STATE OF MINNESOTA

IN SUPREME COURT

A19-1451

Le Sueur County

Jonas David Nelson,

Appellant,

vs.

State of Minnesota,

Respondent.

Hudson, J.
Dissenting, Chutich, Thissen, JJ.
Dissenting, Thissen, Chutich, JJ.

Filed: July 29, 2020
Office of Appellate Courts

Cathryn Middlebrook, Chief Appellate Public Defender, Bradford Colbert, Assistant Public Defender, Saint Paul, Minnesota; and

Perry Moriearty, Associate Professor, University of Minnesota Law School, Minneapolis, Minnesota, for appellant.

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, Saint Paul, Minnesota; and

Brent Christian, Le Sueur County Attorney, Le Center, Minnesota, for respondent.

S Y L L A B U S

1. The rule announced in *Miller v. Alabama*, and later clarified in *Montgomery v. Louisiana*, does not extend to adult offenders.

2. Appellant forfeited appellate review of his argument under the Minnesota Constitution because he failed to cite Article I, Section 5 or provide any specific analysis regarding this issue to the district court and therefore the district court did not address the issue.

Affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

HUDSON, Justice.

Appellant Jonas David Nelson was convicted of first-degree premeditated murder in 2015 for the shooting death of his father and was sentenced to a mandatory term of life in prison without the possibility of release. He was 18 years and 7 days old on the date of the offense. We affirmed Nelson's conviction on direct appeal. Nelson filed a petition for postconviction relief, arguing that the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012), and later clarified in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), should be extended to adult offenders whose crimes reflect the transient immaturity of youth. The district court denied the petition. On appeal, Nelson renews his *Miller/Montgomery* argument. He also asks to us interpret Article I, Section 5 of the Minnesota Constitution to provide greater protection than the Eighth Amendment to the United States Constitution. Because the district court did not abuse its discretion when it

denied Nelson's postconviction petition and Nelson forfeited review of his claim under the Minnesota Constitution, we affirm.

FACTS

Appellant Jonas David Nelson was 18 years and 7 days old when he shot and killed his father. On January 6, 2014, while his father lay sleeping on the living room floor, Nelson walked downstairs from his bedroom, retrieved his father's rifle from a gun cabinet, and loaded the rifle with two cartridges. He entered the living room, where he shot his sleeping father in the head from several feet away. Nelson shot the second round through the bottom pane of the French doors in the living room, then returned the rifle to the gun cabinet and placed the shell casings in a bucket in the basement.

After calling 911, Nelson told law enforcement officers that he had been in his bedroom when he heard glass breaking and a "pop," and suggested that someone must have shot his father from outside the house. Officers identified inconsistencies between Nelson's description and the evidence—most notably that his father's brain matter and skull fragments lay between the body and the broken pane of the French doors. After Nelson was told that law enforcement would conduct forensic analysis of the crime scene and his clothes and hands, he confessed.[1]

On March 26, 2014, a grand jury indicted Nelson for premeditated first-degree murder, intentional second-degree murder, and second-degree murder while committing second-degree assault. Following a jury trial, Nelson was convicted on all three counts.

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[1] A full recitation of the facts regarding the murder and Nelson's trial are set forth in *State v. Nelson*, 886 N.W.2d 505, 507–09 (Minn. 2016).

The district court sentenced him to life imprisonment without the possibility of release (LWOR), the mandatory sentence for adult offenders convicted of first-degree premeditated murder. Minn. Stat. § 609.106, subd. 2(1) (2018). An adult is "an individual 18 years of age or over." Minn. Stat. § 645.45(3) (2018).

Nelson appealed his convictions and sentence. We affirmed Nelson's first-degree premeditated murder conviction and sentence, but vacated the convictions on the lesser-included offenses. *State v. Nelson*, 886 N.W.2d 505, 511–12 (Minn. 2016).

On October 16, 2018, Nelson filed a petition for postconviction relief. In it, Nelson stated that his sentence violated the "Eighth Amendment to the United States and Minnesota Constitutions." Nelson did not cite Article I, Section 5 or any other provision of the Minnesota Constitution. Instead, his argument focused on the Eighth Amendment to the United States Constitution and the rule announced in *Miller*, 567 U.S. 460, and later clarified in *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734 (*Miller/Montgomery* rule).[2] As clarified, the rule renders "life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, *juvenile* offenders whose crimes reflect the

[2] As in our earlier cases discussing *Miller* and its progeny, "[o]ur 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." *Flowers v. State*, 907 N.W.2d 901, 906 n.4 (Minn. 2018) (emphasis added). The *Montgomery* Court noted that, although "*Miller*'s holding has a procedural component," the requisite sentencing hearing "gives effect to *Miller*'s substantive holding." 577 U.S. at ___, 136 S. Ct. at 734–35. It therefore moves *Miller* beyond its holding to say that the Supreme Court created a new procedural rule requiring individualized sentencing in all cases. Sentencing hearings are a byproduct of *Miller*, required to identify juveniles who are not irreparably corrupt.

transient immaturity of youth." *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734 (emphasis added) (citation omitted). Nelson argued that the *Miller/Montgomery* rule applied "equally to a defendant who was just one week beyond his eighteenth birthday," because "the neurological and behavioral characteristics that distinguish juveniles from adults are also present in eighteen year-olds." Put differently, Nelson sought to remove the word "juvenile" from the *Miller/Montgomery* rule, thereby expanding the class of protected defendants to "offenders whose crimes reflect the transient immaturity of youth."

After considering the parties' arguments, the district court denied the petition.[3] In its analysis, the district court considered at length cases from the United States Supreme Court; interpretations of that jurisprudence by state and federal courts, including our own; and separation of powers principles. Although the district court recognized "the significant policy arguments in favor of an individualized sentencing hearing," it concluded that the "ethical, moral, and public policy-based concerns" implicated by the facts of Nelson's case posed questions for the Minnesota Legislature. Ultimately, the district court concluded that "[t]he application of the statutorily-required sentence to [Nelson] does not represent a violation of his 8th Amendment rights" because "the Supreme Court of the United States

[3] As part of his argument, Nelson asked the district court to hold an evidentiary hearing that takes into account Nelson's "age and its attendant features, his family and home environment, his mental and emotional capacity, and [his] capacity for and amenability to rehabilitation." In the alternative, he asked the court to "grant an evidentiary hearing on the evolution and current state of brain development science." The district court denied Nelson's requests because "the determination of whether [Nelson's] sentence is a violation of the Eighth Amendment [was] purely a question of law."

and the Supreme Court of Minnesota have drawn a line at the age of 18 for the purposes of sentencing as relevant here."

ANALYSIS

On appeal, Nelson asserts that the district court abused its discretion by denying his petition for postconviction relief. According to Nelson, the district court's legal conclusion that the *Miller/Montgomery* rule draws a bright line at age 18 "is simply not consistent with the nature of the Eighth Amendment inquiry in this case." He also asks us to interpret Article I, Section 5 of the Minnesota Constitution to provide greater protection than the Eighth Amendment to the United States Constitution. We consider each argument in turn.

I.

We review the denial of a petition for postconviction relief for an abuse of discretion. *Hannon v. State*, 889 N.W.2d 789, 791 (Minn. 2017). A district court abuses its discretion when it has "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). "Constitutional interpretation is a legal question that we review de novo." *State v. Juarez*, 837 N.W.2d 473, 479 (Minn. 2013).

The Eighth Amendment, applied to the states through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII; *Roper v. Simmons*, 543 U.S. 551, 560 (2005). "The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010). Interpretation of the Eighth Amendment is to be "guided by the 'evolving standards of decency that mark

the progress of a maturing society.' " *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

When a defendant brings a categorical challenge under the Eighth Amendment, a court will:

> consider[] objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Graham, 560 U.S. at 61 (citations omitted) (internal quotation marks omitted).

