REL: April 12, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-0393

Christopher Michael Thrasher

v.

State of Alabama

Appeal from Jefferson Circuit Court, Bessemer Division (CC-92-793)

McCOOL, Judge.

Christopher Michael Thrasher appeals a judgment of the Jefferson Circuit Court resentencing him to life imprisonment without the possibility of parole for his 1993 capital-murder conviction.

Facts and Procedural History

In October 1993, Thrasher was convicted of murder made capital pursuant to § 13A-5-40(a)(10), Ala. Code 1975, for the intentional killing of Allen Eakes and Kevin Duncan when Thrasher was 16 years old. Thrasher summarizes the facts giving rise to his conviction as follows:

> "[O]n February 8, 1992, Carvin Stargell and Nathan Gast, beat Eakes and Duncan before leaving them to drown in a creek in ... Jefferson County. Mr. Thrasher was allegedly the orchestrator of the murders and purportedly instructed Stargell and Gast to murder Eakes and Duncan.
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> "The sole witness to the events was Ginger Minor. Minor was nearly beaten to death by Stargell with a baseball bat and left to die in a vacant lot that same evening. Minor recovered and testified against Mr. Thrasher at trial. Minor testified that Mr. Thrasher was the leader of the gang[] that included Stargell and Gast. Mr. Thrasher, Minor, Stargell, Gast, Eakes, and Duncan were together on February 8, 1992. That night after buying alcohol, the group went to Crown Point Apartments to swim in a hot tub. Mr. Thrasher, Minor, Stargell, and Gast got in the hot tub while Duncan and Eakes remained in the car. Minor testified that Mr. Thrasher made her perform oral sex on Gast and Stargell so that she could become a female member of the group called a 'disciple queen.'
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> "Afterwards, Stargell and Gast left Mr. Thrasher and Minor alone in the hot tub. At some point, Duncan came up to the fence around the pool area covered with drool and said 'Chris, are you crazy? They tried to choke us and said we had to die.' Minor testified that Mr. Thrasher went up to the

fence to talk to Duncan and was laughing and grinning. Duncan walked back to the car and left with Gast, Stargell, and Eakes. Mr. Thrasher told Minor that Stargell and Gast were taking Eakes and Duncan home. While they were gone, Mr. Thrasher got sick and vomited over the side of the hot tub.

"Stargell and Gast were gone for two hours. When they returned, Eakes and Duncan were not with them. Stargell told Gast to help Mr. Thrasher get dressed while Stargell took Minor's clothes and dragged her to the car. As he dragged her to the car, Stargell repeatedly told Minor, 'girl you gotta die.' Stargell put Minor in the backseat of the car with Gast while Stargell drove; Mr. Thrasher sat in the front passenger seat.

"As they drove around, Gast told Minor that he and Stargell had put the other boys in the creek while Stargell bragged about how they had beat them and that they were dead. They drove to Red Mountain where Stargell said they were going to throw Minor off the mountain, but they did not. Eventually, they ended up in a wooded area in Bessemer, where Stargell tried to rape Minor in the car.

"After the attempted rape, Stargell told Minor to get out of the car for the last part of the initiation. Mr. Thrasher had a baseball bat. Stargell and Mr. Thrasher kept saying that Minor had to die and Stargell was telling Mr. Thrasher to hit her with the bat. At some point, Mr. Thrasher told Minor to say the disciple's prayer for the gang. Mr. Thrasher picked up a rock but didn't hit her with it.

"Minor testified that Stargell kept telling Mr. Thrasher to hit Minor, but Mr. Thrasher said he couldn't bring himself to hit her. At that point, Stargell bashed Minor in the head with the bat. The last thing Minor remembered was a 'ping' sound when Stargell struck her head with the bat."

Thrasher's brief, at 1-4 (citations to trial transcript and footnote omitted).

At the time of Thrasher's conviction, § 13A-6-2(c), Ala. Code 1975, authorized only two possible sentences for a capital-murder conviction -- death or life imprisonment without the possibility of parole.[1] After Thrasher waived his

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[1]At the time Thrasher was sentenced, § 13A-6-2(c) provided:

> "Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravating circumstances, as provided by Article 2 of Chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto."

However, on May 11, 2016, the legislature amended § 13A-6-2(c); it now provides:

> "Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances by a person 18 years of age or older, as provided by Article 2 of Chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto. The punishment for murder or any offense committed under aggravated circumstances by a person under the age of 18 years, as provided by Article 2 of Chapter 5, is either life imprisonment without parole, or life, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto and the applicable Alabama Rules

right to the participation of the jury in the sentencing hearing, see § 13A-5-44(c), Ala. Code 1975, the trial court sentenced Thrasher to life imprisonment without the possibility of parole. This Court affirmed Thrasher's conviction and sentence on direct appeal. See Thrasher v. State, 668 So. 2d 949 (Ala. Crim. App. 1995) (table), cert denied Ex parte Thrasher, 667 So. 2d 750 (Ala. 1995) (table).

