

IN THE SUPREME COURT OF THE
STATE OF OREGON

KIPLAND PHILIP KINKEL,
Petitioner on Review,

v.

Rob PERSSON,
Superintendent,
Oregon State Correctional Institution,
Respondent on Review.

(CC 13C13698; CA A155449; SC S063943)

On review from the Court of Appeals.*

Argued and submitted September 22, 2016.

Andy Simrin, Andy Simrin PC, Portland, argued the cause and filed the brief for petitioner on review.

Paul L. Smith, Deputy Solicitor General, Salem, argued the cause and filed the brief for respondent on review. Also on the brief were Frederick M. Boss, Deputy Attorney General, and Benjamin Gutman, Solicitor General.

Before Balmer, Chief Justice, and Kistler, Walters, Nakamoto, and Flynn, Justices, and Landau, Senior Justice, Justice pro tempore, and Egan, Chief Judge of the Oregon Court of Appeals, Justice pro tempore.**

KISTLER, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Egan, J. pro tempore, dissented and filed an opinion.

* On appeal from Marion County Circuit Court, Thomas M. Hart, Judge. 276 Or App 427, 367 P3d 956 (2016).

** Baldwin, J., retired March 31, 2017, and did not participate in the decision of this case. Brewer, J., retired June 30, 2017, and did not participate in the consideration or decision of this case. Duncan and Nelson, JJ., did not participate in the consideration or decision of this case.

KISTLER, J.

Petitioner pled guilty to four counts of murder and 25 counts of attempted murder, as well as pleading no contest to a twenty-sixth count of attempted murder. As part of a plea bargain, petitioner and the state agreed that he would receive concurrent 25-year sentences for the four murders. They also agreed that each side would be free to argue that the mandatory 90-month sentences for each of the attempted murders should run consecutively or concurrently. After a six-day sentencing hearing, the trial court ordered that 50 months of each 90-month sentence for attempted murder would run concurrently but that 40 months of each of those sentences would run consecutively to each other and to the four concurrent 25-year sentences. As a result of that ruling, petitioner's aggregate sentence totals slightly less than 112 years.

In this post-conviction proceeding, petitioner argues that, because he was a juvenile when he committed his crimes, the Eighth Amendment prohibits the imposition of an aggregate sentence that is the functional equivalent of a life sentence without the possibility of parole. Petitioner's federal argument entails primarily three issues. The first is whether, as a matter of state law, petitioner's Eighth Amendment claim is procedurally barred. *See* ORS 138.550(2) (barring post-conviction petitioners from raising grounds for relief that were or reasonably could have been raised on direct appeal); *Verduzco v. State of Oregon*, 357 Or 553, 355 P3d 902 (2015) (applying a related statute). If it is, the second issue is whether *Montgomery v. Louisiana*, ___ US ___, 136 S Ct 718, 193 L Ed 2d 599 (2016), requires this court to reach petitioner's Eighth Amendment claim despite the existence of that state procedural bar. Third, if petitioner's Eighth Amendment claim is not procedurally barred, the remaining issue is whether and how *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012), applies when a court imposes an aggregate sentence for multiple crimes committed by a juvenile.

As explained below, we hold that, even if ORS 138.550(2) does not pose a procedural bar to petitioner's Eighth Amendment claim, his claim fails on the merits.

More specifically, the issue in *Miller* was whether the Eighth Amendment prohibited a juvenile from being sentenced to life imprisonment without the possibility of parole for a single homicide. The Court held that such a sentence could be imposed but only if the trial court found that the crime reflected irreparable corruption rather than the transience of youth. The Court did not consider in *Miller* whether a juvenile who has been convicted of multiple murders and attempted murders, as in this case, may be sentenced to an aggregate consecutive sentence that is the equivalent of life without the possibility of parole. This case thus poses a different issue from the issue in *Miller*. Beyond that, we conclude that the facts in this case, coupled with the sentencing court's findings, bring petitioner within the narrow class of juveniles who, as *Miller* recognized, may be sentenced to life without the possibility of parole.

I. FACTS

On May 20, 1998, when petitioner was 15 years old, he was sent home from high school for bringing a gun to school. Later that day, he shot his father once in the head. Afterwards, he shot his mother five times in the head and once in the heart. He left their bodies in the house but covered each with a sheet. The next morning, petitioner got the morning paper, had a bowl of cereal, and later drove his mother's car to the high school. Petitioner wore a trench coat, under which he concealed three guns: a Ruger .22 pistol with a ten-round clip; a Ruger 10/22 rifle with a banana clip that held 50 rounds; and a Glock 9 mm pistol. The stock of the rifle had been modified to create a pistol grip, which allowed the rifle to be concealed more easily.

As petitioner entered a breezeway at school, he called to one of his friends and told him not to go into the cafeteria that day. He then began walking forward, took the rifle out of his trench coat, pointed it at a classmate's head, and pulled the trigger. When the rifle misfired, he "was like mad and upset." After adjusting the rifle, he "[s]hot [the student] in the back of the head." Petitioner then "turned and started walking south *** towards the cafeteria" until he came upon another student whom he shot in the face.

After that, he “just walked forward to the cafeteria door and opened up the door and started shooting.”

One of the students in the cafeteria thought “it was a joke or something” until he realized that “there was blood coming from [another student].” One student stood up when petitioner began shooting, and petitioner shot her in the head. As another student testified, “it look[ed] lik[e] he aimed at her head.” Petitioner began “walking towards the center of the cafeteria and shooting towards the line where people [we]re getting food and snacks.” One student dove under a table, and petitioner “walked up and shot that person” in the head. Petitioner then started shooting towards the door “where there’s some more kids standing by a table.” He put the rifle to a classmate’s head and pulled the trigger, but there were no more bullets in the clip. At that point, two students “jump[ed] up and tackle[d]” petitioner. Although petitioner shot one of those students, they were able to subdue petitioner and take his guns.

That day, petitioner killed two students. Two of the students whom he shot in the head survived but were permanently affected. Of the remaining students whom petitioner shot, some nearly died, others were injured in ways that substantially impaired them, while still others recovered physically from their bullet wounds. As a result of petitioner’s actions, the state charged him with, among other things, four counts of aggravated murder and 26 counts of attempted aggravated murder. The four counts of aggravated murder were based on killing his parents one day and two students the next day. Twenty four of the 26 counts of attempted aggravated murder were based on the 24 students whom petitioner allegedly shot and wounded but did not kill.¹ One count of attempted aggravated murder was

¹ Those 24 charges alleged that petitioner intentionally had attempted to murder 24 named victims by means of a firearm and included a paired charge that he had intentionally inflicted serious bodily harm on each of the 24 victims. Ultimately, petitioner pleaded guilty only to the attempted murder charges regarding the 24 victims. At the sentencing hearing, there was evidence from either the victims or their parents that petitioner had shot and wounded 21 of the 24 victims. However, there was no evidence that he had shot and wounded three of those 24 victims. It follows that, in discussing the evidence, we say only that petitioner shot and wounded nearly two dozen of his classmates with the intent to kill them.

based on the student whom he attempted to kill but did not because the clip ran out of bullets. The final count of attempted aggravated murder arose when, after his arrest, petitioner attempted to kill a police officer with a knife that he had concealed on his person.

Before trial, petitioner moved to dismiss the aggravated murder charges, arguing that “[t]he possibility of a sentence of life in prison without the possibility of parole for a fifteen year old convicted of murder constitutes cruel and unusual punishment in violation of *** the Eighth Amendment to the U.S. Constitution.” The arguments that petitioner advanced in the memorandum in support of his motion paralleled the arguments that the United States Supreme Court later found persuasive in *Miller*; that is, he argued that the prohibition on sentencing a 15-year old to death should be extended to life without the possibility of parole because of the immaturity of juveniles and their possibility for change. Based on that argument, petitioner asked the sentencing court to declare Oregon’s aggravated murder statutes “unconstitutional insofar as these statutes extend the possibility of a true life sentence [a life sentence without the possibility of parole] to a fifteen year old convicted of aggravated murder.” The sentencing court denied petitioner’s motion to dismiss, and petitioner entered into the plea agreement.

As part of that agreement, petitioner pled guilty to the lesser included offenses of murder and attempted murder. Under Oregon law, his plea meant that petitioner admitted intentionally killing the four people whom he shot and intending to kill the nearly two dozen students whom he shot and wounded and the one student whom he attempted to shoot.² Additionally, petitioner stated as part of his plea that, “[b]y permitting the Court to enter a guilty plea on my behalf, I knowingly waive the defenses of mental disease or defect, extreme emotional disturbance, or diminished capacity.”³

² Petitioner entered a nolo contendere plea regarding the officer whom he charged with a knife. The trial court found petitioner guilty of attempted murder for that act as well.

