A16-0553

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

MAHDI HASSAN ALI,

Appellant.

RESPONDENT'S BRIEF

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The district court ruled that it had the discretion to impose consecutive life sentences for three murder convictions. It considered Appellant's age and other unique characteristics and concluded that consecutive sentences were just.

Authorities: *State v. Ali*, 855 N.W.2d 235 (Minn. 2014)
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The district court was not asked, on remand, to rule on Appellant's state constitutional claims.

Authorities: *State v. Ali*, 855 N.W.2d 235 (Minn. 2014)

STATEMENT OF FACTS

Appellant Mahdi Hassan Ali was tried and convicted of murdering three men, Anwar Mohammed, Mohamed Warfa and Osman Elmi, during a robbery at the Seward Market on January 6, 2010. A full account of the facts can be found in *State v. Ali*, 855 N.W.2d 235 (Minn. 2014). In *Ali*, this Court affirmed the appellant's three first-degree murder convictions and the imposition of discretionary consecutive sentences. *Id.* at 258-61. The parties agreed that the appellant's mandatory sentence of life without release (LWOR) on Count III (involving Elmi) was unconstitutional under *Miller v. Alabama*, 567 U.S.__, 132 S.Ct. 2455 (2012). *Id.* at 256. This Court reversed the mandatory sentence on Count III and remanded to the district court for resentencing. The Court's remand included authorization to hold a mitigation hearing ("*Miller* hearing") before determining whether LWOR or life is the appropriate sentence. *Id.*

On remand, the prosecution agreed that a *Miller* hearing did not serve "judicial economy" given that the district court had previously imposed a consecutive sentence on Count III. S2. at 4.[1] The prosecution asked the district court to impose a consecutive life term (with the possibility of release after 30 years) on Count III. S2. at 4; *see also* State's Memorandum of Law on Sentencing After

[1] "S1." Will be used to refer to the transcript of the initial sentencing hearing held on October 31, 2011. "S2." will be used to refer to the transcript of the resentencing hearing held on January 6, 2016.

Remand, District Court file 27-CR-10-2076, filed January 6, 2016 at 2; Appellant's Add. at 27.

The district court imposed a consecutive life term on Count III. S2. at 5. In its written order, the district court concluded that it was prohibited from resentencing Appellant on Counts I and II because those sentences had been affirmed by the Minnesota Supreme Court and were "law of the case." Order and Memorandum Opinion on Motions to Resentence ("Order"), District Court file 27-CR-10-2076, November 6, 2015 at 6; Appellant's Add. at 6. The district court observed that "a plethora of information regarding [Appellant's] youthful age, personal background, and unique circumstances was presented to this court prior to and during trial. All of this information was considered in sentencing" Counts I and II. Order at 5; Appellant's Add. at 5. The district court ruled that, even absent law of the case, it would impose consecutive sentences. Order at 6; Appellant's Add. at 5. Given all the evidence, including the fact that "[t]his was still a brutal, inexcusable murder of three innocent members of the community," the district court concluded that imposition of three consecutive life terms for three murders was "appropriate." Order at 5-6; Appellant's Add. at 5-6.

ARGUMENT

I. THE DISTRICT COURT'S DISCRETIONARY IMPOSITION OF CONSECUTIVE LIFE TERMS FOR THREE DISTINCT MURDERS WAS NOT A VIOLATION OF EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Appellant repeats the Eighth Amendment argument made in his first appeal to this court. He claims that the district court's discretionary imposition of life sentences (with the possibility of release) is the "functional equivalent" of a sentence of life without release (LWOR) and subject to the requirements of *Miller*.[2] He argues that the only constitutional sentence for his three first-degree murder convictions is the concurrent imposition of three life sentences. *See* Appellant's Brief at 20-25. This argument was rejected by this court in *Ali*, 855 N.W.2d at 258. *See also State v. Williams*, 862 N.W.2d 701, 704 (Minn. 2015)(rejecting the argument that the discretionary imposition of two consecutive life sentences for two murders violated the Eighth Amendment or *Miller*).

Appellant is asking this court to reverse recent precedent. Because there is no compelling justification to do so, and this court's precedent is consistent with established constitutional principles of proportionality, Appellant's invitation to reverse *Ali* and *Williams* should be rejected.

