STATE OF MINNESOTA

IN SUPREME COURT

A17-0750

Hennepin County

Brian Lee Flowers,

Respondent,

vs.

State of Minnesota,

Appellant.

McKeig, J.
Concurring, Chutich, J.

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Office of Appellate Courts

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Bradford Colbert, Legal Assistance to Minnesota Prisoners, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

1. *Miller v. Alabama*, 567 U.S. 460 (2012), does not limit a district court's authority to impose consecutive sentences of life imprisonment with the possibility of release upon a juvenile offender.

2. *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016), does not limit a district court's authority to impose consecutive sentences of life imprisonment with the possibility of release upon a juvenile offender.

Reversed and remanded.

O P I N I O N

MCKEIG, Justice.

The State of Minnesota challenges a Hennepin County District Court order that specifies that Brian Lee Flowers's sentences shall run concurrently. Flowers, a juvenile at the time of his offense, was convicted of two counts of first-degree premeditated murder in 2009 and sentenced to two mandatory terms of life imprisonment without the possibility of parole. Six years later, he petitioned for postconviction relief, arguing that his sentences violated the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012). The district court granted Flowers's petition and asked the parties to brief the issue of resentencing. Flowers argued in part that the court's authority to impose consecutive life sentences with the possibility of release after 30 years was limited by both *Miller* and our decision in *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016). The district court imposed two concurrent life sentences with the possibility of release after 30 years. Because neither *Miller* nor *Jackson*

limited the court's authority to impose consecutive sentences in this case, we reverse and remand for resentencing.

FACTS

In 2009, a Hennepin County jury found Brian Lee Flowers guilty of two counts of first-degree premeditated murder, Minn. Stat. §§ 609.05, subd. 1, 609.185(a)(1) (2016), and two counts of first-degree felony murder, Minn. Stat. §§ 609.05, subd. 1, 609.185(a)(3). Flowers was 16 years old at the time of the offense. Flowers, along with a co-defendant, was convicted of murdering Katricia Daniels and her son, Robert Shephard. Crime scene evidence showed that the two victims had been brutally killed, each suffering numerous stab wounds and blunt force trauma. Because the then-existing statutory scheme mandated the imposition of life imprisonment without the possibility of release (LWOR), the district court did not order a presentence investigation (PSI) or hold a contested sentencing hearing. Before imposing the sentences, however, the court did consider several statements, including statements by Flowers and a relative, who spoke on Flowers's behalf, in accordance with Minn. R. Crim. P. 27.03, subd. 3. Flowers was sentenced to two consecutive life terms of imprisonment without the possibility of release. We affirmed Flowers's convictions on direct appeal. *State v. Flowers*, 788 N.W.2d 120, 122 (Minn. 2010).

In 2015, Flowers filed a petition for postconviction relief, relying on *Miller v. Alabama*, 567 U.S. 460, 480 (2012). *Miller* held that mandatory LWOR sentences for juvenile offenders violated the Eighth Amendment to the United States Constitution. 567 U.S. at 479. Although Flowers's conviction was final before *Miller* was decided, Flowers

was entitled to retroactive application of the *Miller* rule under *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016). The district court granted Flowers's petition and scheduled a *Miller* hearing to allow the parties to present evidence about whether Flowers fell within the category of rare juvenile offenders for whom a LWOR sentence was not cruel and unusual punishment because their crimes reflected irreparable corruption.