Broadly, Nelson argues that, under the *Miller/Montgomery* rule, the mandatory imposition of life without the possibility of release for adult offenders who are cognitively similar to juveniles violates the Eighth Amendment.[4] In *Miller*, the Supreme Court held 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.' " 567 U.S. at 465.[5] And, in *Montgomery*, the Supreme Court clarified that *Miller* announced

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[4] The State does not challenge Nelson's Eighth Amendment claim on procedural grounds. Accordingly, we consider the merits of Nelson's claim.

[5] Nelson argues that, although the *Miller*/*Montgomery* rule does not address offenders who are 18 years of age or older, nothing in *Miller* forecloses its application to a broader class of offenders. We disagree. The *Miller* Court did not limit its holding to the facts before it, setting a clear line at 18 despite the fact that both petitioners were only 14 years old at the time of their offenses. *C.f. Thompson*, 487 U.S. at 838 (limiting its holding to those under 16 years old because the case concerned a 15-year-old offender). In the

a new categorical rule that "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 577 U.S. at ___, 136 S. Ct. at 734 (citation omitted). Nelson contends that the *Miller*/*Montgomery* rule applies with equal force to him, an 18-year-old offender, because an evolving scientific and national consensus shows that there are no material neurodevelopmental differences between juveniles and 18 year olds.[6]

We considered the *Miller*/*Montgomery* rule for the first time in *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016). In *Jackson*, we concluded that the *Miller*/*Montgomery* rule prohibited application of the mandatory sentencing provision of Minn. Stat. § 609.106 (2018), to "juveniles such as Jackson, whose LWOR [life without the possibility of release] sentences became final before the *Miller* rule was announced." 883 N.W.2d at 279. In discussing the proper remedy, we concluded that "sever[ing] the relevant LWOR provisions for everyone, both adults and juveniles," was inappropriate because "the

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absence of further guidance from the Supreme Court, then, it is reasonable to infer that the *Miller*/*Montgomery* rule is affirmatively limited to those under 18.

[6] Every appellate court to consider the issue has held that the *Miller*/*Montgomery* rule applies only to juveniles. *See, e.g.*, *U.S. v. Sierra*, 933 F.3d 95, 97 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2540 (Mar. 23, 2020) (mem.); *U.S. v. Chavez*, 894 F.3d 593, 609 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 278 (2018) (mem.); *U.S. v. Marshall*, 736 F.3d 492, 498–500 (6th Cir. 2013), *cert. denied*, 573 U.S. 922 (2014) (mem.). At present, only one federal district court has extended the *Miller*/*Montgomery* rule to 18 year olds. *See Cruz v. U.S.*, No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. 2018), *appeal filed*, No. 19-989 (2d Cir. Apr. 16, 2019).

Moreover, a majority of states mandate life without the possibility of release for adult offenders convicted of some defined set of crimes. States with legislative enactments incorporating the *Miller*/*Montgomery* rule have specifically limited that rule to juveniles. *See, e.g.*, Del. Code Ann. tit. 11 § 4209A (2019).

mandatory imposition of LWOR sentences *is constitutional for adults*." *Id.* at 280–81 (emphasis added) (discussing *State v. Ali* (*Ali I*), 855 N.W.2d 235, 255 n.19 (Minn. 2014) (explaining that Minn. Stat. § 609.106 "is constitutional with respect to almost all of those to whom it applies—adults")). We therefore used the remedy of "as-applied severance" and revived an earlier version of section 609.106 for juvenile offenders, which mandated sentences of life with the possibility of release after 30 years. *Id.* at 281–82.

Since *Jackson*, we have applied the *Miller*/*Montgomery* rule according to its plain terms. In *Munt v. State*, we said, "The Supreme Court's holding in *Miller* is plainly limited to juvenile offenders and does not apply to Munt, who was 35 years old at the time he committed the murder and kidnappings." 880 N.W.2d 379, 383 (Minn. 2016). Similarly, in *State v. Robertson*, we reiterated our holding from *Munt*, stating, "For the reasons we discussed in *Munt*, we hold that *Miller* does not apply to Robertson, who was 22 years old at the time of the shooting." 884 N.W.2d 864, 877 (Minn. 2016). More recently, in *Crow v. State*, which involved a 22-year-old defendant, we said, "Because Crow was *not* a juvenile at the time of [the victim's] murder, *Miller*'s rule regarding the unconstitutionality of life without the possibility of release sentences for juveniles does not apply to him." 923 N.W.2d 2, 10–11 (Minn. 2019). The resentencing of Crow's codefendant, a juvenile offender whose sentence *was* affected by *Miller*, "did not call into question the constitutionality of the heinous-crimes statute or our prior precedent except to the extent

that an automatic sentence of life without the possibility of release is cruel and unusual punishment when applied to juveniles." *Id.* at 11–12.[7]

We have also declined to expand the application of the *Miller/Montgomery* rule to other contexts without further guidance from the United States Supreme Court. For example, in *State v. Ali* (*Ali II*), a juvenile offender claimed that his consecutive sentences of life with the possibility of release after 30 years violated the rule announced in *Miller/Montgomery*. 895 N.W.2d 237 (Minn. 2017). He argued that "the reasoning underlying the *Miller*/*Montgomery* rule applies with equal force when a district court imposes consecutive sentences of life imprisonment with the possibility of release that are, in the aggregate, the functional equivalent of a LWOR sentence." 895 N.W.2d at 242. Calling the issue "an open question," we held that, "absent further guidance from the Court, we will not extend the *Miller*/*Montgomery* rule to include [Ali] and other similarly situated

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[7] In *Crow*, we briefly addressed a claim similar to the one made by Nelson here. We wrote:

> Crow also broadly asserts that despite his age at the time of the crime, he was just as immature as [his juvenile codefendant], and he should therefore be resentenced. Crow vaguely refers to a report from the National Institutes of Health, which concludes that, based on a review of scientific studies, the development and maturation of the brain occurs primarily during adolescence and is not fully accomplished until the age of 25 years. Crow, however, introduced no evidence demonstrating that his individual developmental state at the time of the murder was equivalent to that of [his juvenile codefendant] or a generic juvenile.

Crow, 923 N.W.2d at 12 (footnote omitted). Although this language does not foreclose an argument of the type made by Nelson, neither does it support it. We did not hold that Crow would have been resentenced if he had established that he was cognitively similar to his younger codefendant.

juvenile offenders who are being sentenced for multiple crimes." *Id.* at 246; *see also Flowers v. State*, 907 N.W.2d 901, 906 (Minn. 2018). As we said in *Ali II* and *Flowers*, the Supreme Court has not held that the *Miller*/*Montgomery* rule applies to sentences other than those imposed on juvenile offenders. In the absence of further guidance from the Court, we will not extend the *Miller*/*Montgomery* rule as a matter of Eighth Amendment law to include adult offenders.

Moreover, Supreme Court precedent suggests that extension of the *Miller*/*Montgomery* rule to young adult offenders based on cognitive age is inappropriate. The categorical ban in *Miller*/*Montgomery* explicitly arose from the intersection of "two strands of precedent." *Miller*, 567 U.S. at 470. Analysis of the two strands indicates that the *Miller*/*Montgomery* rule is limited to defendants who are under the age of 18.

The first strand of precedent focused on the lesser culpability of certain classes of offenders, adopting categorical bans on particular sentencing practices because of a mismatch between the sentence and culpability. *Id.* As to juvenile offenders as a class, the Supreme Court cited *Roper*, 543 U.S. 551, and *Graham*, 560 U.S. 48.

In *Roper*, the Supreme Court held that it was unconstitutional for juvenile offenders under the age of 18 to receive the death penalty. 543 U.S. at 568. The *Roper* Court cited "[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," including lack of maturity, vulnerability to negative influence, and transitory personality traits. 543 U.S. at 569–70; *accord Miller*, 567 U.S. at 471. In limiting its holding to those under 18, the Court noted the potential for under- and over-inclusivity, writing:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn.

543 U.S. at 574. In setting the line at 18, the Court in *Roper* observed, "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."[8] *Id.* at 569. And in *Graham*, the Supreme Court relied on *Roper* to hold that life without parole was unconstitutional for juvenile nonhomicide offenders. 560 U.S. at 74−75 (drawing a "clear line" at age 18). Because the Supreme Court has determined that a "clear line" must be drawn, even when such a line is under-inclusive, Nelson's argument that the *Miller/Montgomery* rule should be extended to adult offenders who are cognitively similar to juveniles is inconsistent with this first strand of precedent.

