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Reasonable Minds May Differ: The Application of Miller and Graham to Consecutive Sentences for Juvenile Offenders in Missouri

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NOTE

Reasonable Minds May Differ: The Application of *Miller* and *Graham* to Consecutive Sentences for Juvenile Offenders in Missouri

State v. Nathan, 522 S.W.3d 881 (Mo. 2017) (en banc)

*Shawna C. Quast**

I. INTRODUCTION

Ledale Nathan was convicted of second-degree murder and a series of nonhomicide offenses stemming from a home invasion he committed at the age of sixteen.[1] The St. Louis Circuit Court sentenced Nathan at a time when Eighth Amendment[2] jurisprudence regarding juvenile sentencing was in flux. The United States Supreme Court decided two cases that restricted the way courts sentence juvenile offenders: *Graham v. Florida*[3] and *Miller v. Alabama*.[4] *Graham* held that juvenile offenders who had not committed homicide offenses could not be sentenced to life without parole ("LWOP"),[5] while *Miller* held that LWOP could not be a mandatory sentence for juvenile homicide offenders.[6] However, *Graham* and *Miller* left two main questions unresolved. First, does *Graham* bar consecutive sentences for multiple nonhomicide offenses that effectively function as LWOP? Second, when a juvenile is convicted of homicide and nonhomicide offenses, does *Miller* require courts to consider mitigating evidence when imposing a sentence for the homicide offense alone, or must courts consider such evidence when imposing aggregate sentences for both the homicide and nonhomicide offenses?

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1. State v. Nathan, Nos. ED 96851, ED 96832, 2012 WL 5860933, at *1 (Mo. Ct. App. Nov. 20, 2012), *transferred to* 404 S.W.3d 253 (Mo. 2013) (en banc).

2. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. 560 U.S. 48 (2010).

4. 567 U.S. 460 (2012).

5. *Graham*, 560 U.S. at 74.

6. *Miller*, 567 U.S. at 479.

Even without addressing the latter question, the *Miller* decision prompted resentencing hearings for juvenile offenders throughout the United States,[7] including Nathan.[8] After a series of appeals and a resentencing, Nathan faced more than 300 years in prison resulting from twenty-six convictions.[9] The combined effect of the aggregate sentences – some of which Nathan had to serve consecutively – would leave the young offender in prison for the remainder of his expected life span before he would be eligible for parole.[10]

In light of current United States Supreme Court decisions regarding juvenile sentencing and their subsequent application, some individuals in Nathan's position have had their sentences reviewed to ensure that they do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[11] State and federal courts have grappled with the scope of *Miller* and *Graham*, leading to inconsistent applications across jurisdictions.[12] Juveniles with lengthy aggregate sentences, like Nathan, have sought relief in the courts with mixed results.[13] Recently, the Supreme Court of Missouri offered its interpretation of *Miller* and *Graham* in *State v. Nathan*[14] and the contemporaneously opined *Willbanks v. Department of Corrections*.[15] In both cases, the court declined to apply the underlying rationale of *Graham* and *Miller* in a way that would bar consecutive sentences that function as LWOP for juvenile offenders.[16]

Part II discusses the pertinent facts of *State v. Nathan* and the holdings of the court. Part III reviews relevant jurisprudence regarding juvenile sentencing. Part IV reviews the instant decision. Part V argues that while the holding in *Graham* did not apply to Nathan's case, and the Supreme Court of Missouri was not expressly required to apply *Miller* in light of Nathan's composite sentence, the spirit of the law necessarily requires such consideration.

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7. John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 556–57 (2016).

8. State v. Nathan, 404 S.W.3d 253, 270 (Mo. 2013) (en banc). In the first appeal of *Nathan*, the Supreme Court of Missouri found *Miller* held "life without parole may not be imposed [on a juvenile offender] unless the sentencer is given an opportunity to consider the individual facts and circumstances that might make such a sentence unjust or disproportionate." *Id.*

9. State v. Nathan, 522 S.W.3d 881, 883–84 (Mo. 2017) (en banc), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc). *See also id.* at 899 (Stith, J., dissenting) (finding the "imposed consecutive sentence on the nonhomicide charge, which in aggregate, does not allow for parole for more than 300 years.").

10. *Id.* at 899 (Stith, J., dissenting) ("The consecutive imposition of sentences requiring 300 years in prison without the possibility of parole has the same aggregate effect as [LWOP].").

11. *See* Mills et al., *supra* note 7, at 544, 556–57.

12. *See* discussion *infra* Section III.C.

13. *See* discussion *infra* Section III.C.

14. *See Nathan*, 522 S.W.3d 881.

15. 522 S.W.3d 238 (Mo. 2017) (en banc), *cert. denied*, 138 S. Ct. 304 (2017) (mem.).

16. *Id.* at 246; *Nathan*, 522 S.W.3d at 893–94.

II. FACTS AND HOLDING

On October 5, 2009, sixteen-year-old Ledale Nathan and his twenty-two-year-old accomplice Mario Coleman approached off-duty St. Louis police officer Isabella Lovadina and her then-boyfriend Nicholas Koenig with guns drawn and demanded they turn over their belongings.[17] Following closely behind, Nathan and Coleman ordered the pair into the home where Koenig's grandmother, mother, aunt, and cousins – including Gina Stallis – slept.[18] Nathan attempted to force Stallis to the basement, at which point Lovadina charged Coleman.[19] While Nathan was trying to assist Coleman, Koenig attacked Nathan.[20] As the altercations ensued, seven shots were fired, which resulted in the death of Stallis and non-fatal injuries to Lovadina and Koenig.[21] Nathan and Coleman fled the scene.[22]

The State charged Ledale Nathan with one count of first-degree murder[23] and first-degree burglary,[24] two counts of first-degree assault,[25] four counts of first-degree robbery,[26] five counts of kidnapping,[27] and thirteen counts of armed criminal action.[28] After a trial in the St. Louis City Circuit Court, a jury found Nathan guilty on all twenty-six counts, whereupon he waived jury sentencing.[29] For the first-degree murder conviction, the circuit court sentenced

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17. State v. Nathan, 404 S.W.3d 253, 256 (Mo. 2013) (en banc); Jennifer Mann, *Man Sentenced to Life for Bloody St. Louis Home Invasion*, STL TODAY (Jan. 20, 2012), https://www.stltoday.com/news/local/crime-and-courts/man-sentenced-to-life-for-bloody-st-louis-home-invasion/article_88402424-4387-11e1-98b6-0019bb30f31a.html.

18. *Nathan*, 404 S.W.3d at 256.

19. *Id.*

20. *Id.* at 258.

21. *Id.* Of the seven rounds fired, bullets hit Lovadina five times, Koenig three times, and Stallis and Nathan one time each. *Id.* The court noted that the seven shots resulted in ten wounds and that this result was likely due to the shots being fired in a confined space, which caused "several shots [to] pass[] through one victim and str[ike] another." *Id.* at 258 n.3.

22. *Id.* at 258.

23. *See* MO. REV. STAT. §§ 565.020.1–.2 (Cum. Supp. 2013) ("[I]f a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.") (amended 2016).

24. *See* MO. REV. STAT. § 569.160 (Cum. Supp. 2013) (amended 2014).

25. *See* MO. REV. STAT. § 565.050 (Cum. Supp. 2013) (amended 2014).

26. *See* MO. REV. STAT. § 569.020 (Cum. Supp. 2013), *amended by* MO. REV. STAT. § 570.023 (2014).

27. *See* MO. REV. STAT. § 565.110 (Cum. Supp. 2013) (amended 2014).

28. *See* MO. REV. STAT. § 571.015 (Cum. Supp. 2013); State v. Nathan, 522 S.W.3d 881, 883 (Mo. 2017) (en banc), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc).

29. *Nathan*, 522 S.W.3d at 883.

