815 S.W.2d at 189, not any supposed national consensus or the views of individual citizens.[23]

B. The test Booker invokes under article I, section 16 is inapplicable and unavailing.

Booker and the amicus largely ignore the textual and historical evidence discussed above, not to mention this Court's precedents about interpreting parallel federal and state constitutional provisions. They instead ask this Court to decide whether a lengthy juvenile sentence violates article I, section 16 using a three-part test this Court originally

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[23] For this reason, reliance on nationwide sentencing practices to support the defendant's *state* constitutional argument is misplaced. (Def's Br., at 45-46; Br. of TACDL, *et al.*, at 22-23.) Although the Court in *Van Tran* considered national legislation, it did so while extending *both* the Eighth Amendment and article I, section 16. *Van Tran*, 66 S.W.3d at 800-01, 809. The Court also made clear that, as to the state constitutional issue, it was merely applying the analysis set out in *Black*, *id.* at 800 & n.12, which looked only to Tennessee legislation, *Black*, 815 S.W.2d at 189-90.
Further, the views of individual amici (e.g., Br. of the American Baptist College, *et al.*, at 1-3) are similarly inapposite because they are not necessarily "representative of . . . the views of the people of this state." *Id.* at 189.

adopted in the death-penalty context. (Def's Br., at 45; Br. of TACDL, *et al.*, at 17-18) (citing *Black*, 815 S.W.2d at 189)). Under that test, a court considers whether the punishment (1) "conform[s] with contemporary standards of decency," (2) is "grossly disproportionate to the offense," and (3) goes "beyond what is necessary to accomplish any legitimate penological objective." *Black*, 815 S.W.2d at 189 (quoting *State v. Ramseur*, 524 A.2d 188, 210 (N.J. 1987)).

The Court need not analyze Booker's claim under the three-part test set forth in *Black*. As it has done many times before, this Court should reject Booker's request to extend article I, section 16 beyond its federal counterpart for the simple reason that there is no basis in text or history to do so. *See supra* at 46-51. Further, the Court should not undertake the *Black* test in this case because Booker does not seek a *categorical* ban on juvenile life sentences but challenges only the mandatory nature of his sentence. As discussed *supra* at 38, the U.S. Supreme Court suggested a similar test was inappropriate when considering mandatory LWOP sentences in *Miller*. *See Miller*, 567 U.S. at 482-83 (disclaiming the need to assess societal standards by "tall[ying] legislative enactments").

But even if this Court applies the *Black* test, Booker's challenge still fails. The three-part test favors upholding Tennessee's juvenile-sentencing regime.

First, there is no competent evidence that a 51-year sentence for juvenile murderers is inconsistent with contemporary standards of decency in Tennessee. Tennessee's legislative enactments are the best evidence of contemporary standards, *Black*, 815 S.W.2d at 189; *Van*

Tran, 66 S.W.3d at 804-05, and the General Assembly has approved a lengthy sentence for juvenile murderers. *See* Tenn. Code Ann. § 40-35-501(h)(2).

Booker's argument that the General Assembly did not carefully consider whether to impose such a lengthy sentence on juveniles is both irrelevant and incorrect. (Def's Br., at 46-47.) The relevant question in assessing contemporary standards is whether the legislature has affirmatively *repudiated* the challenged punishment, *Van Tran*, 66 S.W.3d at 804-05, or has instead endorsed it, *Black*, 815 S.W.2d at 189. It is not, as Booker suggests, whether the legislature endorsed the punishment without sufficient reflection.

Recent legislation belies any argument that the General Assembly has repudiated this punishment. As noted, the General Assembly amended the very release eligibility statute challenged here after this Court's decision in *Brown* without making any substantive changes to the statute. 2020 Tenn. Pub. Acts, ch. 765, § 1. Further, as part of the Juvenile Justice Reform Act of 2018, the General Assembly amended Tenn. Code Ann. § 37-1-134(a)(1), which in part prohibits the death penalty for juveniles, but did not include any prohibition on LWOP or life sentences. 2018 Tenn. Pub. Acts, ch. 1052, § 36. The General Assembly approved this Act while it was considering legislation to permit earlier release eligibility for juvenile murderers, S.B. 197, 110th

General Assembly (2017), and while Tennessee's juvenile life sentencing scheme was receiving significant local and national media attention.[24]

