IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARK NORIKI KASIC JR.,
Petitioner.

No. 2 CA-CR 2019-0143-PR
Filed November 7, 2019

Petition for Review from the Superior Court in Pima County
No. CR20084770
The Honorable Kathleen Quigley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Arizona Capital Representation Project, Tucson
By Amy Armstrong and Sam Kooistra
Counsel for Petitioner

OPINION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa concurred, and Judge Eckerstrom dissented.

E P P I C H, Presiding Judge:

¶1 Mark Kasic seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32,

Ariz. R. Crim. P. He argues, as he did below, that his consecutive sentences violate the Eighth Amendment to the United States Constitution. We grant review but deny relief.

¶2 After a jury trial, Kasic was convicted of thirty-two felonies arising from a series of arsons spanning a one-year period, some committed while he was under the age of eighteen. *State v. Kasic*, 228 Ariz. 228, ¶ 1 (App. 2011). His combination of concurrent and consecutive prison terms totaled nearly 140 years. *Id.* On appeal, we affirmed his convictions except for two, which we modified to misdemeanors, and rejected his argument that his consecutive sentences violated the Eighth Amendment's prohibition against cruel and unusual punishment. We remanded for resentencing on the modified convictions. *Id.* ¶¶ 1, 32. The aggregate of his prison terms after resentencing remained unchanged. Kasic sought and was denied post-conviction relief, and this court denied relief on review. *State v. Kasic*, No. 2 CA-CR 2013-0307-PR (Ariz. App. Dec. 23, 2013) (mem. decision).

¶3 In 2017, Kasic again sought post-conviction relief, arguing that under *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010), his consecutive prison terms are unconstitutional because they collectively constitute a sentence of life without the possibility of parole.[1] The trial court summarily denied relief. This petition for review followed.

¶4 On review, Kasic repeats his argument that his consecutive sentences violate the Eighth Amendment under *Montgomery*, *Miller*, and *Graham*. In *Graham*, the United States Supreme Court decided that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. In *Miller* and *Montgomery*, the Court determined that a sentence of life without parole imposed on a juvenile convicted of a homicide offense violates the Eighth Amendment unless the juvenile's crimes "reflect irreparable

[1]In his initial notice, Kasic asserted that he was seeking relief under Rule 32.1(g), contending *Montgomery* and *Miller* constitute a significant change in the law. Since, he has argued only that his consecutive sentences are unconstitutional. Unlike a claim under Rule 32.1(g), that claim cannot be raised in an untimely proceeding such as this one. *See* Ariz. R. Crim. P. 32.1(a), 32.4(a)(2)(A). However, because we prefer to resolve cases on their merits, we construe his argument as arising under Rule 32.1(g).

corruption" rather than "transient immaturity." *State v. Valencia*, 241 Ariz. 206, ¶¶ 14, 18 (2016) (quoting *Montgomery*, 136 S. Ct. at 734, 735).

¶5 Kasic asserts that Arizona law regarding the application of *Graham*, *Miller*, and *Montgomery* to consecutive sentences is "unresolved." It is not. In Kasic's appeal, we determined *Graham* did not entitle him to relief because the Court in *Graham* had not addressed consecutive sentences for multiple crimes, and "we do not consider the imposition of consecutive sentences in [a] proportionality inquiry" under the Eighth Amendment. *Kasic*, 228 Ariz. 228, ¶¶ 23-24. And, as the trial court observed, we resolved in *State v. Helm*, 245 Ariz. 560 (App. 2018), whether *Miller* and *Montgomery* had abrogated *Kasic*. We noted that the Supreme Court had not addressed consecutive sentences in *Miller* or *Montgomery*, and we determined that the applicable law remained as it was when we decided *Kasic*—we do not consider the aggregate of multiple sentences when evaluating a claim under the Eighth Amendment.[2] *See id.* ¶¶ 8-10. Accordingly, we decline to revisit that question.

