IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
February 24, 2022 Session Heard at Nashville[1]

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-SC-R11-CD

Tyshon Booker challenges the constitutionality of Tennessee's mandatory sentence of life imprisonment when imposed on a juvenile homicide offender. In fulfilling our duty to decide constitutional issues, we hold that an automatic life sentence when imposed on a juvenile homicide offender with no consideration of the juvenile's age or other circumstances violates the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Mr. Booker stands convicted of felony murder and especially aggravated robbery—crimes he committed when he was sixteen years old. For the homicide conviction, the trial court automatically sentenced Mr. Booker under Tennessee Code Annotated section 40-35-501(h)(2) to life in prison, a sixty-year sentence requiring at least fifty-one years of incarceration. But this sentence does not square with the United States Supreme Court's interpretation of the Eighth Amendment. When sentencing a juvenile homicide offender, a court must have discretion to impose a lesser sentence after considering the juvenile's age and other circumstances. Here, the court had no sentencing discretion. In remedying this constitutional violation, we exercise judicial restraint. We need not create a new sentencing scheme or resentence Mr. Booker—his life sentence stands. Rather, we follow the policy embodied in the federal Constitution as explained in *Montgomery v. Louisiana*, 577 U.S. 190 (2016) and grant Mr. Booker an individualized parole hearing where his age and other circumstances will be properly considered. The timing of his parole hearing is based on release eligibility in the unrepealed version of section 40-35-501(h)(1), previously in effect, that provides for a term of sixty years with release eligibility of sixty percent, but not less than twenty-five years of service. Thus, Mr. Booker remains sentenced to sixty years in prison, and after he has served between twenty-five and thirty-six years, he will receive an individualized parole

[1] We first heard oral argument on February 24, 2021. In light of the untimely death of Justice Cornelia A. Clark and by order of this Court filed December 17, 2021, retired Tennessee Supreme Court Justice William C. Koch, Jr. was designated to participate in this appeal. The case was re-argued on February 24, 2022.

hearing where his age and other circumstances will be considered. Our limited ruling, applying only to juvenile homicide offenders, promotes the State's interest in finality and efficient use of resources, protects Mr. Booker's Eighth Amendment rights, and is based on sentencing policy enacted by the General Assembly.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Criminal Appeals Reversed in Part

SHARON G. LEE., J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., SP.J., joined. HOLLY KIRBY, J., filed an opinion concurring in the judgment. JEFFREY S. BIVINS, J., filed a dissenting opinion, in which ROGER A. PAGE, C.J., joined.

Eric Lutton, District Public Defender, and Jonathan P. Harwell, Assistant District Public Defender, for the appellant, Tyshon Booker.

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OPINION

I.

This case requires us to rule on the constitutionality of the statutory sentencing process for juvenile homicide offenders. History teaches that our constitutional union is preserved best when the three branches of government respect our state and federal constitutions, particularly the proper roles assigned to each branch of government. As

Justice Bivins recently reminded us, the Tennessee Constitution establishes this Court as "the supreme judicial tribunal of the [S]tate." *State v. Lowe*, 552 S.W.3d 842, 856 (Tenn. 2018) (quoting *Barger v. Brock*, 535 S.W.2d 337, 340 (Tenn. 1976)). Accordingly, this Court has the sole authority—and responsibility—to "determine the constitutionality of actions taken by the other two branches of government." *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995) (citing *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 148 (Tenn. 1993)); *see also Jordan v. Knox Cnty.*, 213 S.W.3d 751, 780 (Tenn. 2007) ("When there is a challenge, the judicial branch of government has a duty to determine the substantive constitutionality of statutes, ordinances, and like measures." (citing *City of Memphis v. Shelby Cnty. Election Comm'n*, 146 S.W.3d 531, 536 (Tenn. 2004))); *Huntsman's Lessee v. Randolph*, 6 Tenn. (5 Hayw.) 263, 271 (1818) (recognizing the courts' duty to determine the substantive constitutionality of statutes).

This Court cannot wield its constitutional prerogative in a way that usurps the authority of the other two branches of government. *See* Tenn. Const. art. II, § 2. It is not our prerogative to determine whether a statute is "dictated by a wise or foolish policy." *Cosmopolitan Life Ins. Co. v. Northington*, 300 S.W.2d 911, 918 (Tenn. 1957). We are not "free to write [our] personal opinions on public policy into law." *Jordan*, 213 S.W.3d at 780.

However, if our constitutions are to remain viable and their integrity maintained, we must strike down statutes that violate either the federal or the state constitution.[2] We have the power and duty to declare a statute void when it violates the prohibition against cruel and unusual punishment in article I, section 16 of the Tennessee Constitution. *Brinkley v. State*, 143 S.W. 1120, 1122 (Tenn. 1911). There is no precedent or reasoned principle that prevents us from determining whether a Tennessee statute violates a similar constitutional protection in the Eighth Amendment to the United States Constitution. The fact that the United States Supreme Court has not yet addressed the precise question before us provides

[2] *Hooker v. Haslam*, 393 S.W.3d 156, 165 (Tenn. 2012); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 7 (Tenn. 2000), superseded by constitutional amendment, Tenn. Const. art. I, § 36 (2014); *Biggs v. Beeler*, 173 S.W.2d 946, 948 (Tenn. 1943). The United States Supreme Court has recognized that state courts have jurisdiction to hear federal constitutional claims. Over two hundred years ago, the Court noted:

> [T]he constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342 (1816).

scant justification to shirk our duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

II.

We begin with a review of the facts of this case. On Sunday afternoon, November 15, 2015, sixteen-year-old Tyshon Booker and another juvenile, Bradley Robinson, were riding around in Knoxville with Mr. Robinson's friend, the twenty-six-year-old victim, G'Metrik Caldwell. The victim drove his car, with Mr. Robinson riding in the front passenger seat and Mr. Booker in the rear passenger seat. Late in the afternoon after the victim pulled his car to a curb, Mr. Booker shot him six times in the back, the side of the chest, and right shoulder. Mr. Robinson and Mr. Booker, who had the victim's cell phone, ran from the scene. More than $800 and a baggy containing a green leafy substance were found in the victim's pockets after the shooting. He died from multiple gunshot wounds.

Mr. Booker was charged with murder in a petition filed in Knox County Juvenile Court. Following a hearing, the juvenile court transferred his case to the Knox County Criminal Court.[3] Mr. Booker was later indicted on two counts of first-degree felony murder and two counts of especially aggravated robbery for taking the victim's cell phone.[4]

At trial, a neighbor of Mr. Booker's testified that the morning after the murder, Mr. Booker told her that he and Mr. Robinson had planned to rob the victim but that the victim resisted and Mr. Robinson yelled at Mr. Booker to shoot. The neighbor further stated that Mr. Booker told her once he started shooting, he could not stop until he had fired all the bullets. When Mr. Booker testified at trial, he admitted shooting the victim but claimed he acted in self-defense. Mr. Booker explained that he and Mr. Robinson rode around with the victim in his car and smoked marijuana and took two pills supplied by the victim. According to Mr. Booker's testimony, when the victim pulled his car to the curb to let Mr. Booker out, the victim and Mr. Robinson began fighting. Mr. Booker said he saw the victim reaching down for something in the front floorboard, and Mr. Robinson yelled, "He got a gun, bro." Mr. Booker stated that when he saw the victim holding a gun and starting to turn

[3] Only an adult may be tried for first-degree murder, but the juvenile court was authorized to transfer a juvenile offender to criminal court to be tried as an adult. *See* Tenn. Code Ann. § 37-1-134 (2014 & Supp. 2021).

[4] Mr. Robinson was also charged with murder in a juvenile court petition and transferred to criminal court to be tried as an adult. *See State v. Robinson*, No. E2020-00555-CCA-R3-CD, 2021 WL 1884713, at *6 (Tenn. Crim. App. May 11, 2021), *perm. app. denied* (Tenn. Sept. 22, 2021). Mr. Robinson and Mr. Booker were indicted together on the same charges. *Id.* at *1. Mr. Robinson's case was severed, and a jury convicted him of facilitation of first-degree felony murder and facilitation of especially aggravated robbery. *Id.* at *6. Mr. Robinson's effective sentence was thirty-seven years. *Id.* at *1.

toward him in the back seat, Mr. Booker shot the victim until he stopped moving. Mr. Booker denied he planned to rob the victim, explaining that he borrowed the victim's cell phone to call his girlfriend. Mr. Booker stated that after the shooting, he ran from the scene not realizing he had the victim's phone in his pocket.

The jury convicted Mr. Booker of two counts of first-degree felony murder[5] and two counts of especially aggravated robbery. The trial court merged the two felony murder convictions and, without a hearing, sentenced Mr. Booker to life in prison. This sentence has a sixty-year term with release after fifty-one years if all applicable sentencing credits are earned and retained. *See* Tenn. Code Ann. § 40-35-501(h)(2) (Supp. 2021).[6] The trial court merged the two especially aggravated robbery convictions and, after a hearing, sentenced Mr. Booker to twenty years—less than the maximum punishment—to be served concurrently with his life sentence. The trial court denied Mr. Booker's motion for a new trial.

In the Court of Criminal Appeals, Mr. Booker challenged the constitutionality of Tennessee's automatic life sentence for first-degree murder when imposed on a juvenile.[7] The Court of Criminal Appeals affirmed, acknowledging Mr. Booker's argument but deferring to existing precedent. *State v. Booker*, E2018-01439-CCA-R3-CD, 2020 WL 1697367, at *33 (Tenn. Crim. App. Apr. 8, 2020).

We granted Mr. Booker's application for permission to appeal to address the constitutionality of Tennessee's sentence of life imprisonment when automatically imposed on a juvenile homicide offender. Order, *State v. Booker*, No. E2018-01439-SC-

[5] Felony murder is a form of first-degree murder that does not require premeditation but involves a killing committed during the commission of or attempt to commit a violent felony such as arson, rape, or robbery. Tenn. Code Ann. § 39-13-202(a)(2) (2018 & Supp. 2021). Other forms of first-degree murder are killings that are premeditated and intentional, *id.* § -202(a)(1), result from a bombing, *id.* § -202(a)(3), or occur during the commission of or attempted commission of an act of terrorism, *id.* § -202(a)(4).

[6] Section 40-35-501(h)(2) is the current version of the statute, which was previously numbered as sections 40-35-501(i)(1) and (i)(2)(a), and is substantively identical. Tennessee law mandates a sentence of death, imprisonment for life without possibility of parole, or imprisonment for life for those convicted of felony murder. *See* Tenn. Code Ann. §§ 39-13-202(a)(2) & (c)(1)–(2) (2018 & Supp. 2021). Mr. Booker was not eligible for the death penalty, *see Roper v. Simmons*, 543 U.S. 551, 568 (2005), and the State did not give notice of intent to seek life without parole. *See* Tenn. Code Ann. § 39-13-208(a)–(c) (2018 & Supp. 2021). Thus, Mr. Booker's sentence of life imprisonment was mandatory. *See* Tenn. Code Ann. § 39-13-208(c).

[7] Mr. Booker also asserted other claims, including the prosecution's failure to disclose exculpatory evidence, juror misconduct, improper closing argument and jury instructions, and challenges to the juvenile transfer process.

R11-CD (Tenn. Sept. 16, 2020) (granting application for permission to appeal). Mr. Booker argues that the life sentence of at least fifty-one years and no more than sixty years violates the Eighth Amendment to the United States Constitution and article I, section 16 of the Tennessee Constitution. Mr. Booker's arguments find universal support in the many briefs filed by amici curiae.[8] The State contends that the life sentence, which guarantees release after sixty years, contravenes neither the United States Constitution nor the Tennessee Constitution.

III.

We review questions of constitutional interpretation de novo without presuming the correctness of the lower court's legal conclusions. *State v. Burns*, 205 S.W.3d 412, 414 (Tenn. 2006) (citing *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001)). Ruling on a constitutional challenge to a statute is often an exercise in judicial restraint. We must be careful not to impose our own policy views on the matter or overstep into the General Assembly's realm of making reasoned policy judgments. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 717 (Tenn. 1997). Similarly, when construing statutes, "it is our duty to adopt a construction which will sustain [the] statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993).

The Eighth Amendment and Juvenile Sentencing

Over a century ago, the United States Supreme Court acknowledged that the principle of proportionality is embedded in the Eighth Amendment. The Court said that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910).

The Court's later opinions applying the proportionality principle do not chart a straight course.[9] In 1983, after noting that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law

[8] Briefs were filed as amici curiae by a coalition of religious organizations in Tennessee; the Tennessee State Conference of the NAACP; the Campaign for the Fair Sentencing of Youth and the Children's Defense Fund; the Juvenile Law Center; the Tennessee and National Associations of Criminal Defense Lawyers; Charles Lowe-Kelley; Amos Brown; the ACLU of Tennessee; the Raphah Institute; the Foundation for Justice, Freedom and Mercy; Cyntoia Brown Long; and Julie A. Gallagher.

[9] We have observed that "the precise contours of the federal proportionality guarantee are unclear." *State v. Harris*, 844 S.W.2d 601, 602 (Tenn. 1992) (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991) (Kennedy, J., concurring in part)).

jurisprudence," the Court stated "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 284, 290 (1983). But eight years later, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court's controlling opinion[10] held that the Eighth Amendment contains a "narrow proportionality principle" that "does not require strict proportionality between crime and sentence" but "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 997, 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at 288).

As to juveniles tried as adults, the Court has been clear about the central importance of proportionality when imposing significant criminal punishment. In 1988, the Court held that the Eighth Amendment prohibited executing juveniles who were under the age of sixteen at the time of the offense. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). Three principles formed the cornerstone of the Court's opinion.

The first principle was that the "authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments." *Id.* at 821. The second principle was proportionality. The Court said that the "punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 834 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). The third principle was that "there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults." *Id.* at 823 (emphasis omitted).

Based on these principles, the Court endorsed "the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Id.* at 835. After noting that "[t]he basis for this conclusion is too obvious to require extended explanation," the Court stated that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.*[11]

The *Thompson* Court declined to extend its decision to juvenile offenders older than sixteen years. *Id.* at 838. Yet when revisiting the question in 2005, the Court held that the

[10] The Court issued a divided opinion in *Harmelin* and later characterized Justice Kennedy's separate opinion as the "controlling opinion." *Graham v. Florida*, 560 U.S. 48, 59–60 (2010).

[11] The *Thompson* Court said that juveniles' reduced culpability arose from the fact that (1) juveniles are "less mature and responsible than adults"; (2) juveniles are "more vulnerable, more impulsive, and less self-disciplined than adults"; and (3) adolescents "may have less capacity to control their conduct and to think in long-range terms than adults." *Thompson*, 487 U.S. at 834.

Eighth Amendment prohibited imposing the death penalty on all juvenile offenders. *Roper v. Simmons*, 543 U.S. 551, 574, 578–79 (2005).