And in any event, the very premise of Booker's argument—that the General Assembly inadvertently imposed a harsh sentence on juvenile murderers due to the confluence of "three separate legislative determinations"—is a nonstarter. (Def's Br., at 46.) Whatever may be true of federal courts, *see Miller*, 567 U.S. at 486-87, this Court "presume[s] that the Legislature knows the law and makes new laws accordingly," *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013); *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) ("[T]he General Assembly is aware of its own prior enactments."); *cf. Miller*, 567 U.S. at 497 (Roberts, C.J., dissenting) (questioning whether federal courts "should ever assume a legislature is so ignorant of its own laws that it does not understand that two of them interact with each other").

Second, a 51-year sentence is not grossly disproportionate to the crime of murder, even for a juvenile. Taking another human life is the most severe crime a person can commit. *See Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (observing that even the most heinous nonhomicide crimes "cannot be compared to murder in their severity and irrevocability" (cleaned up)). Unlike all other crimes, "[l]ife is over for the victim of the murderer." *Enmund v. Florida*, 458 U.S. 782, 797 (1982). This uniquely severe crime deserves a severe penalty.

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[24] *E.g.*, Anita Wadhwani, *Cyntoia Brown: National legal groups join appeal to free woman sentenced to life at 16*, THE TENNESSEAN, Jan. 17, 2018, https://www.tennessean.com/story/news/2018/01/17/cyntoia-brown-national-legal-groups-join-appeal-free-woman-sentenced-life-16/1040772001/.

Booker and amici maintain that juveniles are generally less culpable than adults, and that may be true as a general matter. But there is no constitutional principle of proportionality that requires juveniles to *always* receive a lesser sentence than adults who commit similar crimes. To adopt that novel principle would require the General Assembly to enact an entirely separate juvenile criminal code, with lesser penalties for every crime on the books. *See Wilson*, 2020 WL 6737226, at *8 (rejecting a similar argument in part because it could "end up creating requirements that would vastly alter sentencing procedures for a large swath of juveniles"). That principle is foreign to state and federal constitutional law. The U.S. Supreme Court has limited the application of a juvenile-specific standard of proportionality to the two "most severe penalties" known to law: death and LWOP. *Miller*, 567 U.S. at 474-75. This Court should do the same. And because neither of those penalties is at issue here, a juvenile-specific proportionality standard is unwarranted.

Third, a 51-year sentence for juvenile murderers does not go beyond what is necessary to accomplish *any* legitimate penological objective. This severe sentence for this most severe of crimes serves the legitimate purpose of expressing society's disapproval of killing innocent human beings. *See Black*, 815 S.W.2d at 190 (recognizing that "express[ing] . . . society's moral outrage" is a legitimate penological objective). To hold otherwise, this Court would have to assume the legislative role of determining how many years in prison conveys the appropriate moral outrage for a murder committed by a juvenile. As discussed above in Section I.B, the Court should not assume that role.

Cf. Miller, 567 U.S. at 495 (Roberts, C.J., dissenting) (explaining that lengthy sentences for murderers serve "as a concrete expression of [society's] standards of decency" and that judges "have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty").

C. The other constitutional provisions Booker invokes do not apply.

Booker and the amicus suggest in passing that Booker's sentence violates two other provisions of the Tennessee Constitution. *See* Tenn. Const. art. I, § 13 ("[N]o person arrested and confined in jail shall be treated with unnecessary rigor."); *id.*, § 32 ("[T]he erection of safe prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for."). But these provisions do not limit the punishments the State may impose on a defendant. They instead govern only how a prisoner may be treated while incarcerated. *See Sanders v. State*, 392 S.W.2d 916, 918-19 (Tenn. 1965) (rejecting article 1, section 13 claim); *State v. Brimmer*, 876 S.W.2d 75, 88 (Tenn. 1994) (rejecting article 1, section 32 challenge to death sentence). Booker challenges only his sentence, not his treatment in prison, so these provisions are inapplicable. And in any event, Booker waived any challenges based on these provisions by failing to develop them in his brief. *See State v. Hester*, 324 S.W.3d 1, 80 (Tenn. 2010); *Sneed v. Bd. of Prof'l Responsibility of Supreme Court*, 301 S.W.3d 603, 615 (Tenn. 2010).