Nathan to life imprisonment without the possibility of parole;[30] for the associated nonhomicide offenses, Nathan received five life sentences and five fifteen-year sentences, "which were to be served consecutively to each other and to the sentence for first-degree murder."[31] The circuit court also sentenced Nathan to eleven life sentences for the armed criminal action convictions, which were to be served concurrently with the other sentences.[32] The circuit court dismissed four additional counts, of which the jury had found Nathan guilty, for lack of jurisdiction.[33]

Nathan first appealed his sentence on the ground that section 565.020[34] of the Missouri Revised Statutes unconstitutionally imposed LWOP on a juvenile offender without consideration of his age, in violation of the then-recent Supreme Court decision, *Miller v. Alabama*.[35] The Missouri Court of Appeals for the Eastern District found that the Supreme Court of Missouri had exclusive jurisdiction over appeals challenging the constitutionality of state statutes and transferred the case.[36]

On appeal, the Supreme Court of Missouri remanded the case to the circuit court for resentencing in light of *Miller*'s prohibition on mandatory LWOP for juvenile offenders.[37] The court further found that the circuit court erred in

30. *Id.* The court imposed this sentence prior to the Supreme Court of the United States' decision in *Miller v. Alabama* under a statutory scheme that mandated LWOP for persons sixteen or older who were convicted of first-degree murder. *See* State v. Nathan, Nos. ED 96851, ED 96832, 2012 WL 5860933, at *1–3 (Mo. Ct. App. Nov. 20, 2012), *transferred to* 404 S.W.3d 253 (Mo. 2013) (en banc); *see also* MO. REV. STAT. § 565.033 (2016).

31. *Nathan*, 522 S.W.3d at 883.

32. *Id.*

33. *Id.* The four counts dismissed consisted of first-degree robbery, kidnapping, and two counts of armed criminal action. *Id.*

34. MO. REV. STAT. § 565.020.2 (Cum. Supp. 2013) ("[I]f a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.").

35. *See Nathan*, 2012 WL 5860933, at *2–3. The *Miller* decision held statutory schemes that mandatorily imposed LWOP on juvenile offenders unconstitutional. Miller v. Alabama, 567 U.S. 460, 479 (2012). The statute under which Nathan was convicted of first-degree murder offered LWOP as the only prescribed sentence for such a conviction. *See* § 565.020.2.

36. *Nathan*, 404 S.W.3d at 257; *see also Nathan*, 2012 WL 5860933, at *1.

37. *Nathan*, 404 S.W.3d at 270. States could comply with *Miller* by (1) eliminating LWOP for juvenile offenders or (2) requiring a sentencing hearing where the defendant can introduce mitigating evidence before the sentencer imposes LWOP. *See Miller*, 567 U.S. at 480, 489 (refusing to categorically prohibit LWOP for juveniles and instead requiring an individualized sentencing decision before imposing the harshest sentence possible for juveniles).

dismissing the four additional charges against Nathan for lack of jurisdiction and ordered that the case be remanded for resentencing on those charges.[38]

On remand, Nathan exercised his right to sentencing by jury.[39] The jury recommended a life sentence for the second-degree murder conviction, a thirty year sentence for the first-degree robbery, and a fifteen-year sentence for the kidnapping convictions.[40] The jury also recommended three additional life sentences for the associated armed criminal action convictions.[41]

In accordance with *Miller*, the statute under which Nathan had originally been convicted of first-degree murder was no longer permissible, as it required individuals under the age of eighteen to receive a mandatory LWOP sentence.[42] During resentencing, LWOP for first-degree murder remained a possibility, but the jury did not unanimously decide to impose such a sentence after considering Nathan's age, the nature of his offense, and other mitigating factors.[43] Because of the jury's decision, the circuit court vacated the guilty verdict on the first-degree murder charge and "entered a finding of guilt for second-degree murder."[44] Because the statutory scheme changed in response to *Miller*, and

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38. *Nathan*, 404 S.W.3d at 259–60 (noting that the State did not need to limit its charges to those listed in the juvenile petition, thus dismissal of the four other charges against Nathan for lack of jurisdiction was erroneous).

39. State v. Nathan, 522 S.W.3d 881, 884 (Mo. 2017) (en banc), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc).

40. *Id.*

41. *Id.*

42. *Id.* at 883; *cf.* MO. REV. STAT. § 565.020.2 (Cum. Supp. 2013) ("Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.").

43. *Nathan*, 522 S.W.3d at 884; *see also Nathan*, 404 S.W.3d at 270–71 (outlining protocol for if a jury cannot unanimously sentence Nathan to LWOP for first-degree murder on remand).

44. *Nathan*, 522 S.W.3d at 884. While the statutory sentence for second-degree murder allows for LWOP, it is not a mandatory sentence. *Compare* MO. REV. STAT. § 565.021.2 (2016), *with* MO. REV. STAT. § 558.011.1(1) (2016). At the time of Nathan's sentence, first-degree murder required a sentence of LWOP or death. *See* § MO. REV. STAT. 565.020.2 (Cum. Supp. 2013). *Miller* barred the former while *Roper* barred the latter. Miller v. Alabama, 567 U.S. 460, 465 (2012) ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). The Missouri legislature has since amended the statute outlining the first-degree murder sentence. *See* MO. REV. STAT. § 565.020.2. In its current form, the statute allows a juvenile to be convicted of first-degree murder but requires a sentencing hearing, as mandated by *Miller*. *See id.*; MO. REV. STAT. § 565.033 (2016).

because of Nathan's status as a juvenile at the time of the offense, Nathan could not be subjected to a mandatory LWOP sentence.[45]

Nathan filed a motion for resentencing, arguing that the recommended consecutive sentences were the "functional equivalent of [LWOP]" and were thus unconstitutional.[46] The circuit court denied the motion, imposed the recommended sentences, and ordered the sentences to run consecutively with the exception of the armed criminal action convictions, which were to run concurrently.[47] Nathan appealed, arguing that the imposition of the consecutive sentences functioned as LWOP, which amounted to cruel and unusual punishment and violated the Court's holdings in *Graham* and *Miller*.[48]

On appeal, the Supreme Court of Missouri affirmed the circuit court's sentences, finding that neither *Graham* nor *Miller* provided grounds for relief and rejecting the invitation to extend principles asserted therein to apply to consecutive sentences amounting to the functional equivalent of LWOP.[49]

III. LEGAL BACKGROUND

Laws regarding juvenile sentencing for homicide and nonhomicide offenses have been in flux since the early 1990s.[50] Since 2005 alone, the United States Supreme Court has issued three landmark decisions placing limits on constitutionally permissible sentences for juveniles.[51] Though recent decisions have established new constitutional standards for juvenile sentencing, questions regarding the scope of the decisions remain. Without further guidance from the Court, states have applied these limits differently. This Part will review Court cases relevant to juvenile sentencing and their rationales. This Part will also review pertinent cases from the Supreme Court of Missouri and other state and federal courts that have attempted to answer the questions left open by the Court's decisions.

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45. *Nathan*, 404 S.W.3d at 270.

46. *Nathan*, 522 S.W.3d at 884.

47. *Id.* However, the armed criminal action sentences were ordered to run concurrently. *Id.*

48. *Id.* at 885, 888; *see* Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that LWOP could not be imposed on nonhomicide juvenile offenders); Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that mandatory LWOP for juvenile offenders violates the Eighth Amendment's ban on cruel and unusual punishment). Nathan further claimed that his resentencing request was meritorious due to a *Brady* violation that allegedly occurred at the trial level. *Nathan*, 522 S.W.3d at 884.

49. *Id.* at 893–94. The court further found no *Brady* violation. *Id.* at 885.

50. *See* Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1002–03 (2017).

51. *See Miller*, 567 U.S. at 489 (prohibiting mandatory LWOP sentences for juvenile offenders); *Graham*, 560 U.S. at 82 (prohibiting LWOP for nonhomicide juvenile offenders); Roper v. Simmons, 543 U.S. 551, 578 (2005) (prohibiting the death penalty for offenders who committed a crime under eighteen years old).

A. Authority from the United States Supreme Court

The United States Supreme Court has decided several cases that established categorical bars on the imposition of the death penalty.[52] For example, in its 2002 decision of *Atkins v. Virginia*, the Court held unconstitutional the imposition of death upon "a mentally retarded offender."[53] Due to the evolution in understanding those with intellectual disabilities, evidenced by legislative actions and sentencing practices, such sentences became both cruel and unusual.[54]

In 2005, the United States Supreme Court handed down its landmark decision, *Roper v. Simmons*, which rendered the imposition of the death penalty on juvenile offenders unconstitutional.[55] Simmons, who was seventeen at the time of his homicide offense, appealed his death sentence to the Supreme Court of Missouri, arguing that the Eighth Amendment of the United States Constitution prohibited the execution of a juvenile under eighteen at the time of the offense.[56] The Supreme Court of Missouri agreed, set aside Simmons' death sentence, and sentenced him to LWOP.[57] The State of Missouri appealed to

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52. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (prohibiting the death penalty for the rape of a child when the offender did not kill or assist with the killing of the child); Enmund v. Florida, 458 U.S. 782, 801 (1982) (prohibiting the death penalty for an accomplice to a crime who did not kill and neither attempted nor intended to kill); Coker v. Georgia, 433 U.S. 584, 592 (1977) (prohibiting the death penalty for the rape of an adult woman).