On June 4, 2013, Thrasher filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief in which he argued that his sentence of life imprisonment without the possibility of parole is unconstitutional under Miller v. Alabama, 567 U.S. 460 (2012), which prohibits a sentencing scheme that "mandates life in prison without possibility of parole for juvenile offenders." Id. at 479, 2469. Although the State initially moved to dismiss Thrasher's petition, the State and Thrasher subsequently filed a joint motion to stay the Rule 32 proceedings pending the United States Supreme Court's decision in Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718 (2016), in which the Court granted certiorari to address whether Miller applies retroactively to cases on collateral

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of Criminal Procedure."

review. On January 25, 2016, the United States Supreme Court issued its decision in Montgomery, holding that Miller "announced a substantive rule that is retroactive in cases on collateral review." Montgomery, 577 U.S. at ___, 136 S. Ct. at 732. Thereafter, the State and Thrasher filed a joint motion in which the State conceded that, in light of Montgomery, Thrasher was entitled to a sentencing hearing in accord with Miller. Thus, on March 9, 2016, the trial court entered an order granting Thrasher's Rule 32 petition and scheduling a resentencing hearing.

On September 27, 2017, less than one week before the resentencing hearing, Thrasher filed a motion to continue the hearing. In support of that motion, Thrasher argued that the State, allegedly in violation of Brady v. Maryland, 373 U.S. 83 (1963), had suppressed evidence indicating that Eakes's family and Duncan's family had made cash payments to Minor prior to her testimony at trial. Specifically, Thrasher argued that, in preparation for the resentencing hearing, the State had provided him with discovery that included a memorandum drafted by prosecutor Ted Mills in February 1994 ("the memorandum"). (C. 212.) According to Thrasher, the

memorandum noted that Eakes's family and Duncan's family had made the payments to Minor prior to her testimony at trial and that the State "became aware of the payments in February 1994, approximately three (3) to four (4) months after the trial of the defendant." The memorandum itself, which Thrasher included with his motion to continue, specifically indicates that, "[o]n February 2, 1994, [Mills] received a phone call from Annie Minor, Ginger Minor's stepmother," who informed Mills "that she had heard that [Minor] had received some money from the Eakes and Duncan family [sic] sometime after the Carvin Stargell trial."[2] (C. 217.) According to the memorandum, Mills arranged to meet with Minor at the same time that Andy Bellanca, a captain with the Bessemer Police Department, was to meet with Eakes's family and Duncan's family at a different location to "inquire as to whether this information was in fact true and, if so, what was the intent of giving this money." (C. 218.) Mills reported that Minor told him that

[2]Stargell was convicted of two counts of murder made capital and was sentenced to life imprisonment without the possibility of parole. See Stargell v. State, 672 So. 2d 1359 (Ala. Crim. App. 1994).

> "the money she received was attached to a birthday card and was nothing more than a gift for her sixteenth birthday. She said that she got a hundred dollar bill in a birthday card from the Eakes' family and another card from the Duncans with a twenty dollar bill inside. [Minor] went on to say that she did not receive any other money from either family except that she did get a Christmas card from the Duncans in December and enclosed inside the card was a twenty dollar bill."

(C. 218.) After meeting with Minor, Mills discussed his findings with Bellanca, who reported that "what [Eakes's family and Duncan's family] told him was almost identical to what [Minor] advised [Mills]." (C. 219.) Mills concluded the memorandum by noting that

> "we informed Judge Dan Reynolds of the situation and how we had handled it. Judge Reynolds advised that in his opinion there was nothing to it and that we had handled it properly, and that we should draft a memorandum explaining the entire situation and make it a part of our file for future reference."

(C. 219.) Given his discovery of the memorandum, Thrasher argued that he required a continuance of the resentencing hearing "so that the facts of the [memorandum] may be investigated further and, if necessary, a new trial sought." (C. 213.)

On October 2, 2017, the day of Thrasher's resentencing hearing, the trial court heard the arguments of counsel

regarding Thrasher's motion to continue, and Thrasher's counsel reiterated that the facts reflected in the memorandum supported a Brady claim. (R. 6, 9.) The trial court noted, however, that the facts in the memorandum

> "may be a material issue challenging the conviction in this case -- it may be good grounds for appeal and for a Rule 32 action to challenge the conviction but I am not here to review the conviction. I am here to review the sentence and only the sentence. So, that would not be a basis for a continuance."

(R. 10.) Thus, the trial court denied Thrasher's motion to continue and proceeded with the resentencing hearing.

During the resentencing hearing, the State did not present any witnesses in its case-in-chief, but relied instead on "the complete transcript, all exhibits and all evidence" from Thrasher's trial, which the trial court reviewed (R. 35); the presentencing report from Thrasher's original sentencing hearing, as well as an updated presentencing report filed a few days before the resentencing hearing; and Thrasher's disciplinary report from the Alabama Department of Corrections. After the State rested, Thrasher presented, among other witnesses, Minor and Dr. Paul James O'Leary, a board-certified psychiatrist. In rebuttal, the State presented victim-impact testimony from Eakes's brother and

Duncan's brother, and, at the close of the hearing, Thrasher made a brief statement to the trial court.

On October 13, 2017, the trial court entered a detailed judgment in which it resentenced Thrasher to life imprisonment without the possibility of parole. (R. 244.) Because Thrasher's arguments on appeal include challenges to the trial court's consideration of the evidence presented at the resentencing hearing, we quote the trial court's judgment at length:

> "The United States Supreme Court, in Miller ..., held that a judge 'must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.' In Montgomery ..., the Supreme Court made the Miller decision retroactive, and in so doing held that prisoners 'must be given the opportunity to show their crime did not reflect irreparable corruption.' In making this determination the Alabama Supreme Court held in [Ex parte] Henderson, 144 So. 3d 1262, 1263 [(Ala. 2013),] that a sentencing Court must consider fourteen factors, each of which is addressed by this Court below:
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> "The juvenile's chronological age at the time of the offense and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences
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> "Defendant Christopher Thrasher's date of birth is July 3, 1975. The Defendant was convicted of a capital murder that took place on February 9, 1992. Therefore, the Defendant was 16 years and 7 months old at the time of the offense. Under current

Alabama law the Defendant would have automatically been treated as an adult for a felony offense. Ala. Code [1975] Section [12-15-204].