¶6 We grant review but deny relief.

E C K E R S T R O M, Judge, dissenting:

¶7 I respectfully dissent for the same reasons I expressed in *Helm*, 245 Ariz. 560, ¶¶ 13-22 (Eckerstrom, C.J., dissenting). I write further to emphasize the following points specific to Mr. Kasic's case.

¶8 In *Montgomery*, the United States Supreme Court summarized its application of the Eighth Amendment to juvenile sentencing as follows: "[S]entencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479-80). Rather than demonstrating such corruption, the sentencing record suggests that Kasic's crimes occurred in the context of powerful mitigating factors.[3] These mitigating factors arose

[2]Kasic has not asserted this analysis should differ for juveniles who have not committed homicide. Thus, notwithstanding our dissenting colleague's broad reading of *Miller* and adoption of this issue, we do not address that distinction between Kasic and Helm. *See Helm*, 245 Ariz. 560, ¶ 2; *Kasic*, 228 Ariz. 228, ¶ 12. And we need not separately address Kasic's additional claim that consecutive sentences for the crimes he committed while an adult are unconstitutional.

[3]The discussion below is drawn from the trial record and from the defendant's presentation at sentencing. Were Kasic to receive a *Montgomery*

from the very vulnerabilities of immaturity which underlie the Court's reasoning in *Graham*, *Miller*, and *Roper v. Simmons*, 543 U.S. 551 (2005).

¶9 Kasic, raised by a single father who served in the Air Force, had been abandoned by his mother. She refused to acknowledge him when the boy would seek her attention during casual encounters on the base. Kasic was also sexually abused by another enlisted man who his father had trusted as a caregiver. *See Roper*, 543 U.S. at 570 (juvenile culpability diminished because children have reduced control over their surroundings and environment); *id.* at 569 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." (alteration in *Roper*) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982))). At the time Kasic committed the arsons, his father had been diagnosed with, and undergone surgery for, a brain tumor, which had worried Kasic.

¶10 Kasic committed the offenses with the assistance and encouragement of his peers and no apparent motivation other than to impress his peers with a display of rebellion and risk-taking. *See Graham*, 560 U.S. at 68 (juveniles "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" (quoting *Roper*, 543 U.S. at 569)). Finally, he readily disclosed his crimes to a non-accomplice peer, an action that suggested he lacked any mature understanding of the gravity of his actions or the legal risks he faced in committing the arsons. *See Miller*, 567 U.S. at 471 (juvenile culpability diminished because juvenile mind more prone to "recklessness, impulsivity, and heedless risk-taking"). Thus, Kasic's life situation and actions exhibited the very features of immaturity the Court has identified as its basis for exempting those juveniles, not irrevocably corrupt, from life imprisonment without hope of release.

¶11 Jurisprudence that is controlling on this court is clear: in the absence of a focused consideration of the "offender's youth and attendant characteristics" in the context of the crime committed, the Eighth Amendment forbids imprisoning a juvenile offender for life without hope of release. *Miller*, 567 U.S. at 480, 483; *State v. Valencia*, 241 Ariz. 206, ¶¶ 12,

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hearing, the defense would presumably amplify these facts and provide expert testimony as to whether his actions in the context of these facts would reflect irreparable corruption or transient immaturity. At that hearing, the state would be entitled to challenge any of these factual assertions or expert testimony.

14 (2016). This rule applies even to those juveniles who have committed premeditated, first-degree murder. *Valencia*, 241 Ariz. 206, ¶¶ 2-4. I can find no logical or jurisprudential basis for excluding from this Eighth Amendment protection a particular subset of juvenile offenders: those whose terms of life imprisonment arise from a cumulative sentence, bestowed at one sentencing event, for several offenses.