The *Roper* Court based its decision on the same principles that animated the *Thompson* Court's decision. First, the Court said that the Eighth Amendment's protection against cruel and unusual punishments "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned.'" *Id.* at 560 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). Second, the Court explained that three differences between juveniles and adults show that "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

The three differences between juveniles and adults identified in *Roper* mirror the reasons identified in *Thompson*. The first difference is that juveniles lack maturity and have "an underdeveloped sense of responsibility." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). The second difference is that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). The third difference is that "the character of a juvenile is not as well formed as that of an adult." *Id.* at 570.

Like the *Thompson* Court, the *Roper* Court addressed the Eighth Amendment issue by adopting a bright-line prophylactic rule based on the age of the juvenile when the crime was committed. Justice O'Connor, writing separately, agreed that "juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and . . . these differences bear on juveniles' comparative moral culpability." *Id.* at 599 (O'Connor, J., dissenting). But she disagreed with creating a bright-line rule because "the class of offenders . . . is too broad and too diverse to warrant categorical prohibition." *Id.* at 601. Justice O'Connor preferred to address proportionality concerns "through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his [or her] susceptibility to outside pressures, his [or her] cognizance of the consequences of his [or her] actions, and so forth." *Id.* at 602–03. Thus, Justice O'Connor favored addressing the Eighth Amendment issue with a procedural remedy.

In 2010, the Court employed another bright-line prophylactic rule, holding that the Eighth Amendment prohibits sentencing a juvenile who has not committed homicide to a life-without-parole sentence. *Graham v. Florida*, 560 U.S. 48, 82 (2010). Reflecting the reasoning in *Thompson* and *Roper*, the *Graham* Court's decision was based on the proportionality principle and the lesser culpability of juveniles. The Court said that "[t]he concept of proportionality is central to the Eighth Amendment." *Id.* at 59. Then, relying on the three differences between juveniles and adults discussed in *Roper*, the Court stated that juveniles are "less deserving of the most severe punishments" because they are less

culpable. *Id.* at 68. Finally, the Court said that "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles." *Id.*

Chief Justice Roberts concurred in the judgment, agreeing that Mr. Graham's life-without-parole sentence violated the Eighth Amendment. Chief Justice Roberts cited the *Roper* Court's conclusion that "juvenile offenders are generally less culpable than adults who commit the same crimes." *Id.* at 86 (Roberts, C.J., concurring in the judgment). And he invoked the narrow proportionality rule applicable to noncapital cases. Noting that "an offender's juvenile status can play a central role in the inquiry," *id.* at 90, the Chief Justice said:

> Terrance Graham committed serious offenses, for which he deserves serious punishment. But he was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. In my view, Graham's age—together with the nature of his criminal activity and the unusual severity of his sentence—tips the constitutional balance. I thus concur in the Court's judgment that Graham's sentence of life without parole violated the Eighth Amendment.

Id. at 96.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that mandatory life-without-parole sentences for juveniles violated the Eighth Amendment. The Court based its decision on the two essential principles found in *Thompson*, *Roper*, and *Graham* but fashioned a different remedy to address the constitutional violation.

First, after noting that "[t]he concept of proportionality is central to the Eighth Amendment," the Court said that the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions" and that this right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Id.* at 469 (first quoting *Graham*, 560 U.S. at 59; and then quoting *Roper*, 543 U.S. at 560).

Second, the Court said that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. Relying on the "three significant gaps between juveniles and adults" discussed in *Graham*, the Court said that juveniles "are less deserving of the most severe punishments" because they "have diminished culpability and greater prospects for reform." *Id.* (quoting *Graham*, 560 U.S. at 68). The Court added that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472.

But the Court declined to devise another bright-line rule to remedy the Eighth Amendment problem and instead turned its attention to the sentencing process itself. Consistent with Justice O'Connor's dissenting opinion in *Roper* seven years earlier, the Court decided that the proportionality concerns should be addressed by requiring individualized sentencing so that the sentencer could give appropriate weight to the youthfulness of the defendant. *Id.* at 489. The Court held that mandatory life-without-parole sentences for juveniles "contravene[d] *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 474. Thus, the Court found that subjecting juveniles to a mandatory life-without-parole sentence violates the Eighth Amendment because the sentencing authority did not have the opportunity to consider the "mitigating qualities of youth." *Id.* at 476 (quoting *Johnson*, 509 U.S. at 367).

The *Miller* Court emphasized the fundamental importance of individualized sentencing to avoid imposing disproportionate punishment on juveniles facing a state's harshest penalties. Mandatory sentencing laws "remov[e] youth from the balance" and "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 474. Without individualized sentencing for juveniles facing a state's harshest penalties, the sentencing authority "misses too much," and thereby runs "too great a risk of disproportionate punishment." *Id.* at 477, 479.

The Court decided two *Miller*-related cases after 2012. In 2016, the Court held that *Miller* should be applied retroactively because it announced a new substantive rule of constitutional law. *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). The petitioner in *Montgomery* had been automatically sentenced to life without parole for an offense he committed when he was seventeen years old. *Id.* at 194. After the Court decided *Miller*, the petitioner, then sixty-nine years old, sought collateral review of his mandatory sentence. *Id.* at 195. The Court applied *Miller* retroactively and explained that a *Miller* violation did not require resentencing but could be remedied by allowing juvenile homicide offenders to be considered for parole. *Id.* at 206. In 2021, the Court held that neither the Eighth Amendment nor *Miller* requires separate findings or an on-the-record explanation of permanent incorrigibility before imposing a discretionary life-without-parole sentence on a juvenile. *Jones v. Mississippi*, 141 S. Ct. 1307, 1318–19, 1321 (2021).

In neither case did the Court retreat from the essential principles in *Thompson*, *Roper*, *Graham*, and *Miller*. In *Montgomery*, the Court repeated *Miller*'s point that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," a mandatory life-without-parole sentence "poses too great a risk of disproportionate punishment." *Montgomery*, 577 U.S. at 195 (quoting *Miller*, 567 U.S. at 479). In *Jones*, the Court acknowledged that "youth matters in sentencing," and the "key

assumption" in *Miller* is "that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Jones*, 141 S. Ct. at 1314, 1318.

The *Miller* Court's decision that the mandatory imposition on a juvenile of a life-without-parole sentence poses too great a risk of disproportionate punishment reflects its concern, at least when a state's severest punishments are involved, that a mandatory sentencing scheme risks erroneously depriving a juvenile's right to receive a proportionate sentence. *Miller*, 567 U.S. at 479. The Court's remedy does not preclude juveniles from being sentenced to life without parole. Rather, the remedy requires a procedural safeguard—individualized sentencing—to minimize the risk of erroneously imposing a disproportionate sentence. *Id.* at 489.

Although this case involves a life sentence, and not death or life without parole, three essential rules can be derived from the *Thompson*, *Roper*, *Graham*, and *Miller* line of cases when considering proportionality. The first principle is that the Eighth Amendment's requirement of proportionality means that punishment has to be graduated and proportioned. The second principle is that steps must be taken to minimize the risk of a disproportionate sentence when juveniles are facing the possible imposition of a state's harshest punishments. The third principle is that these steps, whatever they may be, must allow the sentencer to take the mitigating qualities of youth into account by considering, among other relevant factors, (a) the juvenile's "lack of maturity" and "underdeveloped sense of responsibility," which can lead to "recklessness, impulsivity, and heedless risk-taking"; (b) the juvenile's vulnerability and susceptibility to negative influences and outside pressure, as from family and peers; and (c) the fluidity of the development of the juvenile's character and personal traits. *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569–70).

Tennessee's Automatic Life Sentence

With these principles in mind, we turn to a proportionality analysis. In determining whether Tennessee's automatic life sentence when imposed on juvenile homicide offenders complies with the Eighth Amendment's requirement of proportionality, we consider whether "the punishment for the crime conforms with contemporary standards of decency," "whether the punishment is grossly disproportionate to the offense," and whether the sentence goes beyond what is necessary to accomplish "legitimate penological objectives." *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306 (Tenn. 2005) (citing *Roper*, 543 U.S. at 560–61; *Atkins*, 536 U.S. at 311–12; *Solem*, 463 U.S. at 292).

"Reliable objective evidence of contemporary values" can be provided by a review of "legislation enacted by the country's legislators." *Penry v. Lynaugh*, 492 U.S. 302, 331

(1989) *abrogated by Atkins,* 536 U.S. 304. This is in addition to "[a]ctual sentencing practices" because they are "an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62.

Compared to the other forty-nine states, Tennessee is a clear outlier in its sentencing of juvenile homicide offenders. So much so that Tennessee's life sentence when automatically imposed on a juvenile is the harshest of any sentence in the country. No one, including the dissent, disputes that a juvenile offender serving a life sentence in Tennessee is incarcerated longer than juvenile offenders serving life sentences in other states. For example, had Mr. Booker committed felony murder in nearby Alabama, he would have been eligible for release in fifteen years; twenty years in Virginia; twenty-five years in North Carolina, Kentucky, and Missouri; thirty years in Georgia; and twenty-five to thirty years in Arkansas.[12]

Juvenile homicide offenders with life sentences (and in some states, even life-without-parole sentences) may be eligible for release within twenty-five years or less in twenty-three states (Alabama, California, Florida, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maryland, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming) and the District of Columbia.[13] The release eligibility for a life sentence ranges

[12] *See* Ala. Code § 15-22-28(e)(2) (West, Westlaw through Act 2022-442 of 2022 Reg. & First Sp. Sess.); Va. Code Ann. § 53.1-165.1(E) (West, Westlaw through 2022 Reg. Sess. and 2022 Sp. Sess. I, cc. 1 to 22); N.C. Gen. Stat. Ann. § 15A-1340.19A to .19C. (West, Westlaw through S.L. 2022-75 of 2022 Reg. Sess.); Ky. Rev. Stat. Ann. § 640.040 (West, Westlaw through 2022 Reg. & Extraordinary Sess.); Mo. Ann. Stat. § 558.047.1(1)–(2) (West, Westlaw through WID 37 of 2022 Second Reg. Sess.); Ga. Code Ann. § 17-10-6.1 (West, Westlaw through 2022 Reg. Sess.); Ark. Code Ann. § 16-93-621(a)(2)(A) (West, Westlaw through 2022 Third Extraordinary Sess.).

[13] *See* Ala. Code § 15-22-28(e)(2) (15 years); Cal. Penal Code § 3051(b)(4) (West, Westlaw current with urgency legislation through Ch. 997 of 2022 Reg. Sess.) (25 years for a life-without-parole sentence); D.C. Code Ann. §§ 24-403(a) (West, Westlaw through June 30, 2022) (15 years), -403.01(c)(2)(B) (no life without parole); Fla. Stat. Ann. § 921.1402(2) (West, Westlaw through July 1, 2022) (25 years for a life sentence); Haw. Rev. Stat. Ann. §§ 706-656(1), -669(1) (West, Westlaw through 2022 Reg. Sess.) (set by parole board, with immediate eligibility and consideration of youth); Idaho Code Ann. § 18-4004 (West, Westlaw through 2022 Second Reg. Sess. & First Extraordinary Sess.) (10 years); 730 Ill. Comp. Stat. Ann. §§ 5/5-4.5-115, 5-4.5-105, 5-8-1 (West, Westlaw through P.A. 102–1102 of 2022 Reg. Sess.) (20 years, with review of *Miller*'s mitigating considerations and discretionary enhancements, not applicable to Mr. Booker's facts, requiring 40 years and up to natural life); Ky. Rev. Stat. Ann. § 640.040(1) (25 years); La. Stat. Ann. § 15:574.4(E) (West, Westlaw through 2022 First Extraordinary & Reg. Sess.) (25 years for all juvenile homicide offenders, with mandatory conditions); Md. Code Ann., Corr. Servs. § 7-301(d) (West, Westlaw through 2022 Reg. Sess.) (25 years for a life sentence); Mo. Ann. Stat. § 558.047(1)(2) (25 years for a life sentence); Nev. Rev. Stat. Ann. § 213.12135 (West, Westlaw through Ch. 2 (End) of 33rd Sp. Sess. 2021) (20 years, but not for multiple victims); *State v. Comer*, 266 A.3d 374, 380–81 (N.J. 2022) (permitting juvenile homicide offenders to petition for a 20-year look-back hearing applying *Miller* factors

from twenty-five to thirty-five years in twelve other states (Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Massachusetts, Minnesota, Montana, New Mexico, Ohio, and Pennsylvania).[14] In sum, compared to Tennessee's fifty-one-year minimum and sixty-year maximum sentence, thirty-six or nearly three-fourths of other states allow juvenile offenders release eligibility in less than thirty-five years. Two states (Oklahoma and Texas) guarantee parole eligibility in thirty-eight and forty years, respectively.[15] The other twelve states besides Tennessee (Alaska, Indiana, Iowa, Kansas, Maine, Michigan, Mississippi, Nebraska, New Hampshire, South Carolina, South Dakota, and Vermont)

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to avoid constitutional infirmity of a mandatory 30-year-minimum sentence under N.J. Stat. Ann. § 2C:11-3(b)(1)); N.Y. Penal Law §§ 70.00(3)(a)(i), -(5) (West, Westlaw through L.2022, chs. 1 to 566) (20 to 25 years; no life without parole); N.C. Gen. Stat. Ann. §15A-1340.19A (25 years for a life sentence, no life without parole for felony murder); N.D. Cent. Code Ann. § 12.1-32-13.1 (West, Westlaw through 2021 Reg. & Sp. Sess.) (20 years for all); Or. Rev. Stat. Ann. § 144.397 (West, Westlaw through 2022 Reg. Sess.) (15 years for life and life without parole); 13 R.I. Gen. Laws Ann. § 13-8-13(e) (West, Westlaw current with effective legislation through Ch. 442 of 2022 Reg. Sess.) (20 years for a life sentence); Utah Code Ann. §§ 76-3-206(2)(a)(ii), (b) (West, Westlaw through 2022 Third Sp. Sess.) (25 years; no life without parole); Va. Code Ann. § 53.1-165.1(E) (20 years for all); Wash. Rev. Code Ann. § 9.94A.730(1) (West, Westlaw through 2022 Reg. Sess.) (20 years for life); W. Va. Code Ann. §§ 61-11-23(a)–(b) (West, Westlaw through 2022 First Sp. Sess., Reg. Sess., Second Sp. Sess., Third Sp. Sess., & Fourth Sp. Sess.) (15 years; no life without parole); Wis. Stat. Ann. § 973.014(1g)(a)(1) (West, Westlaw through 2021 Act 267) (20 years for a life sentence, with discretion); Wyo. Stat. Ann. § 6-10-301(c) (West, Westlaw through 2022 Budget Sess.) (25 years for all except for cases with certain subsequent adult offenses).