53. 536 U.S. 304, 321 (2002).

54. *Id.* at 314–16, 321. *But see id.* at 321–22 (Rehnquist, J., dissenting) (noting the Court disqualified the use of the death penalty as cruel and unusual primarily on the then-recent enactment by eighteen states to limit death penalty eligibility based on mental retardation but ignored the fact that twenty states left the question of "proper punishment to the individuated consideration[s]" of the offender and his or her crime to be weighed by the sentencing judge or jury).

55. *Roper*, 543 U.S. at 578. The outcome "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id.*

56. *Id.* at 556, 559. This new petition was his second attempt for post-conviction relief. *Id.* at 559. After the original sentencing, Simmons obtained new counsel and moved to set aside the conviction and the sentence for ineffective assistance of counsel during the trial. *Id.* at 558. The trial court denied the motion, and on appeal, this denial was confirmed by the Supreme Court of Missouri. *Id.* at 559 (citing State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997) (en banc)). Shortly after, the United States Supreme Court decided *Atkins*, and Simmons filed his second petition for state post-conviction relief. *Id.* In his new petition to the court, Simmons argued that the reasoning of then-recently decided *Atkins* applied. *Id.*

57. State *ex. rel.* Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003) (en banc), *aff'd sub. nom.* Roper v. Simmons, 543 U.S. 551 (2005). The Supreme Court of Missouri explained:

> Applying the approach taken in *Atkins*, this Court finds that, in the fourteen years since *Stanford* was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen

the Supreme Court of the United States, which granted certiorari to reconsider its holding in *Stanford v. Kentucky*,[58] a 1989 case in which the Court held that capital punishment for juvenile offenders aged sixteen or older was permissible.[59] The Court's Eighth Amendment analysis in *Roper* relied heavily on consulting the moral beliefs of Americans – the "standards of decency" that had evolved over time – as evidenced by legislative enactments, jury decisions, and sentences imposed.[60] In *Roper*, the Court found that the moral views of Americans had evolved since *Stanford*; a growing trend in legislative enactments demonstrated that the American people had come to find death inappropriate for juvenile offenders.[61] Imposing death on juvenile offenders became cruel and unusual punishment.[62]

In the years following *Roper*, the Court decided a series of cases that now anchor the discussion of LWOP sentences for juveniles. In 2010, the Court decided the first in the series, *Graham v. Florida*, holding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide" and mandating that states give such offenders "some realistic opportunity to obtain release."[63] In arriving at this decision, the Court in *Graham*, like the Court in *Roper*, analyzed the shifting moral views of Americans.[64] But the Court in *Graham* also incorporated scientific findings regarding the fundamental differences between juveniles and adults in its reasoning.[65]

The Court also considered the diminished culpability of juveniles relative to adult offenders, noting that a juvenile nonhomicide offender's culpability is "twice diminished" from that of an adult homicide offender.[66] The Court further asserted that, while retribution is a legitimate reason to punish, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related

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> states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.

Id. at 399.

58. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005) (holding that it is constitutionally permissible to execute a juvenile offender who was older than fifteen but younger than eighteen at the time of the offense).

59. *Roper*, 543 U.S. at 555–56, 562.

60. *Id.* at 563–67.

61. *Id.* at 564–65.

62. *Id.* at 566–68; *see also* Atkins v. Virginia, 536 U.S. 304, 315–16 (2002) (finding that executions of the intellectually disabled had become cruel and unusual).

63. 560 U.S. 48, 82 (2010).

64. *See id.* at 62.

65. *Id.* at 68.

66. *Id.* at 69.

to the personal culpability of the criminal offender."[67] The Court concluded, "[R]etribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender."[68] Notably, the Court did not suggest that juvenile offenders are not responsible for their crimes; rather, the Court suggested that, in most cases, their diminished culpability merits less severe punishments.[69]

In 2012, the Court placed another limit on permissible sentences for juveniles convicted of homicide. *Miller v. Alabama* held that imposing a mandatory LWOP sentence on a juvenile violates the Eighth Amendment.[70] The Court did not institute a categorical bar against LWOP for *all* juvenile offenders but rather required that such a sentence could not be *mandatory*.[71] The Court noted that before a court can sentence a juvenile to LWOP, it must allow him to present mitigating evidence relating to his age, his characteristics, and the circumstances and nature of the crime.[72] Using the guiding principles outlined in *Graham* and *Roper*, the Court determined that mandating a LWOP sentence without considering mitigating circumstances of the juvenile offender is unconstitutional and amounts to cruel and unusual punishment.[73]

Roper, *Graham*, and *Miller* all endorse the notion that "children are constitutionally different from adults for purposes of sentencing."[74] The Court cites three key differences between juvenile offenders and their adult counterparts in these cases: (1) juveniles lack maturity and are more likely to behave recklessly or impulsively; (2) juveniles are more susceptible to the negative influences of their peers or family members and cannot readily remove themselves from negative environments; and (3) a juvenile's character is not as

67. *Id.* at 71 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

68. *Id.* at 71–72. The Court further concluded that goals of deterrence, incapacitation, and rehabilitation are not achieved through the imposition of LWOP on juveniles. *Id.* at 72–74.

69. *See id.* at 74–75; Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 678 (2016) ("The Court did not question that juvenile offenders are responsible for their criminal conduct. Instead, its developmental model recognizes that adolescent offenders can and should be held accountable for their crimes. However, because of their developmental immaturity, juveniles deserve less punishment than their adult counterparts, even when they commit murder–the crime involving the greatest harm.").

70. 567 U.S. 460, 489 (2012).

71. *Id.*

72. *Id.*

73. *Id.* The Court employed the same rationale from *Graham*, stating that "juveniles have diminished culpability and greater prospects for reform." *Id.* at 471 (quoting *Graham*, 560 U.S. at 68). Employing the reasoning of *Roper*, the Court further stated that children "'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (alteration in original) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

74. *Id.* at 471, 479.

"well formed" as that of an adult and is less likely to "evidence . . . irretrievabl[e] deprav[ity]."[75] These considerations, based largely on neuroscientific findings, aided the Court in determining that juvenile offenders are categorically different from adult offenders and thus undeserving of identical punishments.[76]

B. Authority from the Supreme Court of Missouri

The Supreme Court of Missouri applied *Miller* in *State v. Hart*.[77] At the age of seventeen, Hart killed a man during a robbery.[78] He was subsequently convicted of first-degree murder and sentenced to life without the possibility of parole.[79] Hart appealed his sentence, asserting an Eighth Amendment violation, among other points.[80] While his appeal was pending, *Miller* was decided, and, in accordance with its precedent, the Supreme Court of Missouri held that Hart's LWOP sentence for first-degree murder violated the Eighth Amendment because it was a mandatory sentence.[81] Therefore, Hart was entitled to a resentencing hearing to determine if his sentence was "just and appropriate in light of [his] age, maturity, and the other factors discussed in *Miller*."[82]

In 2017, the Supreme Court of Missouri decided *Willbanks v. Department of Corrections*,[83] which effectively held that *Graham does not* bar the imposition of a lengthy term-of-years sentence upon a nonhomicide juvenile offender.[84] Willbanks was a juvenile offender convicted of seven nonhomicide felonies.[85] He was sentenced to an aggregate sentence of life plus 355 years, and he would not become eligible for parole until he was approximately eighty-

75. *Id.* (alteration in original) (quoting *Roper*, 543 U.S. at 570).

76. *Id.* ("Our decisions rested not only on common sense – on what 'any parent knows' – but on science and social science as well."); *see also* Khushboo Shah, *What's in an Age? Consider the Neuroscience Dimension of Juvenile Law*, 26 S. CAL. INTERDISC. L.J. 167, 175 (2016) ("This comprehensive understanding of the interplay between the prefrontal cortex, the amygdala, and the accumbens during development from adolescence to adulthood is critical to knowing why, on a fundamental, biological level, the method of risk assessment, moral reasoning, impulse control, and emotional processing is physiologically different [between juveniles and adults].").

77. 404 S.W.3d 232 (Mo. 2013) (en banc).

78. *Id.* at 234.