¶12 Let us start with the controlling jurisprudence. In *Miller*, the Supreme Court expressly observed that none of its reasoning about the unique mitigating features of juvenile behavior is "crime-specific." 567 U.S. at 473. In holding that even offenders who have committed murder are entitled to a focused consideration of their "youth and attendant characteristics," the Court concluded that its reasoning "implicates *any* life-without-parole sentence imposed on a juvenile." *Id.* at 473, 483 (emphasis added). "Any" semantically includes a "life-without-parole sentence" arising from the cumulative effect of several criminal counts. Notably, the *Miller* Court gave relief to the two defendants before it, even though their sequence of offenses included several crimes in addition to murder. *Id*. at 465-69. And, that opinion generally emphasized that the exclusive triggering events for Eighth Amendment relief are the length of sentence and the offender's status as a juvenile. *Id.* at 471-80.

¶13 The Supreme Court's seminal opinion in *Graham* provides even less support for the majority's denial of relief to Kasic. There, the trial court had sentenced Graham to life imprisonment for crimes committed as a juvenile because he had been arrested for a new series of offenses while on probation for armed burglary and attempted armed robbery. 560 U.S. at 53-57. In explaining its basis for such a harsh sentence, the trial court specifically referred to Graham's "escalating pattern of criminal conduct." *Id.* at 57. Concluding that such an irreducible sentence, when imposed on a juvenile, advances no legitimate penological goal, the Court held that "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 71-75, 82. *Graham* therefore instructs that those juveniles who commit repetitive offenses are entitled to relief from life imprisonment without hope of release. In so holding, the Court rejected the lone rationale for denying relief to juveniles who, like Kasic, receive life imprisonment from a cumulative sentence: that a juvenile offender who commits several offenses might be more blameworthy than an offender who commits a lone offense. Thus, I fear my colleagues have overlooked the clear thrust of the two primary controlling precedents, *Graham* and *Miller*, in rejecting Kasic's claim for relief.

¶14 Finally, my colleagues' holding also leads to an untenable result: they have embraced a regime in which juveniles who commit a lone murder are entitled to potential sentencing relief (*Miller* and *Valencia*) while those who, like Kasic, commit a sequence of crimes—where no person is killed—are not. In the context of a body of law premised on evaluating questions of proportionality, this result should give the majority pause. *See Graham*, 560 U.S. at 59 (evaluating Eighth Amendment problem through lenses of two lines of "proportionality" jurisprudence).

¶15 The majority's anomalous result also contradicts a portion of the Supreme Court's core reasoning in *Graham*. In prohibiting life imprisonment without the possibility of release for juvenile offenders for non-homicide offenses, the Court squarely addressed the substantial moral distinction between those juvenile offenders who take another's life and those who do not. *Id.* at 69 (observing that those who do not kill are "categorically less deserving of the most serious forms of punishment than are murderers"). This was no obiter dicta. It expressly identified that distinction as a basis for its prohibition on natural life sentences for those juveniles who, like Kasic, have not committed homicide. *Id.* ("[W]hen compared to an adult murderer, a juvenile offender who did not kill . . . has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis."). In light of such clear direction from the Supreme Court as to how we must treat juvenile offenders who have committed no homicide when compared to those who have done so, the majority's holding here fails to conform to our controlling jurisprudence.

¶16 In summary, I dissent because the majority opinion contradicts the clear instruction and rationale of the United States Supreme Court's opinions in *Graham*, *Miller*, and *Montgomery*. Whether we may agree or disagree with the Supreme Court's reasoning in this line of cases, those cases are binding on this court, and we should apply them accordingly. *See Valencia*, 241 Ariz. 206, ¶¶ 21-31 (Bolick, J., concurring) (joining fully in opinion "compelled" by *Miller* and *Montgomery* while expressing disagreement with the reasoning in those decisions).[4]

[4] As the majority observes, Kasic committed the arsons over a six-month window of time. Some of those offenses occurred before his eighteenth birthday and some of them shortly thereafter. That presents an issue the litigants should brief and further develop in the event of a *Montgomery* hearing.