While the parties were preparing for the *Miller* hearing, we decided *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016). In *Jackson*, the juvenile offender filed a petition for postconviction relief challenging the district court's imposition of a mandatory LWOR sentence for a single conviction of first-degree murder. We concluded that the rule articulated in *Miller*, and later clarified in *Montgomery*, had been violated because the court imposed a mandatory sentence of LWOR without considering "whether Jackson fell within the vast majority of juvenile offenders whose crimes reflect 'transient immaturity,' or whether Jackson was one of the 'rare' juveniles whose crimes reflect 'irreparable corruption' or 'permanent incorrigibility.' " *Id.* at 279. We also concluded that there was no fair or meaningful way that the district court could make the constitutionally mandated determination that Jackson was irreparably corrupt because such a determination required an evaluation of Jackson's "mindset and characteristics from many years ago." *Id.* at 280 (observing that the defendant's LWOR sentence was imposed 10 years prior). As a result, our remand order did not direct the district court to hold a *Miller* hearing. *Id.* at 282.

Instead, we directed the district court to impose a sentence of life imprisonment with the possibility of release after 30 years.[1] *Id.*

After reviewing our decision in *Jackson*, the district court informed the parties that the scheduled *Miller* hearing would no longer take place because "the [Minnesota] Supreme Court has said that basically courts can't do that." Based on *Jackson*, the parties agreed that Flowers could not be resentenced to LWOR, but instead had to be resentenced to two life terms with the possibility of release after 30 years. The parties disagreed about whether the sentences should run consecutively or concurrently. According to Flowers, the court's authority to impose consecutive life sentences was limited by *Miller* and *Jackson*. Citing *State v. Ali* (*Ali I*), 855 N.W.2d 235 (Minn. 2014), the State argued the court could impose discretionary consecutive sentences irrespective of *Miller* and *Jackson*. The State emphasized that "proof of irreparable corruption" was not constitutionally required before a court could impose consecutive sentences for multiple convictions of first-degree murder involving more than one victim. Instead, the relevant inquiry was whether, when compared to past sentences imposed on other offenders, consecutive sentences were commensurate with Flowers's culpability and criminality. *See State v. Warren*, 592 N.W.2d 440, 451–52 (Minn. 1999) ("[G]uided by past sentences imposed on

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[1] The remedy in *Jackson* was a form of as-applied severance and revival of the most recent constitutional versions of the relevant statutes. 883 N.W.2d at 281. We explained that the relevant LWOR sentencing statutes were severed and the most recent constitutional statutes were revived, as applied to the defendant in *Jackson* and to any juvenile offenders who received mandatory LWOR sentences that were final before *Miller* was decided. *Id.* at 282. For the defendant in *Jackson*, the most recent constitutional versions of the relevant sentencing statutes required life sentences with the possibility of release after 30 years. *Id.*

other offenders[,]" "we will consider whether consecutive sentences are 'commensurate with culpability and not an exaggeration of defendant's criminality.' ").

The district court resentenced Flowers to two concurrent life sentences with the possibility of release after 30 years.[2] In its order, the court said:

> [The Court] finds input from the Parties helpful. Such input would not only include the nature of the underlying offense itself, but also many factors that run parallel to the factors illustrated in *Miller* and its progeny: culpability as it pertains to a minor defendant's age, maturity, and life experiences at the time of the crime, as well as maturation and rehabilitation since the crime.

Based on the "parallel" factors, the district court concluded that ordering a PSI, a psychological examination, and an evidentiary hearing on the issue of consecutive sentencing would violate *Jackson* because it would be tantamount to holding a *Miller* hearing. According to the district court, *Jackson* made "unavailable" any "information that would have been elicited at a *Miller* hearing." Contrary to the State's argument, the district court held that our decision in *Ali I* did not control because the district court in that case had a complete contemporaneous record of youth-specific considerations when it imposed consecutive sentences. Ultimately, the district court determined that it was "inappropriate to impose *permissive* consecutive sentences" because the "reasoning which could

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[2] In deciding whether to impose permissive consecutive sentences under Minn. Sent. Guidelines 2.F.2., the district court suggested that the general presumption in favor of concurrent sentences articulated in the first paragraph of Minn. Sent. Guidelines 2.F was somehow relevant. We disagree. First-degree murder is an offense listed in section 6 of the guidelines, which means that it is eligible for permissive consecutive sentencing. Minn. Sent. Guidelines 2.F.2. Offenses eligible for permissive consecutive sentences, which may be imposed without departure, are excepted from the general presumption of concurrent sentencing. Thus, the district court erred when it concluded that its analysis was controlled by the general presumption in favor of concurrent sentencing.

theoretically support a consecutive sentence [was] beyond the reach of [the court due to *Jackson*.]"