[14] *See* Ariz. Rev. Stat. Ann. § 13-751(A)(2) (West, Westlaw through legislation effective Sept. 24, 2022 of the Second Reg. Sess.) (25 to 35 years for life); Ark. Code Ann. § 16-93-621(a)(2)(A) (25 to 30 years for all juvenile homicide offenders); Colo. Rev. Stat. Ann. §§ 17-34-102(8)(a)–(b) (West, Westlaw through Second Reg. Sess.) (30 years for juvenile homicide offenders participating in a specialized rehabilitation program); Conn. Gen. Stat. Ann. § 54-125a(f)(1) (West, Westlaw through 2022 Reg. Sess.) (the greater of 12 years or 60% of the sentence for a sentence of 50 years of less; 30 years for a sentence of more than 50 years); Del. Code Ann. tit. 11, § 4204A(d)(2) (West, Westlaw through Ch. 424 of 151st Gen. Assemb. 2021–2022) (30 years for all), *id*. § 4204A(b)(2); Ga. Stat. Ann. § 17-10-6.1 (30 years for a life sentence); Mass. Gen. Laws. Ann. ch. 279 § 24 (West, Westlaw through Ch. 125 of 2022 Second Ann. Sess.) (20 to 30 years for a life sentence); Minn. Stat. Ann. § 244.05(4)(b) (West, Westlaw through 2022 Reg. Sess.) (30 years for life); Mont. Code Ann. § 46-23-201(4) (West, Westlaw through 2021 Sess.) (30 years); N.M. Stat. Ann. § 31-21-10(A) (West, Westlaw through 2022 Second Reg. & Third Sp. Sess.) (30 years for life); Ohio Rev. Code Ann. § 2929.03 (West, Westlaw through File 132 of 134th Gen. Assemb., 2021-2022) (20 to 30 years for life); 18 Pa. Stat. & Cons. Stat. Ann. § 1102.1 (West, Westlaw through 2022 Reg. Sess. Act 97) (25 to 35 years).

[15] *See* Tex. Gov't Code Ann. § 508.145(b) (West, Westlaw through end of 2021 Reg. & Called Sess.) (40 years for a life sentence); *Anderson v. State*, 130 P.3d 273, 282–83 (Okla. Crim. App. 2006) (85% of 45-year presumptive life sentence).

allow a sentencer to use discretion and impose a term of less than fifty years on juvenile homicide offenders.[16]

In short, Tennessee is out of step with the rest of the country in the severity of sentences imposed on juvenile homicide offenders. Automatically imposing a fifty-one-year-minimum life sentence on a juvenile offender without regard to the juvenile's age and attendant circumstances can, for some juveniles, offend contemporary standards of decency.

Next, we consider whether a sixty-year life sentence requiring a minimum of fifty-one years of service when imposed on juvenile offenders is grossly disproportionate to the crime. The answer is—it depends. A fifty-one-year prison sentence will be proportionate for some offenders, but not for others. This is where individualized sentencing matters. Proportionality concerns can be addressed when the sentencer can consider the offender's age and circumstances, the nature of the crime, and the severity of the sentence. *See Graham*, 560 U.S. at 90 (Roberts, C.J., concurring in the judgment). But in juvenile first-degree murder cases, and only in these cases, a sentence is automatically imposed without considering age, the nature of the crime, or any other factors. The mandatory life sentence when imposed on juvenile offenders is one-size-fits-all. Yet juvenile offenders and their crimes are not all the same. Thus, Tennessee's automatic life

[16] *See* Alaska Stat. Ann. §§ 12.55.125(a) (West, Westlaw through Aug. 27, 2022 of 2022 Second Reg. Sess.) (30 to 99 years with aggravating factors, many involving discretion), -(j) (parole eligibility for 99 at 49.5 years), -(m) (discretion if mandatory 99-year sentence for killing during robbery "would be manifestly unjust"), 33.16.090(b) (two-thirds parole eligibility for first-degree murder but subject to other discretion-empowering provisions); Ind. Code Ann. §§ 35-50-2-3; 35-50-6-4(b) (West, Westlaw through 2022 Second Reg. Sess., Second Reg. Tech. Sess., & Second Reg. Sp. Sess.) (discretionary sentencing between 45 and 65 years or life without parole); *State v. Zarate*, 908 N.W.2d 831, 855 (Iowa 2018) (discretionary factors under Iowa Code Ann. § 902.1(2)(b)); Kan. Stat. Ann. §§ 21-6620, -6623 (West, Westlaw through laws enacted during 2022 Reg. Sess. effective on July 1, 2022) (25, 40, or 50 years, with discretion); Me. Rev. Stat. Ann. tit. 17-A, § 1603(1) (West, Westlaw through 2022 Second Reg. Sess.) (at least 25 years, with discretion); *People v. Skinner*, 917 N.W.2d 292, 317 (Mich. 2018) (25 years to life without parole, with discretion under Mich. Comp. Laws Ann. § 769.25(9)); *Chandler v. State*, 242 So. 3d 65, 69–71 (Miss. 2018) (discretion under *Miller*); *State v. Castaneda*, 842 N.W.2d 740, 757–58, 762 (Neb. 2014) (holding that resentencing was required because life sentence with "no meaningful opportunity to obtain release" was imposed before *Miller* and without consideration of factors required by *Miller*); *Petition of State*, 103 A.3d 227, 229, 236 (N.H. 2014) (ordering retroactive resentencing under *Miller* for four juvenile homicide offenders, despite mandatory life without parole required by New Hampshire law); *State v. Lopez*, 261 A.3d 314, 320 (N.H. 2021) (upholding a discretionary 45-year-minimum sentence); *Aiken v. Byars*, 765 S.E.2d 572, 578 (S.C. 2014) (holding that juveniles sentenced to life without parole before *Miller* were entitled to resentencing hearing for consideration of *Miller* factors); *State v. Quevedo*, 947 N.W.2d 402, 411 (S.D. 2020) (upholding discretionary sentence of 90 years, after consideration of *Miller* factors, with eligibility for parole after 45 years); Vt. Stat. Ann. tit. 13, § 2303 (West, Westlaw through Chs. 186 and M-19 of Adjourned Sess. of 2021–2022) (35 years or more, with discretion).

sentence when imposed on juvenile offenders lacks the necessary procedural protection to guard against disproportionate sentencing.

One consistent thread running through the Supreme Court's decisions is that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471 (describing the proposition established by *Roper* and *Graham*). These differences include a child's "lack of maturity and an underdeveloped sense of responsibility," which "often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569 (quoting *Johnson*, 509 U.S. at 367). In addition, a juvenile's brain and character traits are not fully developed, and a juvenile is particularly "susceptible to negative influences and outside pressures." *Id.* These factors bear directly on a juvenile's culpability.

Yet Tennessee statutes that require a juvenile homicide offender to be automatically sentenced to life imprisonment allow for no consideration of the principles stated in these Supreme Court decisions. In Tennessee, there is no sentencing hearing. There is no recognition that juveniles differ from adults. And the sentencer has no discretion to consider or impose a lesser punishment. *See Jones*, 141 S. Ct. at 1321 (noting that in a case involving a juvenile who committed a homicide, a state's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient). Instead, Mr. Booker's life sentence requires service of between fifty-one and sixty years. Even if he earns every available sentencing credit, Mr. Booker will spend more time behind bars than nearly any adult with the same sentence. As the Supreme Court has observed, lengthy sentences inflict more punishment on juvenile offenders than similarly situated adult offenders because juveniles will spend a higher percentage of their natural lives in prison. *See Graham*, 560 U.S. at 70–71; *Miller*, 567 U.S at 477.

Although Mr. Booker had no sentencing hearing for the first-degree murder conviction, he did have a sentencing hearing on the especially aggravated robbery conviction. At that hearing, the trial court was allowed to consider as a mitigating factor whether Mr. Booker lacked substantial judgment in committing the offense because of his youth. Tenn. Code Ann. § 40-35-113(6). The trial court imposed on Mr. Booker not the harshest sentence, but a mid-range sentence of twenty years to be served concurrently with the life sentence for first-degree murder.

Had there been a sentencing hearing for the first-degree murder conviction, the trial court could have considered Mr. Booker's age and circumstances and the nature of his crime. According to evidence presented at his juvenile transfer hearing, proof at trial, and evidence proffered at the hearing on the motion for new trial, Mr. Booker grew up in a poor, unstable, and chaotic environment. Violence was common, and Mr. Booker witnessed shootings and often heard gunfire in his neighborhood. Before Mr. Booker was born, his father was murdered. According to Mr. Booker, he was physically and

emotionally mistreated by his mother. He saw his mother being physically abused. Once when his mother was selling drugs, Mr. Booker and his family were held at gunpoint during a home invasion. Mr. Booker's relationship with his mother was "rocky," and she often "kicked" him out of the house. During these times, he lived with friends and "door to door." In the eighth grade, Mr. Booker started smoking marijuana to cope with his problems. He smoked marijuana with his family, including his mother. When he was thirteen, Mr. Booker became close to his paternal grandfather. But his grandfather was stabbed to death at his home just over a year later. Mr. Booker, who had visited his grandfather shortly before the stabbing, blamed himself for not being there to protect his grandfather. After his grandfather was murdered, Mr. Booker began skipping school, increased his marijuana use, and misbehaved more often. Before his grandfather's murder, Mr. Booker had never been in serious trouble. According to his juvenile record, he was cited for disorderly conduct, making a false report, violating curfew, and being a runaway. None of these matters led to formal charges, and all were diverted through the juvenile court system.

According to psychological expert testimony, Mr. Booker suffered from cannabis use disorder, secondary to post-traumatic stress disorder, and was amenable to treatment. Expert testimony about adolescent brain development showed that the systems that register emotions, arousal, and reward sensitivity do not fully develop until around ages fourteen to sixteen. Yet the parts of the brain that inhibit and regulate those drives do not fully develop until age twenty to twenty-five. Mr. Booker's post-traumatic stress disorder exacerbated this disparity—making the brain's "alarm system" overly sensitive to threats, bypassing adaptive responses like judgment and executive functioning, and hijacking the brain into a state of "fight, flight, or freeze." Thus, a young person like Mr. Booker is more impulsive, a bigger risk-taker, and has poor judgment. In sum, Mr. Booker's background failed to provide him stability and security, which only increased the likelihood that he would make rash, reckless, and impulsive decisions. But these circumstances were not considered at sentencing for the murder conviction.

Finally, we consider whether Tennessee's automatic life sentence is supported by sufficient penological objectives when imposed on a juvenile. *See Miller*, 567 U.S. at 472–74. These objectives are generally considered to be retribution, deterrence, preventing crime through incarceration, and rehabilitation. *Id.* Retribution is tied to an offender's culpability and blameworthiness. Thus, the reason for retribution is reduced with a juvenile compared to an adult because of the juvenile's reduced culpability. *See Miller*, 567 U.S. at 471–72. And deterrence is not effective because "'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Id.* (quoting *Graham*, 560 U.S. at 71). The benefit of preventing crime through incarceration is no justification—since it necessarily implies that the "juvenile offender forever will be a danger to society" because he is incorrigible, and "incorrigibility is inconsistent with youth." *Id.* at 472–73 (quoting *Graham*, 560 U.S. at 72–73). The justification of rehabilitation also fails because

Tennessee's automatic life sentence rejects the notion that a juvenile should have the chance to change and mature. *Id.* at 473. Although a state need not guarantee a juvenile offender eventual freedom, it must not foreclose all genuine hope of a responsible and productive life or reconciliation with the community. *See Graham*, 560 U.S. at 75. This denial renders "an irrevocable judgment about that person's value and place in society." *Id.* at 74. Thus, the life sentence imposed on Mr. Booker is not supported by sufficient penological objectives.

From *Thompson*, *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones*, we know that juveniles are constitutionally different than adults for sentencing purposes; juveniles have lesser culpability and greater amenability to rehabilitation. To be clear, we are not holding that a juvenile may never receive a life sentence in Tennessee. But consistent with Supreme Court precedent, the sentencer must have discretion to impose a lesser punishment and to properly consider an offender's youth and other attendant circumstances. Tennessee's sentencing scheme for juvenile homicide offenders—which automatically imposes the most extreme punishment short of life without parole in the United States—fails to recognize that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. The current automatic sixty-year sentence does not square with the United States Supreme Court's interpretation of the Eighth Amendment.

In sum, Tennessee's automatic life sentence when imposed on juvenile homicide offenders is an outlier when compared with the other forty-nine states, it lacks individualized sentencing which serves as a bulwark against disproportionate punishment, and it goes beyond what is necessary to accomplish legitimate penological objectives. For these reasons, we hold that Tennessee's automatic life sentence with a minimum of fifty-one years when imposed on juveniles violates the Eighth Amendment.

Because we conclude that Tennessee's mandatory fifty-one- to sixty-year sentence violates the Eighth Amendment, we need not consider Mr. Booker's arguments that his sentence is equivalent to life without parole and is thus subject to *Miller*,[17] or that his life sentence violates article I, section 16 of the Tennessee Constitution. Our direct application of Eighth Amendment principles pretermits these issues.

Remedy for Constitutional Violation

We exercise judicial restraint when remedying the unconstitutionality of the current statutory scheme for sentencing juvenile homicide offenders. Rather than creating a new sentencing scheme or resentencing Mr. Booker, we apply the sentencing policy adopted by the General Assembly in its previous enactment of section 40-35-501. In doing so, we make

[17] *See, e.g.*, *State v. Kelliher*, 873 S.E.2d 366 (N.C. 2022).

no policy decisions. Nor do we substitute our judgment for that of the General Assembly. The parties agree that if the mandatory sentence of fifty-one to sixty years in section 40-35-501(h)(2) is unconstitutional, then we should apply the release eligibility provision that the General Assembly previously enacted and never repealed, that was in effect from November 1, 1989, to July 1, 1995, as stated in section 40-35-501(h)(1),[18] which still applies to conduct during that period. Under this unrepealed statute, Mr. Booker remains sentenced to a sixty-year prison term and is eligible for, although not guaranteed, supervised release on parole after serving between twenty-five and thirty-six years. Thus, at the appropriate time, Mr. Booker will receive an individualized parole hearing in which his age, rehabilitation, and other circumstances will be considered. This ruling applies only to juvenile homicide offenders—not to adult offenders.

The dissent claims, without any basis, that by upholding the protections of our United States Constitution, we are making policy. But when the Court does its duty and rules on the constitutionality of a statute, it makes no policy of its own. The Court simply implements the policy embodied in the Constitution itself. Without question, the General Assembly determines policy and enacts laws. This Court's duty is to apply the law and, when necessary, decide whether a law is constitutional. By interpreting state and federal constitutions with reasoned opinions, courts are carrying out the quintessential judicial function to "say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. Because a party may disagree with a court's conclusion about the constitutionality of a statute does not mean that the judiciary has "usurped the legislative prerogative." *State v. Soto-Fong*, 474 P.3d 34, 43 (Ariz. 2020).

The dissent would have us wait until the United States Supreme Court rules on this precise issue. But we will not shirk our duty and ignore an injustice. Our decision today directly affects Mr. Booker and over 100 other juvenile homicide offenders who are or will be incarcerated in Tennessee prisons under an unconstitutional sentencing scheme.[19] For these incarcerated individuals, time matters. The United States Supreme Court may not

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[18] Tennessee Code Annotated section 40-35-501(h)(1) provides:

> 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 . . . .

[19] *See* Anita Wadhwani & Adam Tamburin, *Special Report: In Tennessee, 185 People Are Serving Life for Crimes Committed as Teens*, The Tennessean (Mar. 6, 2019), https://www.tennessean.com/story/news/2019/03/07/juvenile-sentencing-tennessee-cyntoia-brown-clemency-life/2848278002/. Of the 185 juvenile homicide offenders, 120 were sentenced under the current statute that requires incarceration between fifty-one and sixty years. *Id.*

have the chance to rule on this precise issue soon, if ever. And we need not wait because the Supreme Court has given us clear guidance in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones*. Many other state supreme courts have resolved this issue without delay. We must fulfill our duty.