[2] The phrase "life sentence" or "life term" will be used to refer to a life term with the possibility of release after 30 years. LWOR will be used to designate a sentence of life without the possibility of release.

A. Standard of review.

Whether a sentence constitutes cruel and unusual punishment is a legal question subject to de novo review. *State v. McDaniel*, 777 N.W.2d 739, 753 (Minn. 2010).

B. Eighth Amendment Jurisprudence.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. As the United States Supreme Court has explained, proportionality "is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense." *Graham v. Florida*, 560 U.S. 48, 59 (2010)(internal quotations omitted). There are two types of constitutionally infirm sentences. The first involves categorical ban or restriction on the imposition of a particular sentence. *Id.* The second involves challenges to a term-of-year sentence in light of "all the circumstances in a particular case" and determines whether the sentence imposed is "constitutionally excessive." *Id.*[3]

Over the past decade, the United States Supreme Court has changed the Eighth Amendment landscape with respect to juvenile sentencing. In *Roper v.*

[3] An individual sentence is considered constitutionally excessive and violative of the Eighth Amendment if it is "grossly disproportionate to the crime." *Graham,* 560 U.S. at 59-60 (quotation omitted).

Simmons, the Supreme Court adopted a categorical ban on death sentences for juveniles convicted of murder. 43 U.S. 551, 578 (2005). In *Graham*, the Supreme Court announced a categorical prohibition on LWOR for juveniles convicted of nonhomicide offenses. 560 U.S. at 82. In both cases, the Supreme Court's decisions were based on the principle that "children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S.__, 132 S.Ct. 2455, 2464 (2012). Because juveniles lack maturity, are often impetuous, are more vulnerable to negative influences, and have greater prospects for reform, the Court concluded that they are "less deserving of the most severe punishments." *Id.*

Miller did not adopt a categorical prohibition like the ones in *Roper* and *Graham*. *Miller* held that *mandatory* sentences of LWOR for a juvenile convicted of homicide are unconstitutional because they prevent the sentencer from considering the "chronological age and its hallmark features" that counsel against sentencing a juvenile to a "lifetime in prison." *Id.* at 2468-69. The Court noted that the proper imposition of LWOR sentences would be "uncommon" or "rare" but did not foreclose the possibility that a juvenile convicted of a homicide could receive such a sentence so long as the "sentencer ha[s] the ability to consider the mitigating qualities of youth." *Id.* at 2467 (quotation omitted).

Finally, in *Montgomery v. Louisiana*, the Supreme Court held that *Miller* created a substantive constitutional rule that must be applied retroactively to offenders on federal collateral review. 577 U.S.__, 136 S.Ct. 718, 736 (2016). The Court explained that *Miller* contains both substantive and procedural components.

Id. at 734-35. *Miller* announced a substantive rule that prohibits LWOR for a juvenile whose homicide conviction reflects "transient immaturity" but allows LWOR for the "rare" juvenile whose crime indicates "irreparable corruption." *Miller*, 132 S.Ct. at 2464, 2475; *Montgomery*, 136 S.Ct. at 734. The procedural element – the *Miller* hearing – gives courts the opportunity to consider evidence of youth and its attendant characteristics to determine which offenders are in each class. *Montgomery*, 136 S.Ct. at 734-35; *see also Jackson v. State*, __N.W.2d__, 2016 WL 4126394 at *6 (Minn. Aug. 3, 2016)(describing the holding of *Montgomery*).

Montgomery clarified that *Miller* created, in effect, a presumption that the "vast" majority of juveniles who commit a murder cannot be sentenced to LWOR but instead must be given the opportunity for parole and the chance to prove that they can re-enter society.

C. The district court correctly ruled that *Ali* was law of the case and should be followed. Neither *Miller* nor *Montgomery* alter that conclusion.