79. *Id.* Hart was also found guilty of first-degree robbery and two counts of armed criminal action for which he received three thirty-year sentences to be served concurrently. *Id.*

80. *Id.*

81. *Id.* at 235.

82. *Id.* at 235, 238.

83. 522 S.W.3d 238 (Mo. 2017) (en banc), *cert. denied*, 138 S. Ct. 304 (2017) (mem.).

84. *See id.* at 239 ("This Court holds that Missouri's mandatory minimum parole statutes and regulations are constitutionally valid under the Supreme Court of the United States's opinion in *Graham*.").

85. *Id.* at 240.

five years old.[86] Willbanks argued that his sentence functioned as LWOP because he would not have a meaningful opportunity for release before reaching his natural life expectancy.[87] The Supreme Court of Missouri held that *Graham* did not bar Willbanks' sentence, suggesting that *Graham* only barred sentencing a juvenile to LWOP for a single nonhomicide offense; Willbanks committed seven nonhomicide offenses.[88] The court also found that *Miller* did not preclude the sentence because Willbanks was not sentenced to LWOP even if the term-of-years sentence functioned in a similar fashion.[89]

C. Other Authority

With little guidance regarding the scope of these cases from the United States Supreme Court, other courts have attempted to determine the applicability of *Graham* and *Miller* to consecutive sentences for juvenile offenders with mixed results. In *Nathan*, the majority and dissenting opinions rely on authorities from other jurisdictions with vastly different outcomes. This Section provides a brief overview of the cases relied on by the majority and dissenting opinions.

The majority found *Bunch v. Smith*,[90] a case from the U.S. Court of Appeals for the Sixth Circuit, most persuasive in lieu of mandatory authority.[91] In that case, Bunch received consecutive sentences amounting to eighty-nine years of imprisonment for committing multiple nonhomicide offenses as a juvenile.[92] In its analysis, the Sixth Circuit rejected the idea that *Graham* barred

86. *Id.* at 240–41. The statutory scheme dictating parole eligibility for "offenders guilty of a dangerous felony" mandates that an individual serve either eighty-five percent of the sentence or until the age of seventy if he has served forty percent of the sentence. *Id.* at 241 n.4; *see also* MO. REV. STAT. § 558.019.3 (2016).

87. *Willbanks*, 522 S.W.3d at 240–41. Willbanks' life-expectancy was approximately seventy-nine years old; he would become parole eligible six years later. *See id.* at 241 n.4.

88. *Id.* at 244–46.

89. *Id.* at 246. The Supreme Court of Missouri explained, "Over the last decade, the Supreme Court has stated that youth affects the penological considerations for the following: capital punishment, [in *Roper*]; mandatory life without parole for [juvenile] homicide offenders, [in *Miller*]; and life without parole for nonhomicide [juvenile] offenders, [in *Graham*]." *Id.* (citations omitted). The Supreme Court of Missouri then stated that "the Supreme Court has not held that multiple fixed-term sentences totaling beyond a juvenile offender's life expectancy are the functional equivalent of life without parole" and that doing so would require courts to extend *Graham*. *Id.*

90. 685 F.3d 546 (6th Cir. 2012).

91. State v. Nathan, 522 S.W.3d 881, 886 (Mo. 2017) (en banc), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc).

92. *Nathan*, 522 S.W.3d at 886 (citing *Bunch*, 685 F.3d at 547). Bunch was convicted at age sixteen for "the horrific robbery, kidnaping, and repeated rape of . . . a [twenty-two]-year-old female." *Bunch*, 685 F.3d at 547.

the sentence.[93] Instead, the Sixth Circuit noted that, while Bunch was a juvenile offender at the time of the crimes, the Court in *Graham* did not address "consecutive, fixed-term sentences for juvenile nonhomicide offenders."[94] Because the *Graham* Court did not expressly apply its holding to consecutive, fixed-term sentences, the Sixth Circuit found no reason that such a sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment.[95]

The *Nathan* majority also addressed two cases that the dissent relied on: *State v. Moore*,[96] decided by the Supreme Court of Ohio and *State v. Zuber*[97] decided by the Supreme Court of New Jersey.[98] These two cases considered how *Graham* and *Miller* should be applied to sentences that are not LWOP in name but nonetheless function as such. *Graham* prohibits LWOP for a single nonhomicide offense; however, what if the juvenile offender is convicted of multiple nonhomicide offenses and sentenced to consecutive terms? This question was considered in *Moore*, where the defendant was convicted of a series of violent crimes and firearm violations.[99] Moore was required to serve seventy-seven years of his 112-year sentence before becoming eligible for parole at the age of ninety-two.[100] The Supreme Court of Ohio recognized the "twice diminished moral culpability" of nonhomicide juvenile offenders identified in *Graham* and noted that this diminished culpability is largely why juvenile LWOP is considered unconstitutional for nonhomicide offenses.[101] The Supreme Court of Ohio concluded that because a term-of-years sentence that exceeds the life expectancy of the offender functions the same way as LWOP for

93. *Bunch*, 685 F.3d at 552.

94. *Id.* The U.S. Court of Appeals for the Sixth Circuit further reasoned that the Court in *Graham* mandated a "realistic opportunity to obtain release" for juvenile offenders sentenced to "life," which was clearly not the case for Bunch. *Id.* at 551 (quoting Graham v Florida, 560 U.S. 48, 82 (2010)).

95. *Id.* at 552.

96. 76 N.E.3d 1127 (Ohio 2016), *cert. denied*, 138 S. Ct. 62 (2017) (mem.).

97. 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (mem.).

98. State v. Nathan, 522 S.W.3d 881, 887–88 (Mo. 2017) (en banc), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc); *see also id.* at 894, 906–07, (Stith, J., dissenting).

99. *Moore*, 76 N.E.3d at 1128–30. Moore was involved in the same crimes that led to Bunch's conviction in *Bunch v. Smith*. *See id.* at 1129–30. Because both defendants were juveniles at the time of the crime, these cases demonstrate the inconsistent results among courts in applying *Graham* to juvenile nonhomicide offenders who receive lengthy consecutive sentences absent specific guidance from the United States Supreme Court.

100. *Id.* at 1133.

101. *Id.* at 1135 (quoting Graham v Florida, 560 U.S. 48, 69 (2010)). The Ohio Supreme Court explained that, because juveniles possess diminished capacity, it impossible to meet the penological justifications for LWOP for nonhomicide juvenile offenders. *Id.*

nonhomicide juvenile offenders, it is subject to *Graham*'s requirement that there be a reasonable opportunity for release.[102]

In *Zuber*, the Supreme Court of New Jersey recognized that although *Miller* only expressly barred the *mandatory* imposition of LWOP on juveniles, the "mitigating qualities of youth" discussed therein should be considered when sentencing juveniles to "the practical equivalent" of LWOP – even when the juvenile is convicted of multiple crimes.[103] Zuber was convicted for his participation in two gang rapes committed when he was seventeen.[104] His original sentence would have required him to serve 150 years in prison, which made him eligible for parole after seventy-five years, at the age of ninety-two.[105] The *Zuber* decision also addressed the case of James Comer, who was convicted on multiple counts of armed robbery and weapons possession, theft, and first-degree felony murder.[106] Comer's original sentence would have required him to serve seventy-five years in prison, which made him eligible for parole after more than sixty-eight years, at the age of eighty-five.[107] The court determined that the offenders' juvenile status required the sentencing judges to "take into account how children are different[] and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[108]

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102. *Id.* at 1141. The Ohio Supreme Court addressed the applicability of *Graham* where the juvenile offender commits multiple nonhomicide offenses, stating:

> To suggest that a life-without-parole sentence would be permissible for a juvenile who committed multiple offenses would be to ignore the categorical restriction against that penalty for juveniles who do not commit homicide. A court cannot impose a sentence that is barred because of the identity of the offender on the ground that the offender committed multiple crimes. *As an adult offender who commits multiple, nonhomicide offenses cannot become eligible for the death penalty, neither can a juvenile offender become eligible for the most severe penalty permissible for juveniles by committing multiple nonhomicide offenses.* The number of offenses committed cannot overshadow the fact that it is a child who has committed them.

Id. at 1142–43 (emphasis added).