Although the constitutionality of Tennessee's practice of automatically sentencing juvenile homicide offenders to life in prison is an issue of first impression for this Court, the dissent claims the issue is settled law in Tennessee based on several unreported decisions from the Court of Criminal Appeals. Yet, as the dissent should know, this Court is not bound by decisions of the Court of Criminal Appeals. *See*, *e.g.*, *State v. Middlebrooks*, 995 S.W.2d 550, 557 n.7 (Tenn. 1999) (citing *State v. McKay*, 680 S.W.2d 447, 450 (Tenn. 1984)). And none of the intermediate appellate court decisions relied on by the dissent analyzed the constitutional issue, correctly noting that the intermediate appellate court is bound to follow existing precedent. *See State v. Douglas*, W2020-01012-CCA-R3-CD, 2021 WL 4480904, at *25 (Tenn. Crim. App. Sept. 30, 2021) (stating that although the court had "considered the Defendant's policy arguments regarding the particular length of Tennessee's life sentences, as well as the special considerations applicable to juvenile offenders and their potential for rehabilitation," the court was bound "to apply the law as it has been enacted by [the Tennessee] legislature and interpreted by [the Tennessee] courts"); *State v. Fitzpatrick*, M2018-02178-CCA-R3-CD, 2021 WL 3876968, at *8 (Tenn. Crim. App. Aug. 31, 2021) ("The power to break with well-established precedent does not lie with this court, and we are not prepared to expand the parameters of the Eighth Amendment in this regard, notwithstanding the fact that the Defendant's sentence 'may push, and possibly exceed, the bounds of his life expectancy[.]'" (quoting *State v. King*, W2019-01796-CCA-R3-CD, 2020 WL 5352154, at *2 (Tenn. Crim. App. Sept. 4, 2020))); *State v. Polochak*, M2013-02712-CCA-R3-CD, 2015 WL 226566, at *34 (Tenn. Crim. App. Jan. 16, 2015) ("While the next logical step may be to extend protection to [juvenile] sentences [of life with the possibility of parole], that is not the precedent which now exists." (quoting *Perry v. State*, W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *5 (Tenn. Crim. App. Apr. 7, 2014))).

The remedy here—granting a parole hearing rather than resentencing—serves the State's interest in finality and the efficient use of its resources and also protects juvenile homicide offenders' rights under the Eighth Amendment. Applying the previous unrepealed version of section 40-35-501(h)(1) complies with *Montgomery*, which allows states to remedy a *Miller* violation by allowing juvenile homicide offenders to receive an individualized parole hearing rather than be resentenced. *Montgomery*, 577 U.S. at 212 ("Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.").

This decision need not be the end of the discussion about sentencing juvenile homicide offenders. The General Assembly, in its collective wisdom, may decide to

continue to adhere to its previously adopted sentencing scheme as reflected in the unrepealed version of section 40-35-501(h)(1). The General Assembly may also consider enacting legislation for sentencing juvenile homicide offenders that provides for discretionary, individualized sentencing while maintaining the current life sentence, no life sentence, or a less severe sentence that is in line with the other forty-nine states. We trust the General Assembly to make these important policy decisions.

IV.

Mr. Booker committed a serious offense for which he deserves serious punishment. But he was only sixteen years old when he committed the offense. The United States Supreme Court has made clear that under the Eighth Amendment, youth is a factor that must be considered in sentencing. Thus, we hold that Tennessee's mandatory sentence of life in prison when imposed on a juvenile homicide offender with no consideration of the juvenile's age and attendant circumstances violates the Eighth Amendment's prohibition against cruel and unusual punishment. Consistent with the parties' arguments, we remedy this constitutional defect by applying the unrepealed pre-1995 version of section 40-35-501(h)(1). Under this statute, Mr. Booker remains sentenced to a sixty-year term but is eligible for, although not guaranteed, supervised release on parole after serving between twenty-five and thirty-six years. In line with *Montgomery*, Mr. Booker will, at the appropriate time, receive an individualized parole hearing in which his youth and other circumstances will be considered. This ruling applies only to juveniles, not adults, convicted of first-degree murder.

We reverse the judgment of the Court of Criminal Appeals to the extent it upheld the automatic life sentence imposed on Mr. Booker under Tennessee Code Annotated section 40-35-501(h)(2). The Clerk of the Appellate Court shall provide a copy of this opinion to the Tennessee Department of Correction and the Tennessee Board of Parole. Costs of this appeal are taxed to the State of Tennessee.

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SHARON G. LEE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
February 24, 2022 Session Heard at Nashville[1]

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-SC-R11-CD

HOLLY KIRBY, J., concurring in the judgment.

Not so long ago, it was commonplace for states to require juveniles convicted of homicide to serve sentences of over fifty years. Now, that practice has vanished. A review of sentencing statutes enacted by state legislatures and court decisions shows that there is now only one state where juvenile offenders face a mandatory non-aggregated sentence of more than 50 years for first-degree murder with no aggravating factors—Tennessee. In the entirety of the nation, Tennessee stands alone.

This is strong objective evidence that a national consensus has formed *against* juvenile sentencing statutes like Tennessee's. My concurrence in the holding in Justice Lee's plurality opinion is based on this unequivocal objective data. In the absence of solid objective indicia, I would not be able to concur in the plurality's judgment in favor of Mr. Booker.

In this case, the Court granted permission to appeal on the question of whether a mandatory sentence of life imprisonment for juvenile offenders for first-degree murder, with no aggravating factors, under Tennessee Code Annotated sections 39-13-208(c) and 40-35-501(h)(2) violates the provisions in the United States and Tennessee Constitutions forbidding cruel and unusual punishment. In Tennessee, the mandatory sentence of life imprisonment is a term sentence of sixty years, with a minimum service of fifty-one years.

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[1] We first heard oral argument on February 24, 2021. In light of the untimely death of Justice Cornelia A. Clark and by order of this Court filed December 17, 2021, retired Tennessee Supreme Court Justice William C. Koch, Jr., was designated to participate in this appeal. The case was re-argued on February 24, 2022.

See Brown v. Jordan, 563 S.W.3d 196, 202 (Tenn. 2018).[2] I concur in the holding in the plurality opinion that Tennessee Code Annotated section 40-35-501(h)(2), when imposed on a juvenile homicide offender, violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution. I also concur in the remedy adopted in the plurality opinion and agree it is limited to offenders who were juveniles at the time of the offense. Accordingly, I concur in the judgment in the plurality opinion. I write separately to explain the importance of objective indicia of national consensus to the Eighth Amendment analysis in this case.

I. EIGHTH AMENDMENT ANALYSIS

The Eighth Amendment "bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). The United States Supreme Court's decision in *Gregg v. Georgia* requires us to consider whether a particular punishment is "disproportionate in relation to the crime for which it is imposed." 428 U.S. 153, 187 (1976). In doing so, *Gregg* described the substantive, but limited, responsibility imposed on the judiciary under the Eighth Amendment:

> Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.
> . . . .
> [W]hile we have an obligation to [e]nsure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

Id. at 174–75. The legislature has the "power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such [a] case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked." *Weems v. United States*, 217 U.S. 349, 378 (1910).

In this case, Mr. Booker was convicted of a most serious offense, first-degree murder. "[W]hen a life has been taken deliberately by the offender," that is considered

[2] Tennessee Code Annotated § 39-13-208(c) provides that, when the State does not seek the death penalty or life without the possibility of parole, a defendant convicted of murder in the first degree "shall be sentenced to imprisonment for life." Tennessee Code Annotated § 40-35-501(h)(2) provides that such a defendant "shall serve one hundred percent (100%) of sixty (60) years less sentence credits earned and retained," but "no sentence reduction credits . . . shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%)." In *Brown*, the Court interpreted these provisions to mean that "[a] defendant convicted of first-degree murder that occurred on or after July 1, 1995, may be released after service of at least fifty-one years if the defendant earns the maximum allowable sentence reduction credits." 563 S.W.3d at 202.

"the most extreme of crimes." *Gregg*, 428 U.S. at 187. The length of Mr. Booker's sentence, in and of itself, is not inherently grossly disproportionate to either the crime or the offender, and does not offend the Eighth Amendment. Indeed, in *Miller v. Alabama*, the U.S. Supreme Court expressly permitted sentencers to impose life-without-parole sentences on juvenile homicide offenders, so long as the sentence was not mandatory, that is, so long as there was discretion to consider the defendant's youth and impose a lesser punishment. *See* 567 U.S. 460, 479–80 (2012). And life without parole is an even more severe sentence than Mr. Booker received.

In this type of Eighth Amendment case, where the punishment is not barbaric and not inherently disproportionate to either the crime or the offender, objective indicia of national consensus is a threshold issue. That is, without objective indicia of national consensus against the punishment contained in the statute at issue, the analysis would go no further. This is explained below.

1. As Applied to Juvenile Offenders

Here, Mr. Booker asserts that Tennessee's mandatory sentence of life imprisonment violates the Eighth Amendment to United States Constitution as applied to juvenile homicide offenders. As to a category of offenders, the Eighth Amendment does not guarantee there will be *no* risk of a disproportionate sentence in a specific case. The question instead is whether Tennessee's statutory framework creates an *unacceptably high* risk of a disproportionate sentence in a given case with a juvenile defendant. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1317 (2021) ("[*Miller*] stated that a mandatory life-without-parole sentence for an offender under 18 'poses too great a risk of disproportionate punishment.'" (quoting *Miller*, 567 U.S. at 479)).

The question of whether the risk of a disproportionate sentence is so high that it offends the Constitution is assessed under the analysis set forth in the United States Supreme Court's Eighth Amendment jurisprudence on juvenile offenders. Justice Lee's plurality opinion describes in detail the Supreme Court's Eighth Amendment cases on juvenile offenders, demonstrating the Court's increasingly firm conviction that children are different when it comes to sentencing. *See Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."). The three general differences between juveniles and adults consistently cited by the Supreme Court are (1) "lack of maturity and an underdeveloped sense of responsibility," (2) "more vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure," and (3) that "the character of a juvenile is not as well formed as that of an adult." *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); *see also Graham v. Florida*, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring in the judgment) ("[J]uvenile offenders are generally less culpable than adults who commit the same crimes.").

In *Miller*, these three significant differences between juveniles and adults were the foundation for the Court's conclusion that "children are constitutionally different from adults for purposes of sentencing" and its holding that mandatory life-without-parole sentences for juveniles violated the Eighth Amendment. 567 U.S. at 471. More recent Eighth Amendment cases on juvenile offenders reaffirm these precepts. *See Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016) ("[C]hildren are constitutionally different from adults for purposes of sentencing." (quoting *Miller*, 567 U.S. at 471)); *see also Jones*, 141 S. Ct. at 1314 ("In a series of Eighth Amendment cases applying the Cruel and Unusual Punishments Clause, this Court has stated that youth matters in sentencing.").

This Supreme Court caselaw suggests that, in a case with a juvenile offender, the risk of a disproportionate sentence is higher than in a similar case with an adult offender. But that proposition does not automatically mean that juvenile defendants must *always* be sentenced under a separate, more lenient sentencing structure than adult offenders, in every case and for every crime. The question is whether, under a particular sentencing framework, the risk of a disproportionate sentence for a juvenile offender is so high that it violates the Eighth Amendment.

2. Objective Indicia

To answer the question of whether the risk of a disproportionate sentence for a juvenile offender under Tennessee sentencing statutes is unconstitutionally high, the Supreme Court's body of Eighth Amendment cases, taken as a whole, requires that we consult objective data. The proportionality assessment under the Eighth Amendment "does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173. The Supreme Court has repeatedly emphasized "the requirement that proportionality review be guided by objective factors." *Ewing v. California*, 538 U.S. 11, 23 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

The Supreme Court has looked to three kinds of objective indicia to determine whether there is a national consensus against a challenged sentencing practice. First is the number of states that have overtly rejected the challenged practice, either through legislative or judicial action. *See Atkins v. Virginia,* 536 U.S 304, 312 (2002) ("We have pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (quotation marks omitted) (citation omitted)); *Roper*, 543 U.S. at 564 ("By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.").

The next type of objective indicia is how frequently the challenged sentencing practice is actually used. *See Atkins*, 536 U.S. at 316 ("[E]ven in those States that allow the execution of [intellectually disabled] offenders, the practice is uncommon."); *Roper*, 543 U.S. at 564 ("[E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent."); *Graham*, 560 U.S. at 62 ("Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.").

The final type is objective indicia of trends among the states, including the direction and pace of change regarding the challenged sentencing practice. *See, e.g.*, *Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *Roper*, 543 U.S. at 565–66 (discussing both consistency and pace of change compared to *Atkins*); *Graham*, 560 U.S. at 108–09 (Thomas, J., dissenting) (arguing that lack of consistency and direction of change counseled against the majority's decision).

Such objective indicia anchor any assessment of whether a statute violates the Eighth Amendment to data that demonstrates the nation's values and standards. This underpinning ensures principled constitutional analysis that is not premised on the subjective sensibilities of individual judges. *See Gregg*, 428 U.S. at 173.

To be sure, the Supreme Court's analysis in *Miller* relied much less than previous cases on this type of objective data. *See* 567 U.S. at 483 (distinguishing *Miller* "from the typical [case] in which we have tallied legislative enactments"). At the time *Miller* was decided, many states had the type of statute at issue in *Miller*, a mandatory sentence of life without parole for juveniles convicted of homicide. For that reason, the *Miller* majority's finding of an Eighth Amendment violation drew a sharp dissent from the Chief Justice.[3]

[3] Chief Justice Roberts first identified lack of objective indicia of national standards as the reason for his dissent: "The pertinent law here is the Eighth Amendment to the Constitution, which prohibits 'cruel and unusual punishments.' Today, the Court invokes that Amendment to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such. I therefore dissent." *Miller*, 567 U.S. at 493 (Roberts, C.J., dissenting). He then summarized the Court's Eighth Amendment cases on objective indicia:

> When determining whether a punishment is cruel and unusual, this Court typically begins with "objective indicia of society's standards, as expressed in legislative enactments and state practice." We look to these "objective indicia" to ensure that we are not simply following our own subjective values or beliefs. Such tangible evidence of societal standards enables us to determine whether there is a "consensus against" a given sentencing practice. If there is, the punishment may be regarded as "unusual."

Id. at 494 (first quoting *Graham*, 560 U.S. at 61; and then quoting *Gregg*, 428 U.S. at 173).