III. Alternatively, the Unconstitutional Portion of the Release Eligibility Statute Is Severable.

If this Court concludes that the challenged portion of the release eligibility statute is unconstitutional, it should elide the objectionable portion of the statute and hold that the remainder is valid and enforceable. Under this approach, the elided statute would make juvenile defendants convicted of first-degree murder eligible for parole after serving between 25 and 36 years' imprisonment, depending on the amount of sentence credits they earn and retain. *See* Tenn. Code Ann. § 40-35-501(h)(1), (n).

The doctrine of severability allows a court to "elide an unconstitutional portion of a statute" and leave the remaining provisions valid and effective. *See Willeford*, 597 S.W.3d at 470 (quoting *Lowe's Companies, Inc. v. Cardwell*, 813 S.W.2d 428, 430 (Tenn. 1991)). Although the release eligibility statute lacks a severability clause, "the General Assembly has approved the practice of elision through the enactment of a general severability statute." *Id.* at 471 (quoting *State v. Crank*, 468 S.W.3d 15, 28 (Tenn. 2015)); *see* Tenn. Code Ann. § 1-3-110.

This doctrine applies in "appropriate circumstances" and must operate "in keeping with the expressed intent" of the legislature. *Willeford*, 597 S.W.3d at 470 (quoting *Cardwell*, 813 S.W.2d at 430). Elision is appropriate when "the legislature would have enacted the act in question with the unconstitutional portion omitted." *Id.* at 471 (quoting *In re Swanson*, 2 S.W.3d 180, 189 (Tenn. 1999)).

The release eligibility statute contains two provisions that are relevant here—subsections (h)(1) and (h)(2).[25] The challenged provision, subsection (h)(2), requires defendants convicted of first-degree murder to serve at least 51 years in prison. Tenn. Code Ann. § 40-35-501(h)(2); *see also Brown*, 563 S.W.3d at 200-01. That provision applies to offenses committed on or after July 1, 1995. Tenn. Code Ann. § 40-35-501(h)(2). The other provision, subsection (h)(1), makes defendants convicted of first-degree murder parole eligible after serving between 25 and 36 years. *Id.* § 40-35-501(h)(1). This more lenient provision applies to offenses committed on or after November 1, 1989 but before July 1, 1995. *Id.*

Elision is appropriate if this Court determines that subsection (h)(2) is unconstitutional as applied to juveniles. Under this approach, the statute (as applied to juveniles)[26] would be elided as follows:

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[25] As noted, the General Assembly made non-substantive amendments to the release eligibility after Booker committed his crime and was sentenced. 2020 Tenn. Pub. Acts, ch. 765, § 1. Because the amended release eligibility statute does not "define[]" an "offense" or provide a "lesser penalty" than the version in effect when Booker committed his crime, Tenn. Code Ann. § 39-11-112, the amended statute applies to Booker and governs his release eligibility. Any severability analysis this Court conducts should be based on the most recently amended version of Tenn. Code Ann. § 40-35-501.

[26] Any elision of the release eligibility statute should apply only to juvenile defendants, since no one here challenges the constitutionality of the statute as applied to adults. *See* Tenn. Code Ann. § 1-3-110 ("[T]he inapplicability or invalidity of any section, clause, sentence or part in any one (1) or more instances shall not be taken to affect or prejudice in any way its applicability or validity in any other

(h)(1) Release eligibility for a defendant committing the offense of first degree murder ~~on or after November 1, 1989, but prior to July 1, 1995,~~ who receives a sentence of imprisonment for life occurs after service of sixty percent (60%) of sixty (60) years less sentence credits earned and retained by the defendant, but in no event shall a defendant sentenced to imprisonment for life be eligible for parole until the defendant has served a minimum of twenty-five (25) full calendar years of the sentence, notwithstanding the governor's power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, any sentence reduction credits authorized by § 41-21-236, or any other provision of law relating to sentence credits.