"Dr. Paul O'Leary, a board-certified psychologist retained by the defense as an expert witness who examined the Defendant and subjected him to psychological testing, testified that the Defendant had an emotional capacity of a 13-year-old at the time of the offense. Considering that the Defendant was 16 at the time of the offense, the emotional age attributed to him by Dr. O'Leary is not substantially lower than his chronological age. Further, it is undisputable that thirteen-year olds know right from wrong.

"Although Dr. O 'Leary opined that the Defendant failed to appreciate the consequences of his actions, there is no substantial basis for that opinion. Dr. O'Leary spent very little time with the Defendant and he administered no psychological tests.[3]

"Accordingly, this Court finds that the Defendant was not so young in chronological age, nor did he suffer from such a defect of maturity, to not appreciate the nature and consequences of his actions at the time of the offense.

"The juvenile's diminished culpability

"Dr. O'Leary testified that the Defendant had been intoxicated at the times of the crimes and was sleep deprived. Defendant informed Dr. Alan Blotcky, clinical psychologist for the State, that he had a history of alcohol abuse and marijuana use.

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[3]Dr. O'Leary testified that he performed a "standard psychiatric evaluation" in a two-and-one-half-hour interview with Thrasher but testified that he did not perform any psychological testing of Thrasher. (R. 103; R. 116.)

"The evidence presented at trial established that the Defendant and his codefendants contemplated their action and communicated their intentions to one another before the commission of the crimes. Following the murder of the two minor victims, the Defendant planned and attempted to kill the only witness to the crime.

"Defendant described himself as the leader of the gang that killed the victims in this case. He ordered the other gang members to commit the murders. He ordered the only witness to the crimes to perform sexual acts with his codefendants, the other gang members, to say a gang prayer, and then he attempted to kill the witness.

"The Court finds that the Defendant formulated and carried out a plan to kill and attempted to reduce the chances of being caught by trying to kill the witness to the crime.

"<u>The circumstances of the offense</u>

"The minor victims in this case, Allen Eakes and Kevin Duncan, were 16 and 15 years old at the time they were brutally murdered by being beaten and left in a creek to drown. This Defendant was the self-proclaimed leader of the gang that committed these brutal murders and he instructed the other gang members to commit the murders. This Defendant also savagely beat the only surviving witness, Ginger Minor, and left her for dead in a deserted rural area and covered her body in an effort to conceal her.

"With regard to the two victims murdered, the Defendant cannot argue that, due to his lack of maturity, he made an impetuous decision and fired a single shot from a gun causing a regrettable death. No, in this case, the Defendant instructed other gang members to commit the murders, and when they failed to do so after their first attempt he again

instructed the other gang members to kill Allen Eakes and Kevin Duncan. According to the coroner, each of the victims suffered at least five blows to the head with a blunt instrument. They were then dumped into a creek where they drowned.

"After Allen Eakes and Kevin Duncan were brutally murdered on the instructions of this Defendant, this Defendant beat Ginger Minor with a baseball bat. Ginger Minor suffered skull fractures, a bruise on the brain, fractures to her hands and feet and a broken nose. Ms. Minor was left in a vacant lot to die. She was found only because a codefendant, Nathan Gast, told police where to look for her. Upon first regaining consciousness Ginger Minor was asked, 'who did this to you?' She responded, 'Chris' Thrasher.

"The extent of the juvenile's participation in the crime

"The circumstances surrounding the murders of Allen Eakes and Kevin Duncan, as well as the beating of Ginger Minor, were gruesome. These gruesome crimes were planned, ordered, and committed by this Defendant.

"This Defendant instructed his codefendant to kill the victims. When the first attempt to do so failed, this defendant again instructed his codefendants to kill. After his codefendants told him they had carried out his order, and after Defendant saw blood evidence of the crime in the car, this Defendant brutally beat the only witness who represented a threat to being prosecuted.

"The evidence presented at trial unequivocally demonstrated that this Defendant, Christopher Thrasher, was much more than a mere aider and abettor in the deaths of Allen Eakes and Kevin Duncan, as well as the attempted murder of Ginger Minor. Defendant Christopher Thrasher gave the

order to kill. As the self-proclaimed leader of the gang, this Defendant also had the apparent authority to prevent these brutal crimes.

"The facts of the case show that the Defendant's actions were those of a cold and calculated criminal.

"The juvenile's family, home, and neighborhood environment

"The evidence at trial and at the resentencing hearing is that the Defendant had a good relationship with his mother, who was loving and attentive. He had very little relationship with his father, who was an alcoholic. Dr. Alan Blotcky's report from 1992 states that the Defendant quit school in the ninth grade and had charges of truancy, intoxication, assault with a weapon, and violation of probation.

"Dr. O'Leary testified that the Defendant has done well in a structured environment. In support of this opinion he notes that Defendant's behavior became worse after he dropped out of school. However, the Defendant's history does not support this conclusion.