103. State v. Zuber, 152 A.3d 197, 201 (N.J. 2017) (quoting Miller v. Alabama, 567 U.S. 460, 476 (2012)), *cert. denied*, 138 S. Ct. 152 (2017) (mem.). The court consolidated Zuber's appeal with that of James Comer, who was convicted of multiple counts relating to two robberies – including felony murder – that he committed at the age of seventeen. *Id.* at 203–04. The court noted that because both Zuber and Comer were so young at the time of their respective crimes, "both defendants w[ould] likely serve more time in jail than an adult sentenced to actual life without parole." *Id.* at 213.

104. *Id.* at 202.

105. *Id.*

106. *Id.* at 204.

107. *Id.*

108. *Id.* at 214 (quoting *Miller*, 567 U.S. at 480). Both Comer and Zuber were entitled to resentencing; the sentencing judges were directed to consider the factors outlined in *Miller* before imposing functional LWOP sentences. *Id.* at 215–16. The court also mentioned that the imposition of lengthy sentences on juvenile offenders,

IV. INSTANT DECISION

In a 4–3 decision,[109] the Supreme Court of Missouri held that Nathan was not entitled to relief for the following reasons: (1) he was convicted for both homicide and nonhomicide offenses rather than only a nonhomicide offense,[110] and (2) his second-degree murder conviction did not mandate life in prison without the possibility of parole.[111] The majority reviewed a number of apparent factual differences between Nathan's case and the precedent set by *Miller* and *Graham*, casting aside any similarities as unpersuasive.[112] The dissent relied on the application of *Miller* and *Graham* in other state and federal jurisdictions to support its position and argued that imposing functional LWOP sentencing on juveniles, absent finding the juvenile to be "irreparably corrupt,"[113] amounts to cruel and unusual punishment.[114]

A. The Majority Opinion

The majority, with Chief Judge Zel M. Fischer writing the opinion, assessed Nathan's argument that "the circuit court's imposition of consecutive sentences on the homicide conviction" in conjunction with the nonhomicide convictions is "the functional equivalent of life without possibility of parole," but ultimately, the court found his argument unpersuasive.[115] The court applied a de novo standard of review because Nathan alleged that his constitutional

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much like the sentences that Comer and Zuber received, is not barred by *Graham* or *Miller*, but rather these sentences should be reserved for those demonstrating "irreparable corruption," as stated in *Miller*. *Id.* at 214 (quoting *Miller*, 567 U.S. at 479–80).

109. *See generally* State v. Nathan, 522 S.W.3d 881 (Mo. 2017) (en banc), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc).

110. *Id.* at 885. Therefore, *Graham* did not apply. *Id.*

111. *Id.* at 891. The court held that *Miller* was satisfied at the time of sentencing for second-degree murder but that the imposition of consecutive sentences for his nonhomicide convictions did not warrant further *Miller* consideration. *See id.*

112. *Id.* at 885–90.

113. The phrase "irreparably corrupt" is derived from *Roper*. *See* Roper v. Simmons, 543 U.S. 551, 573 (2005) ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."). The term is used in *Miller* and *Graham* to highlight the difficulty in imposing the harshest of punishments on juvenile offenders due to their diminished culpability. *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (citing Graham v Florida, 560 U.S. 48, 82 (2010)). Unfortunately, the Court did not provide an objective standard by which irreparable corruption could be determined.

114. *Nathan*, 522 S.W.3d at 894–98 (Stith, J., dissenting).

115. *Id.* at 885, 888 (majority opinion).

rights were violated.[116] If the court had found the argument convincing, Nathan's sentence would have violated the constitutional bar against cruel and unusual punishment under the Eighth Amendment, as recognized in *Miller*.[117]

The court noted that the *Graham* decision expressly stated its application "concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense."[118] Rendering *Graham* inapplicable, the court relied on the persuasive authority from the Sixth Circuit articulated in *Bunch v. Smith*.[119] The defendant in *Bunch* appealed his consecutive term-of-years sentences for nonhomicide offenses committed as a juvenile, arguing that they were the functional equivalent of LWOP.[120] The Sixth Circuit rejected Bunch's argument that *Graham* barred his sentences, reasoning that *Graham* only barred LWOP for a nonhomicide offense; therefore, the sentencing court's imposition of the consecutive term-of-years sentences was neither unconstitutional nor unreasonable.[121] The Supreme Court of Missouri applied near-identical logic in reaching its decision in *Nathan*.[122]

Like the Sixth Circuit, the Supreme Court of Missouri emphasized that *Graham* only applied to LWOP for a single nonhomicide offense; it did not address consecutive sentences that functioned as LWOP.[123] The court explained that, had the United States Supreme Court intended *Graham* to prohibit term-of-years sentences for multiple nonhomicide convictions, it would have quantified the number of juveniles affected by the issue differently.[124] When the Court referred to the number of juveniles serving LWOP for a nonhomicide offense, the quantity did not exceed 130.[125] The Supreme Court of Missouri reasoned that if the Court intended *Graham* to extend to juveniles serving consecutive sentences, then "the number . . . would [have] likely be[en] in the thousands."[126]

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116. *Id.* at 885 (citing State v. Sisco, 458 S.W.3d 304, 312–13 (Mo. 2015) (en banc)). In applying the de novo standard of review, the Supreme Court of Missouri reviewed the case for a misapplication of the law. *See Appeal de novo*, BLACK'S LAW DICTIONARY (10th ed. 2014). As such, the court need not show deference to the lower court's findings. *Id.*

117. *Nathan*, 522 S.W.3d at 888.

118. *Id.* (quoting *Graham*, 560 U.S. at 63).

119. *Id.* at 886 (citing Bunch v Smith, 685 F.3d 546 (6th Cir. 2012)). The court recognized that, absent a determination from the United States Supreme Court, courts have arrived at different conclusions regarding whether consecutive sentences are the functional equivalent of LWOP. *Id.* at 885.

120. *Id.* at 886 (citing *Bunch*, 685 F.3d at 547).

121. *Id.* (citing *Bunch*, 685 F.3d at 547).

122. *Id.* at 887.

123. *Id.*

124. *Id.* at 886.

125. *Id.* In *Graham*, the Court noted 123 total juvenile offenders serving LWOP for nonhomicide offenses. *Id.* (citing Graham v. Florida, 560 U.S. 48, 64 (2010)).

126. *Id.*

Continuing its analysis, the majority addressed Nathan's *Miller* claim.[127] Nathan claimed that, because his aggregate sentences functioned as LWOP, the sentences amounted to cruel and unusual punishment and violated his due process rights.[128] The court relied on its previous decision in *Hart*, which noted that *Miller* does not categorically bar an imposition of LWOP on a juvenile "as long as the sentencer determines it is just and appropriate in light of the defendant's age, maturity, and [] other factors."[129] Still, the court held that Nathan was sentenced in accordance with *Miller* for his second-degree murder conviction.[130] The court maintained that absent an explicit instruction from the United States Supreme Court, *Miller* only requires the sentencer to consider mitigating factors for a LWOP sentence.[131] The Court does not require the sentencer to consider the same mitigating factors in contemplation of the aggregate sentences.[132]

B. The Dissenting Opinion

The dissent, with Judge Laura Denvir Stith writing the opinion, suggested that *Miller* and *Graham* should apply to aggregate term-of-years sentences that exceed a juvenile's life expectancy even where the juvenile committed a homicide offense.[133] In support of its position, the dissent cited the following decisions from other state supreme courts: [134] *State v. Zuber*[135] and *State v. Ramos*.[136] The dissent reviewed the underlying principles in *Miller* and *Graham* and argued that the noted differences between juvenile offenders and their adult counterparts warranted a finding of irreparable corruption – essentially a finding that the juvenile cannot be rehabilitated – before handing down a de facto

127. *Id.* at 888–93.

128. *Id.* at 888.

129. *Id.* at 888 (quoting State v. Hart, 404 S.W.3d 232, 237–38 (Mo. 2013) (en banc)). The court's discussion continued, stating that "[a]lthough [the Court] do[es] not foreclose a sentencer's ability to [impose LWOP on a juvenile] in homicide cases, [it] require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing [juvenile offenders] to a lifetime in prison." *Id.* at 888 (quoting *Hart*, 404 S.W.3d at 238).

130. *Id.* at 890. Nathan was resentenced according to *Miller*, which is why he was sentenced to second-degree murder rather than first-degree murder. *Id.*

131. *Id.* at 891–92.

132. *Id.* at 892–93.

133. *Id.* at 895–96 (Stith, J., dissenting).

134. *Id.* at 901–02, 904–05.

135. State v. Zuber, 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (mem.). *See* discussion of *Zuber supra* Section III.C.