Ali held the consecutive imposition of two life sentences for two first-degree murder convictions did not violate *Miller*'s prohibition against cruel and unusual punishment because Minnesota's sentencing scheme gave the district court discretion to consider all of the relevant circumstances related to Appellant's crimes, including the mitigating fact of his youth. *Ali*, 855 N.W.2d at 258. Because the district court had the opportunity to consider "all the aggravating and mitigating

circumstances specific to [Appellant's] crimes" before imposing sentence, reliance on *Miller* was "misplaced." *Id.*[4]

Under Minnesota law, "the doctrine of law of the case ordinarily applies where an appellate court has ruled on a legal issue and remanded the case to the lower court for further proceedings." *State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007). Issues that have been determined on appeal will not be re-litigated in the district court. *Id.* The district court correctly applied the law of the case doctrine.

It is the prosecution's position that if Appellant wished to challenge the validity of this court's ruling in *Ali* on the discretionary imposition of consecutive sentences, he should have petitioned for *certiorari* to the United States Supreme Court. He did not and is now attempting to re-litigate an issue already decided on appeal.

Stare decisis dictates that this court follow its precedent and overrule prior decisions only in "extremely" rare circumstances where there is a "compelling" reason to do so. *Cargill, Inc. v. Ace American Ins. Co.*, 784 N.W.2d 341, 352 (Minn. 2010)(quotation omitted). As demonstrated in the following section, neither *Miller* nor *Montgomery* provide a compelling reason to overrule the legal holdings of *Ali* or *Williams.*

[4] Because the Court vacated Appellant's LWOR sentence for his third murder conviction, it was not required to rule on whether a third consecutive life term was constitutional. *Ali,* 855 N.W.2d at 257 n. 23.

D. The United States Supreme Court's Eighth Amendment juvenile sentencing cases do not prohibit courts from imposing consecutive sentences if a juvenile murders more than one person.

Roper, Graham, Miller and *Montgomery* all involved juveniles who were sentenced to death or LWOR for a single crime. *Miller* and *Montgomery* focused on the fit between a specific crime – a single homicide - and a specific sentence – LWOR. The decisions are silent with regard to the constitutionality of imposing discretionary, consecutive sentences in a cases where a juvenile defendant commits multiple murders. *See United States v. Cobler*, 748 F.3d 570, 580 n. 4 (4th Cir. 2014)("The Supreme Court has not yet decided the question of whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole."); *State v. Cardeilhac*, 876 N.W.2d 876, 889 (Neb. 2016)("the U.S. Supreme Court has not addressed whether imprisonment for a lengthy term of years triggers *Miller* sentencing principles").[5]

Appellant was sentenced to a mandatory term of LWOR for the premeditated murder of Osman Elmi in violation of *Miller*. The case was remanded to the district court for resentencing. As the Supreme Court has observed, a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for

[5] In *Miller*, the Court observed that nothing it said in *Graham* "about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Miller*, 132 S.Ct. at 2465. This is a general statement about the lesser culpability of juveniles as a class. It does not, as Appellant argues, mean that gravity of the crimes committed by a juvenile is no longer relevant to the concepts of blameworthiness and proportionality.

parole" or release. *Montgomery,* 136 S.Ct. at 736. Appellant received the remedy urged by the Supreme Court in *Montgomery.*

Appellant asks this court to extend *Miller* and *Montgomery* beyond their express terms. He urges this court to adopt a constitutional rule that presumes, in all but the "rare" case of "irreparable corruption," a juvenile murderer in Minnesota must be sentenced to a life term with the possibility of release after 30 years – regardless of the number of people that juvenile murders.[6] This court should reject such a rule because it is inconsistent with accepted notions of proportionality in sentencing.

In *O'Neil v. Vermont*, 144 U.S. 323 (1892), the United States Supreme Court was asked to rule on whether the aggregate sentence for 307 liquor law infractions