The second strand of precedent focused on individualized sentencing before imposition of the death penalty. *Miller*, 567 U.S. at 470 (reviewing decisions that require individualized sentencing determinations before imposing the death penalty). The second strand is discussed in *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Harmelin*, the Supreme Court declined to extend the "individualized capital sentencing doctrine" to mandatory life without the possibility of release sentences. 501 U.S. at 995–96. In

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[8] The Minnesota Legislature has *not* increased the age for voting or marrying without parental consent in response to current brain-development science. *See* Minn. Stat. § 201.014, subd. 1(1) (2018); Minn. Stat. § 517.02 (2018). Nor has the age for jury service increased. Minn. Gen. R. Prac. 808(b)(2).

extending individualized sentencing under *Miller*, the Supreme Court distinguished *Harmelin*, explaining that, "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." *Miller*, 567 U.S. at 481. Taken together, these cases establish that, for constitutional purposes, juveniles and adults are treated differently, and that the line between juveniles and adults is drawn at age 18. A holding to the contrary would contradict the very precedent that enabled the *Miller*/*Montgomery* rule in the first place.

As a final matter, we recognize the ethical, moral, and public policy-based concerns implicated by the facts of Nelson's case. These concerns, however, are better left to the Minnesota Legislature.[9]

It is a well-established principle that crimes and sentences are within the province of the Legislature. Minn. Stat. § 609.095(a) (2018) ("The legislature has the exclusive authority to define crimes and offenses and the range of the sentences or punishments for their violation."). "[T]he court has jurisdiction to interfere with legislation upon this

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[9] The Legislature has provided that, generally, an adult is "an individual 18 years of age or over." Minn. Stat. § 645.45(3). In her dissent, Justice Chutich observes that the Legislature considers 18-year-olds to be adults for some purposes but not for others. In our view, this only confirms that the change sought here is a matter of public policy which is more properly the subject of legislative action. Just as it has in these other contexts, the Legislature could amend the heinous crimes statute to exclude those under 19 or 21 years old. And yet, it has not. The Eighth Amendment does not allow us to forbid the Legislature's policy choice on such a matter when the national consensus and controlling precedent do not evidence a clear departure from the fundamental law and a punishment that is "manifestly in excess of constitutional limitations." *State v. Moilen*, 167 N.W. 345, 347 (Minn. 1918).

subject only when there has been a clear departure from the fundamental law and the spirit and purpose thereof and a punishment imposed which is manifestly in excess of constitutional limitations." *State v. Moilen*, 167 N.W. 345, 347 (Minn. 1918); *see also State v. McDaniel*, 777 N.W.2d 739, 753 (Minn. 2010) (stating that we presume sentencing statutes to be constitutional).

In 2005, the Legislature amended Minn. Stat. § 609.106, subd. 2(1), to add first-degree premeditated murder—the crime at issue here. Act of June 2, 2005, ch. 136, art. 2, § 5, 2005 Minn. Laws 901, 922; *see also Robertson*, 884 N.W.2d 864 (upholding mandatory life without the possibility of release sentence for an adult offender convicted of first-degree premeditated murder).[10] Before 2005, first-degree premeditated murder required a previous conviction of a heinous crime to warrant mandatory life without the possibility of release. Minn. Stat. § 609.106, subd. 2(3) (2004).

In short, this is an extremely tragic case. Nelson was only 1 week beyond his 18th birthday when he killed his father, and the record is replete with evidence of Nelson's cognitive and social delays and years of psychological and emotional abuse. The

[10] In his dissent, Justice Thissen contends that mandating a sentence of life without the possibility of release for *any person* violates the Eighth Amendment because "it is not at all clear that the purported differences between people under the age of 18 and people over the age of 18 are constitutionally meaningful such that it makes sense to draw the line for requiring individualized sentencing for LWOP at age 18." Under his view, not only is Nelson entitled to an individualized sentencing hearing, but the heinous crime statute, Minn. Stat. § 609.106, must also be struck down as unconstitutional under the Eighth Amendment. We cannot agree with Justice Thissen's bold proclamation that "the logic and reasoning of *Miller* is better seen as ineluctably compelling an individualized sentencing requirement in all LWOP cases." Because the distinctions that the United States Supreme Court has drawn between juveniles and adults are sound, we do not strike down the heinous crime statute.

Miller/*Montgomery* rule, however, is clearly limited to juvenile offenders under the age of 18 at the time of the offense. The nature of a bright-line rule is that in some instances it will be under-inclusive. For the reasons discussed above, we conclude that the district court did not abuse its discretion when it denied Nelson's petition for postconviction relief.

II.

Nelson also asks us to interpret Article I, Section 5 of the Minnesota Constitution to provide greater protection than the Eighth Amendment to the United States Constitution. For the reasons that follow, Nelson forfeited appellate review of this issue.

"A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *State v. Morse*, 878 N.W.2d 499, 502 (Minn. 2016) (citation omitted) (internal quotation marks omitted). It is also well-settled that " 'a party may not raise issues for the first time on appeal' from denial of postconviction relief." *Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (quoting *Robinson v. State*, 567 N.W.2d 491, 494 n.2 (Minn. 1997)). "This procedural bar applies even in postconviction proceedings raising constitutional issues of criminal procedure." *Ferguson v. State*, 645 N.W.2d 437, 448 (Minn. 2002); *accord Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006); *State v. Frazier*, 649 N.W.2d 828, 839 (Minn. 2002).

In his petition for postconviction relief, Nelson wrote, "Because [his] mandatory life without parole sentence prevented the sentencing court from considering his age and this wealth of mitigating evidence, his sentence violates the Eighth Amendment to the United States and *Minnesota* Constitutions." (Emphasis added). Reviewing the record as

a whole, we note that Nelson did not cite Article I, Section 5 or any other provision of the Minnesota Constitution in either his postconviction petition or supporting memorandum. At the hearing before the district court, Nelson's counsel said, "[t]oday we are asking the Court to declare [his] mandatory life without release sentence unconstitutional under the United States Supreme Court decision in *Miller vs. Alabama*, and grant him the sentencing hearing that he should have been given." At no point did Nelson provide any specific analysis in the district court that the greater protections of the Minnesota Constitution extend to adult offenders whose crimes reflect the transient immaturity of youth.

The district court's order does not mention the Minnesota Constitution, much less consider whether Article I, Section 5 of the Minnesota Constitution provides greater protection than the Eighth Amendment to the United States Constitution. Instead, it focused on the issue of whether Nelson's sentence of life without the possibility of release was "unconstitutional under the Eighth Amendment."

Nelson raised the issue in question for the first time in his brief to our court. Citing *Frazier*, 649 N.W.2d at 839, the State argued that Nelson forfeited the issue. In his reply brief, Nelson does not contend that he raised the issue in the district court.

Applying the relevant law to the facts described above, we conclude that Nelson forfeited appellate review of the issue of whether Article I, Section 5 of the Minnesota Constitution provides greater protection than the Eighth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.

D I S S E N T

CHUTICH, Justice (dissenting).

I agree with the court that appellate review of the second issue—whether Article I, Section 5 of the Minnesota Constitution provides greater protection than the Eighth Amendment of the United States Constitution—has been forfeited. But because the court today upholds a sentence that reflects an uncompromising view of the Supreme Court's Eighth Amendment jurisprudence regarding youthful offenders, I respectfully dissent.

Appellant Jonas David Nelson was sentenced to life in prison without the possibility of release, the functional equivalent of a death sentence, without any consideration of him, his personality, his upbringing, or his psychological attributes, solely because the offense occurred 7 days after his 18th birthday. But "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole," *Miller v. Alabama*, 567 U.S. 460, 473 (2012). In a line of decisions beginning with *Roper v. Simmons*, 543 U.S. 551 (2005), and culminating in the substantive rule announced in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), the Supreme Court has insisted that the individual circumstances of youthful offenders be considered before imposing the harshest of sentences, including life in prison without the possibility of release. The court's decision to uphold the harsh sentence in this case reflects an overly rigid, inflexible, view of the Supreme Court's Eighth Amendment jurisprudence and an inconsistent application of Minnesota's standards for defining adulthood.