"The Pre-sentencing Report dated September 3, 1993, states that the Defendant had legal problems while in school, he admitted to cutting classes, and he dropped out of school. Because of the trouble Defendant was getting into he was sent to a more structured environment, Big Oak Boys Ranch, where he subsequently ran away. At that time, he was on juvenile probation and was described by his probation officer as 'a terrible probationer.'

"Further, Defendant's record of thirty-two disciplinary infractions while in the custody of the Department of Corrections indicates that even in a

highly structured environment Defendant has failed to conform to the restrictions placed on him.

"The juvenile's emotional maturity and development

"Although Dr. Paul O'Leary testified that the Defendant possessed an emotional age of a thirteen-year-old, he also admitted that Defendant's leadership position in a gang demonstrated a level of control, maturity, and obvious leadership. There is no other substantial evidence that this Defendant suffered from delayed emotional development. This Court finds that the Defendant demonstrated sufficient emotional maturity and development.

"Whether familial and/or peer pressure affected the juvenile

"The Defendant has proclaimed himself to be the leader of the gang that killed the minor victims. The testimony from trial establishes that his codefendants looked to him as a leader, and took instructions from him. The Defendant ordered the other defendants to kill the minor victims. At a minimum, Defendant had the authority to prevent the crimes committed by the codefendants. The Court finds that there was no familial or peer pressure that affected his behavior when the crimes were committed.

"The juvenile's past exposure to violence

"There was no evidence presented that the Defendant had been impacted by any past exposure to violence against him whatsoever. Defendant does, however, have prior charges of assault with a weapon. Further, Defendant admits to being a leader in a street gang.

"The juvenile's drug and alcohol history

"The Defendant has admitted drinking alcohol and smoking marijuana on the night of the crimes. Dr. O'Leary testified that because of the Defendant's age the use of alcohol resulted in his diminished culpability. Defendant's records from the Department of Corrections indicate[] that he still has issues with substance abuse.

"The juvenile's ability to deal with the police. The juvenile's capacity to assist his attorneys

"These two prongs were addressed together in Miller wherein Justice Kagan wrote that a failure to consider these prongs 'ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth -- for example, his inability to deal with police officers and prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.'

"As reported by Dr. Blotcky, the Defendant understood how the criminal justice system worked, and he had no mental defects that would prohibit him from assisting his attorneys. Thus, there is no reason to believe that the Defendant was unable to deal with police officers and to assist his attorney. In fact, the Defendant had minor criminal charges in his past, so he therefore had dealt with police before.

"No evidence was presented at the resentencing hearing that indicates that the Defendant had any trouble dealing with police or assisting his attorneys.

"The juvenile's mental health history

"Although the record reflects that the Defendant had been treated with depression at age 14, and was in the low average range of IQ testing, he appeared to Dr. Blotcky as 'fairly bright, thinking was

logical, rational, and coherent.' Defendant has no other history of mental health conditions.

"The juvenile's potential for rehabilitation

"While incarcerated in the Alabama Department of Corrections the Defendant has been found guilty of approximately 38 disciplinary infractions. Some of his infractions are major, violent infractions. In June of 2013 the Defendant filed the Rule 32 Petition that led to this resentencing hearing. At that time, the Defendant should have known that he had a chance at parole at some point. And yet, Defendant has been found guilty of at least seven disciplinary infractions since then. Moreover, one witness for the defense testified that she has been in communication with this Defendant in 'recent months' by cell phone from prison, indicating that this Defendant is still in violation of institutional rules.

"At his resentencing hearing the Defendant was given an opportunity to make a statement. Defendant's statement was very brief. He expressed no specific remorse, nor did he specifically take responsibility for actions. Instead, the Defendant deflected responsibility for the crimes on one of his codefendants. In an article written by the Defendant, and admitted at the resentencing hearing, the Defendant also denied responsibility for his crimes.

"In Dr. Blotcky's report following his evaluation of March 10, 1992, the defendant 'showed absolutely no emotion when discussing the crimes,' and displayed 'no evidence or remorse or guilt.' Dr. Blotcky reported that the Defendant 'seemed cocky, glib, and bored,' and that he 'comes across as sullen, guarded, angry, and totally unremorseful,' and he has 'a tendency to blame others.' Dr. Blotcky concluded that the Defendant

'is at high risk to be involved in criminal acts in the future,' and that 'he can be quite dangerous.'

"Any other relevant factor related to the juvenile's youth

"This Court finds that there is no other compelling evidence related to the Defendant's age, over 16 years, at the time of the crime that should result in a change of his sentence. The jury convicted the Defendant of Capital Murder, for the killing of two minors, after being presented with all the evidence in this case. Judge James Hard IV then appropriately sentenced the Defendant to Life Without Parole for his cold, calculating, cruel, and heinous crime against innocent minor victims. Judge Hard's sentence would have been appropriate even if he had the option to sentence the Defendant to a lesser term.

"Conclusion

"Defendant Christopher Thrasher participated in planning, and ordered the brutal murder of two minor victims. After the two minors were brutally beaten to death, and after this Defendant was informed that they had been killed, and after he was presented with the blood evidence of the murders on the murder weapon, he attempted to cover up evidence of the crimes by trying to kill the only witness who could lead to a prosecution. The crimes committed by this Defendant are not representative of an immature and impetuous youth, but rather a mature, cold, and calculated criminal eager to cover his tracks at all costs. This Defendant expressed no remorse for his actions at the time of the incident, at his trial, or in the intervening years.