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[6] Much of Appellant's brief is devoted to case law from other jurisdictions holding that *Miller* applies to both mandatory and discretionary statutory schemes and courts must consider age before sentencing an offender. To the extent that the sentence involved is LWOR for a single homicide, the holdings are not surprising. This is what *Miller* requires: courts must be allowed to consider age and its attendant characteristics before sentencing a juvenile convicted of a homicide to LWOR. Considering a defendant's age when exercising sentencing discretion is not a novel concept in Minnesota. *See State v. McLaughlin,* 725 N.W.2d 703, 715 (Minn. 2007) (recognizing that age is a mitigating fact and can be considered by a court in deciding whether to impose concurrent or consecutive sentences). Thus, the procedural component of *Miller* - that instructs courts to consider age before sentencing an offender - is consistent with Minnesota's law on discretionary sentencing. The question is not whether a district court should consider a juvenile murderer's age in exercising its discretion to impose either concurrent or consecutive life sentences for more than one crime. The district court in this case and courts in other cases have done this. Order at 5; Appellant's Add. at 5; *Williams*, 862 N.W.2d at 704. The issue is whether the substantive rule of *Miller* (LWOR is limited to rare situations where offender's crimes show irreparable corruption) is a constitutional command in cases where an offender kills more than one person (i.e. the gravity of the offense is greater).

violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 331. The Court found that it lacked jurisdiction to decide the question but noted, in dicta:

> If [the defendant] has subjected himself to a severe penalty, it is simply because he has committed a *great many* of such offenses. It would scarcely be competent for a person to assault the constitutionality of the statute prescribing the punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question.

Id. (quoting *State v. Four Jugs of Intoxicating Liquor*, 2 A. 586, 593 (Vt. 1886)(emphasis in original).

Many courts have accepted this logic and held that the fit between a crime and sentence should be viewed independently, rather than in the aggregate, in determining whether a sentence is cruel and unusual. *See Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001)("it is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim."); *Hawkins v. Hargett*, 200 F.3d 1279, 1285 n. 5 (10th Cir. 1999)("The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes."); *United States v. Aiello*, 864 F.2d 257, 265 (2nd Cir. 1988)(same); *State v. Hairston*, 888 N.E.2d 1073, 1077-79 (Ohio 2008)(analyzing each sentence for each crime separately and rejecting the argument

that an aggregate prison term of 134 years for multiple crimes violated the Eighth Amendment); *State v. Buchhold*, 727 N.W.2d 816, 823 (**S**.D. 2007)(consecutive sentences for 11 sexual assault convictions amounting a "de facto" life sentence of 175 years did not violate the Eighth Amendment); *State v. Berger*, 134 P.3d 378, 381 (Ariz. 2006)(affirming 200 year sentence for multiple acts of child pornography stating that, "a defendant has no constitutional right to concurrent sentences for two separate crimes.").

The "one crime-one sentence" proportionality analysis has been used to reject sentencing challenges under *Graham* and *Miller*. *See e.g. Bunch v. Smith*, 685 F.3d 546, 551-53 (6th Cir. 2012) (*Graham* does not prohibit imposition of a consecutive sentences, aggregating to an 89-year term, imposed for multiple nonhomicide offenses) *cert. denied* 133 S.Ct. 1996 (U.S. Apr. 22, 2013); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 926 (Va. 2016)(affirming consecutive sentences for multiple rape-related crimes, aggregated to130 and 150 years, stating that "the only reason the aggregate sentences exceeded their life expectancies was because they committed so many separate crimes."); *Lowe-Kelly v. State*, 2016 WL 742180 at *8 (Tenn. Crim. App. Feb. 24, 2016) *rev. denied* (Tenn. Jun. 23, 2016)(*Miller* did not apply to the discretionary imposition of consecutive 51-year life terms imposed for two separate murders).

All of these cases stand for the unremarkable proposition that it is constitutionally permissible to punish a person who commits two, three, four or even more crimes (including murder) more severely than a person who commits a single

crime. *See State v. August*, 589 N.W.2d 740, 744 (Iowa 1999)("there is nothing cruel or unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing."). In other words, it is constitutionally permissible for a State to conclude that a person who kills many people is more blameworthy than a person who kills only one. *Graham*, 560 U.S. at 72 (retribution is a valid reason to punish and courts consider *both* the personal culpability of the offender *and* the gravity of the offense). While is it true that "the case for retribution is not as strong with a minor as with an adult," it is equally true that the case for retribution increases with the severity and gravity of the crime. *Id.*

This is a fundamental flaw in Appellant's argument. He asks this court to presume that a juvenile who kills two, three, and even four people is exactly as blameworthy as a juvenile who commits single homicide *and* to presume that, absent proof of irreparable corruption, these disparate offenders must be punished in exactly the same way. In Appellant's view, the only material fact is the offender's age. The gravity of the criminal offense is irrelevant. This is not what *Graham*, *Miller*, or *Montgomery* hold. Accepting Appellant's position defeats accepted notions of proportionality because it presumes a "one size fits all" approach for all juvenile murder cases, regardless of the frequency and magnitude of the offender's criminal conduct.