Nelson's chronological age at the time of the offense—18 years and 7 days—does not mark him as an adult. Societal norms and constitutional principles require that we

provide him with an individualized sentencing determination; that is, a hearing at which mitigating circumstances—his personality, his upbringing, and his unique attributes—are taken into consideration before imposing the "harshest possible penalty." *Miller*, 567 U.S. at 489. Because the refusal to afford him this process ignores the evolving understanding of youthful offenders, is inconsistent with Minnesota's recognition of youthful immaturity, and violates Eighth Amendment principles, I respectfully dissent.

The majority correctly notes that the Supreme Court has not, yet, extended the *Roper-Miller-Montgomery* line of cases to an offender who is 18 years or older.[1] And I recognize that the Court has drawn the current line at age 18 because "a line must be drawn." *Roper*, 543 U.S. at 574. But the Court has also said that the Eighth Amendment has a "flexible and dynamic" nature that requires consideration of societal standards and "conceptions of decency." *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (plurality opinion), *abrogated by Roper*, 543 U.S. 551. Further, the Court has acknowledged that the

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[1] The category of youthful offenders can range up to 21 or 25 years of age. *See, e.g.*, John H. Blume, et al., *Death by Numbers: Why Evolving Standards Compel Extending* Roper*'s Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921, 923–24, 930–36 (2020) (asserting that "a cutoff of eighteen years old is no longer supportable" so the death-penalty ban "should be raised to twenty-one"); Alli Katzen, Note, *Why Justice Kavanaugh Should Continue Justice Kennedy's Death Penalty Legacy—Next Step: Expanding Juvenile Death Penalty Ban*, 74 U. Miami L. Rev. 964, 985–90 (2020) (asserting that the death penalty should be banned for offenders "under the age of 25"); U.S. Sent'g Comm'n, *Youthful Offenders in the Federal System* 1 (2017) (defining youthful offenders as "persons age 25 or younger at the time they are sentenced"), https://www.ussc.gov/research/research-reports/youthful-offenders-federal-system (last visited July 27, 2020) [opinion attachment].

It is unnecessary to decide whether the category of youthful offenders includes those between the ages of 18 and 21, or between the ages of 18 and 25, because Nelson committed the offense just 7 days after his 18th birthday and clearly falls into this category, however the lines are drawn.

relative immaturity of youthful offenders—including those 18 years or older at the time of the offense—*is* a relevant factor in sentencing. *See, e.g.*, *Gall v. United States*, 552 U.S. 38, 58 (2007) (stating that "it was not unreasonable" to consider a defendant's immaturity at age 21, when the offense was committed, and noting the relevance of studies showing "that human brain development may not become complete until the age of twenty-five"); *see also Johnson v. Texas*, 509 U.S. 350, 367 (1993) (noting that youth, for a 19-year-old offender, "is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury").

I would apply this flexible view of the Eighth Amendment, particularly because life in prison without release is a sentence "akin to the death penalty," *Miller*, 567 U.S. at 475, to conclude that Nelson is a youthful offender whose immaturity requires an individualized sentencing process. The force and logic behind the principle that youth are "constitutionally different from adults in their level of culpability," *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 736, require that we consider all relevant mitigating factors; maturity and responsibility are not reflected by chronological age alone, *see Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact.").

In fact, we cannot impose an immutable line—a cutoff date based only on chronological age—after which we refuse to consider an offender's individual and mitigating characteristics; even the Supreme Court's "line" has evolved in recent decades—notably, continually upward—as society's standards, mores, and understanding of the impact of immaturity on the culpability of youthful offenders have evolved. In 1988, in *Thompson*, the Court held that a 15-year-old boy could not be sentenced to the death

penalty. 487 U.S. 815, 823 (1988) (plurality opinion) (explaining its holding in light of "indicators of contemporary standards of decency"). By 2005, the Court had extended the death-penalty ban to offenders under the age of 18, after considering "objective indicia of consensus," *see Roper*, 543 U.S. at 567. Five years after *Roper*, the Court held that non-homicide offenders under the age of 18 could not be sentenced to life in prison without release without giving that offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010).

Two years later, the *Graham* rule was extended to a juvenile offender who committed murder, the Court noting again that the Eighth Amendment's proportionality principle must be viewed through "the evolving standards of decency that mark the progress of a maturing society." *Miller*, 567 U.S. at 469 (citation omitted). Time and again, the Court has looked beyond simply chronological age to *define* youth, considering current, and evolving, standards relevant to that category. *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 710 (2014) (explaining that defining "intellectual disability" takes into consideration "the work of medical experts" and professional expertise).

No consensus exists in Minnesota that a person is an adult on the very day that the person reaches 18 years of age; to the contrary, Minnesota considers an 18-year-old an adult for some purposes but not for others. An 18-year-old is, as here, treated as an adult for purposes of criminal offenses, including the harshest punishment Minnesota can impose, life in prison without the possibility of release. *See* Minn. Stat. §§ 609.10, subd. 1(a), 609.106, subd. 2 (2018). That same 18-year-old is allowed to vote, to marry, and to obtain a driver's license. *See* Minn. Stat. § 201.014, subd. 1(1) (2018) (allowing any person

at least 18 years old to vote); Minn. Stat. § 517.02 (2018) (allowing anyone "who has attained the full age of 18 years" to marry); Minn. Stat. § 171.04, subd. 1(1) (2018) (prohibiting issuance of a driver's license "to any person under 18 years" with exceptions).

But that same 18-year-old cannot buy tobacco products in Minnesota, *see* Act of May 16, 2020, ch. 88, §§ 2, 11, 2020 Minn. Laws ___, ___ (amending Minn. Stat. § 144.4167, to prohibit persons under 21 from entering a tobacco shop, and Minn. Stat. § 609.685, to prohibit the sale of tobacco to persons under age 21); cannot legally buy a firearm under federal law, *see* 18 U.S.C. § 922(b)(1) (2018); and cannot legally buy or consume alcohol in Minnesota, *see* Minn. Stat. § 340A.503, subds. 1–2 (2018). Other examples of the non-adult status of an 18-year old abound. *See, e.g.*, Minn. Const. art. VII, § 6 (requiring a person to be at least 21 years old to hold state or local office); Minn. Stat. § 177.24, subd. 1(c) (2018) (allowing an employer to pay a lower wage "during the first 90 consecutive days of employment" to an "employee under the age of 20 years"); Minn. Stat. § 259.83 (2018) (restricting post-adoption services to adopted persons "aged 19 years and over"); Minn. Stat. § 518A.26, subd. 5 (2018) (including in the definition of a "child" for purposes of child support "an individual under age 20 who is still attending secondary school"); Minn. Stat. § 527.21(1), (11) (2018) (defining an "adult" and a "minor" by reference to age 21, for purposes of the Uniform Transfers to Minors Act).

Accordingly, we prohibit youth up to age 21 from engaging in certain risky behaviors or undertaking certain responsibilities in the apparent belief that at age 18, 19, or 20, they are not sufficiently mature and responsible to do so. Yet we treat those same youth as sufficiently mature and responsible at age 18 to immediately impose—without

consideration of any relevant, individual, mitigating circumstances—a sentence of life in prison without the possibility of release.[2]

It is illogical, inconsistent, and constitutionally disproportionate for Minnesota to treat youthful offenders as immature for some purposes but sufficiently mature when imposing the harshest possible sentence without considering any relevant mitigating circumstances. *See, e.g.*, *Miller*, 567 U.S. at 479 ("[M]aking youth (and all that accompanies it) irrelevant to imposition of [the] harshest prison sentence . . . poses too great a risk of disproportionate punishment."); *Graham*, 560 U.S. at 72–73, 75 (noting that a life sentence without the possibility of release reflects a judgment that the offender is "incorrigible" even though "characteristics of juveniles make that judgment questionable," particularly when the decision is "made at the outset"); *Thompson*, 487 U.S. at 835 ("The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."); *Eddings*, 455 U.S. at 112 (stating that any "consistency produced by ignoring individual differences" when imposing the death penalty "is a false consistency").