"Notably, Defendant's conduct since his incarceration demonstrates that his crime was not the result of 'transient immaturity or youth,' but instead was the product of 'irreparable corruption.'

> Click v. State, 215 So. 3d 1189, Ala. Crim App. (2016). Considering all the circumstances, this Court finds that this is the rare case where the original sentence of the trial judge was an appropriate sentence for a juvenile defendant convicted of capital murder."

(C. 244-49.) (Internal citations omitted.)

On November 13, 2017, Thrasher filed a "motion for new trial and request for an evidentiary hearing on the same" in which he argued that he was entitled to a new trial based on the facts supporting his Brady claim and sought an evidentiary hearing on that claim. (C. 250.) Thrasher also argued that his sentence is "contrary to the weight of the evidence" and that, in resentencing him, the trial court "failed to acknowledge" the factors set forth in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013). (C. 258.) Thrasher's motion was denied by operation of law on December 12, 2017, and Thrasher filed a timely notice of appeal on January 12, 2018.

Discussion

On appeal, Thrasher argues that this Court must "develop a framework" for "sentencing juvenile defendants pursuant to Miller," Thrasher's brief, at 30-31; that the trial court erred by resentencing him to life imprisonment without the possibility of parole; and that this Court should remand the

case for the trial court to hold an evidentiary hearing on his Brady claim. We address each of those arguments in turn.

I.

Thrasher filed his brief with this Court on November 16, 2018. In that brief, Thrasher argues that the "framework" for a Miller sentencing hearing should recognize (1) that a sentence of life imprisonment without the possibility of parole for a juvenile offender is presumptively unconstitutional; (2) that, to overcome that presumption, the State must prove beyond a reasonable doubt that the juvenile to be sentenced "displays permanent incorrigibility and lacks rehabilitative potential," Thrasher's brief, at 42; and (3) that the appropriate standard of review is de novo or "a heightened abuse-of-discretion." Id. at 54.

However, on the same day Thrasher filed his brief, this Court issued its decision in Wilkerson v. State, [Ms. CR-17-0082, Nov. 16, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018), in which it addressed and rejected the three "framework" arguments Thrasher raises.[4] Specifically, it held that "Miller and Montgomery do not require a presumption against

[4]Thrasher's appellate counsel was also the counsel for appellant in Wilkerson.

life-imprisonment-without-the-possibility-of-parole sentences for juveniles convicted of murder." Wilkerson, ___ So. 3d at ___. It also held that

> "the legislature has already answered the questions (1) who bears the burden of proving the appropriate sentence for a juvenile defendant convicted of capital murder and (2) the degree of proof necessary to make that determination. Specifically, the legislature has placed those questions under the normal procedures applicable at a sentencing hearing. Thus, in capital cases involving juvenile offenders, both the State and the defendant may present evidence to the circuit court to assist in its sentencing determination under § 13A-5-43(e), Ala. Code 1975 and Rule 26.6, Ala. R. Crim. P. Whether the juvenile defendant convicted of capital murder is eligible for a sentence of life imprisonment without the possibility of parole is a question to 'be determined by the preponderance of evidence.' Rule 26.6, Ala. R. Crim. P.
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> "Because the legislature has answered those questions adversely to Wilkerson, this Court is not free to disregard those answers unless, as Wilkerson argues, the United States Constitution via Miller and Montgomery compels us to do so."

___ So. 3d at ___. As to the argument that the legislature's sentencing scheme violates Miller and Montgomery, this Court thoroughly examined federal and state caselaw, particularly People v. Skinner, 502 Mich. 89, 917 N.W.2d 292 (2018), and concluded that Miller and Montgomery "do not require the State to bear the burden of proving that a juvenile defendant is the

'rare irreparably depraved or corrupt offender warranting a life-without-parole sentence' before that juvenile may be sentenced to life imprisonment without the possibility of parole." Wilkerson, ___ So. 3d at ___ (citation omitted). In addition, it held that, "[b]ecause life imprisonment without the possibility of parole remains a sentencing option for juvenile offenders, even in light of ... Miller and Montgomery, the standard of review to be applied is an abuse-of-discretion standard." Id. at ___.

In light of our decision in Wilkerson, Thrasher filed a motion with this Court, which the Court granted, seeking permission to file a supplemental brief. In that brief, Thrasher takes issue with this Court's decision in Wilkerson and asks the Court to overrule that case. Specifically, Thrasher challenges the Court's conclusions that the legislature's sentencing scheme does not violate Miller and Montgomery and that the appropriate standard of review of a decision in a Miller sentencing hearing is an abuse of discretion.[5] However, those issues were squarely before, and

[5]Thrasher's supplemental brief does not challenge the Court's conclusion that Miller and Montgomery do not require a presumption against life-imprisonment-without-the-possibility-of-parole sentences for juvenile offenders.

were thoroughly analyzed by, this Court in Wilkerson, and, although Thrasher disagrees with the Court's resolution of the issues, he offers no compelling basis for reversing course on those issues. Accordingly, because the Court has already decided Thrasher's "framework" arguments, the only issues we address in this case are whether the trial court erred by resentencing Thrasher to life imprisonment without the possibility of parole and whether the trial court should have granted Thrasher an evidentiary hearing on his Brady claim.

II.

Thrasher argues that the trial court erred by resentencing him to life imprisonment without the possibility of parole.