³ Later, at the sentencing hearing, petitioner’s lawyer explained that petitioner had deliberately waived those defenses but retained the right to raise his mental health issues as mitigation evidence at the sentencing hearing.

The plea petition recites that petitioner was aware that, as a result of his plea, the trial court was “bound and shall impose a 300 month sentence (25 years) on each [of the four convictions of murder] with those sentences to be served concurrently.” Regarding the remaining 26 counts of attempted murder, petitioner acknowledged that he would receive a mandatory sentence of 90 months on each count, that the trial court was not bound to order that the sentences be served concurrently, and that each side was free to argue for consecutive or concurrent sentences.

The sentencing court held a six-day hearing to determine whether the sentences on the 26 attempted murder charges should be concurrent or consecutive. At the hearing, the court considered a presentence investigation report that detailed petitioner’s background. It heard an abbreviated recitation of the events that occurred at the high school and also what the officers found when they went to petitioner’s home after the shooting. In addition to describing the discovery of his parents’ bodies and evidence regarding the manner of their death, the officers described the writings they found in petitioner’s room, books they found in his room discussing making explosive devices, and multiple explosive devices secreted throughout petitioner’s home.

In mitigation, petitioner submitted evidence from his sister, former teachers, and neighbors who commented on positive aspects of his character. The majority of petitioner’s mitigation evidence, however, consisted of expert testimony regarding his mental health. His experts presented evidence that petitioner had been hearing voices for the past three years and that one of the voices had commanded him to commit the murders and attempted murders. Although acknowledging some difficulties in diagnosing adolescents, petitioner’s medical experts concluded that he suffered from paranoid schizophrenia or a schizoaffective disorder that combines some of the essential features of schizophrenia and depression.

One of petitioner’s experts, Dr. Sack, is a child and adolescent psychiatrist who previously chaired the department of child psychiatry at Oregon Health Sciences University. Sack concluded that, although he could not

“pigeonhole [petitioner] into one psychotic box or the other,” petitioner’s “crimes and his behavior on [May 20 and 21] were directly the product of a psychotic process that had been building intermittently in him over a three-year period.”⁴ He explained that petitioner’s psychosis was treatable, but he cautioned that he could not “claim that it’s curable.” That is, the psychosis could be managed if petitioner recognized it and accepted treatment, but if petitioner did not treat the psychosis, “he would be a dangerous person.” As Sack explained, the “crime [that petitioner committed] is so bizarre, and it so fits with what we know about paranoid schizophrenics, who are dangerous people.”

Another of petitioner’s experts, Dr. Bolstad, is a psychologist who works extensively with juvenile offenders. He agreed with Sack that petitioner’s condition could be treated and that, with continued treatment and supervision, petitioner could be a candidate for release. However, Bolstad also agreed with Sack that petitioner’s condition could not be cured. As he testified on cross-examination, “I personally don’t think there is any way of curing [petitioner’s] disorder. There’s not a cure for it, okay? I do think it can be managed,” principally with psychotropic medicine. Bolstad then added:

“Real frankly, I would not want to see [petitioner] out on the streets, ever, with this condition, okay? Without medicine and without an awful lot of structure and support services arranged for him.”⁵

Petitioner also argued that the trial court should consider his youth when imposing his sentence. More specifically, he incorporated the arguments that he previously had made against imposing a life sentence without possibility of parole for aggravated murder and contended that those same considerations applied equally to imposing consecutive sentences that were equivalent to a life sentence without the possibility of parole. In making that argument, petitioner’s

⁴ Later, Sack testified that petitioner’s mental condition “caused him to commit these tragedies” and that petitioner “would not have killed anybody had it not been for the mental illness.” Petitioner’s other expert, Dr. Bolstad, also testified that the only explanation that he could find for the murders was that petitioner’s “behavior was dominated at the time by psychotic thinking, by mental illness.”

⁵ We quote this portion of Bolstad’s testimony because the trial court later adopted it in sentencing petitioner.

counsel advanced virtually the same arguments that later informed the Court’s decision in *Miller*; that is, he argued that *Thompson v. Oklahoma*, 487 US 815, 108 S Ct 2687, 101 L Ed 2d 702 (1988), which had categorically prohibited imposing the death penalty on juveniles under 16 years of age, should be extended to aggregate sentences imposed on a juvenile that were equivalent to a life sentence without the possibility of parole.⁶

In addition to those considerations, the court also heard from the surviving students who had been shot, as well as from the students’ parents. Each of the students who spoke told the court how petitioner’s actions had affected their lives—the loss of their classmates, the loss of the use of their limbs, the loss of part of their childhood, and their difficulty trying to come to terms with that loss. Some parents spoke of losing their children. Others spoke of coming to the school on learning of the shooting, waiting to hear whether their children had been shot, and, if their children had been shot but survived, the difficulty of coping with their children’s injuries and trying to move past the harm that petitioner had inflicted on their families.

In determining the appropriate sentence, the trial court began by comparing petitioner’s case to the cases of two young homicide offenders⁷ who previously had been before the court. One had received a 25-year sentence; the other, a sentence of life with the possibility of parole after 30 years, conditioned on the availability of treatment and other safeguards to ensure that the offender was no longer a danger to society. The court explained that the facts in those cases “pale[d] in the light of the facts” in petitioner’s case and concluded that a similar sentence would not be “proportional to those sentences or to these present facts.”

The court recognized that petitioners’ experts had “necessarily and appropriately focused on [petitioner] and on his condition,” and that they “generally agree[d] that with extensive, long-term treatment, they would not expect

⁶ In making that argument, petitioner’s counsel bridged two gaps. He contended first that *Thompson* should be extended to (1) a sentence of life without the possibility of parole and (2) equivalent aggregate sentences.

⁷ One was a juvenile; the other, just over 18 years old at the time of sentencing.

him to be dangerous to others.” The court observed, however, that petitioner’s experts had agreed that, “[u]ntreated, or I suppose improperly or incompletely treated, [petitioner] is and remains dangerous.” The sentencing court noted that “[o]ne of the last things Dr. Bolstad said was to the effect that there is no cure for [petitioner’s] condition, that he should never be released without appropriate medication and—I quote—‘an awful lot of structure and appropriate support services arranged for him.’”

After expressing concern that the system might not be able to provide the necessary level of treatment and support, the court observed that, given the mandatory nature of the sentences for attempted murder, it lacked the flexibility to “structure any kind of long-range conditional sentence.” The court added, however, that, even if it had that authority, it would not be appropriate to exercise it. The court explained that, after listening to the effect that petitioner’s actions had had on his classmates and their families, “[i]t became very apparent yesterday that this sentence needed to account for each of the wounded, who rightly call themselves survivors, and for [petitioner] to know that there was a price to be paid for each person hit by his bullets.”

The trial court accordingly divided each mandatory 90-month sentence for attempted murder into two parts. It provided that 40 months of each 90-month sentence would run consecutively to each other and to the four 25-year concurrent sentences for murder, while 50 months of each of those 26 sentences would run concurrently. The sentencing court structured the aggregate sentence to ensure that petitioner would serve 40 months (three-and-one-third years) for each of the students whom he shot with the intent to kill, for the student whom he attempted to shoot in the head but ran out of bullets, and for the officer whom he charged with a knife. As noted, imposing a consecutive 40-month sentence on each of petitioner’s 26 attempted murder convictions, when run consecutively to his four concurrent 25-year sentences for murder, results in an aggregate sentence of slightly less than 112 years.

Petitioner challenged his aggregate sentence on direct appeal, contending primarily that it violated

Article I, section 16, of the Oregon Constitution. He added in a footnote that his “true-life sentence violates the Eighth Amendment’s ban on cruel and unusual punishment, for it is ‘grossly disproportionate’ to the crime.” (Quoting *Harmelin v. Michigan*, 501 US 957, 1001, 111 S Ct 2321, 115 L Ed 2d 271 (1991).) The Court of Appeals rejected petitioner’s state constitutional argument, as well as his Eighth Amendment claim. *State v. Kinkel*, 184 Or App 277, 56 P3d 463, *rev den*, 335 Or 142, 61 P3d 938 (2002). A year later, petitioner filed a timely post-conviction petition, challenging his conviction. The post-conviction court denied that petition, the Court of Appeals affirmed, and this court denied review. *Kinkel v. Lawhead*, 240 Or App 403, 246 P3d 746, *rev den* 350 Or 408, 256 P3d 121 (2011).