(2) ~~There shall be no release eligibility for a person committing first degree murder, on or after July 1, 1995, and receiving a sentence of imprisonment for life. The person shall serve one hundred percent (100%) of sixty (60) years less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236 or any other law, shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).~~

This remedy accords with the Court's established practice of eliding the objectionable part of a statute when the legislature has a "generally legitimate role to legislate" in a particular area. *Willeford*, 597 S.W.3d at 471. There are only two objectionable features of this statute—the 51-year mandatory minimum in subsection (h)(2) and the date range in subsection (h)(1) that limits application of the more

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instance."); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 586 (2012) (severing one application of a statute based upon a similar severance provision and noting that "[w]hen we invalidate an application of a statute because that application is unconstitutional, we are not 'rewriting' the statute; we are merely enforcing the Constitution").

lenient parole timeframe to crimes committed before July 1, 1995. Eliding the statute as proposed above would eliminate these "objectionable features" in a manner that is "consistent with the expressed legislative intent." *Id.* at 473 (internal quotation marks omitted).

To see why this remedy respects legislative intent, it is helpful to understand how the release eligibility statute came to exist in its current form. Before 1995, subsection (h)(1) made all defendants who received a life sentence for first-degree murder parole eligible after serving between 25 and 36 years of imprisonment, depending on sentence credits earned and retained. Tenn. Code Ann. § 40-35-501(h)(1) (1994). But in 1995, the legislature added the 51-year mandatory minimum now codified in subsection (h)(2) without repealing the more lenient parole timeframe in subsection (h)(1). *See* Tenn. Code Ann. § 40-35-501(h)-(i) (1995). Thus, the statute contained two different release eligibility timeframes for defendants convicted of first-degree murder, a result that this Court explained could, "[a]t first blush," create the appearance of a conflict. *Brown*, 563 S.W.3d at 200.

In *Brown*, this Court ultimately concluded that no conflict existed. *Id.* It held that the effect of the 1995 amendment was to require defendants who committed first-degree murder *on or after* July 1, 1995, to serve at least 51 years, while leaving in place the existing parole eligibility timeframe of 25 to 36 years for defendants who committed their crimes *before* July 1, 1995. *Id.* at 199-202.

After the *Brown* decision, in July 2020, the General Assembly added the date range in subsection (h)(1), which makes explicit the

construction of the statute that this Court provided in *Brown*. *See* 2020 Tenn. Pub. Acts, ch. 765, § 1. Defendants who committed their crimes on or after November 1, 1989, but before July 1, 1995, are parole eligible after serving 25 to 36 years. Tenn. Code Ann. § 40-35-501(h)(1). But those who committed their crimes on or after July 1, 1995, must serve at least 51 years before being released. *Id.* § 40-35-501(h)(2).

Eliding all of subsection (h)(2) and the date range in subsection (h)(1) is warranted because the Court can be certain that the legislature would have intended subsection (h)(1) to apply to *all* defendants convicted of first-degree murder—regardless of the date of their crime—if subsection (h)(2) were found to be unconstitutional. After all, the language now codified in subsection (h)(1) *did* apply to all such defendants before 1995, when the allegedly objectionable language now codified in subsection (h)(2) was added to the statute. *Compare* Tenn. Code Ann. § 40-35-501(h)(1) (1994), *with* Tenn. Code Ann. § 40-35-501(h)-(i) (1995); *see also Brown*, 563 S.W.3d at 200 n.4.

This Court has approved elision in similar circumstances. In *Crank*, this Court elided an objectionable provision in a statute because the legislature originally enacted the statute without that provision, and the statute stood on its own for several years before the objectionable provision was added. 468 S.W.3d at 29. Moreover, there was "no indication that the General Assembly would have repealed the [entire] statute had it been unable to enact" the objectionable provision. *Id.* The same is true here. The parole eligibility timeframe now codified in subsection (h)(1) stood on its own and applied to all defendants prior to 1995. And there is no reason to think the

legislature would have done away with that timeframe had it been unable to enact the mandatory minimum now codified in subsection (h)(2).

As in *Crank*, eliding the statute in the manner proposed above is "consistent with the expressed legislative intent." *Id.* (internal quotation marks omitted). Doing so would leave intact "a complete law capable of enforcement and fairly answering the object of its passage." *Gibson Cnty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985) (internal quotation marks omitted). Juveniles convicted of first-degree murder and sentenced to life would become "eligible for parole" (although not guaranteed release) after serving between 25 and 36 years in prison. Tenn. Code Ann. § 40-35-501(h)(1), (n).

CONCLUSION

For the reasons stated, the judgment should be affirmed. Alternatively, the judgment should be amended to reflect a sentence under Tenn. Code Ann. § 40-35-501(h)(1) as elided.

Respectfully submitted,

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