136. State v. Ramos, 387 P.3d 650 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017) (mem.). In *Ramos*, the court reviewed the sentence of a juvenile convicted of multiple homicide offenses. *Id.* at 656. The Supreme Court of Washington held, in part, that *Miller* applied to "de facto" LWOP sentences, just as it does to literal LWOP sentences. *Id.*

LWOP sentence.[137] According to the dissent, to avoid violating *Miller* and *Graham*, the aggregate effect of a juvenile's sentence must be considered rather than viewing each sentence individually.[138] The dissent also noted that most state supreme courts that have decided the issue have applied *Miller* to cases such as Nathan's, requiring the sentencer to consider the offenders age, characteristics, maturity, background, and unique circumstances in light of the aggregate sentence.[139]

The dissenting opinion challenged the applicability of *Bunch*, suggesting that it is not applicable to state courts.[140] It suggested that *Bunch* "did *not* decide that *Graham* and *Miller* do not apply to aggregate sentences[,]" but instead decided that federal courts cannot reverse state court decisions unless they are contrary to clearly established federal law.[141] Finally, the dissent argued that the penological goals of retribution, deterrence, incapacitation, and rehabilitation are not served by functional LWOP sentences for juveniles.[142]

V. COMMENT

The Supreme Court of Missouri declined to find that *Graham* and *Miller* prohibit consecutive juvenile sentences that function as the equivalent of LWOP.[143] In *Nathan*, the court went to great lengths to assert that it will not apply *Graham* and *Miller* precedent to juveniles convicted of multiple offenses until required to do so by the United States Supreme Court.[144] Because no mandatory authority exists, the court reviewed persuasive authority that supported its desired outcome and ignored authorities that are more factually similar to Nathan's case.[145] The court's reliance on *Bunch* and its contemporaneous opinion in *Willbanks* demonstrates the court's desire to avoid further disrupting juvenile sentencing standards unless the United States Supreme Court expressly requires it.[146]

This Part will review how *Graham* and *Miller* have been applied to consecutive sentences for homicide and nonhomicide offenders, respectively. This Part will also argue in support of the *Nathan* majority's rejection of Nathan's *Graham* claim and suggest that it did not give due consideration to his *Miller* claim.

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137. *Nathan*, 522 S.W.3d at 895–96 (Stith, J., dissenting).
138. *Id.* at 900.
139. *Id.* at 901.
140. *Id.* at 906–08.
141. *Id.* at 906.
142. *Id.* at 908–09.
143. *Id.* at 893 (majority opinion).
144. *Id.* at 892–94.
145. *See* discussion of James Comer's case *supra* note 103.
146. *See* Willbanks v. Dep't of Corr., 522 S.W.3d 238, 246 (Mo. 2017) (en banc), *cert. denied,* 138 S. Ct. 304 (2017) (mem.) ("Without direction from the Supreme Court to the contrary, this Court should continue to enforce its current mandatory minimum parole statutes and regulations by declining to extend *Graham*.").

A. The Application of Graham *to Consecutive Sentences that Function as LWOP*

Graham held that LWOP cannot be imposed on nonhomicide juvenile offenders and that such offenders must receive a "realistic opportunity" for release.[147] The Court's logic in *Graham* recognized that juvenile offenders are less culpable than adults for the crimes they commit.[148] *Graham* involved "an issue the Court ha[d] not considered previously: a categorical challenge to a term-of-years sentence."[149] The Court reviewed the analysis offered in *Atkins*[150] and *Roper*,[151] both of which similarly barred the imposition of the death penalty for specific categories of offenders.[152] Using the reasoning from *Roper* as a guide, the Court in *Graham* held that LWOP sentences cannot be imposed on a juvenile offender convicted of a nonhomicide offense.[153]

1. *Graham* Does Bar Nathan's Sentence

The Supreme Court of Missouri's extensive discussion of *Graham's* application to consecutive sentences does not directly speak to Nathan's claim. This claim is easily overcome by the fact that Nathan committed a homicide, which is not directly contemplated by *Graham*.[154] While the court held that *Graham* did not apply to Nathan's case because he committed homicide,[155] its

147. Graham v. Florida, 560 U.S. 48, 82 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.").

148. *Id.* at 69 ("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."). Logically, one can infer that if a nonhomicide juvenile offense yields "twice diminished moral culpability," a homicide juvenile offense yields diminished moral culpability. *See id.*

149. *Id.* at 61.

150. Atkins v. Virginia, 536 U.S. 304 (2002).

151. Roper v. Simmons, 543 U.S. 551 (2005).

152. *Graham*, 560 U.S. at 61–62. *Atkins* barred the imposition of the death penalty on "mentally retarded criminals." *Atkins,* 536 U.S. at 321. *Roper* barred the imposition of the death penalty on offenders who were under the age of eighteen at the time of their offenses. *Roper*, 543 U.S. at 578. *See supra* Section III.A for discussions of *Atkins* and *Roper*.

153. *Graham*, 560 U.S. at 82.

154. *Graham* "held that the Eighth Amendment requires that States 'give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' . . . 'forbid[ding] States from making the judgment at the outset that those offenders never will be fit to reenter society.'" Moore v. Biter, 725 F.3d 1184, 1190 (9th Cir. 2013) (quoting *Graham*, 560 U.S. at 75). Nathan is not like Graham in that Nathan committed a homicide offense.

155. *See* State v. Nathan, 522 S.W.3d 881, 888 (Mo. 2017) (en banc), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc).

opinion went beyond the scope of *Graham*'s application only to nonhomicide offenses. Instead, the court asserted that *Graham* does not bar a sentence that subjects a juvenile offender to the functional equivalent of LWOP for multiple offenses, which may or may not include homicide.[156] Here, the court had the opportunity to distinguish the imposition of functional LWOP through consecutive sentences on nonhomicide juvenile offenders but failed to do so.

Interestingly, the *Nathan* majority cited the dissent's reliance on *Zuber* as "misplaced" and "not persuasive because unlike Nathan, Zuber was not convicted of a homicide offense along with multiple nonhomicide offenses."[157] After the court criticized *Zuber*'s persuasiveness based on the defendant's lack of homicide and nonhomicide convictions, the court ironically cited *Bunch*, where the defendant, too, was sentenced for multiple nonhomicide offenses rather than the combination of a homicide and multiple nonhomicide offenses.[158] Further, there were two juvenile offenders discussed in *Zuber* – Zuber and Comer.[159] The latter was convicted of felony murder.[160] He participated in an armed robbery where his accomplice shot and killed a victim.[161] Because the circumstances of Comer's conviction are potentially more similar to Nathan's, *Zuber* should have been more persuasive than the court acknowledged.[162]

Acknowledging this similarity could have supplemented the court's discussion of Nathan's *Graham* claim, given that the court in *Zuber* did not directly apply the holding in *Graham* to Comer's case. While the Supreme Court of New Jersey did cite the "principles of *Graham*," these principles merely reflected the logic employed by the Court in *Miller*, *Graham*, and *Roper* – that juvenile offenders have diminished culpability.[163] It is possible the Supreme Court of Missouri found this case unpersuasive due to the Supreme Court of New Jersey's recognition that *Miller*'s constitutional requirements apply to

156. *Id.* The majority's discussion of this particular issue in the *Nathan* opinion likely serves to emphasize the holding established in the *Willbanks* decision. *See* Willbanks v. Dep't of Corr., 522 S.W.3d 238, 246 (Mo. 2017) (en banc), *cert. denied*, 138 S. Ct. 304 (2017) (mem.). For more on *Willbanks*, see *supra* Section III.B.

157. *Nathan*, 522 S.W.3d at 887–88.

158. *See id.* at 886.

159. State v. Zuber, 152 A.3d 197, 202–03 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (mem.).

160. *Id.* at 203.

161. *Id.*

162. *See* discussion of Comer's case *supra* note 103. The word "potentially" is utilized here because the jury in Nathan's trial was not required to determine if Nathan or his accomplice fired the fatal shot. State v. Nathan, 404 S.W.3d 253, 265 (Mo. 2013) (en banc) (finding the jury must only find him guilty of deliberation to aid or encourage his co-conspirator, and the jury had sufficient evidence to do so).

163. *See Zuber*, 152 A.3d at 211–13.