The United States Supreme Court did not issue its decision in *Miller* until 2012, approximately a year after petitioner’s first post-conviction petition had become final. After the Court decided *Miller*, petitioner filed a second post-conviction petition, once again raising an Eighth Amendment challenge to his sentence but this time relying on the reasoning in *Miller*. The post-conviction court ruled that the state post-conviction statutes barred petitioner from raising his Eighth Amendment claim in his second post-conviction petition because he reasonably could have raised that ground for relief in his first post-conviction petition. *See* ORS 138.550(3) (prohibiting successive petitions if the ground for relief reasonably could have been raised in the preceding petition).

The Court of Appeals affirmed the post-conviction court’s judgment, but it did so based on a related procedural statute, ORS 138.550(2). That subsection provides that “no ground for relief may be asserted by [a] petitioner in a petition for review under [Oregon’s post-conviction statutes] unless such ground was not asserted and could not reasonably be asserted in the direct appellate review proceeding.” ORS 138.550(2); *see Kinkel v. Persson*, 276 Or App 427, 443, 367 P3d 956 (2016) (applying that statutory bar). Although petitioner argued that he could not reasonably have raised his Eighth Amendment claim until after the United States Supreme Court decided *Miller*, the Court

of Appeals explained that petitioner had in fact raised that ground for relief on direct appeal. *Id.* at 442-44.

Following this court's decision in *Verduzco*, the Court of Appeals reasoned that the fact that *Miller* had not yet been decided when petitioner filed his direct appeal did not mean that the procedural bar in ORS 138.550(2) was inapplicable. *Id.* It also rejected petitioner's argument that federal law, as a result of the Court's decision in *Montgomery*, overrode the procedural bar set out in ORS 138.550(2). *Kinkel*, 276 Or App at 438 n 6. The Court of Appeals accordingly affirmed the post-conviction court's judgment. We allowed this petition for review to consider whether petitioner's Eighth Amendment claim is procedurally barred in state court and, if not, whether his aggregate sentence violates the Eighth Amendment.

II. ORS 138.550(2)

The state argues that ORS 138.550(2) provides a complete answer to petitioner's Eighth Amendment claim. It contends, and the Court of Appeals agreed, that ORS 138.550(2) precludes petitioner from relitigating in a state post-conviction proceeding the same ground for relief that he litigated on direct appeal.⁸ Petitioner responds that the United States Supreme Court decisions interpreting the Eighth Amendment underwent a fundamental shift after he filed his opening brief on direct appeal in 2001. He contends that the Eighth Amendment claim that he is raising now differs from the claim he raised at his sentencing hearing and that his current claim could not reasonably have been raised or adjudicated in 2001. It follows, he concludes, that ORS 138.550(2) does not bar the state courts from reaching the federal claim that he raised in his second post-conviction petition.

We need not resolve the parties' procedural arguments to decide this case. Even if we assume that petitioner

⁸ If the state is correct, it does not follow that petitioner has no remedy. To the contrary, having exhausted his state remedies by raising his Eighth Amendment claim on direct appeal, petitioner can seek to vindicate his federal rights in a federal habeas proceeding. See *O'Sullivan v. Boerckel*, 526 US 838, 839, 119 S Ct 1728, 144 L Ed 2d 1 (1999) ("Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court.").

is not procedurally barred from relitigating his Eighth Amendment claim on state post-conviction, we conclude that the Court of Appeals decision may be affirmed on an alternative ground. Petitioner’s Eighth Amendment challenge to his sentence fails on the merits. Before explaining why we reach that conclusion, we first describe two lines of Eighth Amendment authority. One involves categorical Eighth Amendment limits on juvenile sentencing; the other, the limits that the Eighth Amendment places on a court’s ability to impose consecutive sentences for multiple crimes. We then explain why we conclude that, in light of the sentencing court’s findings, petitioner’s aggregate sentence complies with the Eighth Amendment.

III. EIGHTH AMENDMENT

Eighth Amendment proportionality cases “fall within two general classifications.” *Graham v. Florida*, 560 US 48, 59, 130 S Ct 2011, 176 L Ed 2d 825 (2010). One involves challenges to a term of years in light of all the circumstances of a particular case. *Id.* at 59-60 (citing *Solem v. Helm*, 463 US 277, 103 S Ct 3001, 77 L Ed 2d 637 (1983)). The other involves categorical limits on certain sentencing practices. *Id.* at 61. In this case, petitioner argues that the categorical rule announced in *Miller* applies to his aggregate sentence. In analyzing petitioner’s argument, we accordingly focus on the Court’s cases that have announced categorical rules for sentencing juvenile offenders.

A. *Categorical sentencing limitations*

Generally, in determining whether a categorical rule applies, the Court has looked to “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” and it also has relied on its own “exercise of independent judgment [regarding proportionality, which entails] consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” See *Graham*, 560 US at 61, 67 (internal quotation marks and citation omitted). The Court looked to both considerations in concluding that juveniles are not eligible for the death penalty, *Roper v. Simmons*, 543 US 551, 125 S Ct 1183, 161

L Ed 2d 1 (2005), and that juveniles convicted of a non-homicide offense may not be sentenced to life imprisonment without the possibility of parole, *Graham*, 560 US at 75. In contrast to *Roper* and *Graham*, the *Miller* Court relied on a proportionality analysis in holding that not every juvenile who commits a murder is eligible for life imprisonment without the possibility of parole. *Miller*, 567 US at 479.⁹ Only those juveniles whose homicide reflects irreparable corruption rather than the transience of youth are eligible for a life sentence without possibility of parole. See *Montgomery*, 136 S Ct at 734 (interpreting *Miller*).

Following *Miller*, petitioner relies solely on a proportionality analysis in arguing that the rule from that case applies to his sentence. Because petitioner does not identify any objective indicia of society's standards to support his categorical Eighth Amendment claim, we limit our discussion to the proportionality analyses in *Roper*, *Graham*, and *Miller*. Although those analyses are similar in many respects, they also differ in ways that bear on petitioner's Eighth Amendment argument. Accordingly, we first describe briefly the proportionality analysis in each of those cases before describing a separate line of Eighth Amendment cases regarding aggregate sentences.

In *Roper*, the Court concluded that the unique characteristics of juveniles made that class of offenders ineligible for the death penalty. The Court observed that

“[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”

Roper, 543 US at 569 (quoting *Johnson v. Texas*, 509 US 350, 367, 113 S Ct 2658, 125 L Ed 2d 290 (1993)). It noted that juveniles, as a class, are more “vulnerable or susceptible to

⁹ The Court announced its holding in *Miller* after engaging in a proportionality analysis based on the considerations stated in *Roper* and *Graham*. See *Miller*, 567 US at 479 (announcing the holding). Consistently, the Court did not conclude that objective indicia of society's standards demonstrated a national consensus against imposing life without parole on juveniles who commit murder. Rather, it explained that those objective indicia did not provide a sufficient basis for departing from the proportionality analysis in *Roper* and *Graham*. See *id.* at 483.

negative influences and outside pressures, including peer pressure.” *Id.* Finally, the Court noted that a juvenile’s character and personality traits are “more transitory, less fixed.” *Id.* at 570. It followed from those considerations that juveniles are not, as a class, as culpable as adults and possess greater capacity for reform, with the result that the penological justifications for the death penalty—retribution and deterrence—apply with less force to juveniles. *Id.* at 571. In light of those considerations and the severity of the sentence, the Court concluded that imposing the death penalty on a juvenile was too harsh and too final to comply with the Eighth Amendment.

Graham considered how the constitutional balance is struck when a juvenile is sentenced to life without possibility of parole for a nonhomicide offense. The Court began from the proposition that, although death is different in kind from other punishments, life without the possibility of parole is comparable in terms of severity when applied to a juvenile. *Graham*, 560 US at 69-70. Moreover, the Court explained that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” *Id.* at 69. It followed that not only are juveniles generally less culpable than adults who commit the same crime but the nature of the crime (a nonhomicide offense) called for less serious punishment. The Court reasoned that, “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis.” *Id.* Given a juvenile’s lesser culpability and greater potential for reform, the Court held that the Eighth Amendment categorically bars a sentence of life without possibility of parole for a nonhomicide offense committed by a juvenile.