> "In Click [v. State], 215 So. 3d [1189,] 1192 [(Ala. Crim. App. 2016)], this Court stated:
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> > "'Miller "mandates only that a sentencer follow a certain process -- considering an offender's youth and attendant characteristics" -- before "meting out" a sentence of life imprisonment without parole. Miller, 567 U.S. at 483, 132 S. Ct. at 2471. "[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Miller, 567 U.S. at 489, 132 S. Ct. at 2475.'

> "As noted [in the trial court's order], the Alabama Supreme Court in Ex parte Henderson[, 144 So. 3d 1262 (Ala. 2013),] established the following factors courts must consider when deciding whether life in prison with the possibility of parole would be an appropriate sentence for a juvenile:
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> > "'(1) the juvenile's chronological age at the time of the offense and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile's diminished culpability; (3) the circumstances of the offense; (4) the extent of the juvenile's participation in the crime; (5) the juvenile's family, home, and neighborhood environment; (6) the juvenile's emotional maturity and development; (7) whether familial and/or peer pressure affected the juvenile; (8) the juvenile's past exposure to violence; (9) the juvenile's drug and alcohol history; (10) the juvenile's ability to deal with the police; (11) the juvenile's capacity to assist his or her attorney; (12) the juvenile's mental-health history; (13) the juvenile's potential for rehabilitation; and (14) any other relevant factor related to the juvenile's youth.'
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> "144 So. 3d at 1284."

Wilkerson, ___ So. 3d at ___.

In this case, the trial court expressly considered and addressed each of the 14 Henderson factors in resentencing Thrasher to life imprisonment without the possibility of parole. On appeal, Thrasher challenges the trial court's

determination on only a few of those factors, each of which we address in turn.

A.

Thrasher first argues that the trial court "minimized or ignored testimony that [he] not only possesses rehabilitative potential but has demonstrated rehabilitation." Thrasher's brief, at 62. Specifically, Thrasher alleges that the trial court "minimized or ignored" Dr. O'Leary's testimony that Dr. O'Leary "had seen ... Thrasher's potential for rehabilitation" and that, "since turning [25 years old], ... Thrasher has demonstrated change." Id. at 63.

"This Court has previously recognized:

> "'"The United States Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), requires that a circuit court consider all evidence offered in mitigation when determining a capital defendant's sentence. However,
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> > "'"'[m]erely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury to find the existence of that fact. Mikenas [v. State, 407 So. 2d 892, 893 (Fla. 1981)]; Smith [v. State, 407 So. 2d 894 (Fla. 1981)]." Harrell v. State, 470 So. 2d 1303, 1308 (Ala. Cr. App.

> 1984), aff'd, 470 So.2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 276 (1985).'
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> "'"Perkins v. State, 808 So. 2d 1041[, 1137] (Ala. Crim. App. 1999). '"Although the trial court must consider all mitigating circumstances, it has discretion in determining whether a particular mitigating circumstance is proven and the weight it will give that circumstance."' Simmons v. State, 797 So. 2d 1134, 1182 (Ala. Crim. App. 1999), quoting Wilson v. State, 777 So. 2d 856, 893 (Ala. Crim. App. 1999). '"While Lockett [v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority."' Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996), quoting Bankhead v. State, 585 So. 2d 97, 108 (Ala. Crim. App. 1989)."'
>
> "White v. State, 179 So. 3d 170, 236 (Ala. Crim. App. 2013) (quoting Albarran v. State, 96 So. 3d 131, 212-13 (Ala. Crim. App. 2011))."

Wilkerson, ___ So. 3d at ___ (emphasis added).

Although the trial court did not expressly reference Dr. O'Leary's testimony in its findings regarding Thrasher's potential for rehabilitation, the trial court clearly considered Dr. O'Leary's testimony, as evidenced by the multiple references to Dr. O'Leary's testimony in other parts

of the trial court's judgment. However, because Dr. O'Leary "spent very little time with" Thrasher (C. 245), the trial court apparently found Dr. O'Leary's testimony less convincing than other evidence weighing against a finding that Thrasher has the potential for rehabilitation -- specifically Thrasher's disciplinary infractions while incarcerated, some of which occurred after Thrasher filed his Rule 32 petition, and Dr. Blotcky's conclusion that Thrasher was "'at high risk to be involved in criminal acts in the future'" and "'can be quite dangerous.'" (C. 248.) As we noted in Wilkerson, the trial court was required only to consider Dr. O'Leary's testimony regarding Thrasher's potential for rehabilitation, which the trial court did; the decisions whether to afford Dr. O'Leary's testimony any weight and whether to find that Thrasher has the potential for rehabilitation were within the trial court's discretion. Accordingly, this argument does not entitle Thrasher to any relief.

B.

Thrasher next argues that the trial court "ignored or dismissed [Dr. O'Leary's] unrebutted expert testimony as to

... Thrasher's youth and ... its characteristics." Thrasher's brief, at 66. However, the trial court's judgment states:

> "Dr. Paul O'Leary, a board-certified psychologist retained by the defense as an expert witness who examined the Defendant and subjected him to psychological testing, testified that the Defendant had an emotional capacity of a 13-year-old at the time of the offense. Considering that the Defendant was 16 at the time of the offense, the emotional age attributed to him by Dr. O'Leary is not substantially lower than his chronological age. Further, it is undisputable that thirteen-year olds know right from wrong.
>
> "Although Dr. O 'Leary opined that the Defendant failed to appreciate the consequences of his actions, there is no substantial basis for that opinion. Dr. O'Leary spent very little time with the Defendant and he administered no psychological tests.
>
> "Accordingly, this Court finds that the Defendant was not so young in chronological age, nor did he suffer from such a defect of maturity, to not appreciate the nature and consequences of his actions at the time of the offense."