ANALYSIS

Ordinarily, the decision of whether to impose concurrent sentences falls within the discretion of the district court. *Ali I*, 855 N.W.2d at 259. When a district court declines to exercise its discretion based on a mistake of law, however, reversal is required. *See Seibert v. Minneapolis & St. Louis Ry. Co.*, 57 N.W. 1068, 1070 (Minn. 1894) ("The court having refused to exercise its discretion on the ground of a supposed want of power, the order appealed from must be reversed."); *see also Ricker v. J.L. Owens Co*, 186 N.W. 702, 703 (Minn. 1922).

On appeal, the State argues that the district court abused its discretion when it decided to impose concurrent sentences because its decision was based on the mistaken belief that the court's authority to impose consecutive sentences was limited by *Miller* and *Jackson.* We agree. The district court's authority to impose consecutive sentences was not limited by *Miller* because, under our decision in *Ali II*, the *Miller/Montgomery* rule does not apply to the decision to impose consecutive sentences. *State v. Ali* (*Ali II*), 895 N.W.2d 237, 246 (Minn. 2017), *cert. denied*, No. 17-5578, 2018 WL 311461, at *1 (U.S. Jan. 8, 2018). Further, the district court's authority to impose consecutive sentences was not limited by *Jackson* because the nature of a district court's decision to impose

consecutive sentences is fundamentally different from the inquiry mandated by *Miller/Montgomery.*

I.

The United States Supreme Court's decision in *Miller* is part of a line of cases acknowledging that there are fundamental differences between juveniles and adults in assessing whether a punishment is cruel and unusual under the Eighth Amendment.[3] The first case to address the effect of these differences in the context of an LWOR sentence was *Graham v. Florida*, 560 U.S. 48 (2010). In *Graham*, the Court observed that "developments in psychology and brain science" show that the "parts of the brain involved in behavior control continue to mature through late adolescence." 560 U.S. at 68. As a result, juveniles are more capable of change and their actions are less likely to be evidence of "irretrievably depraved character." *Id.* at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). In light of this ability to change, the Court in *Graham* held that the Eighth Amendment categorically prohibited the imposition of an LWOR sentence for a juvenile convicted of *nonhomicide* crime. *Id.* at 75. The Court made clear that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide

[3] This line of cases includes *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005) (adopting a categorical ban on death sentences for juvenile offenders), *Graham v. Florida*, 560 U.S. 48, 74 (2010) (adopting a categorical ban on LWOR sentences for juvenile offenders convicted of a nonhomicide crime), *Miller*, 567 U.S. at 479–80 (holding that before a juvenile offender is sentenced to LWOR for a homicide crime, the sentencer must distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption"), and *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 734 (adopting a categorical ban on LWOR sentences for juvenile offenders who were convicted of a homicide crime and who are not irreparably corrupt).

crime." *Id.* Instead, states must simply provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.*

Two years later, in *Miller v. Alabama*, the United States Supreme Court considered whether the Eighth Amendment prohibited the mandatory imposition of an LWOR sentence for a juvenile convicted of a *homicide* crime. The Court once again observed that " 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' " and that "transient rashness, proclivity for risk, and inability to assess consequences . . . both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, [the child's] 'deficiencies will be reformed.' " *Miller*, 567 U.S. at 471–72 (quoting *Graham*, 560 U.S. at 68). Because mandatory sentencing schemes "prevent[] those meting out punishment from considering a juvenile's '*lessened culpability*' and greater '*capacity for change*,' " the Court held that mandatory LWOR sentences for juveniles convicted of a homicide crime violate the Eighth Amendment's prohibition on cruel and unusual punishments. *Id.* at 465 (emphasis added). Ultimately, the *Miller* Court adopted the following rule: before a juvenile is sentenced to LWOR, the sentencer must take into account the differences between children and adults, distinguishing between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479–80. The Court later clarified in *Montgomery* that the rule announced in *Miller* categorically prohibits LWOR

sentences for juvenile offenders who are not irreparably corrupt. *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 734.