In *Miller*, the Court relied on the proportionality reasoning in *Roper* and *Graham* to hold that imposing a mandatory life sentence on a juvenile who commits a homicide violates the Eighth Amendment. *See* 567 US at 470-74. Specifically, the Court held that a factfinder must be able to make an individualized determination whether a life sentence without possibility of parole is appropriate when

a juvenile is convicted of homicide. *Id.* at 479. The Court observed that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon,” particularly “because of the great difficulty [the Court] noted in *Roper and Graham* of distinguishing at this early age 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 (quoting *Roper*, 543 US at 573). The Court explained, however, that the Eighth Amendment did not foreclose a court from sentencing a juvenile who has committed a homicide to life without the possibility of parole. *Id.* at 480.

Later, in *Montgomery*, the Court concluded that *Miller* announced a substantive limitation as well as a procedural requirement of an individualized sentencing hearing when a juvenile is convicted of homicide. As the Court explained in *Montgomery*,

“Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects “unfortunate yet transient immaturity.” [*Miller*, 567 US] at 479 (quoting *Roper*, 543 U.S., at 573). Because *Miller* determined that sentencing a child to life without parole is excessive for all but “the rare juvenile offender whose crime reflects irreparable corruption,” *id.* at 479-80 (quoting *Roper*, 543 U.S., at 573), it 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. *Penry*, 492 U.S., at 330.”

136 S Ct at 734.¹⁰

In both *Miller* and *Graham*, the severity of the punishment (life without possibility of parole) and the nature of the offender (a juvenile) were the same. Only one factor differed: the nature of the offense. The different categorical rules that the Court announced in those cases resulted from

¹⁰ Having concluded that *Miller* announced a substantive limitation on sentencing juveniles convicted of homicide, the Court held in *Montgomery* that that substantive limitation applied retroactively.

the differing offenses at issue in each case, a nonhomicide in one and a homicide in the other. The Court expressly recognized that point when it explained in *Miller* that “*Graham* established one rule (a flat ban [on life without possibility of parole]) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.” See *Miller*, 567 US at 474 n 6. Similarly, the Court reaffirmed in *Miller* that a juvenile’s “moral culpability [for homicide] and [the] consequential harm” of that offense justified a more severe sanction than a nonhomicide offense. See *id.* (distinguishing *Graham*).

At this juncture in our analysis, one other aspect of the Court’s juvenile sentencing cases warrants mention. To date, the Court has not extended its holdings in *Roper*, *Miller*, and *Graham* to lesser minimum sentences. See *Graham*, 560 US at 124 (Alito, J., dissenting) (“Nothing in the Court’s opinion affects the imposition of a sentence to a term of years without the possibility of parole.”); *id.* at 123 n 13 (Thomas, J., dissenting) (making that observation);¹¹ cf. *Miller*, 567 US at 475 (recognizing that *Graham*’s prohibition on sentencing juveniles to life without possibility of parole for a nonhomicide offense was “unprecedented for a [lesser] term of imprisonment”).

Consistently, petitioner does not argue that sentencing him to a 25-year prison term without the possibility of parole for a single murder or 40 months without the possibility of parole for a single attempted murder violates the Eighth Amendment. Rather, his argument rests on the proposition that, even though each sentence for each of his crimes may be constitutionally permissible, running his attempted murder sentences consecutively to each other and to his concurrent murder sentences results in an aggregate sentence that is equivalent to life without the possibility of parole and, as a result, violates the Eighth Amendment. Before turning to petitioner’s argument that the reasoning

¹¹ Far from disagreeing with the dissenting opinions’ observation, the majority explained in *Graham* that, even though the state could not sentence the defendant in that case to life without possibility of parole for a nonhomicide offense, the defendant still “deserved to be separated from society for some time in order to prevent what the trial court described as an ‘escalating pattern of criminal conduct.’” 560 US at 73.

in *Miller* and *Graham* applies with equal force to aggregate sentences, we first describe briefly a line of federal authority that touches on aggregate sentencing.

B. *Eighth Amendment limits on aggregate sentences*

In considering the constitutionality of an aggregate sentence, the United States Supreme Court observed over 125 years ago:

“If [a defendant sentenced to an aggregate sentence for multiple offenses] has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. 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 offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the [defendant] has committed.”

O’Neil v. Vermont, 144 US 323, 331, 12 S Ct 693, 36 L Ed 450 (1892) (quoting *State v. O’Neil*, 58 Vt 140, 2 A 586, 593 (1886)). To be sure, the passage quoted above was *dicta* for purposes of the issues facing the United States Supreme Court in *O’Neil*.¹² However, later courts have found the Court’s reasoning persuasive. See, e.g., *Pearson v. Ramos*, 237 F3d 881, 886 (7th Cir 2001) (“Every disciplinary sanction, like every sentence, must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual.”); *Hawkins v. Hargett*, 200 F3d 1279, 1285 n 5 (10th Cir 1999) (“The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes.”); *United States v. Aiello*, 864 F2d 257, 265 (2d Cir 1988) (“Eighth amendment

¹² After noting that *O’Neil* had not assigned error to the Vermont Supreme Court’s ruling that an aggregate life sentence for 306 liquor law convictions did not violate the Cruel and Unusual Clause, the United States Supreme Court repeated with apparent approval the Vermont Supreme Court’s reasoning, which is quoted above. *O’Neil*, 144 US at 331.

analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.”¹³

C. *Petitioner’s arguments*

Given those two lines of Eighth Amendment cases, we think that the initial question this case presents is how *Miller* and *Graham* apply when a juvenile receives an aggregate life sentence for multiple murders and attempted murders. As we understand petitioner’s argument, he contends that the number and nature of his offenses should not be a factor in striking an Eighth Amendment proportionality balance. Rather, he appears to argue that, when a juvenile’s aggregate sentence is equivalent to life without possibility of parole, then the severity of the sentence coupled with the characteristics of juvenile offenders will always lead to the conclusion that a life sentence without possibility of parole will violate the Eighth Amendment.

The holdings in *Miller* and *Graham* do not compel the categorical rule that petitioner urges. The question in *Miller* was whether a juvenile who had committed a single homicide could be sentenced to life imprisonment without the possibility of parole for that crime.¹⁴ *Graham* is

¹³ See also *State v. Hairston*, 118 Ohio St 3d 289, 295, 888 NE2d 1073 (2008) (“[P]roportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively.”); *State v. Buchhold*, 727 NW2d 816, 824 (SD 2007) (noting *O’Neil* and following the courts that have “concluded that the gross disproportionality review applies to the sentence imposed for the individual crimes rather than the consecutive aggregate”); *State v. Berger*, 212 Ariz 473, 479, 134 P3d 378 (2006) (“Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate.” (Citing *Aiello*, 864 F2d at 265)); *Close v. People*, 48 P3d 528, 539 (Colo 2002), as modified on denial of reh’g (July 1, 2002) (“The reasoning underlying this statement [from *O’Neil*], that a defendant who commits numerous crimes may be punished for each separate crime, supports our conclusion that an abbreviated proportionality review must be completed for each of Close’s crime of violence statute sentences.”). Other courts reached the same result without considering the *dicta* in *O’Neil*. See, e.g., *United States v. Schell*, 692 F2d 672, 675 (10th Cir 1982) (concluding that the Eighth Amendment applies to individual, rather than aggregate sentences); *State v. August*, 589 NW2d 740, 744 (Iowa 1999) (same).

¹⁴ In *Miller*, there were two cases before the Court. In one, the 14-year-old defendant was convicted of killing a single victim based on a felony murder theory. 567 US at 465-66. In the other, there was evidence that the 14-year-old defendant intentionally killed the victim. *Id.* at 468. In both cases, state law automatically mandated a life sentence without possibility of parole on conviction for a single homicide.

similarly limited. In that case, the question was whether a juvenile convicted of a single nonhomicide offense could be sentenced to life without parole. *See Graham*, 560 US at 48, 63 (“The instant case concerns only those juvenile offenders sentenced to life without parole solely for a non-homicide offense.”).¹⁵ The Court neither considered nor decided in *Miller* and *Graham* how the categorical limitations that it announced for a single sentence for one conviction would apply to an aggregate sentence for multiple convictions.

It follows that the holdings in *Miller* and *Graham* do not dictate the result when a juvenile is convicted of multiple murders and attempted murders, as petitioner was. Moreover, the reasoning in those cases leads us to conclude that the inquiry for a sentencing court in imposing an aggregate sentence is not as narrow as petitioner perceives. Contrary to petitioner’s argument, *Miller* and *Graham* do not limit a sentencing court to considering only the severity of the sentence and the nature of the offender. Rather, those decisions make clear that a sentencing court can and should consider the nature and number of the juvenile offender’s convictions.