This court has held that, where the district court has had the opportunity to consider the fact of age and other mitigating circumstances, the imposition of

consecutive life terms for distinct, multiple murders does not offend the Eighth Amendment. *Ali*, 855 N.W.2d at 258; *Williams*, 862 N.W.2d at 704. These rulings comport with the procedural principle announced in *Miller.* Because *Miller* and *Montgomery* involved a single crime and sentence rather than multiple murders, they are substantively distinguishable. The Supreme Court has not held that a state must find a defendant is irreparably corrupt in order to impose consecutive sentences for multiple murder convictions. Neither *Miller* nor *Montgomery* provide a compelling basis to deviate from the holdings in *Ali* and *Williams.*

E. This court should reject the assertion that the only constitutionally permissible sentence in Appellant's case is life with the possibility of release after 30 years.

Appellant argues that all juvenile murderers who are not irreparably corrupt must be given a meaningful opportunity to demonstrate maturity and rehabilitation and to obtain release into society. Precisely what the United States Supreme Court means by a "meaningful" or "realistic" opportunity to obtain release from prison is unknown. *Graham*, 560 U.S. at 79, 82. Appellant contends that the only presumptively constitutional sentence for a juvenile murderer in Minnesota is one that is less than "average life expectancy." *See* Appellant's Brief at 17. He cites actuarial data suggesting that average life expectancy varies from 50-79 years depending on where a person lives, a person's gender, a person's race and whether a person is incarcerated. Based on these statistics, he argues that even the imposition of two consecutive life sentences which results in an aggregate term of 60 years

before release eligibility will exceed a juvenile murderer's life expectancy and thereby violate the Eighth Amendment's cruel and unusual punishment provision.

Several problems are apparent in Appellant's approach. First, as stated previously, there is nothing in U.S. Supreme Court case law that dictates or warrants such a result. Second, this approach expressly invites the court to use improper factors like race, gender, or socioeconomic status to set the constitutional parameters of a LWOR term. Third, Appellant's proposed rule encourages inconsistencies between and within jurisdictions. *Compare State v. Zarate,* 2016 WL 1079462 at *11 (N.J. Super. Mar. 21, 2016)(holding a mandated 63.75 year period of parole ineligibility for juvenile convicted of homicide amounts to a de facto LWOR sentence triggering *Miller*) and *State v. Zuber*, 126 A.3d 335, 343 (N.J. Super. 2015)(holding a mandated period of 55 years of parole ineligibility for a juvenile convicted of multiple nonhomicide offenses was not an unconstitutional de facto LWOR sentence). Finally, Appellant's proposed rule raises as many questions as it answers, like:

> At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? *** Does the number of crimes matter? ….Also, what if aggregate sentences are from different cases? From different circuits? From different jurisdictions?

Moore v. Biter, 742 F.3d 917, 917-18 (9th Cir. 2014)(J. O'Scannlain, dissenting denial of en banc review). *Graham*, *Miller* and *Montgomery* do not answer these or other questions about the parameters of a "de facto" sentence of LWOR.

Appellant's argument is fraught with practical issues and competing policy concerns that are typically left to the legislature to resolve. He is asking this court expand *Miller* and *Montgomery* to create a categorical rule that a life sentence with release eligibility at 30 years is the presumed constitutional sentence for a juvenile murderer, regardless of how many people the juvenile kills. Adopting Appellant's position is inconsistent with a principled application of the Eighth Amendment and the notion of appropriate judicial restraint. *Vasquez*, 781 S.E.2d at 928.

The Eighth Amendment forbids only term-of-year sentences that are grossly disproportionate to the crime committed. The district court's discretionary imposition of three consecutive life terms for Appellant's unprovoked and senseless murders of three men simply does not offense this standard.