The United States Supreme Court has not extended the *Miller/Montgomery* rule beyond the context of an LWOR sentence imposed in a first-degree murder case involving a single victim.[4] We recently held that, absent further guidance from the United States Supreme Court, we will not extend the *Miller/Montgomery* rule to multiple consecutive sentences of life imprisonment with the possibility of release after 30 years. *Ali II*, 895 N.W.2d at 246. As part of our analysis, we acknowledged that, in *O'Neil v. Vermont*, the United States Supreme Court recognized that there is a difference between an offender who commits multiple crimes rather than a single crime under the Eighth Amendment:

> *It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.* The mere fact that cumulative punishments may be imposed for distinct offences in the same prosecution is not material upon this question. *If the penalty were unreasonably severe for a single offence, the constitutional question might be urged; but here the unreasonableness is only in the number of offences which the respondent has committed.*

Ali II, 895 N.W.2d at 242 (quoting *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892)). Because the United States Supreme Court ultimately decided that it lacked jurisdiction in *O'Neil*, we concluded the above-quoted language was dictum. *Id.* We went on to observe, however, that "every state supreme court and federal circuit court that has acknowledged

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[4] Our use of the term "*Miller/Montgomery* rule" acknowledges the importance of *Montgomery*, 136 S. Ct. at 734, which clarified that the rule announced in *Miller* was a rule of substantive constitutional criminal law that categorically prohibits LWOR sentences for juvenile offenders who are not irreparably corrupt.

the Court's dictum in *O'Neil* has rejected an Eighth Amendment challenge to consecutive sentences." *Id.* at 245.

In light of our analysis in *Ali II*, the district court's belief that *Miller* limited its authority to impose consecutive sentences was mistaken.[5] We reiterate that the *Miller/Montgomery* rule does not extend to the imposition of consecutive sentences with the possibility of release after 30 years for multiple first-degree murder convictions involving multiple victims, especially when the United States Supreme Court has not held that the *Miller/Montgomery* rule applies to sentences other than life imprisonment without the possibility of parole.

II.

Next, we consider whether the district court's authority to impose consecutive sentences in this case was limited by our decision in *Jackson*, 883 N.W.2d 272. The issue in *Jackson* was whether the district court could re-impose an LWOR sentence on remand. The State conceded that, under the *Miller/Montgomery* rule, a determination that Jackson fell within the "irreparably corrupt class" of juvenile offenders was required before the district court could re-impose an LWOR sentence. *Jackson*, 883 N.W.2d at 280. As part

[5] The district court expressed a concern that the rule announced in *Miller* might be implicated by the discretionary imposition of multiple consecutive life sentences with the possibility of release after 30 years if the total aggregate sentence was the "functional equivalent" of LWOR. When the district court issued its order, such a concern was unfounded because in *Ali I*, 855 N.W.2d at 258, we plainly held that *Miller* did not apply to the discretionary imposition of consecutive sentences. Such a concern remains unfounded because, in *Ali II*, 895 N.W.2d at 246, we declined to extend the *Miller/Montgomery* rule to juvenile offenders who receive consecutive life sentences with the possibility of release after 30 years in first-degree murder cases involving multiple victims.