For example, *Graham* explained that determining whether a sentencing practice is categorically disproportionate “requires consideration of the culpability of the offenders at issue *in light of their crimes* and [their personal] characteristics, along with the severity of the punishment in question.” 560 US at 67 (emphasis added). As the Court also stated in *Graham*, “the age of the offender *and the nature of the crime* [in that case, a nonhomicide

¹⁵ The defendant in *Graham* was charged with two offenses: armed burglary with assault or battery, which carried a maximum penalty of life imprisonment without possibility of parole, and attempted armed robbery, which carried a maximum penalty of 15 years’ imprisonment. 560 US at 53-54. Initially, the trial court placed the defendant on probation and withheld adjudication of those charges. *Id.* at 54. When the defendant later violated his probation, the court found him guilty of both offenses and sentenced him to life imprisonment on the first offense and 15 years’ imprisonment on the second. *Id.* at 57. Only the constitutionality of the life sentence for the first offense (armed burglary with assault or battery) was at issue before the Court. *Graham* did not involve an aggregate sentence for multiple crimes, which was equivalent to a life sentence without the possibility of parole.

offense] each bear on the analysis.” *Id.* at 69. As noted above, the one fact that categorically precluded imposition of life without parole on any juvenile offender in *Graham* but permitted the imposition of that punishment on some juvenile offenders in *Miller* was the nature of the offense. As the Court explained in *Miller*, “*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.” 567 US at 474 n 6. That was true, even though, as *Miller* noted, none of what the Court had said about juveniles in *Graham* and *Roper*—their “distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.” *Id.* at 473.

Put simply, “[j]uvenile offenders who commi[t] both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide.” *Graham*, 563 US at 63.¹⁶ It follows that the reasoning in *Graham* and *Miller* permits consideration of the nature and the number of a juvenile’s crimes in addition to the length of the sentence that the juvenile received and the general characteristics of juveniles in determining whether a juvenile’s aggregate sentence is constitutionally disproportionate.

Given the nature and the number of the crimes that petitioner committed, we are hard pressed to say that his aggregate sentence is constitutionally disproportionate even taking his youth into account. Petitioner killed four people over the course of two days. Additionally, he shot and wounded almost two dozen of his classmates with the intent to kill them. He put a gun to another classmate’s head and would have killed him except that the gun ran out of bullets, permitting two students to subdue petitioner before he could shoot anyone else. Finally, even after officers had placed petitioner under arrest, he attempted to kill one of the officers with a knife he had hidden on his person.

¹⁶ *Graham* made that statement in explaining why statistics addressing sentences for a homicide and a nonhomicide, offered in support of the state’s position in that case, were not relevant. Although the context differs somewhat, the statement accurately captures the distinction between the issue in *Graham* and the issue here.

We recognize, as petitioner and the state argue, that other courts have divided over whether and how *Miller* and *Graham* apply to aggregate sentences for multiple crimes. Some courts take the position that the number and nature of a juvenile's crimes are immaterial when an aggregate sentence approximates life without the possibility of parole.¹⁷ Others find the existence of an aggregate sentence a sufficient basis, in and of itself, for distinguishing *Miller* and *Graham*.¹⁸ We strike a middle ground between those two extremes.

We note, as an initial matter, that the nature and number of petitioner's crimes in this case distinguish his aggregate sentence from the aggregate sentences that other courts have found inconsistent with *Miller* and *Graham*. See note 17 *supra*. For instance, this is not a case in which petitioner's aggregate life sentence resulted from a single homicide and a subsidiary related offense, such as committing

¹⁷ *McKinley v. Butler*, 809 F3d 908, 911 (7th Cir 2016) (remanding two 50-year consecutive sentences for homicide and possession of the weapon used to commit the homicide where the trial court failed to consider the petitioner's youth); *Moore v. Biter*, 725 F3d 1184, 1192 (9th Cir 2013) (holding that an aggregate life sentence based solely on nonhomicide offenses runs afoul of *Graham*); *State v. Zuber*, 227 NJ 422, 447, 152 A3d 197 (2017), *cert den*, 138 S Ct 152 (2017) (remanding for trial court to consider principles stated in *Graham* in deciding whether aggregate sentences arising out of two rapes should be concurrent or consecutive); *Casiano v. Comm'r of Correction*, 317 Conn 52, 73, 115 A3d 1031 (2015), *cert den*, 136 S Ct 1364 (2016) (remanding a 50-year aggregate sentence for felony murder and attempted robbery for sentencing in light of *Miller*); *Henry v. State*, 175 So 3d 675, 680 (Fla 2015) (holding that an aggregate 90-year sentence for sexual battery and robbery violated *Graham*); *Brown v. State*, 10 NE3d 1, 8 (Ind 2014) (applying *Miller* to sentence defendant to an 80-year aggregate sentence for being an accomplice to two murders and a burglary); *People v. Caballero*, 55 Cal 4th 262, 268, 282 P3d 291 (2012) (holding a 110-year aggregate sentence for three nonhomicide offenses inconsistent with *Graham*).

¹⁸ *Bunch v. Smith*, 685 F3d 546, 551 (6th Cir 2012) (*Graham* not clearly applicable to 89-year aggregate sentence for eight distinct felonies); *State v. Nathan*, 522 SW3d 881, 886 (Mo 2017) (holding that *Miller* and *Graham* do not preclude an aggregate sentence equivalent to life without parole for a homicide accompanied by nonhomicide offenses); *Lucero v. People*, 394 P3d 1128, 1132-33 (Colo 2017), *cert den*, 138 S Ct 641 (2018) (holding that *Miller* and *Graham* do not apply to aggregate sentences); *State v. Ali*, 895 NW2d 237, 246 (Minn 2017), *cert den*, 138 S Ct 640 (2018) (holding that *Miller* did not apply to aggregate 90-year minimum sentence for three murders); *Vasquez v. Commonwealth*, 291 Va 232, 241-43, 781 SE2d 920 (2016) (holding that *Graham* does not apply to an aggregate life sentence based on multiple convictions for rape and sodomy); *State v. Kasic*, 228 Ariz 228, 233, 265 P3d 410 (Ct App 2011) (holding *Graham* inapplicable to an aggregate life sentence for 32 felonies arising from six arsons and one attempted arson).

murder and possessing the weapon used to commit the murder. See *McKinley v. Butler*, 809 F3d 908, 911 (7th Cir 2016) (considering that circumstance). Nor is it a case in which petitioner’s aggregate life sentence resulted solely from non-homicide offenses. See *Moore v. Biter*, 725 F3d 1184, 1192 (9th Cir 2013) (considering that circumstance). Rather, this is a case in which petitioner’s aggregate sentence resulted from four murders and 26 attempted murders, all of which were intentional and each of which inflicted substantial, separate harms on multiple victims.

In the same way that a juvenile who commits a single homicide is subject to a greater sentence than a juvenile who commits a single nonhomicide offense, a juvenile who intentionally commits four murders and 26 attempted murders is subject to a greater sentence “based on both [greater] moral culpability and consequential harm” than a juvenile who commits a single homicide. See *Miller*, 567 US at 473 (distinguishing a homicide from a nonhomicide); *Solem*, 463 US at 293-94 (explaining that the seriousness of the crimes and the offender’s mental state bear on the constitutionally permissible sentence). Additionally, the sentencing court’s determination that petitioner should serve 40 months for each classmate whom he shot with the intent to kill reflects a legitimate interest in retribution that is proportionate to each attempted murder and results in a correspondingly proportionate aggregate sentence for all petitioner’s crimes. Cf. *Roper*, 543 US at 571 (explaining that imposing the death penalty on a juvenile whose culpability is reduced by reason of age is so disproportionate for a single murder that it does not reflect a legitimate penological interest).¹⁹

¹⁹ Petitioner has not identified any objective indicia of society’s standards that demonstrate a national consensus against imposing an aggregate sentence on juvenile offenders who commit multiple murders and attempted murders. The absence of any argument on that point may reflect a recognition that imposing life sentences without parole on juveniles traditionally has been “widely practiced and accepted.” See Maureen Dowling, *Juvenile Sentencing in Illinois: Addressing the Supreme Court Trend away from Harsh Punishments on Juvenile Offenders*, 35 N Ill U L Rev 611, 619 (2015) (recognizing that objective data while arguing for lower sentences). Alternatively, the absence of any argument on that issue may result from the fact that the variety of offenses that can give rise to an aggregate sentence can make any meaningful comparison among aggregate sentences difficult, with the result that aggregate sentences, even for juveniles, evade categorical rules and call instead for a case-specific inquiry.