F. The district court properly considered the individualized circumstances of Appellant's case prior to imposing consecutive sentences.

After the jury returned its guilty verdicts, the district court set a sentencing date in order to permit the parties to argue their respective positions on the appropriate sentence. The court ordered a presentence investigation report (PSI) be prepared. After reviewing the PSI, hearing the victim impact statements and considering the arguments of the parties, the district court imposed consecutive sentences for each of the men Appellant murdered. S1. 29-28. The district court ultimately concluded that imposition of consecutive terms was the "just" result. S1. 27.

In *Ali*, this court ruled that the district court had sufficient information to properly exercise its discretion in sentencing the defendant.

> Like the defendants in *McLaughlin, Ouk, Brom*, and *Warren,* Mahdi is convicted of "particularly callous murders." The defense acknowledges that because of the age-determination hearing, the district court "had an abundance of information about appellant's unique personal circumstances," and the defense also urged the court at sentencing to consider Mahdi's youthful characteristics. Nonetheless, the court recognized the singular brutality with which Mahdi carried out the crimes and made clear that Mahdi should never be released from prison. * * * We hold that the district court did not abuse its discretion by imposing consecutive sentences on Mahdi.

Ali, 855 N.W.2d at 260 (internal citations omitted).

On remand, the district court confirmed that it considered Appellant's age and other "plethora" of information about his personal background and unique circumstances gleaned throughout the proceedings in exercising it sentencing discretion. Order at 5; Appellant's Add. at 5. The district court reaffirmed that three consecutive sentences was the appropriate sentence for Appellant's three murder convictions. Order at 6; Appellant's Add. at 6.

In this appeal, Appellant reasserts and amplifies his earlier arguments. He now claims that the sentencing hearing was constitutionally inadequate because (1) the district court did not use the irreparably corrupt standard, (2) the district court relied on information obtained "haphazardly" throughout the prosecution of Appellant's case, (3) the district court did not give sufficient weight to evidence of

Appellant's "troubled life," and (4) Appellant was deprived of his right to present expert testimony on adolescent brain development.

Here, the district court actually considered the types of evidence discussed in *Miller*. The district court obviously knew Appellant's age and, like "any parent," was certainly aware of the attendant characteristics of youth that generally make juveniles less blameworthy. *Miller*, 132 S.Ct. at 2464. Expert testimony on the general concepts of adolescent brain development is unlikely to have changed the district court's analysis. The court was also aware of Appellant family history. The sentencing record, however, contradicts some of Appellant current assertions of a vastly and recently "troubled" youth. *See* PSI, District Court file 27-CR-10-2076 at 3-4 (detailing Appellant's "significant family history").[7]

The district court had extensive information about Appellant's conduct before, during and after the murders. Appellant was 17-years-old at the time of the murders. *See Miller*, 132 S.Ct. at 2468 (observing that the culpability of a 17-year-old is very different than that of the 14-year-old petitioner in *Miller).* He planned to rob the Seward Market weeks before he acted. He was the ringleader, not a mere

[7] Appellant had a full opportunity to litigate his sentence and could have introduced any mitigating testimony he wished, including expert testimony on his mental or physical state or the general principles of adolescent brain development (of which he was clearly aware given his reliance on *Roper, Graham*, and *Miller*). He asserts that he should have been permitted to introduce expert neurological evidence to support a claim of transient immaturity. Experts in the field agree that the science has not advanced to the point where specific opinions about the neurological development of a particular individual can be offered. *See* Francis X.Shen, *Legislating Neuroscience: The Case of Juvenile Justice*, 46 Loy. L.A. L. Rev. 985, 995 (2013).

accomplice. Appellant executed three innocent men without provocation. Appellant shot Anwar Mohammed in the face as he crouched on the floor, terrorized. Appellant had already escaped from the market when he shot Mohamed Warfa in the neck while he was standing in the doorway to the market. Appellant returned to the store moments later to ensure there were no witnesses to his crimes. He chased Osman Elmi through the store before shooting him three times in the back. Appellant left all three men lying in pools of their own blood to die. The murders were senseless and devastated the victims' families and their community. Appellant gave several statements to police but did not confess, demonstrating his maturity. Appellant has accepted no responsibility for his crimes and has shown no remorse. It would be difficult to overstate the gravity of Appellant's conduct. Imposition of permissive consecutive sentences was commensurate with Appellant's criminality and not excessive. *Compare State v. Warren*, 592 N.W.2d 440, 452 (Minn. 1999).