(C. 244-45.) Thus, as noted in the preceding section, the trial court clearly considered Dr. O'Leary's testimony regarding Thrasher's chronological age at the time of the crime but chose not to afford that testimony any weight -- a decision within the trial court's discretion. Wilkerson, supra. "Merely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury

to find the existence of that fact." Wilkerson, ___ So. 3d at ___ (citations omitted). Accordingly, this argument does not entitle Thrasher to any relief.

C.

Thrasher next argues that the trial court erred by "placing too much emphasis on the circumstances of ... the offense" and "repeatedly emphasiz[ing] the circumstances of the crime." Thrasher's brief, at 70. According to Thrasher, the trial court's allegedly undue emphasis on the circumstances of the offense "blinded it to ... Thrasher's rehabilitative achievements and potential for further growth." Id. at 72. Although Thrasher concedes that "the circumstances of the offense constitute a factor under Henderson in determining whether ... Thrasher belongs to the class of juveniles displaying permanent incorrigibility and lacking rehabilitative potential," he argues that "the circumstances, in and of themselves, cannot demonstrate ... that [he] belongs to that class." Id.

However, the trial court was not "blinded" to evidence of Thrasher's potential for rehabilitation. Rather, as noted previously, the trial court considered Dr. O'Leary's testimony

but found his testimony unconvincing. Furthermore, contrary to Thrasher's contention, the trial court did not rely solely on the circumstances of the offense in resentencing Thrasher. Rather, the trial court separately analyzed each of the 14 Henderson factors, most of which it found weighed against mitigation, and nothing in the trial court's judgment indicates that it afforded the circumstances-of-the-offense factor more weight than it afforded the other factors.

In conjunction with this argument, Thrasher also argues that "the importance of the circumstances of the offense" was "severely diminished by the critical differences between ... Minor's testimony at trial and her testimony at the resentencing hearing." Thrasher's brief, at 72. According to Thrasher, "[w]hile Minor painted ... Thrasher as the ringleader at the original trial, her testimony at the Miller hearing painted a very different picture: one where Carvin Stargell was unquestionably the leader of the gang and ordered the events of that night." Id. at 73. However, that argument goes to the weight to be afforded Minor's testimony and whether the circumstances-of-the-offense factor weighed in favor of or against mitigation, which were questions within

the scope of the trial court's discretion. Wilkerson, supra. Accordingly, this argument does not entitle Thrasher to any relief.[6]

D.

Thrasher next argues that the trial court "erroneously emphasized [his] history of substance abuse." Thrasher's brief, at 74. Once again, however, the trial court analyzed each of the 14 Henderson factors, and nothing in the trial court's judgment indicates that the trial court afforded the drug-and-alcohol-history factor more weight than it afforded the other factors. In fact, only three sentences in the trial court's lengthy and detailed judgment address Thrasher's drug and alcohol history, and those sentences are nothing more than a factual recitation of the evidence presented without any explanation from the trial court as to whether that evidence weighed in favor of or against mitigation. Accordingly, this argument does not entitle Thrasher to any relief.

E.

[6]Thrasher also takes issue with the trial court's alleged emphasis on "the beating of Minor" because he "was not tried or convicted for the assault of Minor." Thrasher's brief, at 73. However, the beating of Minor was clearly connected to the murders of Eakes and Duncan and was therefore relevant to the circumstances-of-the-offense factor.

Lastly, Thrasher argues that the trial court erred in that, he says, it disregarded the finding of the trial judge in the original sentencing hearing that "the mitigating circumstances would outweigh the aggravating circumstances, if any, that could be proved." (R. 1297, trial transcript.) According to Thrasher, the trial judge had therefore already determined that he "was not among the worst of offenders and, therefore, did not warrant the ultimate punishment." Thrasher's brief, at 76. Thus, Thrasher argues that the trial court "previously, and conclusively, determined this issue" and that, as a result, "the doctrine of collateral estoppel bars redetermination of that issue." Id.

However, Thrasher did not assert a collateral-estoppel defense below, and it is well settled that

> "'[r]eview on appeal is restricted to questions and issues properly and timely raised at trial.' Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989). 'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992). '"[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof."' McKinney v. State, 654 So. 2d 95, 99 (Ala. Crim. App. 1995) (citation omitted)."

Ex parte Coulliette, 857 So. 2d 793, 794 (Ala. 2003). Thus, because Thrasher did not raise a collateral-estoppel defense below, he failed to preserve that issue for appellate review. See Weeks v. Herlong, 951 So. 2d 670, 678-79 (Ala. 2006) (failure to assert collateral-estoppel defense at trial constituted waiver of the defense).