It might be possible to uphold petitioner’s sentence against an Eighth Amendment challenge based solely on the number and magnitude of his crimes. However, we need not go that far to decide this case: The sentencing court’s findings in this case persuade us that petitioner comes within the class of juveniles who, as *Miller* recognized, may be sentenced to life without possibility of parole for a homicide. As noted, *Miller* explained that, despite the difficulty “of distinguishing at an early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,’” the Eighth Amendment permits sentencing a juvenile to life without possibility of parole for a single homicide if that crime reflects irreparable corruption rather than the transience of youth. 567 US at 479 (quoting *Roper*, 543 US at 573).

The distinction between juveniles whose crime reflects irreparable corruption rather than the transience of youth finds its source in *Roper*. See *Roper*, 543 US at 573 (drawing that distinction). Although *Roper* announced that distinction without detailing the characteristics that distinguish one class of juvenile offenders from the other, both the discussion that preceded that distinction in *Roper* and also the Court’s decision in *Miller* shed light on the issue.

As noted above, the Court identified “three general differences” in *Roper* between juvenile offenders and adults who commit the same offense. *Id.* at 569. First, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults.” *Id.* Second, juveniles are “more vulnerable or susceptible to negative influences or outside pressures.” *Id.* Third, “the personality traits of juveniles are more transitory, less fixed” than adults. *Id.* at 570. Each of those characteristics results from a juvenile’s age and typically will ameliorate as a juvenile grows older. As the Court put it, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Id.* (quoting *Johnson*, 509 US at 368).

It is precisely because the signature qualities of youth are generally transient that a juvenile's commission of a heinous offense usually does not signal an irretrievably depraved character in the same way that an adult's commission of the same offense does. *Id.* The Court made that point explicitly in *Roper*:

“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of an irretrievably depraved character. From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.”

Id. Put differently, what keeps a juvenile's commission of a heinous offense from reflecting an irretrievably depraved character is the fact that, typically, the characteristics or personality traits that led to the juvenile's commission of the offense are transitory. Conversely, in those rare occasions when those characteristics or traits are fixed, and not transitory, a “heinous crime” can reflect an “irretrievably depraved character” or “irreparable corruption,” even when committed by a juvenile.

That conclusion follows from an article that *Roper* cited in support of the distinction it drew between crimes that reflect the transience of youth and those that reflect irreparable corruption. *See id.* at 573 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am Psychologist*, 1009, 1014-16 (2003)). In that article, the authors explain that, because most adolescents do not develop a coherent sense of self until late adolescence or early adulthood, their adolescence can be marked by experimentation that involves “risky, illegal, or dangerous activities like alcohol use, drug use, unsafe sex, and antisocial behavior.” Steinberg & Scott, 58 *Am Psychologist* at 1014. “For most teens, these behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small portion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into

adulthood.” *Id.*²⁰ The authors conclude that, because most juvenile antisocial behavior does not reflect bad character but instead reflects transient immaturity, juveniles generally should not be subject to the same punishments imposed on adults for the same crimes. *Id.* at 1015.

The Court’s decision in *Miller* adds one more piece to the puzzle. After observing that the number of juveniles eligible for a life sentence without possibility of parole will be small because of the difficulty of distinguishing between juvenile offenses that reflect the transience of youth and those that reflect irreparable corruption, the Court disagreed with a concern expressed by the dissenting opinions that the Court’s holding would preclude “tak[ing] into account the differences among defendants and crimes.” *Id.* at 480 n. 8. Specifically, the Court made clear that, in deciding whether a juvenile’s crime reflects irreparable corruption rather than the transience of youth, sentencing courts can consider that a “‘17-year-old [was] convicted of deliberately murdering an innocent victim,’” that a juvenile was convicted of “‘the most heinous murders’” or “‘the worst type of murders,’” or that a “‘17-1/2-year-old se[t] off a bomb in a crowded mall.’” *Id.* (quoting hypotheticals from the dissenting opinions).

As the foregoing discussion makes clear, the transience of youth—the recognition that most juvenile crimes are attributable to traits that will disappear or significantly diminish as a youthful offender ages—is the primary characteristic that justifies a constitutional distinction between the permissible punishment for a juvenile and an adult whose

²⁰ Steinberg and Scott note that:

“adolescent offenders fall into one of two broad categories: adolescence-limited offenders, whose antisocial behavior begins and ends during adolescence, and a much smaller group of life-course-persistent offenders, whose antisocial behavior begins in childhood and continues through adolescence and into adulthood. According to [a psychological study], the criminal activity of both groups during adolescence is similar, but the underlying causes of their behavior are very different. Life-course-persistent offenders show long-standing patterns of antisocial behavior that appear to be rooted, at least in part, in relatively stable psychological attributes that are present early in development and that are attributable to deficient socialization or neurobiological anomalies. Adolescence-limited offending, in contrast, is the product of forces that are inherent features of adolescence as a developmental period
***”

58 *Am Psychologist* at 1015.

crimes are otherwise identical. As *Miller* explained and *Montgomery* confirmed, if a single juvenile homicide reflects the transience of youth, the possibility of reformation is too great for life without possibility of parole to be constitutionally permissible. *Montgomery*, 136 S Ct at 734. However, when the traits that led to the commission of the homicide are fixed or irreparable, rather than transient, then that characteristic no longer bars imposition of a life sentence without possibility of parole for a single homicide. Additionally, the homicide must reflect a level of corruption sufficient to impose life without possibility of parole on a juvenile. See *Miller*, 567 US at 480 n 8 (recognizing that the “most heinous murders” or “the worst type of murders” can evidence irreparable corruption even when committed by a juvenile). For example, a single homicide based on a felony murder theory may not justify a sentence of life without the possibility of parole. See *id.* at 492 (Breyer, J., concurring) (“The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who ‘kill or intend to kill.’”) (Quoting *Graham*, 560 US at 69)).

With that background in mind, we turn to the trial court’s findings in this case. As noted, the trial court held a six-day sentencing hearing at which it considered all the evidence that petitioner presented regarding his youth, his psychological problems, and positive aspects of its character. Although the decisions in *Roper*, *Miller*, and *Montgomery* were not available when the trial court sentenced petitioner, the findings that the trial court made bring petitioner within the class of juveniles who, as *Miller* recognized, may be sentenced to life without possibility of parole.

The trial court accepted, as petitioner’s medical experts had testified, that petitioner suffered from a schizoaffective disorder that motivated him to commit his crimes, and the court agreed that petitioner’s disorder was not a function of his youth—*i.e.*, his condition could be treated but never cured. The sentencing court agreed that, if petitioner’s disorder were untreated or inadequately treated, petitioner “remained dangerous.” Specifically, the sentencing court agreed with petitioner’s expert that “there is no cure for [petitioner’s] condition, that he should never be released without appropriate medication and—I quote—‘an

awful lot of structure and appropriate support services arranged for him.’”²¹

Those findings are inconsistent with a determination that petitioner’s crimes “reflect the transient immaturity of youth.” *Montgomery*, 136 S Ct at 734 (summarizing why life without possibility of parole is constitutionally impermissible when applied to most juveniles). Rather, as petitioner’s experts testified and the sentencing court found, petitioner’s crimes reflect a deep-seated psychological problem that will not diminish as petitioner matures.

We also conclude, and we think no person reasonably could dispute, that petitioner’s actions are the sort of heinous crimes that, if committed by an adult, would reflect an “irretrievably depraved character,” see *Roper*, 543 US at 570, or “irreparable corruption,” see *Miller*, 567 US at 480. And as *Miller* recognized, the “most heinous murders” or “worst types of murders,” even when committed by a juvenile, can evidence irreparable corruption. 567 US at 480 n 8 (internal quotation marks and citation omitted). In this case, petitioner admitted and the trial court found that he intentionally shot his parents: his father as he sat unsuspecting at the kitchen counter and his mother as she came home from an errand. Petitioner admitted and the trial court found that he intentionally killed two classmates: one as he was walking in the school hallway and the other as he was trying to find cover from petitioner’s bullets in the school cafeteria. And petitioner shot and wounded nearly two dozen innocent students, some only in the ninth grade, intending to kill each and every one of them.²²

²¹ Given the trial court’s express findings that petitioner remains dangerous and should not be released without adequate treatment and supervision, we conclude that the court implicitly found, consistent with the evidence before it, that petitioner’s psychological issues motivated him to commit the murders and attempted murders and that they would continue to do so without medication and extensive supervision. See *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968) (explaining that, as a matter of state law, when a trial court does not make express findings on fact, “we will presume that the facts were decided in a manner consistent with the [trial court’s] ultimate conclusion” as long as there is evidence in the record to support those implicit findings).