of our analysis, we acknowledged that a *Miller* hearing was the procedure that gave "effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* (quoting *Montgomery*, ___ U.S. ___, 136 S. Ct. at 734–35). Put differently, at a *Miller* hearing "youthful characteristics are considered and evidence is evaluated to determine whether the juvenile falls within the transiently immature class or the irreparably corrupt class." *Id.* Ultimately, we concluded that, because much time had passed since Jackson's 2006 sentencing, a determination of permanent corruption was not possible because such a determination required an evaluation of Jackson's "mindset and characteristics from many years ago." *Id.*

The district court's belief that *Jackson* limited its authority to impose consecutive sentences in this case was mistaken because, as we said in *Jackson*, a *Miller* hearing serves a unique purpose. The process of collecting information that ultimately informs a decision to impose consecutive sentences—which may include conducting hearings and ordering a PSI[6] or psychological evaluation—serves a different purpose. In determining whether to impose permissive consecutive sentences, a sentencing court considers whether, when compared to past sentences imposed on other offenders for similar crimes, consecutive sentences are commensurate with the defendant's culpability and criminality. *Warren*, 592 N.W.2d at 451–52. This inquiry may involve considering an array of factors relative to the offender and the offense, such as the nature of the crime and the defendant's unique

[6] A presentence investigation provides information regarding "the defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community." Minn. Stat. § 609.115, subd. 1 (a) (2016).

circumstances at the time, generally subject to the discretion of the district court. Accordingly, the specific facts considered by a sentencer in determining whether to impose permissive consecutive or concurrent sentences, such as the defendant's age at the time of the offense and the defendant's culpability relative to similarly-situated offenders, may overlap somewhat with the facts elicited at a *Miller* hearing, but the two inquiries are fundamentally distinct. Nothing we said in *Jackson* regarding the *Miller* inquiry prevents a court, at the time of sentencing, from exercising its discretion or considering all available facts, including aggravating and mitigating circumstances, relevant to a juvenile offender's culpability and criminality.

CONCLUSION

For the foregoing reasons, we reverse the district court's order imposing consecutive sentences, and remand to the district court to exercise its discretion to determine whether consecutive or concurrent sentences are appropriate consistent with the requirements of *State v. Warren*.[7]

Reversed and remanded.

[7] The district court denied the State's motion for a sentencing hearing under Minn. R. Crim. P. 27.03, based on its mistaken belief that its authority to impose consecutive sentences was limited by *Miller* and *Jackson*. Nothing in our opinion should be read as limiting the parties' ability to file a motion for a sentencing hearing under Minn. R. Crim. P. 27.03 or Minn. Stat. § 244.10, subd. 1 (2016).

C O N C U R R E N C E

CHUTICH, Justice (concurring).

I join the court's opinion because I agree that, given our decision in *State v. Ali* (*Ali II*), 895 N.W.2d 237 (Minn. 2017), the district court's authority to impose consecutive sentences was not limited by *Miller v. Alabama*, 567 U.S. 460 (2012), or *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016). I write separately to emphasize that it is an open question whether the United States Supreme Court will apply its 126 year-old dictum in *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892), to a *juvenile* offender's Eighth Amendment challenge to consecutive sentences that are the functional equivalent of life without the possibility of release. Tellingly, since the United States Supreme Court's landmark decision in *Roper v. Simmons*, 543 U.S. 551, 569–73 (2005) (acknowledging fundamental differences between juveniles and adults), no state supreme court or federal circuit court has adopted the *O'Neil* dictum in a *juvenile* sentencing case.[1]

[1] In *Ali II*, 895 N.W.2d 237, we did not adopt the *O'Neil* dictum, which discusses the issue of whether consecutive sentences should be viewed separately when conducting a proportionality analysis under the Eighth Amendment. Instead, we held "that absent further guidance from the Court, we will not extend the *Miller/Montgomery* rule to include . . . juvenile offenders who are being sentenced for multiple crimes, especially when . . . the issue of whether consecutive sentences should be viewed separately when conducting a proportionality analysis under the Eighth Amendment *remains an open question*." *Id.* at 246 (emphasis added).