In a subsequent case, however, the Court's description of past Eighth Amendment caselaw on juvenile offenders reaffirmed its traditional emphasis on objective indicia. In *Jones v. Mississippi*, the Court considered whether *Miller* and *Montgomery* required sentencing authorities to make a separate factual finding that a juvenile offender was permanently incorrigible before sentencing him to life without parole. 141 S. Ct. at 1311. In considering whether permanent incorrigibility would be an eligibility criterion for a sentence, similar to sanity or competence, the *Jones* Court recounted that, "when the Court has established such an eligibility criterion, the Court has considered whether 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' demonstrated a 'national consensus' in favor of the criterion." *Id.* at 1315 (quoting *Graham*, 560 U.S. at 61). Describing *Miller*'s discussion of whether a discretionary sentencing procedure would result in fewer life-without-parole sentences for juveniles, *Jones* commented: "Importantly, . . . the Court [in *Miller*] relied on data, not speculation. The Court pointed to statistics from 15 States that used discretionary sentencing regimes to show that, 'when given the choice, sentencers impose life without parole on children relatively rarely.'" *Id.* at 1318 (quoting *Miller*, 567 U.S. at 483 n.10).[4]

Thus, the body of Supreme Court Eighth Amendment cases counsel us to base any finding of unconstitutionality on solid data illuminating the nation's values and standards on the sentencing framework at issue, "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173. Our review must be "guided by objective factors." *Ewing*, 538 U.S. at 23 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)). This approach provides a limiting principle to ensure that findings of a violation of the Eighth Amendment are reserved for punishments that may fairly be regarded as "unusual." *Miller*, 567 U.S. at 494 (Roberts, C.J., dissenting).

In this case, the elevated risk of a disproportionate sentence for a juvenile convicted of first-degree murder arises because of Tennessee's unique combination: (1) a mandatory sentence, allowing the sentencer no discretion, plus (2) a very lengthy minimum imprisonment of fifty-one years. Consistent with the facts in this case, it is appropriate to focus our review on how many states still subject juvenile offenders convicted of first-degree murder, with *no* aggravating factors, to a *mandatory* non-aggregated sentence of more than 50 years.

[4] *See also Jones*, 141 S. Ct. at 1320 ("*Miller* highlighted 15 existing discretionary state sentencing systems as examples of what was missing in the mandatory Alabama regime before the Court in that case." (citing *Miller*, 567 U.S. at 484 n.10)). Indeed, *Jones* itself used statistics to show that *Miller* and *Montgomery* had in fact accomplished the stated objective of drastically reducing the number of juvenile homicide offenders sentenced to life without parole. *See id.* at 1322 ("Those statistics bear out *Miller*'s prediction: A discretionary sentencing procedure has indeed helped make life-without-parole sentences for offenders under 18 'relatively rar[e].'" (alteration in original) (quoting *Miller*, 567 U.S. at 484 n.10)).

Two objective indicia tell the story best: (1) legislative enactments, i.e., sentencing statutes, and (2) state court decisions holding state sentencing statutes unconstitutional. Taken together, these provide strong objective evidence of the nation's contemporary standards for sentencing juvenile homicide offenders who fit Mr. Booker's circumstances.

Here, those objective indicia demonstrate that now, almost ten years after *Miller*, sentencing statutes like Tennessee's have disappeared. Now, only one state sentences juvenile offenders to a mandatory non-aggregated sentence of more than fifty years for first-degree murder with no aggravating factors—Tennessee.[5] This is compelling data that Tennessee's sentencing framework for juvenile defendants convicted of first-degree murder, with no aggravating factors, stands far apart from the rest of the nation.

Turning to actual sentencing practices, assessing the frequency with which a *mandatory* sentence is imposed reveals little about community standards because by definition there are no other available options. It is instructive to recall, however, that defendants resentenced under the Supreme Court's decisions in *Miller* and *Montgomery* were rarely given sentences of life without parole. *See Jones*, 141 S. Ct at 1322. This shows that, in actual practice, such severe sentences for juveniles convicted of homicide are disfavored.

The direction and pace of change regarding the challenged sentencing practice is also illuminating. Ten years ago, before the U.S. Supreme Court decided *Miller*, twenty-eight states had mandatory life-without-parole statutes applicable to juveniles. *See Miller*, 560 U.S. at 513–14 (Alito, J., dissenting). As *amici* have shown, many states changed their laws in the last decade, post-*Miller*.[6] The consistent direction of the changes, by either legislative enactment or state court decision, has been to either reduce the mandatory sentence applicable to juveniles or insert discretion into sentencing for juveniles.[7] Most

[5] The gap between Tennessee and the rest of the country is substantial. As noted by the plurality opinion, the next longest mandatory sentences, in Oklahoma and Texas, are over ten years shorter than the term set forth in Tennessee Code Annotated § 40-35-501(h)(2). In twelve other states, the maximum mandatory sentence with no discretionary review is between one third to one half less than Tennessee's mandated sentence. In twenty-three other states and the District of Columbia, a juvenile convicted of first-degree murder serves less than half the time as in Tennessee before becoming eligible for some type of individualized consideration. Twelve other states *may* impose a sentence as long as Tennessee's, but their sentencing authorities have discretion to impose a lesser sentence. *See* Plurality Op. nn.12–16.

[6] Asked at oral argument about the startling level of change in state laws through either legislative enactment or court decision, the State observed that many of the changes were prompted by the *Miller* decision. The dissent echoes this observation. The State conceded, however, that the great majority of changes in other states went considerably further than was needed to come into strict compliance with *Miller*'s holding.

[7] The change in national consensus on sentencing juvenile homicide offenders recalls the change that occurred over twenty years ago regarding the execution of intellectually impaired offenders, as recognized by the U.S. Supreme Court in *Atkins*, which held that imposing the death penalty on persons

states went well beyond *Miller*'s explicit requirements. In a relatively short number of years, societal standards on juvenile homicide offenders have consistently moved away from mandatory sentences of over fifty years.

These objective indicia are compelling. Considered as a whole, they do more than demonstrate that Tennessee's sentencing practice is unusual. These objective indicia suggest that every other state in the nation has decided that a *mandatory* sentence of more than fifty years for juveniles convicted of first-degree murder, with no aggravating factors, creates an unacceptable risk of a disproportionate sentence. In other words, there is now a national consensus *against* the type of statute Tennessee has.

3. Proportionality

In our analysis, the seriousness of Mr. Booker's crime must weigh heavily. The Eighth Amendment's proportionality principle does not just implicate the status of the offender and the severity of the punishment; it also addresses the nature of the crime. *See Graham*, 560 U.S. at 86 (Roberts, C.J., concurring in the judgment). Moreover, there are clearly some juvenile offenders from whom society needs and deserves protection for fifty-one years—or even longer.

But there are other juvenile offenders convicted of first-degree murder for whom such a lengthy incarceration is not warranted. A mandatory sentence, coupled with a minimum service in excess of fifty years, presents a serious risk of a disproportionate sentence. Is the risk of a disproportionate sentence so high for juvenile offenders that Tennessee's statutes violate the Eighth Amendment? The objective indicia in this case provide a solid foundation for making that assessment. Considering the qualities of youth the U.S. Supreme Court has recognized, as well as the compelling objective indicia of a national consensus, I agree with the plurality's conclusion that an automatic life sentence with a minimum of fifty-one years, when imposed on juveniles convicted of first-degree murder with no aggravating factors, violates the Eighth Amendment.

The evidence of national consensus in this case provides both the basis of the Eighth Amendment proportionality analysis and its limiting principle. I would not join the plurality's judgment in favor of Mr. Booker in the absence of solid objective indicia of national consensus.

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with intellectual disabilities violated the United States Constitution. 536 U.S. at 314 (commenting that "[m]uch has changed since" the Court issued its decision in *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), holding that executing intellectually disabled people convicted of capital offenses did not contravene the Eighth Amendment). *See Coleman v. State*, 341 S.W.3d 221, 234–35 (Tenn. 2011) (summarizing the changes regarding intellectual disability).

II. REMEDY

Because the unconstitutionally high risk of a disproportionate sentence for juvenile homicide offenders stems from Tennessee's unique combination of (1) a mandatory sentence plus (2) a minimum incarceration period of over fifty years, that risk can be ameliorated by changing either parameter. In other words, the unacceptably high risk of disproportionality can be reduced by either (a) giving sentencing authorities discretion to sentence juveniles convicted of first-degree murder a lesser sentence, or (b) reducing the mandatory sentence applicable to juveniles convicted of first-degree murder to a level that comports with the national standards, as reflected in other states' sentencing statutes.

The remedy adopted in Justice Lee's plurality opinion accomplishes this, and is consistent with the positions of the parties in the event of a finding of unconstitutionality. As described in Justice Lee's plurality opinion, the remedy applies the pre-1995 version of Tennessee Code Annotated § 40-35-501(h) to Mr. Booker, a juvenile offender convicted of first-degree murder with no aggravating factors.[8] Thus, Mr. Booker will remain sentenced to a sixty-year term, but he is eligible for—though not guaranteed—supervised release on parole after serving between twenty-five and thirty-six years. For this reason, I concur in the remedy adopted in Justice Lee's plurality opinion.

This remedy leaves the General Assembly free, in its discretion, to enact a new sentencing statute for juvenile offenders convicted of first-degree murder with no aggravating factors, consistent with the national consensus.

III. REJOINDER

Justice Bivins's well-stated dissent makes a number of important points that warrant this respectful response.

The dissent first says the majority "impermissibly moves the Court into an area reserved to the legislative branch." It does not.

The view expressed in the dissent was rejected by the Founders in the earliest days of our nation. The Federalist Papers explain that, when courts hold statutes unconstitutional, it does not mean the judiciary has assumed superiority over the legislative branch. It means instead that the Constitution is superior to both branches:

[8] This appears consistent with the remedy suggested by the State in the event of a finding of unconstitutionality, to elide the objectionable part of Tennessee Code Annotated § 40-35-501 that requires service of at least fifty-one years in prison, as to juvenile offenders convicted of first-degree murder, and hold that the remainder of the statute is enforceable.

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. . . . [T]he courts were designed to be an intermediate body between the people and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . .
>
> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the Legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

The Federalist No. 78 (Alexander Hamilton). In ruling on the constitutionality of a statute, we do not usurp the job of the legislative branch; we do our own job.

The dissent next notes that the holding in *Miller* dealt only with sentences of life without parole, and admonishes that the majority fails to apply the Supreme Court's holdings "as they are written, not what we wish were true."[9]

And yet the dissent acknowledges that the Supreme Court has never addressed whether a statute such as Tennessee's violates the Eighth Amendment. Respectfully, judicial restraint does not prohibit lower courts from taking up constitutional issues of first impression. It's been an everyday practice since the earliest days of our nation.[10]

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[9] The dissent cites cases such as *Arkansas v. Sullivan*, 532 U.S. 769 (2001). *Sullivan* says only that states are not free to contradict the Court's "controlling precedent" on factual situations where the Court has issued a definitive ruling. *Id*. at 771. Nothing in that opinion, or any other, prohibits states from considering issues of first impression under the federal constitution.

[10] Years before he penned his famous dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan wrote for the United States Supreme Court:

> Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it. . . . If they fail therein . . . the party aggrieved may bring the case from the highest court of the state in which the question could be decided, to this court for final and conclusive determination.

The question of whether Tennessee's mandatory life sentence statute, as applied to juveniles, violates the Eighth Amendment has not yet been presented to the United States Supreme Court. It has been presented to us. We are obliged to answer it as best we can. Our decision is then subject to the High Court's review.

Next, in its analysis, the dissent offers a lengthy discourse on why Tennessee's mandatory life sentence, as applied to juvenile offenders, is not the "functional equivalent" of a life-without-parole sentence. The inclusion of this discussion is a puzzler.

Here's why. In this appeal, Mr. Booker offered two theories for why Tennessee's statute violates the Eighth Amendment. First, Mr. Booker argued that, under the well-established Eighth Amendment analysis in *Roper*, *Graham*, etc., and based on objective indicia of a national consensus, Tennessee's mandatory sentencing statute violates the Eighth Amendment. Second, in the alternative, Mr. Booker contended that Tennessee's mandatory life sentence is the "functional equivalent" of a mandatory sentence of life without parole, which was held unconstitutional in *Miller*.

In both the plurality opinion and this separate opinion, the majority of the Court relies exclusively on the well-established Supreme Court analytical framework to hold that Tennessee's statute violates the Eighth Amendment. That pretermits Mr. Booker's alternative "functional equivalency" argument. There was no reason to even discuss it.

If the majority doesn't even discuss the alternative functional equivalency argument, there's no reason for the dissent to spend pages and pages discrediting it.[11] Meanwhile, however, the dissent fails to refute the reasoning *actually* relied upon by the majority of the Court.

Perhaps most troubling, the dissent virtually ignores the objective indicia of a national consensus against a sentencing statute like Tennessee's. The dissent's only response to it is to shrug—in a footnote—that there is no way to "predict with confidence what the Supreme Court may say" if it were faced with the data Mr. Booker presents.

This is weak tea. The conclusion demonstrated by the objective indicia in this case is irrefutable: Tennessee's mandatory life sentence, as applied to juveniles, renders our State an island in the nation. We must not simply shrug that off.

Robb v. Connolly, 111 U.S. 624, 637 (1884).

[11] The only reason offered by the dissent is that the functional equivalency argument is used in *other* state and federal court opinions. Perhaps they are dissenting from those other opinions. It makes little sense for the dissent to fault the majority for failing to use the functional equivalency reasoning for its holding, and then turn around and criticize that very same reasoning.

IV. CONCLUSION

For these reasons, I concur in the plurality's holding that Tennessee Code Annotated section 40-35-501(h)(2), when imposed on a juvenile homicide offender, violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution. I concur in the remedy adopted by the plurality, to hold that Mr. Booker remains sentenced to sixty years in prison but shall be allowed an individualized parole hearing after he has served between twenty-five and thirty-six years in prison, based on release eligibility in the previous version of Tennessee Code Annotated section 40-35-501(h)(2) in effect from November 1, 1989, to July 1, 1995, as stated in section 40-35-501(h)(1). I concur in the plurality's holding that this ruling applies only to offenders who were juveniles at the time of the offense.

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HOLLY KIRBY, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
February 24, 2022 Session Heard at Nashville

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-SC-R11-CD

JEFFREY S. BIVINS, J., with whom ROGER A. PAGE, C.J., joins, dissenting.

I respectfully dissent from the result reached by a majority of the Court today. Quite frankly, I find the policy adopted as a result of the plurality opinion of Justice Lee and the concurring opinion of Justice Kirby to be sound. However, it is just that. It is a policy decision by which the majority today has pushed aside appropriate confines of judicial restraint and applied an evolving standards of decency/independent judgment analysis that impermissibly moves the Court into an area reserved to the legislative branch under the United States and Tennessee Constitutions.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

On November 15, 2015, then sixteen-year-old Tyshon Booker ("Mr. Booker") shot and killed G'Metrick Caldwell ("the victim") while sitting in the victim's car on a residential street in East Knoxville. Mr. Booker and then seventeen-year-old Bradley Robinson ("Mr. Robinson") left the victim for dead in the vehicle, and Mr. Booker fled with the victim's cellphone, which he eventually discarded. Mr. Booker's finger and palm prints were found at the scene of the shooting along with shell casings from his nine-millimeter handgun.

Two days later, Mr. Booker was charged by petition in the Knox County Juvenile Court related to his involvement in the victim's death. The next day, he was arrested at the home of his neighbor, Linda Hatch ("Ms. Hatch").