It cannot be that an 18-year-old is insufficiently mature to buy tobacco or alcohol, to be paid the same wages as an adult, to obtain information about birth parents, or to

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[2] In light of the legislation cited above, which restricts activities, conduct, or rights to youth who are at least 18 but 21 or younger, our decisions in *Crow*, *Munt*, and *Robertson* are not controlling because the defendants in those cases were over the age of 21 when the offense was committed. *See Crow v. State*, 923 N.W.2d 2, 8 (Minn. 2019) (noting that the defendant "was 22 on the date of the crime"); *State v. Robertson*, 884 N.W.2d 864, 877 (Minn. 2016) (noting that the defendant "was 22 years old at the time of the shooting"); *Munt v. State*, 880 N.W.2d 379, 383 (Minn. 2016) (noting that the defendant "was 35 years old" when the offense occurred).

assume ownership of certain custodial property transfers; but is sufficiently mature so that we need not consider the individual circumstances and life story of that person when imposing Minnesota's harshest judgment. A sentencing regime that refuses to take into consideration factors relevant to the "transient immaturity of youth," *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734, is constitutionally inadequate and disproportionate under the Supreme Court's Eighth Amendment jurisprudence. *See also id.* at ___, 136 S. Ct. at 736 (requiring courts to give juvenile offenders "the opportunity to show their crime did not reflect irreparable corruption"); *Miller*, 567 U.S. at 489 (directing courts to consider mitigating circumstances); *Graham*, 560 U.S. at 75 (explaining that a state "is not required to guarantee eventual freedom to a juvenile offender," but it must give those defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

If this murder had been committed 7 days earlier, Nelson could have offered evidence relevant to his age, background, and unique circumstances. It is incomprehensible to think that, because of the passage of 7 days, we will say only that his crime reflects irreparable corruption. A properly conducted *Miller*/*Montgomery* sentencing hearing is critical for any youthful offender who is facing a lifetime in prison because, as the Supreme Court has acknowledged, "[i]t 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," *Roper*, 543 U.S. at 573.

I would therefore hold that the Eighth Amendment requires that Nelson receive an individualized hearing to determine whether he belongs to the rare group of youthful offenders whose crimes demonstrate permanent incorrigibility before determining the appropriate sentence here.

Accordingly, I respectfully dissent.

THISSEN, Justice (dissenting).

I join in the dissent of Justice Chutich.

Youthful Offenders in the Federal System

UNITED STATES SENTENCING COMMISSION

Youthful Offenders in the Federal System

Introduction

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Although youthful offenders account for about 18 percent of all federal offenders sentenced between fiscal years 2010 and 2015, there is little current information published about them. In this publication, the United States Sentencing Commission ("the Commission") presents information about youthful offenders, who for purposes of this report are defined as persons age 25 or younger at the time they are sentenced in the federal system.

Recent studies on brain development and age, coupled with recent Supreme Court decisions recognizing differences in offender culpability due to age, have led some policymakers to reconsider how youthful offenders should be punished. This report reviews those studies and provides an overview of youthful federal offenders, including their demographic characteristics, what type of offenses they were sentenced for, how they were sentenced, and the extent of their criminal histories.[1] The report also discusses the intersection of neuroscience and law, and how this intersection has influenced the treatment of youthful offenders in the criminal justice system.

The Commission is releasing this report as part of its review of the sentencing of youthful offenders. In June 2016, the Commission's Tribal Issues Advisory Group (TIAG) issued a report that proposed several guideline and policy

D I S S E N T

THISSEN, Justice (dissenting).

I join Justice Chutich's dissent. I write separately to explain my view that the evolution of the United States Supreme Court's Eighth Amendment jurisprudence over the last 45 years, culminating in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), inevitably signals that the United States Constitution mandates that a person be afforded an opportunity to present individualized mitigating evidence before being sentenced to life without the possibility of release.

I.

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The authors of that amendment "made no attempt to define the contours of" what constitutes cruel and unusual punishment. *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988). Instead, they "delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.' " *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). Proportionality has long been the touchstone for determining whether a punishment is cruel and unusual under the Eighth Amendment. The Supreme Court has said that the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). And that right is derived from the " 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *See Miller*, 567 U.S. at 469

(quoting *Roper*, 543 U.S. at 560). In other words, when considering Eighth Amendment challenges to sentencing practices, the Court asks whether particular sentences match the culpability of certain offenders and the severity of certain crimes.

Over the course of the last 45 years, Eighth Amendment challenges have focused on two types of punishments—death and life without the possibility of parole (LWOP)—and the imposition of those punishments on adults, juveniles, and individuals with developmental disabilities.[1] And although the Supreme Court at first reserved its proportionality analysis for capital cases, it has more recently breached the divide between capital and noncapital cases. A review of the Court's Eighth Amendment case law is necessary to understand how that came about and where the evolving logic and rationale of the Court's precedent inevitably must lead regarding the constitutionality of imposing a sentence of life without the possibility of release without affording a defendant an individualized sentencing hearing.

A.

For decades, the Supreme Court largely declined to take up cases challenging the constitutionality of the death penalty and its administration. However, in 1963, Justice Arthur Goldberg published a dissent from a denial of certiorari, in which he articulated three questions about the constitutionality of the death penalty that had not been raised by

[1] Minnesota law provides for a sentence of "life imprisonment without possibility of release." Minn. Stat. § 609.106, subd. 2 (2018). It does not provide for a sentence of life without parole. The two sentences are, however, substantively the same. Because the Supreme Court uses the phrase "life without the possibility of parole" (LWOP), I use that phrase when discussing the Court's cases. When referring to the effects of that jurisprudence on Minnesota cases, I use the phrase "life without the possibility of release."

the petitioner. *See Rudolph v. Alabama*, 375 U.S. 889, 889–91 (1963) (Goldberg, J., dissenting from denial of certiorari). His dissent, which was joined by Justices Douglas and Brennan, signaled to the legal community that the Court was open to considering constitutional challenges to capital punishment. *See* James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment 1963-2006*, 107 Colum. L. Rev. 1, 17 (2007). And, indeed, in the late 1960s, the Court granted certiorari on a number of death penalty cases.

However, the Supreme Court resolved many of those cases on criminal procedure grounds, rather than addressing the constitutionality of the death penalty head-on. *See, e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969) (reversing the conviction and death sentence because the record did not show that the defendant had voluntarily and intelligently entered a guilty plea, and declining to address the claim that the death penalty for common law robbery violated the Eighth Amendment); *Witherspoon v. Illinois*, 391 U.S. 510, 522–23 (1968) (holding that it is unconstitutional for a defendant to be sentenced to death by a jury "chosen by excluding veniremen . . . [who] voiced general objections to the death penalty"); *United States v. Jackson*, 390 U.S. 570, 581–83 (1968) (holding unconstitutional the death penalty provisions of the federal kidnapping statute because they imposed the death penalty only on defendants who went to trial instead of pleading guilty). It was not until *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), that the Court

confronted an Eighth Amendment challenge to the constitutionality of the death penalty itself.[2]

In *Furman*, petitioners in the collected cases, two of whom were convicted for murder and one for rape, argued that the death penalty violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 239. The *Furman* Court held, in a one-page per curiam opinion, that the death penalty was unconstitutional as applied to the petitioners. *Id.* However, all nine justices filed separate opinions concurring in or dissenting from the judgment. Although the five concurring justices offered varying rationales for supporting the judgment, they shared one common concern: that the death penalty as it existed at the time was imposed arbitrarily, *id.* at 295 (Brennan, J. concurring); *id*. at 313 (White, J., concurring); or wantonly and freakishly, *id.* at 310 (Stewart, J., concurring). The justices pointed to the complete lack of objective standards for guiding the discretion of sentencing bodies. *See id.* at 253, 258 (Douglas, J., concurring). And two—Justices Brennan and Marshall—believed the death penalty to be unconstitutional under all circumstances. *Id.* at 305 (Brennan, J., concurring); *id*. at 369 (Marshall, J., concurring). Most states that imposed the death penalty at the time did so under sentencing schemes that suffered from the arbitrariness and lack of guided discretion that troubled the *Furman* Court. The practical effect of the decision was therefore to prohibit the use of the death penalty in states that employed it at the time.