LWOP sentences *and* the functional equivalents of LWOP equally, which the Supreme Court of Missouri sought to avoid.[164]

While the majority declined to apply *Graham* to consecutive sentences for nonhomicide offenders, the dissent in *Nathan* sought to apply *Graham* to juvenile homicide offenders.[165] This is a difficult contention to support – especially after reading the analyses offered from persuasive authority cited by the dissent. Neither *Zuber* nor *Ramos* directly applied the holding in *Graham* to homicide cases; instead, both suggested that the underlying principles set forth therein applied.[166] These principles merely express the limited culpability of juvenile offenders when compared to adult offenders.[167] The *Graham* case further distinguished the culpability of nonhomicide juvenile offenders compared to homicide juvenile offenders, asserting that the former are less culpable (thus less deserving of more harsh penalties) than the latter.[168] Given that *Graham* is limited to nonhomicide juvenile offenders, it is not applicable in Nathan's case. The underlying rationale expressed therein is compatible with this conclusion in that Nathan has diminished culpability relative to an adult homicide offender but does not have the twice-diminished culpability of a nonhomicide juvenile offender.

2. *Graham* Should Apply to the Functional Equivalent of LWOP Sentences for Nonhomicide Juvenile Offenders

Graham is not applicable to Nathan's case because Nathan committed a homicide offense, and *Graham* clearly does not contemplate such offenses.[169] Absent a homicide offense, however, *Graham* should apply. Logically, the Court's rationale in *Graham* should apply where the sentence imposed is the functional equivalent of LWOP for nonhomicide offenders.[170] The Supreme

164. *Compare id.* at 211–12, *with* State v. Nathan, 522 S.W.3d 881, 882–83 (Mo. 2017) (en banc), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc).

165. *Nathan*, 552 S.W.3d at 894–95 (Stith, J., dissenting).

166. *See Zuber*, 152 A.3d at 212; State v. Ramos, 387 P.3d 650, 660–61 (Wash. 2017), *cert. denied*, 138 S. Ct. 467 (2017).

167. Graham v. Florida, 560 U.S. 48, 74 (2010).

168. *See id.* at 69. Application of *Graham* to homicide offenses does not satisfy the court's analyses pertaining to categorical bars used in *Roper*, *Kennedy*, and *Miller* when the category is "juveniles" rather than "nonhomicide juvenile offenders."

169. *Nathan*, 522 S.W.3d at 885 (citing *Graham*, 560 U.S. at 63 (2010)). "Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide . . . . The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Id.* (alteration in original) (quoting *Graham*, 560 U.S. at 63 (2010)).

170. *See* Rebecca Lowry, *The Constitutionality of Lengthy Term-of-Years Sentences for Juvenile Non-Homicide Offenders*, 88 ST. JOHN'S L. REV. 881, 904 (2014) ("[W]hile the holding [in *Graham*] may specify a life-without-parole sentence, when the opinion is taken as a whole, it applies to any lengthy term-of-years sentence that

Court of Missouri recently considered this question in *Willbanks v. Department of Corrections* and found the opposite.[171]

The court's opinion in *Willbanks* illustrates the difficulty courts have when applying *Graham* (and *Miller*) due to discrepancies between the plain language of the opinion and the underlying rationales presented.[172] For example, while *Graham*'s plain language limits it application to a single nonhomicide offense, the rationale behind the *Graham* decision discusses the twice-diminished culpability of nonhomicide juvenile offenders.[173] Applying the plain language without incorporating the rationale renders a nonhomicide juvenile offender convicted of two crimes, as opposed to one, eligible for de facto LWOP despite his twice-diminished culpability. Of particular difficulty is the fact that, on these matters, neither the court that strictly applies the language nor the court that applies the rationale is expressly wrong in doing so. Absent clear guidance from the United States Supreme Court on the issue of whether *Graham*'s holding is applicable to the imposition of functional LWOP through consecutive sentences on nonhomicide juvenile offenders, a court must exercise its best judgment, which is bound to yield different results across jurisdictions.[174]

The dissent in *Nathan* is correct in stating that *Graham* need not be extended to apply to consecutive sentences for nonhomicide offenses.[175] The Supreme Court of Missouri should have joined other jurisdictions in finding that "[a] sentence that results in no meaningful opportunity for release during the juvenile's lifetime is the functional equivalent of LWOP" and therefore must satisfy *Graham*.[176] This action would either mandate parole consideration for juvenile offenders or outright bar de facto LWOP sentences for such offenders. Doing so would more accurately reflect the spirit of the law in *Graham* and recognize the diminished culpability of juvenile offenders.

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fails to offer a juvenile offender the opportunity to mature, to make amends for wrongdoings, to develop into a contributing member of society, and to lead a meaningful life outside of the confines of prison walls.").

171. 522 S.W.3d 238 (Mo. 2017) (en banc), *cert. denied*, 138 S. Ct. 304 (2017) (mem.).

172. *See id.* at 241–43.

173. *Graham*, 560 U.S. at 63, 69.

174. Indeed, courts presented with the issue have reached different conclusions. *Compare, e.g.*, United States v. Mathurin, 868 F.3d 921, 932, 934 (11th Cir. 2017) (assuming *Graham* applies where a juvenile is convicted for multiple nonhomicide crimes and received lengthy consecutive sentences), *cert. pending* (2018), *with* Lucero v. People, 394 P.3d 1128, 1130 (Colo. 2017) (en banc) (finding *Graham* does not apply because LWOP is a specific sentence which is distinct from a term-of-year sentence for multiple convictions), *cert. denied*, 138 S. Ct. 641 (2018) (mem.).

175. *See* State v. Nathan, 522 S.W.3d 881, 894 (Mo. 2017) (en banc) (Stith, J., dissenting), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc).

176. *Id.* at 895.

B. The Application of Miller *to Functional LWOP Sentences*

This Section discusses how *Miller* is applied in cases involving aggregate sentences. First, this Section discusses how *Miller* was applied in Nathan's case. Second, this Section discusses the limitations of the holding in *Miller*, noting that it does not yield a categorical bar on LWOP or its functional equivalent for juvenile offenders.

1. Principles Set Forth in *Miller* Were Considered in Nathan's Resentencing

The Supreme Court of Missouri determined that where a sentencing judge or jury fails to consider the factors outlined in *Miller* in handing down a LWOP sentence for a juvenile homicide offender, the sentence violates the Eighth Amendment.[177] This was the case in *State v. Hart*.[178] In light of *Miller*, the court outlined the procedure required by the sentencing judge to satisfy *Miller's* constitutional requirements:

> On remand, after the parties have presented their evidence and arguments regarding the question posed by *Miller,* the sentencer must determine whether life without parole is a just and appropriate sentence for the first-degree murder Hart committed. If the sentencer is persuaded of this beyond a reasonable doubt, the trial court must impose that sentence. If the state fails to persuade the sentencer of this proposition beyond a reasonable doubt, Hart cannot receive that sentence. In that event, the trial court must declare section 565.020 void as applied to Hart on the ground that it fails to provide a constitutionally valid punishment for the crime it purports to create.[179]

The question posed by *Miller* requires the sentencer to consider the juvenile offender's "age and age-related characteristics and the nature of [his] crimes" before imposing LWOP.[180] Considering the offender's age and age-related characteristics requires the sentencer to consider the offender's mental development, maturity, impetuosity, appreciation for risks and consequences,

177. State v. Hart, 404 S.W.3d 232, 235 (Mo. 2013) (en banc).

178. *Id.*

179. *Id.* at 242. The court further stated that:

> [I]f section 565.020 is void, the trial court must vacate the jury's verdict finding Hart guilty of first-degree murder and enter a new finding that he is guilty of second-degree murder under section 565.021.1(1). The trial court also must vacate the jury's verdict finding Hart guilty of armed criminal action based on Hart having been found guilty of first-degree murder and enter a finding that he is guilty of armed criminal action in connection with the second-degree murder.

Id. (footnote omitted).

180. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012).

and the effect of potential pressure from family or peers.[181] Because identical instructions were given to the sentencing court when Nathan's case was remanded, it can hardly be said that this portion of his sentence violated *Miller*.[182]

The dissent suggests that the *Miller* factors should be applied in contemplation of Nathan's entire sentence rather than merely the homicide offense.[183] Again, support for this position is split among courts.[184] Courts have discussed *Miller* and *Graham* simultaneously when referencing their application to aggregate sentences, as the arguments can logically extend to both cases.[185] It is just as illogical for a juvenile to be convicted of what is effectively LWOP when he does not commit homicide (as long as he commits more than one nonhomicide offense)[186] as it is for a juvenile homicide offender to be spared LWOP in name only to then receive its functional equivalent in the aggregate.[187] As the Supreme Court of Ohio noted in *Moore*, an adult offender cannot become eligible for capital punishment, or its functional equivalent, through the commission of multiple non-capital offenses; so, why should a juvenile offender become eligible for a sentence, which is effectively LWOP, without having committed a homicide offense?[188] Similarly, while Nathan could have constitutionally been sentenced to LWOP for his homicide offense,

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181. *Id.* at 471–72, 477.