Appellant's sentences were also comparable to those imposed in other cases involving juvenile offenders who murdered multiple victims. *Compare McLaughlin*, 725 N.W.2d at 715 (affirming consecutive sentences for first- and second-degree murder where a 15-year-old shot and killed two fellow students at school); *State v. Ouk*, 516 N.W.2d 180, 186 (Minn. 1994) (upholding consecutive sentences for 15-year-old murderer who without provocation shot four people at close range); *State v. Brom*, 463 N.W.2d 758, 765 (Minn. 1990) (affirming consecutive sentences for a 16-year-old defendant who killed four family members with an ax).

Appellant's case is one of the "uncommon" or rare situations for which the most severe punishment should be reserved. Between 1980 and 2008, less than one percent (1%) of all homicides involves three or more victims. *See* Homicide Trends in the United States, 1980-2008, U.S. Dept. of Justice Bureau of Justice Statistics, November 2011 at 24; available at www.bjs.gov/content/pub/pdf/huts8008.pdf. Accepting Appellant's argument would preclude district courts from assessing the true criminality of a defendant's conduct. Killing one person would be treated the same as killing two or even three people. Prohibiting consecutive life sentences (or even long term-of-years sentences) for juvenile offenders would destroy any reasonable notion of proportionality. This is contrary to common sense and the teachings of the Eighth Amendment.

II. APPELLANT IS NOT ENTITLED TO RELIEF BASED ON HIS STATE CONSTITUTIONAL CLAIMS.

Appellant reasserts his claim that his aggregate sentence violates the Minnesota Constitution's ban on cruel or unusual sentences. *See* Appellant's Brief at 21. He also raises a new state constitutional claim. Appellant argues that, in absence of a *Miller* hearing and determination that he is irreparably corrupt, he has been deprived of equal protection of the law. *See* Appellant's Brief at 36. Both arguments fail.

A. Standard of review.

The constitutionality of a statute and its construction are generally considered legal questions subject to de novo review. *State v. Tennin,* 674 N.W.2d 403, 406 (Minn. 2004). The same standard of review is applied to the question of whether a punishment is cruel or unusual. *McDaniel*, 777 N.W.2d at 753.

B. This court has already determined that the discretionary imposition of consecutive life terms imposed for multiple murders does not violate the Minnesota Constitution.

In *Ali*, this court wrote:

> The Minnesota Constitution contains a provision that is almost identical to the Eighth Amendment, but it prohibits "cruel *or* unusual" punishments instead of "cruel *and* unusual" punishments. *Compare* Minn. Const. art. I, § 5 (emphasis added), *with* U.S. Const. Amend. VIII (emphasis added). We have held that this difference in wording is "not trivial" because the "'United States Supreme Court has upheld punishments

that, although they may be cruel, are not unusual.'" *State v. Vang*, 847 N.W.2d 248, 263 (Minn.2014) (quoting *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn.1998)). In determining whether a particular sentence is cruel or unusual under the Minnesota Constitution, courts should separately examine whether the sentence is cruel and whether it is unusual. *State v. Juarez*, 837 N.W.2d 473, 482 (Minn. 2013). Someone challenging a sentence as cruel or unusual bears the "heavy burden ... of showing that our culture and laws emphatically and well nigh universally reject the sentence." *259 *State v. Chambers*, 589 N.W.2d 466, 479 (Minn. 1999) (citation omitted) (internal quotation marks omitted).

To determine whether a sentence is cruel, a court should compare the gravity of the offense to the severity of the sentence. *See Mitchell*, 577 N.W.2d at 489 (noting that this step of the analysis is consistent with the first step of the case-by-case analysis for the Eighth Amendment). Mahdi has made no showing that the imposition of consecutive sentences was disproportionate considering the gravity of the offenses the jury found that he committed. Therefore, Mahdi has not shown that the sentence is "cruel" under Article I, Section 5 of the Minnesota Constitution.