²² This case does not require us to decide whether a life sentence without possibility of parole would comply with the Eighth Amendment if petitioner’s psychological condition were less entrenched or if it had manifested itself in less devastating ways. We accordingly express no opinion on that issue.

We recognize that the psychological problems that motivated petitioner's crimes are a two-edged sword. On one hand, the trial court's findings establish that petitioner's crimes stem from fixed psychological problems that will not diminish as petitioner ages. On the other hand, those problems diminish his moral culpability in the same way that any and every defendant whose crimes reflect deep-seated psychological problems can claim diminished moral culpability. However, because petitioner's psychological problems diminish his culpability for reasons that are unrelated to his youth, they are independent of and separate from the concerns that animated the Court's Eighth Amendment holdings in *Roper*, *Miller*, and *Graham*. Put differently, while petitioner's psychological problems are relevant mitigating evidence, which the sentencing court considered, they are not the sort of concerns that led to the categorical sentencing limitations announced in *Roper*, *Miller*, and *Graham*.

The dissenting opinion would reach a different conclusion. As we read the dissent, it turns on two propositions. The dissent rests in large part on the proposition that "petitioner's youth is inextricable from his crimes, and it is difficult to comprehend how petitioner's youth at the time of his crimes, in combination with his mental disorder, did not affect the nature and gravity of his crimes." 363 Or at 34 (Egan, J., dissenting). The dissent also reasons that petitioner's psychological problems reduce his culpability for his crimes in a way that makes life imprisonment without possibility of parole unconstitutional as a matter of federal law. 363 Or at 38 (Egan, J., dissenting).

We appreciate the dissent's concerns. However, we question how we can say, as the dissent does, that petitioner's crimes reflect the transience of youth when the trial court reached precisely the opposite conclusion. As noted, the trial court found that "there is no cure for [petitioner's] condition, that he should never be released without appropriate medication and—I quote—'an awful lot of structure and appropriate support services arranged for him.'"²³ Moreover, given

²³ Petitioner's crimes were not a one-time occurrence. During cross-examination, one of petitioner's experts acknowledged that he was aware of a series of violent incidents that had preceded the shootings in this case: when

the trial court's finding that the psychological issues that make petitioner dangerous are not transient, we question the other premise on which the dissent rests: the extent to which petitioner's mental health issues bears on the Eighth Amendment analysis in *Miller* and *Montgomery*. Unless the Eighth Amendment prohibits imposing a life sentence without the possibility of parole on every criminal defendant (young or old) who commits murder because of psychological issues, we cannot say that it prohibits imposing that sentence on petitioner because he suffers from a psychological problem that will continue throughout his adult years as well as his juvenile ones.²⁴

It is important to remember that the issue before us is limited. The question is not how we would find the facts if we were the sentencing court, nor is the question whether the sentence imposed in this case is the one that we would have imposed if we had sentenced petitioner. Rather, the only question before us is whether the sentence that the trial court did impose falls below federal constitutional standards. Given the trial court's findings and the severity of petitioner's acts, we cannot say that petitioner's sentence is constitutionally disproportionate to his crimes for the reasons that underlie the Court's decisions in *Miller* and *Graham*. Because we do not agree with petitioner's argument that the holding and reasoning in *Miller* render his aggregate sentence unconstitutional under the Eighth

petitioner was six, he broke another child's arm with a piece of rebar after flying into a rage; when petitioner was older, he became upset while looking for a knife and threw a bottle putting a hole in the wall; when he was a freshman in high school, he became angry, got a knife from the kitchen, and threatened his friends, who had locked themselves in a bedroom; and petitioner previously had threatened to kill one of his classmates. Although those incidents did not lead petitioner's expert to reach a different diagnosis, he acknowledged that those incidents had in fact occurred.

²⁴ We note that, when petitioner entered into his plea bargain, he expressly waived any claim that his psychological problems prevented him from appreciating the consequences of his actions or conforming his conduct to the law. He also expressly gave up any claim that he acted with diminished intent as a result of his psychological problems or that his acts were less culpable because they were the product of an extreme emotional disturbance. His mitigation claim at sentencing thus reduced to the proposition that the psychological problems that motivated his actions were ones that did not affect either the intent with which he committed murder and attempted murder or his ability to control his actions.

Amendment, we affirm the Court of Appeals decision and the post-conviction court’s judgment.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

EGAN, J. pro tempore, dissenting.

The majority concludes that the nearly 112-year aggregate sentence imposed on petitioner is permissible because petitioner is “within the class of juveniles who, as *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012)] recognized, may be sentenced to life without the possibility of parole.” *Kinkel v. Persson*, 363 Or 1, 27, ___ P3d ___ (2018). That exception, as quoted by the majority, is as follows:

“Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity. Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects *irreparable corruption*, it 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.”

Montgomery v. Louisiana, ___ US ___, 136 S Ct 718, 734, 193 L Ed 2d 599 (2016) (internal citations and quotation marks omitted; emphasis added). Because the majority’s conclusion is based on an incomplete reading of that exception and the mistaken belief that petitioner’s youth played *no* role in his crimes, I dissent.

In *Miller*, the Supreme Court began with the principle that it had established in *Roper v. Simmons*, 543 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005) and *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825 (2010), that “children are constitutionally different from adults for purposes of sentencing.” *Miller*, 567 US at 471. The Court noted that “developments in psychology and brain science continued to show fundamental differences between juvenile and adult minds” and that “[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and

systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.” *Id.* at 471-72, 472 n 5 (internal quotation marks omitted). The Court added that those characteristics—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, his deficiencies will be reformed.” *Id.* at 472 ((internal quotation marks omitted).

Additionally, in light of those differences, *Miller* recognized that the distinctive attributes of youth diminish the penological justifications for imposing on child-offenders life sentences without the possibility of release. *Id.* The case for retribution in sentencing, which is related to an offender’s blameworthiness, is weakened when the offender is a juvenile. *Id.* The deterrence rationale is weakened because the same characteristics that cause juveniles to be less culpable than adults—immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Id.* The justification for incapacitation is also weakened because ordinary adolescent development reduces the likelihood that a juvenile offender will forever will be a danger to the community. *Id.* Lastly, the principle of rehabilitation cannot justify the sentence of life without the possibility of release because it necessarily rejects that possibility of reform. *Id.*

Those considerations form the basis for the Court’s holding in *Miller* that a sentencing court must, before sentencing a juvenile to life without parole, take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison. *Montgomery*, 136 S Ct at 733-34. *Miller* recognized that, in light of children’s diminished culpability and heightened capacity for change, it would be “the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.” *Montgomery*, 136 US at 733. That bar is extremely high because life without the possibility of parole, according to the Court, is comparable to the death penalty in terms of severity when applied to a juvenile. *See Graham*, 560 US at 69-70.

In this case, the majority concludes that petitioner's nearly 112-year sentence is constitutional because his crimes do not "reflect the transient immaturity of youth." 363 Or at 28 (internal quotation marks omitted). The majority arrives at that conclusion based on the testimony at sentencing of petitioner's mental health expert witnesses and majority's inferences from that evidence. Briefly, that testimony was as follows. Petitioner's medical experts, acknowledging that it is difficult to diagnose adolescents, concluded that he suffered from an incurable mental disorder diagnosed as either paranoid schizophrenia or schizoaffective disorder, which combines schizophrenia and depression. For three years prior to his crimes, petitioner had been hearing voices, one of which commanded him to commit the murders and attempted murders. Petitioner's crimes "were directly the product of a psychotic process that had been building intermittently in him over a three-year period" and would not have occurred without petitioner's mental disorder. Although petitioner's mental disorder could not be cured, the experts testified that petitioner's psychosis was treatable with medication and supervision and that he could be a candidate for release. Without treatment, however, petitioner would "remain dangerous." Finally, an expert testified that he would not want to see petitioner out on the streets without medication and a lot of structure and support services arranged for him. The sentencing court adopted that last view in determining petitioner's sentence.

According to the majority, because petitioner's mental disorder caused his crimes and because his mental disorder is not a transient condition, his crimes reflected not "the transient immaturity of youth" but "reflect[ed] instead a deep-seated psychological problem that will not diminish as petitioner matures" and, thus, his nearly 112-year sentence is constitutional. *Id.* (internal quotation marks omitted). That conclusion disregards two things. First, the acts of petitioner as a child-offender cannot be extricated from the fact that he is a child. And second, to lawfully impose on a child a sentence of life without the possibility of release, *Miller* requires more than simply a finding that the youth's condition is not transient; it requires also that the crimes show that the child is "irreparabl[y] corrupt[]" or "exhibits

such irretrievable depravity that rehabilitation is impossible and life without parole is justified.” *Montgomery*, 136 S Ct at 733-34.