182. *See* State v. Nathan, 522 S.W.3d 881, 890 (Mo. 2017) (en banc) (quoting State v. Nathan, 404 S.W.3d 253, 270–71 (Mo. 2013) (en banc)), *aff'g in part*, *rev'g in part* 404 S.W.3d 253 (Mo. 2013) (en banc).

183. *Id.* at 897 (Stith, J., dissenting).

184. *Compare, e.g.*, State v. Ali, 895 N.W.2d 237, 246 (Minn. 2017) (refusing to hold *Miller* extends to sentences other than LWOP and refusing to apply *Miller* to consecutive sentences), *cert. denied*, 138 S. Ct. 640 (2018) (mem.), *and* Springer v. Dooley, No. 3:15–CV–03008–RAL, 2015 WL 6550876, at *9 (D.S.D. Oct. 28, 2015) (holding *Miller* did not apply because the LWOP sentence was not mandatory and the judge considered specific mitigating factors in the sentencing), *with* State v. Ramos, 387 P.3d 650, 656 (Wash. 2017) (finding the juvenile offender was entitled to a *Miller* hearing, which he received), *cert. denied*, 138 S. Ct. 467 (2017) (mem.).

185. *See e.g.*, State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013) ("The rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole.").

186. Such a sentence goes against the spirit of *Graham*. *See, e.g.*, State v. Moore, 76 N.E.3d 1127, 1142 (Ohio 2016), *cert. denied*, 138 S. Ct. 62 (2017) (mem.).

187. Such a sentence goes against the spirit of *Miller*.

188. *Moore*, 76 N.E.3d at 1142; *see also supra* note 51. The majority may be concerned that endorsing such a limitation potentially allows juvenile offenders to dodge punishment for their crimes, as nonhomicide offenses can still include violent crimes. *See Nathan*, 522 S.W.3d at 892. This Note argues that there is little benefit in sentencing an offender to hundreds of years in prison; it is merely symbolic. Further, allowing juvenile offenders the opportunity to demonstrate maturity at some point before they die in prison does not guarantee their eventual release. It merely gives them a meaningful chance to demonstrate that the penological justification of rehabilitation actually works.

a jury decided not to subject him to LWOP.[189] Why then should he become eligible for de facto LWOP in the aggregate?

The spirit of *Miller* suggests that the dissent in *Nathan* reached the right conclusion on this issue: LWOP and its functional equivalent should be reserved for "the rare juvenile offender whose crime reflects irreparable corruption."[190] Because juveniles, as a class, are different, the sentencer must consider "how those differences counsel against irrevocably sentencing them to a life in prison."[191] Unfortunately, the holding in *Miller* does not make this finding an express requirement for cases involving lengthy, consecutive sentences.

The Supreme Court of Missouri stated that the sentencing judge in *Nathan* did consider all "relevant factors" in ordering that Nathan's sentences run consecutively – conceivably exceeding the constitutional requirements of *Miller* and making the finding insisted upon by the dissent.[192] Therefore, Nathan's sentence did not violate the letter of the law in *Miller*, though the exact factors that the sentencing judge deemed relevant in imposing Nathan's sentence are unclear. Without clear direction from the United States Supreme Court mandating *Miller*'s application to the functional equivalent of LWOP, sentences like Nathan's will remain constitutionally permissible – even where a jury decides against LWOP as punishment.[193]

2. The *Miller* Rationale Does Not Justify a Categorical Bar of the Functional Equivalent of LWOP Sentences on Juvenile Offenders

Miller does not bar the imposition of LWOP on juvenile homicide offenders but rather requires that a LWOP sentence cannot be mandated.[194] Courts can sentence such offenders to LWOP so long as they consider the factors outlined in the decision.[195] In *Miller*, the Court reviewed the logic employed in *Roper* and its applicability to *Graham*, identifying the functional similarities

189. *Nathan*, 522 S.W.3d at 898–99 (Stith, J., dissenting).

190. Miller v. Alabama, 567 U.S. 460, 479–80 (2012); *see also Nathan*, 522 S.W.3d at 898–99 (Stith, J., dissenting).

191. *Miller*, 567 U.S. at 480.

192. *Nathan*, 522 S.W.3d at 892 (majority opinion).

193. *Id.* at 892–93 ("Nothing in *Miller* or *Graham* takes away a sentencer's – the circuit court in this case – authority to run sentences consecutively for a homicide offense along with multiple nonhomicide offenses.") This is the case even where the sentencing judge imposes consecutive sentences to bypass the limitations set forth in *Graham* or *Miller*. *See id.* at 899 (Stith, J., dissenting) ("The judge made no pretense about the fact he felt a personal stake in being able to sentence juveniles to life without parole and took *Miller* and *Graham* as personal "losses" . . . . [that] he could get around . . . by imposing multiple distinct sentences for the purpose of their aggregate effect in keeping Nathan in prison forever . . . . The [] sentences were imposed consecutively solely for the purpose of denying Nathan a meaningful opportunity for release.").

194. *Miller*, 567 U.S. at 479.

195. *See, e.g.*, State v. Zuber, 152 A.3d 197, 210–11 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (mem.).

between the imposition of the death penalty on juveniles and the imposition of LWOP on juveniles.[196] The difference in *Miller* is that, unlike *Roper*, the opinion does not establish an outright bar on the imposition of such sentences and therefore does not establish a categorical bar against the imposition of LWOP against juvenile offenders in the same sense that *Roper* and *Graham* bar capital punishment and LWOP against juveniles.

As such, *Miller* does not require courts to reduce juvenile sentences, but rather it requires them to give due consideration to mitigating factors of the offender's youth characteristics and individual circumstances instead of mandating LWOP.[197] Applying this requirement to the entire sentence, where multiple term-of-years sentences are applied consecutively, does not cast an undue burden on the sentencer. Instead, this practice ensures that juvenile offenders maintain their Eighth Amendment protections throughout the sentencing process. Requiring courts to consider mitigating factors, such as age and individual circumstances, when imposing consecutive sentences embraces the spirit of the *Miller* decision and recognizes that juvenile offenders are not deserving of the harshest penalties due to their diminished culpability absent a finding of irreparable corruption.[198]

This is not to suggest that juvenile homicide offenders should never be subjected to lengthy consecutive sentences. Instead, the factfinder should make an additional determination that the juvenile being sentenced does not share the general characteristics of other juveniles (i.e., neurological malleability or moral redeemability) and instead demonstrates irreparable corruption. Making this finding would also clarify *Miller's* scope, requiring an additional inquiry in the sentencing stage to ensure that a juvenile is "irreparably corrupt" prior to the denial of a meaningful opportunity for release.[199] This is a necessary safeguard that would protect juvenile offenders from the imposition of cruel and unusual prison sentences.

V. CONCLUSION

In State v. Nathan, the Supreme Court of Missouri maintained strict standards of interpretation regarding the applicability of Eighth Amendment jurisprudence to the sentencing of juvenile offenders and refused to apply the *Miller* and *Graham* decisions beyond their plain language.[200] The court ruled in opposition to recent decisions that have applied the logic employed in *Graham*

196. *Miller*, 567 U.S. at 469–75 (citing *Graham*, 560 U.S. at 60) ("In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to the most severe punishment. We imposed a categorical ban on the sentence's use in a way unprecedented for a term of imprisonment.").

197. *Id.* at 489.

198. *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005); *Graham*, 560 U.S. at 68).

199. *See Nathan*, 522 S.W.3d at 895 (Stith, J., dissenting).

200. *Id.* at 892–93 (majority opinion).

and *Miller* to juvenile sentences that function identically to LWOP.[201] While the court cannot be said to have violated *Graham* or *Miller* in its decision, the different rationales presented by the majority and the dissent reflect the need for greater clarification of the issue by the United States Supreme Court to ensure uniform application of the principles of *Miller* and *Graham* and to ensure that juvenile offenders are not subjected to cruel and unusual punishments.

201. *Id.* at 887–88, 891–92.