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[1] This opinion discusses only those facts relevant to the issue granted appeal by this Court. A full recitation of the facts is set out in the Court of Criminal Appeals' opinion. State v. Booker, No. E2018-10439-CCA-R3-CD, 2020 WL 1697367 (Tenn. Crim. App. Apr. 8, 2020), perm. app. granted, (Tenn. Sept. 16, 2020).

A. Juvenile Court

Following Mr. Booker's arrest, the State filed a "Notice and Motion to Transfer," seeking to transfer Mr. Booker to the Knox County Criminal Court to be tried as an adult. During the hearing that followed, the State put on forensic evidence linking Mr. Booker to the victim's vehicle. Additionally, Ms. Hatch testified that, the day after the shooting, Mr. Booker confessed to her that he and Mr. Robinson shot the victim in a failed robbery attempt.

In response, Mr. Booker attacked Ms. Hatch's credibility. He argued that she fabricated part of his confession to protect herself because she maintained an inappropriate relationship with him that included smoking marijuana together, helping him sell crack cocaine, and engaging in sexual activities. Dr. Keith Cruise, clinical psychologist, testified that Mr. Booker suffered from Post-Traumatic Stress Disorder, Moderate Cannabis Use Disorder, and Conduct Disorder stemming from numerous traumatic events he experienced during childhood, including witnessing both the death of a close relative and the shooting of a neighborhood child, as well as experiencing the murder of his paternal grandfather when Mr. Booker was in his early teens. Dr. Cruise explained that Mr. Booker was likely amenable to treatment but that adult correctional facilities were "ill equipped" to help him.

At the close of the hearing, the juvenile court considered the transfer factors required by Tennessee Code Annotated section 37-1-134(b).[2] In its oral ruling, the juvenile court explicitly found: (1) there were reasonable grounds to believe Mr. Booker committed the murder, (2) Mr. Booker was not committable to an institution for the developmentally disabled or mentally ill, (3) his prior delinquency records were "not of great importance here," (4) he received minimal past treatment efforts, (5) the nature of the alleged offense weighed heavily in favor of transfer, (6) any gang affiliation had little impact in the case, and (7) there was little hope of rehabilitating Mr. Booker in the twenty-one months remaining before his nineteenth birthday when he would be released from juvenile state custody. The juvenile court expressed reservations but, ultimately, based on its findings, the judge transferred Mr. Booker to criminal court to be tried as an adult.

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[2] In making the [transfer] determination . . ., the court shall consider, among other matters:

(1) The extent and nature of the child's prior delinquency records;
(2) The nature of past treatment efforts and the nature of the child's response thereto;
(3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
(4) Whether the offense was committed in an aggressive and premeditated manner;
(5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
(6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

Tenn. Code Ann. § 37-1-134(b) (2014) (amended 2022).

B. Criminal Court

A Knox County Grand Jury indicted Mr. Booker on two counts of felony murder and two counts of especially aggravated robbery related to the victim's death. The case proceeded to a jury trial. At trial, the State's evidence was consistent with its presentation at the juvenile transfer hearing, including evidence of Mr. Booker's confession to Ms. Hatch and their improper relationship.

Mr. Booker took the stand and testified at trial that he shot the victim in self-defense. According to Mr. Booker, there was a fight between the victim and Mr. Robinson in the vehicle, during which Mr. Booker believed the victim reached for a gun. Mr. Booker denied telling Ms. Hatch that he and Mr. Robinson planned to rob the victim, but rather stated that the three planned only to drive around and smoke marijuana together.

The jury convicted Mr. Booker as charged on all counts. The felony murder convictions merged, and the trial court imposed the mandatory sentence of life imprisonment.[3] Following a sentencing hearing, the trial court sentenced Mr. Booker to twenty years for the especially aggravated robbery convictions, to be served concurrently with his life sentence.

C. The Appeal

On appeal to the Court of Criminal Appeals, Mr. Booker raised, *inter alia*, constitutional challenges to Tennessee's automatic life sentence for first-degree murder. After briefing and oral argument, the Court of Criminal Appeals found no reversible error and affirmed Mr. Booker's convictions. 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). As to Mr. Booker's claim that his mandatory life sentence is unconstitutional under the Eighth Amendment to the United States Constitution and United States Supreme Court precedent, the court stated, "While we understand [Mr. Booker]'s argument, we must reject his invitation as we are bound by court precedent." Id. (citing State v. Collins, No. W2016-01819-CCA-R3-CD, 2018 WL 1876333, at *20 (Tenn. Crim.

[3] Tennessee law mandates a sentence of death, imprisonment for life without possibility of parole, or imprisonment for life for those convicted of felony murder. See Tenn. Code Ann. §§ 39-13-202(a)(2), (c)(1)–(3) (2014) (amended 2018, 2021 & 2022). The State must send notice to the defendant of its intent to seek the death penalty or life without parole. See Tenn. Code Ann. § 39-13-208(a)–(c) (2014) (amended 2021 & 2022). If the State seeks either the death penalty or life without parole, the sentencer has discretion to choose between the alternative sentences during a sentencing hearing. Tenn. Code Ann. § 39-13-204 (2014) (amended 2019, 2021 & 2022). When the State declines to pursue the death penalty or life without parole, the law mandates a sentence of life imprisonment if the defendant is convicted of first-degree murder. See Tenn. Code Ann. § 39-13-208(c) (2014). Mr. Booker was not eligible for the death penalty, see Roper v. Simmons, 543 U.S. 551, 568 (2005), and the record indicates that the State did not give notice of intent to seek life without parole. Therefore, Mr. Booker's sentence of life imprisonment was mandatory.

App. Apr. 18, 2018), perm. app. denied, (Tenn. Aug. 8, 2018), cert. denied, 139 S. Ct. 649 (2018)).

Mr. Booker then appealed to this Court. We granted the application only as to the issue of whether Tennessee's sentence of life imprisonment, as applied to juveniles, violates the United States or Tennessee Constitutions. Order, State v. Booker, No. E2018-01439-SC-R11-CD (Tenn. Sept. 16, 2020) (granting the application for permission to appeal). We also directed the parties to address what sentencing options may be available under Tennessee law if the sentence of life imprisonment is improper. Id. Approximately two months after oral argument in this case, the United States Supreme Court issued its opinion in Jones v. Mississippi, 141 S. Ct. 1307 (2021), which analyzed a related juvenile sentencing issue. We ordered the parties to submit supplemental briefing regarding whether Jones affects the analysis or outcome in this case.[4] Order, State v. Booker, No. E2018-01439-SC-R11-CD (Tenn. June 10, 2021) (directing the parties to submit supplemental briefs).

II. ANALYSIS

The proper analysis for this challenge requires examination of the issue of whether the Eighth Amendment to the United States Constitution, as interpreted in Miller v. Alabama, 567 U.S. 460 (2012), requires this Court to hold that Tennessee's life sentence is unconstitutional as applied to juveniles. The Eighth Amendment, applicable to the States through the Fourteenth Amendment, states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Further, the United States Supreme Court has explained, "The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions[, which] flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" Roper v. Simmons, 543 U.S. 551, 560 (2005) (second alteration in original) (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002); Weems v. United States, 217 U.S. 349, 367 (1910)).

When our Court is asked to interpret the Eighth Amendment, we are bound by the existing interpretations of the United States Supreme Court. West v. Schofield, 519 S.W.3d

[4] Both parties agree that the holding in Jones does not directly control the outcome in Mr. Booker's case. However, each party's supplemental brief argues that Jones ultimately supports that party's position in this case. Mr. Booker argues that his position rests on applying the principles of Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, 567 U.S. 460 (2012), and because Jones explicitly upholds Graham and Miller as good law, Jones supports his position that Tennessee's life sentence is unconstitutional as applied to juveniles. The State maintains that Miller is distinguishable and that Jones implicitly approves of Tennessee's first-degree-murder sentencing scheme in a footnote. See Jones, 141 S. Ct. at 1318 n.5. Further, because Tennessee's sentencing scheme can result in discretion if the State pursues a life-without-parole sentence, the State argues that a life sentence is the lesser, not equal, punishment when compared to a life-without-parole sentence.

550, 566 (Tenn. 2017) (citing James v. City of Boise, 577 U.S. 306, 307 (2016) (per curiam) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 531 (2012) (per curiam) ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.")). We may not "interpret the United States Constitution to provide greater protection than [the United States Supreme Court's] own federal constitutional precedents provide." Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (citing Oregon v. Hass, 420 U.S. 714, 719 (1975)).[5]

A. The Roper/Graham/Miller Trilogy

Over the last twenty years, the United States Supreme Court has held that the Eighth Amendment prohibits certain punishments and requires special procedural protections in the context of juvenile sentencing. See Roper, 543 U.S. at 568; Graham v. Florida, 560 U.S. 48, 74–75 (2010); Miller, 567 U.S. at 465; Montgomery v. Louisiana, 577 U.S. 190, 212 (2016). In Roper, the Court barred the use of the death penalty on any juvenile offender, regardless of the crime of conviction, as cruel and unusual under the Eighth Amendment. Roper, 543 U.S. at 568. First, the Court determined that a national consensus had formed against the juvenile death penalty supported by the understanding that juveniles are "categorically less culpable than the average criminal." Id. at 567 (citing Atkins, 536 U.S. at 316) (summarizing the objective indicia of national consensus against the juvenile death penalty as "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice" (Id. at 552)). The Court also reasoned that the usual penological justifications for the death penalty, such as retribution and deterrence, no longer carried the same weight when considering the harshness of the penalty compared to certain inescapable characteristics of youth, such as immaturity and irresponsibility, vulnerability and susceptibility to negative influences coupled with a lack of control over their environment, and personality traits that are more transient and amenable to rehabilitation. Id. at 569–73. For these reasons, the Court concluded that the death penalty is disproportional when applied to any juvenile offender and violates the Eighth Amendment. Id. at 575.

Five years later, in Graham, the Supreme Court barred the use of life-without-parole sentences for juveniles convicted of nonhomicide crimes. Graham, 560 U.S. at 74. The Supreme Court determined that a national consensus had developed against the use of such a harsh punishment for juvenile nonhomicide offenders and held, in that context, such a sentence violates the Eighth Amendment. Id. at 67, 74. The Graham Court reiterated the same characteristics associated with youth first stated in Roper: "juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable and

[5] In my view, the result reached by the majority today does just that: the majority has interpreted the United States Constitution to provide greater protection than federal constitutional precedents provide.

susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" Id. at 68 (quoting Roper, 543 U.S. at 569–70). In the context of juvenile nonhomicide offenders, these same characteristics led the Supreme Court to conclude that a juvenile's already lowered moral culpability is twice diminished when he or she "did not kill or intend to kill," id. at 69, and, overall, juveniles cannot reliably be classified as incorrigible at the time of conviction, id. at 72–73.

The Graham Court described a life-without-parole sentence as "the second most severe penalty permitted by law," id. at 69 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)), and something akin to the death penalty, which "alters the offender's life by a forfeiture that is irrevocable . . . without giving hope of restoration," id. at 69–70. Therefore, a life-without-parole sentence is disproportional when applied to juvenile nonhomicide offenders given the difficulty of differentiating between a juvenile "whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 68 (quoting Roper, 543 U.S. at 573). Similar to the reasoning in Roper, the Court concluded that deterrence and retribution do not support life-without-parole sentences in the context of juvenile nonhomicide offenders. Id. at 71–72. Further, while incapacitation may justify a lengthy punishment for a serious nonhomicide crime, it does not support life without parole for juvenile nonhomicide offenders because it requires a sentencer to make the decision that a juvenile "forever will be a danger to society" at the outset, id. at 72, even though "incorrigibility is inconsistent with youth," id. at 73 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)). The Supreme Court also explained that such a punishment is inconsistent with rehabilitation as a goal because life without parole "forswears altogether the rehabilitative ideal[ ] [b]y denying the defendant the right to reenter the community" despite a juvenile's capacity for reform. Id. at 73–74. Therefore, a sentence of life without parole is cruel and unusual and violates the Eighth Amendment as applied to a juvenile convicted of a nonhomicide crime. Id. at 74.

Just two years later, the Court decided Miller, which held that life without parole could be imposed on a juvenile convicted of *homicide*, but only under a discretionary sentencing scheme. Miller, 567 U.S. at 465. Two fourteen-year-old offenders, Kuntrell Jackson and Evan Miller, were convicted of capital murder and the only available sentence under the law of their respective states was life without parole. Id. at 465–69; see Ark. Code. Ann. § 5-4-104(b) (1997) (providing that "[a] defendant convicted of capital murder . . . shall be sentenced to death or life imprisonment without parole"); Ala. Code §§ 13A-5-40(a)(9), 13A-6-2(c) (1982) (fixing murder in the course of arson as a capital offense subject to life without parole). Therefore, both Mr. Jackson and Mr. Miller were sentenced under mandatory sentencing schemes, which did not allow for consideration of their youth or an option to impose a lesser punishment than life without parole. Miller, 567 U.S at 465–69. Their cases were consolidated on review.

The Miller Court explained that there may be the type of rare incorrigible youth who commits homicide and deserves a sentence of life without parole. Id. at 479–80. However, given all that Roper and Graham said about youth, the "appropriate occasions for sentencing juveniles [to life without parole] will be uncommon" and require a sentencing scheme that allows for the sentencer to consider the offender's "youth and attendant characteristics." Id. at 479, 483. If the sentencing scheme is mandatory and "mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," the Supreme Court explained, the "scheme poses too great a risk of a disproportionate punishment" and runs afoul of the Eighth Amendment. Id. at 479. Miller relied on the same characteristics of youth announced in Roper and reiterated in Graham, that a juvenile's "transient rashness, proclivity for risk, and inability to assess consequences" leads to diminished criminal culpability and an increased ability to reform and be rehabilitated, and determined that "none of what [its precedents] said about children . . . is crime-specific." Id. at 471–73.

Building on Graham's conclusion that life without parole "alters the offender's life by a forfeiture that is irrevocable," the Miller Court reasoned that individualized sentencing and consideration of "the 'mitigating qualities of youth'" are particularly relevant when considering the constitutionality of a life-without-parole sentence imposed on a juvenile. Id. at 475–76 (first quoting Graham, 560 U.S. at 69; then quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)). Both Roper and Graham, the Supreme Court acknowledged, "teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." Id. at 477. Therefore, mandatory imposition of life without parole, which ignores the very attributes that make children constitutionally different from adults and disregards the offender's potential for rehabilitation, violates the Eighth Amendment. Id. at 479. The Supreme Court clarified that its holding, unlike Graham, did not categorically bar life-without-parole sentences for juvenile homicide offenders. Id. at 479–80. However, after Miller, the Eighth Amendment requires that a sentencer "take into account how children are different, and how those differences counsel against irrevocably sentencing [a juvenile] to a lifetime in prison." Id. at 480.