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[2] Minnesota eliminated the death penalty in 1911. *See* Act of Apr. 22, 1911, ch. 387, 1911 Minn. Laws 572, 572 (codified as amended at Minn. Stat. § 609.185(a) (2018)); John D. Bessler, *The "Midnight Assassination Law" and Minnesota's Anti-Death Penalty Movement, 1849-1911*, 22 Wm. Mitchell L. Rev. 577, 690–96 (1996).

States responded quickly to *Furman*, passing laws restoring the death penalty, many of which were drafted to conform to *Furman*'s mandates. *See* Corinna Barrett Lain, *Furman Fundamentals*, 82 Wash. L. Rev. 1, 46–55 (2007). Thus, 4 years later, the Supreme Court again took up an Eighth Amendment challenge to the death penalty. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). This time, the Court considered Georgia's capital punishment law, which was enacted in the wake of *Furman* and which provided some guidance to juries in determining whether to impose the death penalty. *Id.* at 162–68. The Court explained that the Eighth Amendment guarantees that punishments must not be excessive. *Id.* at 173. Citing, among others, *Trop*, 356 U.S. at 100, and *Weems v. United States*, 217 U.S. 249, 367 (1910), the Court said this inquiry has two aspects. "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." *Id.* As such, the Court grounded its decision in the proportionality inquiry introduced in *Trop* and *Weems*.

The Supreme Court then determined that the death penalty is not per se unconstitutional under the Eighth Amendment. Although the Court acknowledged that death is "an extreme sanction," it was concerned in *Gregg* "only with the imposition of capital punishment for the crime of murder," a crime that it considered "the most extreme of crimes." *Id.* at 187. It concluded that the death penalty was not "invariably disproportionate" to the crime for which it was imposed. *Id.*

However, the Supreme Court went on to impose procedural requirements on the use of the death penalty. It explained that *Furman* mandated "that [the death penalty] could

not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Id.* at 188. Any state with a criminal justice system that permits the imposition of the death penalty must "provide[] for a bifurcated [sentencing] proceeding at which the sentencing authority is apprised of the information relevant to the imposition of [the] sentence and provided with standards to guide its use of the information." *Id.* at 195. And while the *C*ourt cautioned that each distinct capital sentencing system would need to be examined "on an individual basis," it made clear that "it is possible to construct capital-sentencing systems capable of meeting *Furman*'s constitutional concerns." *Id.* Accordingly, because the Georgia statute delineated standards to guide juries' decisionmaking, the Court held that it was not prohibited by the Eighth Amendment. *See id.* at 206–07.

In a companion case to *Gregg*, the Supreme Court struck down a mandatory death penalty statute because it failed to provide for an individualized assessment of the offender before sentencing. *See Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976) (plurality opinion). In reaction to *Furman*'s concern with unbridled sentencing discretion, North Carolina had passed a law that, rather than guiding a sentencer's discretion, removed that discretion altogether, making the death penalty mandatory for all persons convicted of first-degree murder. *See id.* at 286–87. As in *Gregg*, the *Woodson* Court focused not on the constitutionality of the death penalty per se, but on "the procedure employed by the State to select persons for the unique and irreversible penalty of death." *Id.* at 287. The *Woodson* Court held that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a

constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304. Such individualized consideration would ensure that a sentencing body would "arrive at a just and appropriate sentence." *Id.* Put another way, the Court viewed individualized sentencing as a way to ensure that the death penalty was inflicted only on those offenders whose characters and crimes were proportional to that penalty. However, the Court also stated that its "conclusion rest[ed] squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long," because death is more final. *Id.* at 305; *cf. id.* at 304 (noting that "the prevailing practice of individualizing sentencing determinations *generally* reflects simply enlightened policy rather than a constitutional imperative") (emphasis added). It was this qualitative difference that made individualized assessments necessary to determine whether death was the most appropriate penalty for a crime.

Together, *Gregg* and *Woodson* stand for the proposition that the death penalty can be constitutionally imposed, but only where the offender is afforded an individualized sentencing hearing in which the sentencing body's discretion is guided by clear standards. In later cases, the Supreme Court delineated specific factors that sentencing bodies must consider. For example, in *Lockett v. Ohio*, the Court said that "the sentencer, in all but the rarest kind of capital case, [can]not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978) (plurality opinion) (footnotes omitted). And the Court has since made clear that "any aspect" truly means *any* aspect. For example, in *Eddings v. Oklahoma*, an Oklahoma

trial court judge refused to consider an offender's family background, including extensive physical and emotional abuse that the offender had experienced. 455 U.S. 104, 106–09 (1982). The *Eddings* Court held that the trial court had erred and remanded for the trial court to consider "all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." *Id.* at 117.

Aside from family history, the Supreme Court has approved the consideration of an offender's youth, psychological damage or other emotional disturbance, and susceptibility to influence. *See, e.g.*, *id.* at 115–16. It has also upheld sentencing procedures that require consideration of whether the offender has no criminal history, the victim participated in or consented to the offender's conduct, or the offender's capacity to appreciate the criminality of their conduct was impaired. *See, e.g.*, *Proffitt v. Florida*, 428 U.S. 242, 248 n.6, 251 (1976). The Court has stressed, however, that any list of legislatively mandated mitigating factors cannot be exclusive. *See Lockett*, 438 U.S. at 608.

The upshot of these cases is that a sentence of death may not be imposed unless the sentencer is first afforded the opportunity to comprehensively assess that offender's mental health, life history, and background, as well as the crime committed and *any* other factors relevant to the determination of whether death is a punishment disproportionate to the offender's culpability for the crime committed. However, the Supreme Court has made clear that individualized sentencing is merely a procedural floor; there are some instances in which individualized sentencing is constitutionally insufficient. In other words, for particular types of crimes, the Court has concluded that the death penalty is always a

disproportionate punishment. In those instances, even an individualized sentencing process that considers all mitigating factors does not satisfy the Eighth Amendment.

In *Coker v. Georgia*, the Supreme Court held that the death penalty was a "grossly disproportionate and excessive punishment for the crime of rape." 433 U.S. 584, 592 (1977) (plurality opinion). While condemning the crime of rape as "highly reprehensible" and "without doubt deserving of serious punishment," the Court reasoned that because rape does not involve the taking of a human life, the death penalty may not be imposed as punishment for that crime. *Id.* at 597–98. This is because, the Court explained, "[l]ife is over for the victim of the murderer." *Id.* at 598. And because death is " 'unique in its severity and irrevocability,' " it is excessive for the crime of rape, which does not result in the loss of human life. *Id.* (quoting *Gregg*, 428 U.S. at 187).[3]

The implication of *Coker*—that death may not be imposed for nonhomicide crimes—was made explicit in *Kennedy v. Louisiana*, 554 U.S. 407 (2008). There, the Supreme Court considered whether the Eighth Amendment prohibits imposition of the death penalty as punishment for the rape of a child that did not, and was not intended to, result in the death of the child. The *Kennedy* Court stated that "there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." *Id.* at 438. Further, it reasoned

[3] Although the *Coker* Court did not include an analysis of the penological justifications for punishment, it stated that, for rape, death "is cruel and unusual punishment within the meaning of the Eighth Amendment *even though* it may measurably serve the legitimate ends of punishment." 433 U.S. at 592 n.4 (emphasis added).

that the death penalty's potential deterrent value did not outweigh the incongruity between child rape and the punishment of death. *Id.* at 441–42. Finally, with regard to the retributive function of capital punishment, the Court opined that such a function is ill-served for the crime of child rape because "[i]t is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator." *Id.* at 442. The Court held that, because the death penalty is not a punishment proportional to nonhomicide crimes, the Eighth Amendment prohibits imposition of the death penalty except for crimes "that take the life of the victim." *Id.* at 446–47.