First, I cannot agree that petitioner’s crimes do not reflect the transient immaturity of youth. In my view, petitioner’s youth is inextricable from his crimes, and it is difficult to comprehend how petitioner’s youth at the time of his crimes, in combination with his mental disorder, did not affect the nature and gravity of his crimes. Petitioner’s crimes were the result of a set of circumstances that were products of both his age and mental disorder. As a matter of fact, one medical expert testified that it is difficult to diagnose adolescents because of that phenomenon. In *Roper*, the Court expressed that “[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.” 543 US at 573. That difficulty, according to the Court, “underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.” *Id.* (citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 701-06 (4th ed text rev 2000)). “If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation[.]” *Id.*

Petitioner began hearing voices at roughly age 12, three years before his crimes. A child’s experience with, and results from, the onset of a mental disorder will almost certainly be different from that of an adult who experiences the onset of the same mental disorder. An adult would more likely be able to understand that something had changed and can better communicate the need for help. A 26-year-old, for example, unlike a 12- to 15-year-old child, who experienced the onset of a mental disorder like petitioner’s would have better understood that hearing voices is not simply

a common part of life for either himself or the majority of other people. And even if a child could understand the significance of hearing voices, the defining characteristics of youth itself make the distinction between the voices and the child's conscience difficult. An adult would be less likely to have allowed the voices to continue without treatment for three years.

Petitioner's expert testified that his crimes "were directly the product of a psychotic process that had been *building intermittently* in him over a three-year period." (Emphasis added.) An adult faced with the same slow onset would be less likely than a child to allow the build up to continue until a crisis point that left four people dead and tens more injured or otherwise harmed. Finally, an adult, who has had the benefits of a diagnosis, medication, behavioral treatment, and time to allow for maturity of understanding those things does not have the same danger as an untreated child. For those reasons, I disagree that petitioner's mental disorder was solely, to the exclusion of any role of petitioner's youth, responsible for his crimes.

Second, and relatedly, I disagree with the majority's conclusion that a child may be sentenced to life without the possibility of release based solely on the determination that petitioner's crimes do not "reflect the transient immaturity of youth." As I noted, I believe that the majority's conclusion is based on an incomplete reading of what *Miller* requires. As summarized by the Supreme Court in *Montgomery*:

"*Miller* required that sentencing courts consider a child's diminished culpability and heightened capacity for change before condemning him or her to die in prison. Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption."

136 S Ct at 726 (internal citations and quotation marks omitted).

Petitioner's crimes do not reflect irreparable corruption and do not exhibit such irretrievable depravity that life in prison without the possibility of release is constitutionally

justified. There is no question that petitioner's crimes were horrendous. Any legal conclusion about petitioner or his sentence does not require this, or any, court to diminish or ignore the immense pain, suffering, and loss of life that petitioner inflicted. Petitioner killed four people. He attempted to kill 26 more people. His crimes took place over a period of less than 24 hours. His crimes were the heartbreaking culmination of three years of intermittently building psychosis. His crimes were the product of a 15-year-old boy with a mental disorder. In total, those statements do not demonstrate irreparable corruption. Rather, they demonstrate a brief but horrible psychotic break with horrific consequences.

There is no evidence admitted for the truth of the matter asserted that petitioner's crimes are the result of an irretrievable depravity.¹ There is no evidence that petitioner had engaged in a pattern or series of crimes that would demonstrate that he can never be trusted to be free within the community without causing harm or otherwise committing crimes. The majority assumes that it is implicit in the sentencing court's findings that the number and magnitude of petitioner's crimes reflect a disregard for human life that requires that petitioner serve a 70-month minimum sentence, with 40 months consecutive for each of the 26 persons whom he intended to kill. But that only follows if the petitioner is fully culpable for his crimes. The rarest of children whose crimes reflect irreparable corruption are the cool and calculated souls who appreciate and understand their conditions and who either use the conditions as a means to an end or who revel in the hideousness of their depravity. The rarest of children are not those who struggle with their disorder and fail. Petitioner, as a 12- to 15-year old child, heard voices as a result of his mental disorder for three years prior to his crimes, including one voice that told him to kill. Petitioner's crimes "were directly the product of a psychotic process that had been building intermittently in him over a three-year period" and would not have occurred without petitioner's mental disorder. There is no evidence that petitioner had a disregard for human life before his crimes or

¹ I acknowledge the majority's reference to previous episodes of violence in petitioner's medical history.

that he retained a disregard for human life past the time of his crimes.

Instead, the evidence supports a conclusion that that disregard for human life was a temporary product of petitioner's mental disorder. The conditional statements made by the expert witnesses that petitioner would remain dangerous if he did not accept treatment also mean that petitioner would *not* be dangerous *unless* he did not receive treatment for his mental disorder. Therefore, the danger—the risk produced from a disregard for human life—can also be treated. If there is evidence that the condition causing his dangerousness or corruption can be treated, then that corruption is conditional and cannot be considered irreparable. The fear of the danger of petitioner without treatment does not allow for a determination that he is irreparably corrupt when the expert testimony resoundingly supported the idea that petitioner can be safely released under certain circumstances.

The onerous and disproportionately severe sentencing of child offenders with treatable mental illness that manifest in terrible criminal acts tends to drive the public narrative in the wrong direction. When the highest court in the land validates such a sentence, the harm is much greater than the alternative of treatment and release of schizophrenic youths who commit these crimes. That greater harm comes when courts reinforce notions about mental illness in relation to mass shootings that reflect larger cultural stereotypes and public anxieties about matters such as race, ethnicity, social class, and politics.² We obscure the issue of race, ethnicity, social class, and politics when we allow mass shootings to represent all gun crime and when we stop using “mental illness” as a medical diagnosis and change it into a sign of gun violence.³ The facts surrounding this particular mass shooting are well known and irrefutable.

The facts about mental illness are now common knowledge and irrefutable as well. One in five Americans

² Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 *Am J Public Health* 240 (2015).

³ J. Michael Bostwick, *A Good Idea Shot Down: Taking Guns Away from the Mentally Ill Won't Eliminate Mass Shootings*, 88 *Mayo Clin Proc* 1191 (2013).

experience some detectable measure of mental illness in a given year; one in 25 American adults experience a *serious mental illness* in a given year; and one in five American youths ages 13 to 18 experience a severe mental illness.⁴ These numbers illustrate the fact that children with severe mental illness mature, and become law abiding adults. The largest share of adults with mental illness live without any limitations in their activities of daily living. Only a small fraction of severely mentally ill youths become severely mentally ill adults. The principles that the Court relied on in *Miller* cannot allow a conclusion that it is acceptable to imprison for the entirety of their lives any of these youth offenders whose mental illness will likely result in treatable conditions in adulthood without some manifestation of irreparable corruption. In doing so, we buy in to the narrative that the problem is mental illness.

The Court in *Miller* noted that, given all it said in *Roper* and *Graham*, imposition of the harshest penalty possible for a child, life without the possibility of release, will rarely be constitutional because of the great difficulty of determining that a child's crimes reflect irreparable corruption. *Miller*, 567 US at 479. That holds true in this case. A conclusion that petitioner's crimes reflect irreparable corruption requires a determination that the danger that petitioner poses to the community will not end or change and cannot be forecast to end or change such that the state is justified in incapacitating him and the threat he poses until his death. Petitioner's crimes reflect a danger that can be reduced and changed—it is neither a certainty nor a constant that the danger petitioner posed at sentencing will not end.

Petitioner's crimes were absolutely horrific. Those crimes were committed by a child with a treatable mental disorder. They do not show irreparable corruption. Both his age and his mental disorder reduce his moral culpability. And both his age and the fact that his mental disorder is treatable weigh against both an explicitly retributive

⁴ National Institute of Health, *Transforming the understanding and treatment of mental illnesses* (November 2017), <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> (accessed May 3, 2018).

sentence and a sentence aimed at incapacitating him for the rest of his life.

In sum, because I believe that petitioner's crimes are the horrible acts of a juvenile offender whose crimes reflect an unfortunate yet transient immaturity, and because I believe that he is not the rare juvenile offender whose crimes reflect irreparable corruption, I would hold that petitioner's nearly 112-year sentence of incarceration is unconstitutional.

I respectfully dissent.