I do agree with the majority that the Roper/Graham/Miller trilogy[6] centers around one foundational principle: "children are constitutionally different from adults for purposes of sentencing." Id. at 471. In support of this principle, each holding builds off prior precedent to support the conclusion: juvenile offenders generally are less culpable than their adult counterparts and more responsive and amenable to rehabilitation, which makes

[6] Following Miller, the United States Supreme Court held in Montgomery v. Louisiana, 577 U.S. 190, 212 (2016), that Miller established a new rule of constitutional law that applies retroactively on collateral review. The Court also recently clarified that "[i]n light of th[e] explicit language" in Miller and Montgomery, there is no formal factfinding requirement regarding a child's incorrigibility before sentencing a juvenile homicide offender to life without parole, so long as the overall sentencing scheme is discretionary. Jones, 141 S. Ct. at 1311.

them less deserving of the most severe punishments at law. Id. (citing Graham, 560 U.S. at 68); see also Roper, 543 U.S. at 569–71.

Additionally, the trilogy recognizes that "the 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. Retribution, incapacitation, deterrence, and rehabilitation provide little support for either the death penalty or life-without-parole sentences once a court considers that juveniles, in general, have diminished culpability, are unlikely to contemplate the potential for punishment before acting, and cannot with reliability be classified as incorrigible or irredeemable at such a young age. See id. at 472–73; Graham, 560 U.S. at 71–73; Roper, 543 U.S. at 571. The Supreme Court cemented the interconnectedness of this line of cases in Miller when it stated that "none of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." Miller, 567 U.S. at 473. Therefore, whether the crime of conviction is homicide or something less severe in the eyes of the law, the rationale for limiting the imposition of these harsh sentencing practices remains the same.

These cases and their collective underpinning are compelling. However, in answering the federal constitutional question before the Court today, "our duty to follow binding precedent is fixed upon case-specific holdings rather than general expressions in an opinion that exceed the scope of any particular holding." State v. Slocumb, 827 S.E.2d 148, 153 (S.C. 2019) (citing Vasquez v. Commonwealth, 781 S.E.2d 920, 926 (Va. 2016)). Because Mr. Booker argues that the principles of both Graham and Miller compel this Court to hold that Tennessee's life sentence is unconstitutional as applied to juveniles, the proper analysis narrows the focus to their specific holdings.

B. Graham and Miller

In Graham, the Supreme Court held that "for a juvenile offender who did not commit homicide[,] the Eighth Amendment forbids the sentence of life without parole." Graham, 560 U.S. at 74. The Supreme Court clarified its holding:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life[-]without[-]parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of

> incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 75.

After Graham, a few points are clear: Tennessee is prohibited from sentencing juvenile *nonhomicide* offenders to life without parole; juvenile nonhomicide offenders can remain incarcerated for life so long as they are given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation;" and it is for our State to decide "the means and mechanisms for compliance" with Graham's holding. Id. Less clear from Graham, however, is how to define a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. That question, while an important one, is not determinative for the analysis today because Graham is distinguishable from this case. Simply put, Graham applies to cases in which a juvenile is convicted of a nonhomicide crime and sentenced to life without parole. In this case, Mr. Booker was convicted of homicide and received a life sentence—not a sentence of life without parole.

In Miller, the Supreme Court held that the Eighth Amendment forbids mandatory imposition of a life-without-parole sentence on juveniles convicted of homicide. Miller, 567 U.S. at 479–80; see Montgomery, 577 U.S. at 193 ("In Miller[], the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing."); Jones, 141 S. Ct. at 1311 ("Under Miller[ ], an individual who commits a homicide when he or she is under [eighteen] may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment."). Therefore, Miller does not prohibit life-without-parole sentences, nor does it prohibit all mandatory sentencing schemes in the juvenile context. Miller, 567 U.S. at 480. Miller requires that, before a juvenile homicide offender is sentenced to life without parole, a sentencer must consider the offender's youth and its accompanying characteristics before deciding the juvenile is incorrigible and must spend the rest of his days in prison. Id. at 479–80.

The Supreme Court has clarified that "Miller did not impose a formal factfinding requirement" on the sentencer. Montgomery, 577 U.S. at 211. Rather, it is up to States to determine the mechanisms to comply with Miller's mandate. Id. This means that not only is the sentencer relieved of making a specific finding of incorrigibility, but also he or she is relieved of making *any* specific factual findings on the record. Jones, 141 S. Ct. at 1316, 1320 (stating "Miller did not require the sentencer to make a separate finding of permanent incorrigibility before imposing [life without parole]" and "Miller did not say a word about requiring some kind of particular sentencing explanation with an implicit finding of

permanent incorrigibility, as Montgomery later confirmed"). The discretionary scheme itself is sufficient, the Supreme Court explained, because it "allows the sentencer to consider the [offender's] youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the [offender's] age." Id. at 1318.

After Miller (and Montgomery/Jones), two points are clear: (1) Tennessee can impose a life-without-parole sentence on a juvenile *homicide* offender only if it does so under a discretionary sentencing scheme; and (2) federal constitutional law, based upon Supreme Court precedent, does not require a sentencer to make any specific findings on the record before sentencing a juvenile homicide offender to life without parole, including that the juvenile is incorrigible.[7]

Because Mr. Booker was under the age of eighteen at the time he committed a homicide, and because his life sentence was mandatorily imposed,[8] Miller's holding could be viewed as providing guidance in this case. One, however, cannot ignore an important distinguishing fact: Mr. Booker was sentenced to life imprisonment, not life without parole. Thus, the main issue Mr. Booker asks this Court to contemplate, and what is still left unclear following Miller and its progeny, is: do the Eighth Amendment protections, as interpreted by Miller, apply to sentences that are not life without parole in name but could

[7] Few state courts have interpreted or applied Jones since it was released. Among the courts that have, the above-mentioned rules are clear. See, e.g., Holmes v. State, 859 S.E.2d 475, 480–81 (Ga. 2021); Elliott v. State, No. CR-20-407, 2021 WL 2012632, at *5 (Ark. May 20, 2021); Wynn v. State, No. CR-19-0589, 2021 WL 2177656, at *8–9 (Ala. Crim. App. May 28, 2021); State v. Miller, 861 S.E.2d 373, 380 (S.C. Ct. App. 2021); Harned v. Amsberry, 499 P.3d 825, 833 (Or. Ct. App. 2021). However, Jones has left some state court decisions now in question. See People v. Dorsey, 183 N.E.3d 715, 727 (Ill. 2021) (determining that Illinois Supreme Court precedent, which held the protections of Miller and Montgomery apply equally to mandatory *and* discretionary life-without-parole sentences is "questionable in light of Jones," but that, overall, Jones approves of the state's discretionary sentencing scheme at issue in that case); People v. Ruiz, No. 1-18-2401, 2021 WL 2102850, at *12 (Ill. App. Ct. May 25, 2021) (concluding that the Illinois Supreme Court can require more fact finding procedures under Miller than those stated in Jones); People v. Terry, No. 1-18-2084, 2021 WL 2290798, at *4 (Ill. App. Ct. May 28, 2021) (stating that the impact of Jones is "unclear" on Illinois Supreme Court precedent).

[8] As previously noted, although Tennessee's first-degree murder sentencing scheme *can* result in the sentencer having discretion, *supra* note 3, Mr. Booker's sentence of life imprisonment was imposed mandatorily because he is not eligible for the death penalty and the State did not seek a sentence of life without parole. Had the State sought life without parole, under Tennessee law, a jury would have had discretion to sentence Mr. Booker to either life without parole—if it unanimously determined that the State proved at least one aggravating factor beyond a reasonable doubt—or life imprisonment. See Tenn. Code Ann. § 39-13-207(a)–(c) (2014) (amended 2021 & 2022). In Tennessee, so long as the proper notice is given, it appears that this type of sentencing discretion is what Miller suggests as a constitutionally sufficient procedure for sentencing a juvenile to life without parole. Miller, 567 U.S. at 478–80, 489. However, that is not the scenario presented today because the State did not seek a life-without-parole sentence in this case.

be considered the functional equivalent to a life-without-parole sentence? Stated another way, does Tennessee's life sentence—a sixty-year sentence that requires at least fifty-one years imprisonment before an opportunity for release—offend the Eighth Amendment and principles of Miller when applied to a juvenile convicted of homicide?

C. State and Federal Court Analysis of the Functional Equivalency Issue[9]

Tennessee clearly is not the only state court to contemplate whether Miller applies to lengthy sentences that are not life without parole in name. Because the United States Supreme Court has not answered this question, and it is an issue of first impression for this Court, we consult the decisions of our lower courts, other state courts, and federal courts for guidance. Overall, research shows there is no consensus on this issue.

Tennessee courts consistently have held that Tennessee's life sentence is not unconstitutional under the Eighth Amendment and Miller because it "permits release eligibility after serving fifty-one years." State v. Polochak, No. M2013-02712-CCA-R3-CD, 2015 WL 226566, at *34 (Tenn. Crim. App. Jan. 16, 2015); see also State v. Douglas, No. W2020-01012-CCA-R3-CD, 2021 WL 4480904, at *24–25 (Tenn. Crim. App. Sept. 30, 2021) (listing other Tennessee cases). Additionally, the courts have recognized that "[w]hile the next logical next step may be to extend protection to these types of sentences, that is not the precedent which now exists." Polochak, 2015 WL 226566, at *34 (quoting Perry v. State, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *5 (Tenn. Crim. App. Apr. 7, 2014)); see also State v. Fitzpatrick, No. M2018-02178-CCA-R3-CD, 2021 WL 3876968, at *8 (Tenn. Crim. App. Aug. 31, 2021) ("The power to break with well-established precedent does not lie with this court, and we are not prepared to expand the parameters of the Eighth Amendment in this regard, notwithstanding the fact that the Defendant's sentence 'may push, and possibly exceed, the bounds of his life expectancy[.]'" (alteration in original) (quoting State v. King, No. W2019-01796-CCA-R3-CD, 2020 WL 5352154, at *2 (Tenn. Crim. App. Sept. 4, 2020)).

[9] The concurring opinion professes that our lengthy discussion of the functional equivalency issue is a "puzzler" and "makes little sense" because neither the plurality nor the concurring opinion relies on such an analysis. The answer as to why such a detailed discussion is necessary is two-fold and very simple. First, Mr. Booker raised this issue as a primary argument to support his position. Indeed, Mr. Booker's counsel spent the majority of his time at the first oral argument of this appeal advocating for an application of Miller to this case, while mentioning an evolving standards of decency/independent judgment analysis only in passing during rebuttal. Second, the overwhelming number of other state and federal courts that have invalidated juvenile sentences under the Eighth Amendment in similar cases have done so on the basis of a functional equivalency analysis. Indeed, today this Court becomes the only court in the country to base its holding on "the well-established Supreme Court [Eighth Amendment] analytical framework" in order to find such a statute unconstitutional under the United States Constitution. Of course, this "well-established framework" is an evolving standards of decency/independent judgment analysis. The fact that both the plurality and the concurrence for some reason chose to ignore this important argument is their choice and not binding or limiting upon us.

As for other state courts, some have decided that the protections of Miller apply equally to a juvenile homicide offender sentenced to life without parole and to a lengthy term of years when the lengthy term-of-years sentence is the functional equivalent of life without parole or a de facto life-without-parole sentence.[10] See Casiano v. Comm'r of Corrs., 115 A.3d 1031, 1044 (Conn. 2015) (concluding that Miller applies to a sentence not based on its label but rather because it is lengthy, does not offer parole, and requires the juvenile to actually be imprisoned for the rest of his or her life); State v. Shanahan, 445 P.3d 152, 159 (Idaho 2019) ("Because the Supreme Court has 'counsel[ed] against irrevocably sentencing [juveniles] to a lifetime in prison' without consideration of the Miller factors, we conclude that the rationale[] of Miller . . . also extend[s] to lengthy fixed sentences that are the functional equivalent of a determinate life sentence . . . ." (first and second alteration in original) (citation omitted)); People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016) (per curiam) ("[W]e hold that sentencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the [E]ighth [A]mendment."); State v. Ragland, 836 N.W.2d 107, 121–22 (Iowa 2013) (holding under the Eighth Amendment and Iowa state constitution that "Miller applies to sentences that are the functional equivalent of life without parole"); Carter v. State, 192 A.3d 695, 725 (Md. 2018) ("The initial question is whether a sentence stated as a term of years for a juvenile offender can ever be regarded as a sentence of life without parole for purposes of the Eighth Amendment. It seems a matter of common sense that the answer must be 'yes.'"); State ex rel. Carr v. Wallace, 527 S.W.3d 55, 60 (Mo. 2017) (en banc) ("Miller controls because [the defendant] was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme without the jury having any opportunity to consider the mitigating and attendant circumstances of his youth."); State v. Kelliher, 873 S.E.2d 366, 370 (N.C. 2022) (holding that "any sentence or combination of sentences which, considered together, requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison"); State v. Zuber, 152 A.3d 197, 201 (N.J. 2017) ("We find that the same concerns apply to sentences that are the practical equivalent of life without parole . . . . The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to [the] sentence."); Ira v. Janecka, 419 P.3d 161, 167 (N.M. 2018) ("We conclude that the analysis contained within Roper and its progeny should be applied to a multiple term-of-years sentence."); White v. Premo, 443 P.3d 597, 605 (Or. 2019) ("We know of no state high court that has held that a sentence in excess of [fifty] years for a single homicide provides a juvenile with a meaningful opportunity for release. Given those particular circumstances, we conclude that petitioner's [fifty-four-year-mandatory-minimum] sentence is sufficiently lengthy that a Miller

[10] Curiously, neither Justice Lee's plurality opinion nor Justice Kirby's concurring opinion relies on a conclusion that Tennessee's statute constitutes a de facto sentence of life without parole.

analysis is required." (footnote and citation omitted)); State v. Ramos, 387 P.3d 650, 659 (Wash. 2017) ("We now join the majority of jurisdictions that have considered the question and hold that Miller does apply to juvenile homicide offenders facing de facto life-without-parole sentences.").

However, there is no clear line to determine when a sentence becomes the functional equivalent of life without parole. Compare Carter, 192 A.3d at 727–30, 734 (discussing five benchmarks courts have used to determine when a sentence becomes the functional equivalent to life without parole and concluding that fifty years before parole eligibility is equivalent to life without parole for purposes of the Eighth Amendment); Zuber, 152 A.3d at 212–13 (stating that Miller applies to a minimum sentence of fifty-five years imprisonment); Casiano, 115 A.3d at 1045–47 (stating that a sentence of fifty years imprisonment without parole triggers Miller protections); Reyes, 63 N.E.3d at 888 (concluding that a mandatory minimum sentence of eighty-nine years is a de facto life-without-parole sentence), with Shanahan, 445 P.3d at 160–61 (determining a fixed thirty-five-year sentence without the possibility of parole was not the functional equivalent of life without parole); State v. Diaz, 887 N.W.2d 751, 768 (S.D. 2016) (concluding that forty years in prison before parole eligibility was not a de facto life sentence); People v. Dorsey, 183 N.E.3d 715, 728–29 (Ill. 2021) (determining that a seventy-six-year sentence was not a de facto life-without-parole sentence because good-time credits made release after thirty-eight years a possibility).