The Supreme Court has also determined that the death penalty is inherently disproportionate for certain classes of offenders. In *Thompson v. Oklahoma*, the Court considered whether the death penalty could be constitutionally applied to individuals who were under the age of 16 at the time of their offense. 487 U.S. 815 (1988). The Court reasoned that juveniles are less culpable for their actions than adults because "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 835. It further stated that the social purposes the death penalty is purported to serve—deterrence and retribution—carry much less force for juveniles than for adults. *Id.* at 836. Juveniles are less likely to have engaged in a cost-benefit analysis before acting. Thus, the possibility that death could be the consequence of acting is unlikely to ever cross a juvenile's mind, and the retributive purpose of the death penalty is less persuasive because of a juvenile's capacity for growth and because of the fiduciary duty that society owes to its youth. *Id.* at

837–38. As in other Eighth Amendment cases, the *Thompson* Court drew a clear link between an offender's life experiences and characteristics and the offender's culpability. And because individuals under the age of 16 are characterized by inexperience, lack of education, and underdeveloped intellect, the Court concluded that they are inherently less culpable. It therefore held that the death penalty could not be applied to individuals who were under the age of 16 at the time of their offense. *Id.* at 838.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court abrogated its decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989),[4] and held that the execution of individuals who were under the age of 18 at the time of their crimes violates the Eighth Amendment's proscription on cruel and unusual punishment. The *Roper* Court explained that the death penalty must be limited to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " 543 U.S. at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders" such that their actions merit capital punishment. *Id.* at 569. First, juveniles lack the maturity, sense of responsibility, and reasoned decisionmaking of adults. *See id*. Second, juveniles are more "vulnerable or susceptible to negative influences." *Id.* And third, because the personalities

[4] The *Stanford* Court declined to extend its decision in *Thompson* to hold that the death penalty was unconstitutional for all persons under the age of 18. 492 U.S. at 380. The *Roper* Court's decision to overrule *Stanford* is one more proof of the continued evolution of Eighth Amendment jurisprudence and the Supreme Court's willingness to allow it to evolve.

of juveniles are more transitory, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570. Taken together, these three differences mean that juveniles are insufficiently culpable to merit the death penalty.[5]

The Supreme Court has long recognized that " '[t]his whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . .' " *Woodson*, 428 U.S. at 296–97 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)). And, as discussed above, over the course of the last 4½ decades, the Court has shifted its own jurisprudence further and further from the automatic imposition of severe punishment. Thus, the path the Court walked before *Graham v. Florida*, 560 U.S. 48 (2010), in developing Eighth Amendment doctrine points in the direction of where it would—and will—go next.

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[5] In *Atkins v. Virginia*, the Supreme Court held the death penalty unconstitutional as applied to persons with developmental disabilities. 536 U.S. 304, 321 (2002). The *Atkins* Court concluded that putting persons with developmental disabilities to death would not "measurably advance the deterrent or the retributive purpose" of the death penalty. *Id.* Those individuals, it reasoned, have "cognitive and behavioral impairments . . . that make it less likely that they can process the information of the possibility of execution as a penalty and control their conduct based on that information." *Id.* at 320. Further, persons with developmental disabilities "in the aggregate face a special risk of wrongful execution" because they may be generally less capable of assisting their attorney in their defense, serving as effective witnesses, or presenting a persuasive showing of mitigation. *See id.* Finally, the Court stated that persons with developmental disabilities are "less morally culpable" than those without developmental disabilities. *Id.* at 320. Accordingly, because of the unique characteristics of persons with developmental disabilities, the Court concluded that death is a punishment disproportionate to the culpability of that class of offenders.

By applying proportionality review to the death penalty, the Court held that death cannot be imposed absent an individualized hearing to determine whether death is the proportional response to a particular crime or offender. Stated another way, the Court's jurisprudence has acknowledged that the Eighth Amendment prohibits the mandatory imposition of at least some punishments that are "different" in severity or substance. Prior to *Graham,* the Supreme Court stated in its Eighth Amendment jurisprudence that death is different. *See, e.g.*, *Eddings*, 455 U.S. at 110–11; *Beck v. Alabama*, 447 U.S. 625, 637 (1980). And nearly 30 years ago, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court held that "[p]roportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides." *Id*. at 994 (citing *Turner v. Murray*, 476 U.S. 28, 36–37 (1986)).

The Supreme Court, applying a proportionality analysis, also held that there are some types of crimes and offenders for whom a death sentence is automatically disproportionate and so a per se violation of the Eighth Amendment. And the Court identified juveniles as one such class of offenders. The Court concluded that the reduced culpability of juveniles precludes constitutional imposition of the death penalty. As we shall see below, however, the way the *Roper* Court distinguished juveniles from adults has not been limited to death-eligible cases. Instead, the Court has extended its juvenile proportionality analysis to LWOP cases. It is this progression that most clearly signals the Court's willingness to also view certain noncapital punishments—namely, LWOP—as "different."

B.

In *Graham*, the Supreme Court considered an Eighth Amendment challenge to LWOP sentences for juveniles who commit nonhomicide crimes. 560 U.S. at 48. The Court held that it contravenes the Eighth Amendment to sentence a juvenile to life without the possibility of parole for a nonhomicide crime. *Graham* was a notable shift in the Court's approach to the Eighth Amendment because it signaled the Court's willingness to subject noncapital punishments to a proportionality analysis. The *Graham* Court began its analysis by noting that "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles." *Id.* at 68. It therefore reaffirmed that juveniles have lessened culpability for the reasons discussed in *Roper*. *Id.* at 69.

The *Graham* Court then considered all four major penological justifications for criminal punishment—retribution, deterrence, incapacitation, rehabilitation. Such an analysis is critical to the Eighth Amendment inquiry, the Court said, because a "sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 71. As in *Roper*, the Court concluded that juveniles' reduced culpability lessens the retributive value of LWOP for those under 18. *Id.* at 71–72. It also reaffirmed that deterrence fails to justify juvenile LWOP because juveniles are less likely to have considered the consequences of their actions before acting. *Id.* at 72. The Court likewise discounted the incapacitation value because to "justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible," which the Court concluded was a "questionable" judgment. *Id.* at 72–73. Finally, the Court stated that LWOP "cannot

be justified by the goal of rehabilitation" because "[t]he penalty forswears altogether the rehabilitative ideal." *Id.* at 74.

In addition to a dearth of penological justifications, the *Graham* Court justified its holding by drawing parallels between LWOP and the death penalty. It stated that, although "a death sentence is 'unique in its severity and irrevocability,' . . . life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id.* at 69 (quoting *Gregg*, 428 U.S. at 187). LWOP, like death, "alters the offender's life by a forfeiture that is irrevocable . . . [by] depriv[ing] the convict of the most basic liberties without giving hope of restoration." *See id.* at 69–70. And, the Court reasoned, LWOP is a particularly harsh punishment for juveniles because a juvenile sentenced to LWOP will serve more years and a greater percentage of his life in prison than an adult offender. *Id.* at 70.

The Supreme Court broadened its *Graham* holding in *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, two 14-year-old offenders were convicted of murder and sentenced to life without the possibility of parole, as required by state law. *Id.* at 466. The Court held that mandatory imposition of LWOP for juveniles violates the Eighth Amendment's ban on cruel and unusual punishment. *Id.* at 479. In its analysis, the Court reaffirmed the distinctions it had drawn between adults and juveniles in *Graham* and *Roper*: neither juveniles' reduced culpability nor any penological justifications for punishment support the mandatory imposition of LWOP on juveniles. *Id.* at 471–72. The Court then connected the reasoning of *Roper* (prohibiting the death penalty for juvenile offenders) and *Graham* (prohibiting LWOP for nonhomicide juvenile offenders because of its similarities to the

death penalty) to cases like *Woodson* (demanding individualized sentencing when imposing the death penalty). The *Miller* Court concluded that "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 470. In other words, because juvenile LWOP is akin to the death penalty, and the Eighth Amendment requires individualized sentencing for the death penalty, the Court concluded that the Eighth Amendment also mandates individualized sentencing for juvenile LWOP.[6]

At first blush, *Miller* seems consistent with the idea that LWOP is disproportionate only for juveniles, due to their immaturity, vulnerability, and under-formed personalities, presenting little challenge to the idea that mandatory LWOP imposed on adults is constitutional. But rather than precluding the individualized-sentencing requirement for adults facing an LWOP sentence, the logic and reasoning of *Miller* is better seen as ineluctably compelling an individualized sentencing requirement in *all* LWOP cases. It is to that I now turn.