To determine whether a sentence is unusual, a court should compare the defendant's sentence with sentences received by other offenders convicted of the same or similar offenses both inside and outside of Minnesota. *See Juarez*, 837 N.W.2d at 482. Here, too, Mahdi's claim fails. We have repeatedly affirmed consecutive life sentences for juveniles for the kinds of crimes that Mahdi committed. *See, e.g., State v. Flowers*, 788 N.W.2d 120, 122 (Minn. 2010) (affirming two consecutive life sentences for a 16–year–old who murdered two people while trying to rob a house); *State v. Warren*, 592 N.W.2d 440, 452 (Minn. 1999) (holding that a district court abused its discretion in imposing concurrent sentences on a defendant who shot and killed three victims); *State v. Ouk*, 516 N.W.2d 180, 186 (Minn. 1994) (affirming consecutive sentences for a

> 15–year–old who shot and killed two people at close range); *State v. Brom*, 463 N.W.2d 758, 765 (Minn.1990) (affirming consecutive life sentences for a 16–year–old who murdered his parents and siblings with an ax). Mahdi has also made no showing that such sentences are "unusual" in other states. Therefore, we hold that the district court's imposition of consecutive life sentences did not violate Article I, Section 5 of the Minnesota Constitution.

Ali, 855 N.W.2d at 258-59. Contrary to Appellant's claim, there is nothing in *Montgomery* that alters this court's analysis. This court should reaffirm its prior ruling and reject Appellant's claim.

C. Appellant's equal protection claim must be rejected.

Minnesota law expressly grants a district court the authority to impose permissive consecutive sentences in murder cases involving multiple victims. *McLaughlin,* 725 N.W.2d at 715*;* Minn. Sentencing Guidelines 2.F.2.A (1)(ii). Appellant argues that these provisions violate the state constitutional equal protection clause because they grant district courts the authority to sentence similarly situated defendants (those not irreparably corrupt) to different sentences.

As Appellant conceded, this argument was not made at sentencing or in his first appeal. It should not be considered for the first time in Appellant's second appeal of his sentence. *State v. Frazier*, 649 N.W.2d 828, 839 (Minn. 2002)("Where an issue of constitutionality is not raised and acted upon in the court below, a party will not be heard to raise the issue for the first time on appeal to the supreme court.").

Appellant's claim also fails on the merits. It is founded on the same faulty premise as his Eighth Amendment claim – that all juvenile murderers must be

treated exactly the same for sentencing purposes regardless of how many people each juvenile kills. As argued previously, it defies common sense to conclude that a juvenile who kills two, three or even four victims is "similarly situated" to the juvenile who kills a single person. Moreover, the fact that two offenders may be similarly situated in gross terms does not mean that the imposition of different sentences violates the equal protection guarantee. *State v. Gamelgard*, 287 Minn. 74, 78-79, 177 N.W.2d 404, 407 (1970)("The mere fact that two different judges chose to exercise this discretion in two widely different ways is not in and of itself a denial of equal protection."). Appellant's claim ignores the requirement that sentencing, including the imposition of consecutive sentences for murder, must be based on the individual circumstances of an offender's case. The district court considered Appellant's youth, his unique circumstances and the gravity of the three murders he committed. It concluded that consecutive sentences was the proportionate and just result. The fact that another judge could have exercised discretion differently does not give rise to an equal protection claim.

CONCLUSION

Appellant received a fair and individualized sentencing determination. With regard to his premeditated murder sentence, he received the remedy authorized by the U.S. Supreme Court –a life term with eligibility for release after 30 years. The district court had the authority to impose discretionary consecutive sentences for Appellant's three murder convictions. After consideration of Appellant's age and other unique circumstances, the district court concluded that imposition of three consecutive life terms was the just result given the extreme brutality and gravity of Appellant's crimes. The sentences were lawful and must be affirmed by this court.

DATED: October 26, 2016

Respectfully submitted,

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Mahdi Hassan Ali,

Appellant.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6064 words. This brief was prepared using Microsoft Office 2013, Times New Roman font face size 13.

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