Moreover, even if Thrasher had preserved this argument, we would not find it persuasive. The doctrine of collateral estoppel precludes the relitigation of an identical issue decided in a prior action. See Aliant Bank v. Four Star Invs., Inc., 244 So. 3d 896, 911 (Ala. 2017); and Russell v. State, 739 So. 2d 58, 62 (Ala. Crim. App. 1999). Here, the issue Thrasher contends the trial judge determined in the original sentencing hearing was that Thrasher "was not among the worst of offenders." However, the trial judge made no such determination; instead, the judge merely determined that "the mitigating circumstances would outweigh the aggravating circumstances, if any, that could be proved." The weighing of aggravating and mitigating circumstances pursuant to § 13A-5-47(b), Ala. Code 1975, however, is a statutory procedure reserved solely to determine whether an adult offender is

eligible for the death penalty and is therefore not applicable in cases in which a juvenile offender is to be sentenced for a capital offense. See Roper v. Simmons, 543 U.S. 551 (2005) (abolishing the death penalty for juvenile offenders). Thus, at the resentencing hearing, the trial court used the proper procedure by considering the Henderson factors, which is a wholly separate and distinct procedure from the weighing of aggravating and mitigating circumstances under § 13A-5-47(b). As a result, the issues in Thrasher's two sentencing hearings simply were not identical. Accordingly, the doctrine of collateral estoppel would not entitle Thrasher to relief, even if he had preserved that issue for appellate review.

III.

Finally, Thrasher argues that this Court should remand the case for the trial court to hold a hearing on his motion for a new trial because, he says, he "sufficiently pleaded a meritorious Brady claim and supported it with competent evidence." Thrasher's brief, at 83. We disagree, however, with Thrasher's contention that he pleaded a meritorious Brady claim.

It is well settled that "[i]n order to obtain relief on a Brady claim, [Thrasher] was required to prove '(1) that the prosecution suppressed evidence ... (2) that the evidence was of a character favorable to his defense, and (3) that the evidence was material.'" State v. Ziegler, 159 So. 3d 96, 106 (Ala. Crim. App. 2014) (quoting Hamilton v. State, 677 So. 2d 1254, 1260 (Ala. Crim. App. 1995)). As noted, Thrasher's Brady claim is based upon the fact that the memorandum indicates that Eakes's family and Duncan's family made cash payments to Minor prior to her testimony at trial. Thrasher concedes, however, and the memorandum reflects, that "[t]he State became aware of the payments in February 1994, approximately three (3) to four (4) months after the trial of the defendant," which occurred in October 1993. (C. 212.) (Emphasis added.) Thus, by Thrasher's own admission, the State was not aware of the payments to Minor until months after the trial. However, "it is the suppression of evidence before and during trial that carries Brady's constitutional implications." Grayson v. King, 460 F.3d 1328, 1337 (11th Cir. 2006) (emphasis added). As a result, the State cannot be found to have suppressed evidence of the payments to Minor,

and thus to have violated Brady, when the State had neither actual nor constructive knowledge of the payments prior to or during trial.[7] The State's possession or knowledge after trial of evidence potentially favorable to the defense is not a basis for a Brady claim. See United States v. Hall, 434 F.3d 42, 55 (1st Cir. 2006) (concluding that there was no Brady violation "because there is no evidence that, prior to the conclusion of the trial, the government had information concerning" the allegedly suppressed evidence but, rather, "learned about [the allegedly suppressed evidence] ... during Hall's presentence investigation" (emphasis added)); United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993) ("Nothing in this record indicates that this prosecutor withheld evidence from the defendants. Here, the prosecutor simply did not have the [allegedly suppressed evidence] until the trial was over. Such a case is fundamentally different than when information is in the prosecutor's files." (emphasis added)); United States v. Chorin, 322 F.3d 274, 282 (3rd Cir. 2003) ("Brady

[7]In certain instances not applicable here, knowledge of exculpatory or otherwise favorable evidence is imputed to the State regardless of whether the prosecutor had actual knowledge of the evidence. See Smith v. State, 698 So. 2d 189, 208 (Ala. Crim. App. 1996).

only requires that the government disclose information that is in its actual or constructive possession, and Sidebotham did not provide information to the government until ... five days after the conclusion of Chorin's trial ...." (emphasis added and internal citation omitted)); United States v. Rosario-Diaz, 202 F.3d 54, 66 (1st Cir. 2000) (concluding, in a case where a statement made by an FBI agent the day after trial "ran directly contrary to the government's theory at trial," that because the statement "was made after trial, the prosecution cannot be faulted for failing to produce it as Brady material (emphasis added)); United States v. Sanchez, 251 F.3d 598, 603 (7th Cir. 2001) (concluding that there was no Brady violation because "the government cannot suppress evidence that does not exist at the time of the trial" (emphasis added)); United States v. Wolf, 860 F.3d 175, 192 (7th Cir. 2017) (finding no error in the trial court's denial of a Brady claim asserted in a motion for a new trial where the appellant "did not suggest the prosecutors in his case had [the allegedly suppressed] materials until well after trial" (emphasis added)); United States v. Jones, 399 F.3d 640, 647 (6th Cir. 2005) ("As such evidence did not exist at the time

of trial, it was not Brady material." (emphasis added)); United States v. Heppner, 519 F.3d 744, 750 (8th Cir. 2008) (concluding that there was no Brady violation where the appellants failed to show that the government "possessed the [allegedly suppressed evidence] or was even aware of it prior to or during trial" (emphasis added)); and United States v. Calderón, 829 F.3d 84, 93 (1st Cir. 2016) ("The government cannot be faulted for failing to turn over information it did not have" during trial. (emphasis added)).

Thus, because the State undisputedly was not aware until after trial that Eakes's family and Duncan's family had made cash payments to Minor prior to her testimony at trial, Thrasher did not assert a meritorious Brady claim based on the memorandum. Accordingly, the trial court did not err by refusing to hold a hearing on that claim.

Conclusion

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Cole and Minor, JJ., concur. Kellum, J., concurs in the result.