Other state courts have reached the opposite conclusion, that Miller's holding is narrower and applies only to sentences that are life without parole in name. See Lucero v. People, 394 P.3d 1128, 1132 (Colo. 2017) ("Graham and Miller apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense."); Wilson v. State, 157 N.E.3d 1163, 1176 (Ind. 2020) ("Miller, Graham, and Montgomery expressly indicate their holdings apply only to life-without-parole sentences."); Hobbs v. Turner, 431 S.W.3d 283, 289 (Ark. 2014) ("[The defendant] was not subjected as a juvenile homicide offender to a mandatory life-without-parole sentence; therefore, Miller, is inapplicable."); Lewis v. State, 428 S.W.3d 860, 863–64 (Tex. Crim. App. 2014) (holding that Miller did not apply to single sentence of life imprisonment with the possibility of parole after forty years imposed mandatorily on a juvenile homicide offender).

This debate is further complicated by the fact that the majority of states that have answered the functional equivalency question have done so in the context of an aggregate sentence for multiple crimes, rather than a single term-of-years sentence, as is the factual scenario presented in this case. But see White, 443 P.3d at 603–04 (determining that Miller applies to a determinate 800-month minimum sentence for a single murder); Parker v. State, 119 So.3d 987, 996–99 (Miss. 2013) (concluding that Miller applies to a single sentence for "natural life" that is not eligible for parole but allows for conditional release at age sixty-five); Shanahan, 445 P.3d at 158–61 (acknowledging that Miller can apply to

a single sentence that is the functional equivalent of life without parole but that thirty-five years before parole eligibility was not the functional equivalent of life without parole).

To reinforce the fact that the answer to this particular question remains unclear, federal jurisdictions have come down on both sides of this issue in the habeas corpus context.[11] Compare Starks v. Easterling, 659 Fed. Appx. 277, 280–81 (6th Cir. 2016) ("Because the Supreme Court has not yet explicitly held that the Eighth Amendment extends to juvenile sentences that are the functional equivalent of life, and given the fact that lower courts are divided about the scope of Miller, we hold that the Tennessee courts' decisions were not contrary to, or an unreasonable application of, clearly established federal law . . . ."), cert. denied, (Jan. 17, 2017); Demirdjian v. Gipson, 832 F.3d 1060, 1076–77 (9th Cir. 2016) (upholding the state court's decision that Miller's ban on mandatory life-without-parole sentences did not apply to defendant's fifty-year sentence with parole eligibility at sixty-six years of age); Webster v. Royce, No. 97-cv-2146 (NG), 2021 WL 3709287, at *17 (E.D.N.Y Aug. 20, 2021) (holding that it was not unreasonable for a state court to deny petitioner relief from a sentence of fifty years before parole eligibility because "the Supreme Court has not 'clearly established' that a sentence of [fifty] years to life imposed on a juvenile is the 'functional equivalent' of life without parole"), with McKinley v. Butler, 809 F.3d 908, 911 (7th Cir. 2016) (overturning a state court decision and expressing reservations based on Miller about a 100-year sentence imposed on a juvenile). In short, courts around the country are divided concerning Miller's application to lengthy sentences such as Mr. Booker's.

At this time, given no controlling authority to the contrary, I would conclude that we should remain consistent with Tennessee's lower courts and join the other state courts that have adopted a narrower interpretation of Miller's holding and United States Supreme Court Eighth Amendment precedent. See Slocumb, 827 S.E.2d at 156 ("Rather than predict what the Supreme Court may or may not do, we believe the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court."); Turner, 431 S.W.3d at 289 ("Miller prohibits a sentencing scheme that *mandates* life in prison without the possibility of parole for juveniles homicide offenders. [The defendant] was not subjected . . . to a mandatory life-without-parole sentence; therefore, Miller is inapplicable." (citation omitted)); Wilson, 157 N.E.3d at 1175 ("And determining what sentence constitutes a 'de facto life sentence' would be a task completely unmoored from the language of Miller.").

[11] Under the Antiterrorism and Effective Death Penalty Act, a federal district court may grant relief to a petitioner only if his or her claim was heard on the merits and "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Therefore, the conclusion of the federal court in the habeas corpus context is not necessarily a review of the petitioner's claim on the merits and has different weight or precedential value.

I reach this decision for two reasons. First, Miller's holding expressly applies to life-without-parole sentences, and Tennessee's life sentence is not that.[12] Under Tennessee law, a life sentence guarantees release after sixty years and offers release as early as fifty-one years, if the offender earns good-time credits. Brown v. Jordan, 563 S.W.3d 196, 200 (Tenn. 2018) ("[F]or first-degree murders committed *on or after* July 1, 1995, a defendant must serve one hundred percent of sixty years less any sentence credits received, but the sentence credits cannot operate to reduce the sentence imposed by more than fifteen percent.") (citing Tenn. Code Ann. § 40-35-501(i)). Therefore, not only does life imprisonment under Tennessee law guarantee release at a certain point, the sentencing scheme offers Mr. Booker the opportunity to obtain release nine years early through earning good-time credits. See Tenn. Code Ann. § 40-35-501(h)(1), (i)(1), & (i)(2)(a) (2014) (amended 2020); Tenn. Code Ann. § 41-21-236 (2014). For a juvenile like Mr. Booker, who is sentenced to life imprisonment at the age of sixteen or seventeen, he or she can expect to remain incarcerated until at least age sixty-seven and at most age seventy-seven. While quite lengthy, I cannot say that Tennessee's life sentence, considered under the current Eighth Amendment jurisprudence of the United States Supreme Court, is equivalent to a life-without-parole sentence with no meaningful opportunity to obtain release.[13] See United States v. Mathurin, 868 F.3d 921, 934–36 (11th Cir. 2017) (determining that a sentencing scheme that offered the ability to earn good-time credits and reduce a sentence by seven years gave a juvenile offender "a reason to pursue and exhibit 'maturity and rehabilitation'" and thus served as a "'meaningful opportunity to obtain release' during [the juvenile's] lifetime" (quoting Graham, 560 U.S. at 75)); Dorsey, 183 N.E.3d at 733 (concluding that a sentence did not violate the Eighth Amendment or constitute a de facto life-without-parole sentence because the state's day-for-day sentencing credit provided a defendant with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (quoting Graham, 560 U.S. at 75)).

I do not believe it is wise or appropriate to extend Miller, or other existing Eighth Amendment precedent, by predicting whether the United States Supreme Court would extend its jurisprudence and hold unconstitutional a lengthy term-of-years sentence in this

[12] Indeed, as previously noted, Tennessee law allows juveniles tried as adults to be subject to a sentence of life without parole. There appears to be no issue regarding the constitutionality of the life-without-parole statute.

[13] Both Mr. Booker and the amici curiae parties argue that a person who spends the majority of his or her life incarcerated has a lower overall life expectancy and that there is convincing data that a juvenile incarcerated for fifty-one years or more is likely to die in prison before the opportunity for release. See Brief of Amici Curiae National Association of Criminal Defense Attorneys, Tennessee Association of Criminal Defense Attorneys, Amos Brown, and Charles Lowe-Kelly, State v. Booker, No. E2018-01439-SC-R11-CD, at 23–25 (Tenn. Dec. 2, 2020). While this data may be compelling, evaluation of such research and its impact on whether a particular sentence is appropriate punishment for a crime is a determination best left to the legislature.

context. See, e.g., Wilson, 157 N.E.3d at 1175 ("[D]etermining the reach of the [Eighth Amendment's cruel and unusual punishment] clause is inherently a line drawing exercise best left to the U.S. Supreme Court."). This Court must apply the holdings of the United States Supreme Court as they are written, not what we wish were true about the holding or how far we would like for the holding to extend.[14] See, e.g., Jones, 141 S. Ct. at 1321–22 ("The dissent draws inferences about what, in the dissent's view, Miller and Montgomery 'must have done' in order for the decisions to 'make any sense.' We instead rely on what Miller and Montgomery said . . . ." (citation omitted)).

The United States Supreme Court certainly could choose to extend its aforementioned Eighth Amendment jurisprudence to a lengthy term-of-years sentence. However, unlike the majority, I do not find it appropriate to extend its precedent further than its own language. In no way do I wish to diminish the fact that Mr. Booker's sentence requires over half a century of incarceration before any opportunity for release.[15] However, for constitutional purposes, I cannot ignore that it not only offers the opportunity for release but also guarantees it. Therefore, Miller does not apply.

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[14] Mr. Booker argues, and Justice Kirby's concurring opinion concludes, that a new national consensus has formed since Miller that sentences that require a minimum of fifty years of incarceration or more, when applied to a juvenile, trigger the protections of Graham and Miller. The United States Supreme Court may very well choose to take up this issue and hold in accord. However, the data relied on by the Supreme Court in Roper and Graham to reach the conclusion that a new national consensus had formed with regard to the particular punishment in those cases varies widely. See Roper, 543 U.S. at 564–68 (relying on legislative enactments and infrequent imposition of the juvenile death penalty in a majority of states); Graham, 560 U.S. at 62–67 (relying on actual sentencing practices rather than legislative action or inaction). Perhaps more importantly, the purported national consensus applied in this case in no way developed in an organic manner as was the situation in Roper and Graham. Many of the legislative and judicial decisions relied upon by the concurrence arose simply as responses to Miller. As a result, I do not believe that we can predict with confidence what the Supreme Court may say when viewing the existing data Mr. Booker highlights in his brief. Likewise, given these circumstances, I am not prepared to find that a national consensus exists in this case similar to the ones found in Roper and Graham.

[15] Both the plurality and especially the concurring opinion make much of the fact that Tennessee imposes the harshest sentence in the nation in terms of years of service. Yet, no less than Justice Anthony Kennedy, the author of the majority opinions in Roper, Graham, and Montgomery, and one of the Justices in the majority in Miller, has written very interestingly regarding a state having the most severe punishment for a particular crime. In Harmelin v. Michigan, a case relied upon in the plurality opinion, Justice Kennedy opines as follows:

> [M]arked divergences . . . in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . Thus, the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate. Our Constitution is made for people of fundamentally differing views. . . . Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.

501 U.S. 957, 999–1000 (1991) (Kennedy, J., concurring) (internal quotation marks and citation omitted).

Second, this Court has long recognized that it is the distinct job of the legislature to make policy decisions and to determine the appropriate sentence or punishment for a crime. See State v. Gentry, 538 S.W.3d 413, 420 (Tenn. 2017) (citing State v. Burdin, 924 S.W.2d 82, 87 (Tenn. 1996)); State v. Harris, 844 S.W.2d 601, 602 (Tenn. 1992) (citing Solem v. Helm, 463 U.S. 277, 289–90 (1983)). In the specific context of Miller, the Supreme Court has reiterated that States are not "preclude[d] . . . from imposing additional sentencing limits in cases involving defendants under [eighteen] convicted of murder." Jones, 141 S. Ct. at 1323. In fact, since Miller, a majority of the state legislatures and the District of Columbia have acted to reform their criminal sentencing laws as they relate to juvenile homicide offenders.[16] However, to date, Tennessee's legislature is not among them. Even very recently, the General Assembly has considered bills to reform Tennessee's first-degree-murder sentencing scheme not only for juveniles but also for all adult offenders. See S.B. 1452, 112th Gen. Assem. (2021) (proposing to reduce the minimum amount of time a juvenile convicted of first-degree murder is required to serve before becoming release-eligible from fifty-one years to thirty years); S.B. 0561, 112th Gen. Assem. (2021) (proposing to reduce the portion of a person's sentence for first-degree murder that must be served prior to becoming eligible for parole to sixty percent of sixty years if sentenced to imprisonment for life for an offense committed during certain dates or 100 percent of sixty years if sentenced to imprisonment for life without the possibility of parole). In fact, Senate Bill 0561, which proposed parole eligibility after thirty-six years for offenders convicted of first-degree murder during a certain time and sentenced to life imprisonment, among other provisions, passed with only four dissenting votes in the Senate on April 22, 2021.[17] However, this measure, and similar measures, have stalled at some point in the legislative process. So, while I certainly recognize that Tennessee's life sentence, as applied to juveniles, is lengthy in comparison to other States, upon answering the constitutional question in this case, this Court should defer to the legislative process and the legislature's distinct role in making "broad moral and policy judgments in the first instance [by] enacting [the] sentencing laws." Jones, 141 S. Ct. at 1322; see also State v. Black, 815 S.W.2d 166, 178 (Tenn. 1991) ("Justice Fones, speaking for the Court, stated: 'The validity and humanity of that complaint should be addressed to the Legislature. This Court's authority over punishment for crime ends with the adjudication of constitutionality.'" (quoting State v. Adkins, 725 S.W.2d 660, 664 (Tenn. 1987))). I continue to urge the legislature to take up this important issue.

[16] See Josh Rovner, Juvenile Life Without Parole: An Overview, THE SENTENCING PROJECT, (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ (summarizing state legislative action since Miller).

[17] See S.B. 0561, 112th Gen. Assem., Bill History, https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0561&GA=112 (last visited Nov. 16, 2022).

In response to this dissenting opinion, the plurality announces that it "will not shirk [its] duty and ignore an injustice." Respectfully, those of us in dissent are far from shirking our duty and ignoring an injustice. To the contrary, I would submit that the exercise of judicial restraint in the face of bad policy, particularly involving vulnerable juveniles, is perhaps the ultimate exercise of our judicial responsibility. Indeed, the eloquent words of Justice Felix Frankfurter directly address this point: "For the highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law of which we are all guardians—those impersonal convictions that make a society a civilized community, and not the victims of personal rule." Tom C. Clark, Mr. Justice Frankfurter: "A Heritage for All Who Love the Law," 51 A.B.A. J. 330, 332 (1965).

I stress that I do not arrive at my conclusion today without serious concerns and reservations. Although I cannot say that Mr. Booker's sentence is unconstitutional under the Eighth Amendment to the United States Constitution, the words of Justice Brett Kavanaugh in Jones are equally or perhaps even more appropriate in the context of this case:

> To be clear, our ruling on the legal issue presented here should not be construed as agreement or disagreement with the sentence imposed against Jones. As this case again demonstrates, any homicide, and particularly a homicide committed by any individual under [eighteen], is a horrific tragedy for all involved and for all affected. Determining the proper sentence in such a case raises profound questions of morality and social policy. The States, not the federal courts, make those broad moral and policy judgments in the first instance when enacting their sentencing laws. And state sentencing judges and juries then determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender.

Jones, 141 S. Ct. at 1322.

III. CONCLUSION

For these reasons, I am compelled to hold that Tennessee's life sentence, as applied to juveniles, does not violate the Eighth Amendment, as interpreted by the United States Supreme Court in Miller. In reaching this conclusion, I suggest the parallel of Justice Kavanaugh's words in Jones applies here. State courts must not make broad moral and social policy judgments. Our constitution leaves those decisions to the legislative branch. The majority's conclusion today to the contrary impermissibly crosses the parameters imposed on our judiciary by our constitution. While perhaps representing good, sound policy, the majority's conclusion fails to allow this issue to be resolved appropriately "by our Legislature as the representatives of the people." State v. Barber, 753 S.W.2d 659, 670 (Tenn. 1988).

For these reasons, I respectfully dissent.

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JEFFREY S. BIVINS, JUSTICE