Prior to *Miller*, the Supreme Court had long limited individualized-sentencing requirements to capital cases. For example, the *Harmelin* Court considered a challenge to mandatory LWOP sentences for nonhomicide adult offenders. 501 U.S. 957 (1991). The Court acknowledged that "severe, mandatory penalties may be cruel" but not "unusual in a constitutional sense." *Id*. at 994. But it rejected the challenge, noting that its "cases

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[6] In *Montgomery v. Louisiana*, the Supreme Court held that its decision in *Miller* announced a substantive rule of constitutional law that applies retroactively. 577 U.S. ___, ___, 136 S. Ct. 718, 736 (2016).

creating and clarifying the 'individualized capital sentencing doctrine' ha[d] repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties." *Id.* at 995. In *Miller*, Alabama and Arkansas argued that invalidating mandatory LWOP for juveniles would effectively overrule *Harmelin*. *Miller*, 567 U.S. at 481. But the Court rejected that argument as "myopic." *Id.* It concluded that "if (as *Harmelin* recognized) 'death is different,' children are different too." *Id.*

The court today rejects Nelson's challenge because of *Miller*'s clear emphasis on the difference between juveniles and adults. And, as the court notes, nearly every federal court to consider this issue has similarly declined to extend the *Miller*/*Montgomery* rule. But the reasoning of *Miller* cannot be logically confined to juveniles; it is not at all clear that the purported differences between people under the age of 18 and people 18 or older are constitutionally meaningful such that it makes sense to draw the line for requiring individualized sentencing for LWOP at age 18.

First, the weaknesses in the penological justifications for LWOP sentences where an offender has no opportunity to present evidence of mitigating circumstances are as true for adults as they are for juveniles. If the "heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender," *Graham*, 560 U.S. at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)), then individualized sentencing for LWOP is as appropriate for adults as it is for juveniles. Like children, adults have varying levels of culpability that depend on a wide range of factors, including youth, family background, history of abuse, mental health issues, criminal

history, the offender's capacity to appreciate the criminality of their conduct, and more. *See, e.g.*, *Woodson*, 428 U.S. at 304; *Proffitt*, 428 U.S. at 251. Similarly, if retribution is based on personal culpability, LWOP without any chance to account for individualized circumstances of the offender fails to serve the goal. Mandatory LWOP for adults also fails to serve deterrence aims. Immaturity, recklessness, and an inability to consider the repercussions of one's actions are not traits that are reserved for individuals under the age of 18, and only individualized consideration of each offender can reveal whether LWOP would have the desired deterrent effect.

Likewise, incapacitation is a poor justification for mandatory LWOP for adult offenders. The *Graham* Court has said that "incorrigibility is inconsistent with youth." 560 U.S. at 73 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)). But that is a value judgment rather than a constitutional mandate. Every offender may be capable of change and should get the chance to show as much before being consigned to die in prison. And the fact remains that requiring an individualized assessment of an offender's personal experiences and characteristics in no way prevents those who should be permanently incapacitated from being permanently incapacitated. One must ignore the logic of the Court's 21st-century Eighth Amendment case law to conclude that LWOP sentencing schemes based on the irrebuttable assumption that an offender will forever embody his or her worst act are compatible with the Eighth Amendment.

The Supreme Court has said that "[t]he penalty [of life without the possibility of parole] forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value

and place in society." *Id.* at 74. This is true whether the offender is a juvenile or an adult. When any person is sentenced to life imprisonment without the possibility of parole, without consideration of the individual characteristics of that person, the message is that that person no longer has value to society. The weaknesses identified in *Miller* in the penological justifications for punishing a person with death in prison without any consideration of the person as a unique human being with unique life experiences apply similarly to juveniles and adults. Accordingly, if we take the *Miller* Court's reasoning seriously, there is no way to meaningfully restrict the Court from eventually reaching the conclusion that LWOP without any consideration of individualized circumstances is unconstitutional for all offenders.

The *Miller* Court based its decision in part on the idea that sentencing a juvenile to LWOP has the practical effect of subjecting the juvenile to many more years in prison than an adult who receives the same sentence. 567 U.S. at 475 (citing *Graham*, 560 U.S. at 70). Therefore, the Court reasoned, juvenile LWOP is a harsher punishment than adult LWOP. But that is just one consideration in an individualized assessment, and it is certainly relevant to an offender like Nelson, who was only 7 days past his 18th birthday when he committed his offense. *Miller*'s logic provides no explanation why Nelson should not be entitled to individualized consideration of his age while an offender who is 17 years and 364 days old is so entitled. *See, e.g.*, William W. Berry, III, *The Mandate of Miller*, 51 Am. Crim. L. Rev. 327, 347–48 (2014) (explaining that "the difference in length between a juvenile life-without-parole sentence and an adult life-without-parole sentence is, on average, less than ten years").

Moreover, the more pertinent question in an LWOP case is not the number of years an offender spends in prison, but whether the offender will ever be released. All offenders sentenced to LWOP—whether adults or juveniles—are sentenced to die in prison. In that sense, the punishment—and the "denial of hope" that accompanies it, *Graham*, 560 U.S. at 70 (citation omitted)—is equally harsh and cruel, regardless of the offender on whom it is *inflicted*. *See* William W. Berry, III, *More Different than Life, Less Different than Death*, 71 Ohio St. L.J. 1109, 1123–25 (2010).

Finally, the Supreme Court's insistence that "death is different" holds less water after *Miller*. Although the *Miller* Court stated that *Harmelin* remains good law, the *Miller* Court's holding also broke down a previously impervious wall between capital and noncapital cases with regard to individualized sentencing. More to the point, *Miller* extended the principle of constitutionally required individualized sentencing to a particular type of noncapital sentence: namely, LWOP.

To be clear, my point is not that sentences of life without the possibility of release are inherently unconstitutional. Under my reading of the Supreme Court's jurisprudence, courts will still be able to impose a sentence of life without the possibility of release. But such a sentence cannot be imposed unless the offender is first given an opportunity to present individualized evidence that the sentence is not appropriate under the unique circumstances of the case.[7]

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[7] As the court correctly holds, by failing to raise the issue before the district court, Nelson forfeited review of his claim that Article I, Section 5, of the Minnesota Constitution provides greater protection than the Eighth Amendment to the United States Constitution.

Jonas Nelson endured years of abuse, both emotional and psychological. The record shows that he suffered delays in his social and emotional development as a result—so much so that one psychologist concluded that he "lags significantly in his overall development as an individual" as compared to same-age peers. Had Nelson committed his crime one week before his 18th birthday, instead of one week after, he would have been entitled to an individualized sentencing hearing to determine whether he was sufficiently culpable to receive a sentence of life without the possibility of release. The fundamental logic underlying *Miller*, the trajectory of Eighth Amendment case law over the last 45 years, and the potential cruelty of the mandatory sentence imposed in this case counsels that Nelson should receive an individualized sentencing hearing.

Therefore, I respectfully dissent.

CHUTICH, Justice (dissenting).

I join in the dissent of Justice Thissen.

If such a claim were properly presented to us, however, it would be cause for serious consideration as to whether Nelson's mandatory LWOP sentence is cruel. It is this court's prerogative—and, indeed, responsibility—to independently interpret and apply our state constitution. If, in our independent judgment under the Minnesota Constitution, we conclude that the logic of *Miller*/*Montgomery* extends to those over the age of 18, we need not, and should not, wait for "further guidance from the [Supreme] Court" on the issue. *Cf. State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017).