IN THE SUPREME COURT OF THE
STATE OF OREGON

LYDELL MARCUS WHITE,
Petitioner on Review,

v.

Jeff PREMO,
Superintendent,
Oregon State Penitentiary,
Respondent on Review.

(CC 11C24315) (CA A154435) (SC S065188)

On review from the Court of Appeals.*

Argued and submitted March 7, 2019, at the University of Oregon School of Law, Eugene, Oregon.

Ryan T. O'Connor, O'Connor Weber LLC, Portland, argued the cause and filed the briefs 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 Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Aliza B. Kaplan, Lewis & Clark Law School, Portland, filed the brief for *amici curiae* Constitutional Law and Criminal Procedure Scholars.

Alexander A. Wheatley, Fisher & Phillips, LLC, Portland filed the brief for *amici curiae* Lewis & Clark Law School's Criminal Justice Reform Clinic, Oregon Criminal Defense Lawyers Association, Oregon Justice Resource Center, Juvenile Law Center, and Phillips Black, Inc.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, and Nelson, Justices, and Kistler and Brewer, Senior Justices pro tempore.**

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* On appeal from Marion County Circuit Court, Thomas M. Hart, Judge. 285 Or App 570, 397 P3d 504 (2017).

** Duncan and Garrett, JJ., did not participate in the consideration or decision of this case.

WALTERS, C. J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

WALTERS, C. J.

In *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012), the United States Supreme Court determined that it is cruel and unusual punishment to sentence a juvenile to life without parole unless a court determines that the juvenile's crime does not reflect the "'transient immaturity'" of youth, but instead, demonstrates that the juvenile is "'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479-80 (quoting *Roper v. Simmons*, 543 US 551, 573, 125 S Ct 1183, 161 L Ed 2d 1 (2005)). In this post-conviction proceeding, petitioner, a juvenile offender, contends that the 800-month sentence he is serving for a single homicide is the functional equivalent of life without parole and was imposed without a hearing that satisfied the procedural and substantive requirements of the Eighth Amendment. For the reasons that follow, we hold that petitioner is not procedurally barred from seeking post-conviction relief and that his sentence is subject to *Miller*'s protections. Because this record does not convince us that the sentencing court determined that petitioner's crime reflects irreparable corruption, we reverse the decisions of the Court of Appeals and the post-conviction court and remand to the post-conviction court for further proceedings.

We begin our discussion with the fact that *Miller* was decided almost 20 years after petitioner and his twin brother, Laycelle, both then 15 years old, murdered an elderly couple. Petitioner was convicted of those murders in 1995, and he appealed to the Court of Appeals. That court affirmed without opinion, and this court denied review. *State v. White (Lydell)*, 139 Or App 136, 911 P2d 1287, *rev den*, 323 Or 691 (1996). In 1997, petitioner filed his first petition for post-conviction relief. The post-conviction court denied relief, and, on appeal, the Court of Appeals affirmed without opinion. This court again denied review. *White v. Thompson*, 163 Or App 416, 991 P2d 63 (1999), *rev den*, 329 Or 607 (2000). Later, petitioner filed a second petition for post-conviction relief, raising a claim under *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004). Then, in 2012, the United States Supreme Court decided *Miller*, and, in 2013, petitioner filed this petition for

post-conviction relief.[1] The superintendent responded with a motion for summary judgment, asserting that the petition was procedurally barred; the post-conviction court agreed and dismissed the petition. The Court of Appeals affirmed, and we allowed review. *White v. Premo*, 285 Or App 570, 397 P3d 504 (2017), *rev allowed*, 363 Or 727 (2018).

Three procedural barriers to post-conviction relief are relevant here: a statute of limitations, a claim preclusion limitation, and a successive petition limitation. ORS 138.510(3),[2] 138.550(2), (3).[3] The petition before us now is barred by all three of those procedural limitations, unless review is permitted by what we refer to as their "escape" clauses. Each of those escape clauses permit a petitioner to bring a claim that would be procedurally barred if the "grounds" on which the petitioner relies were not asserted

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[1] The petition filed in 2013 was an amended petition filed through counsel.

[2] ORS 138.510(3) provides:

"(3) A petition pursuant to [the Post-Conviction Hearing Act (PCHA)] must be filed within two years of the following, unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition:

"(a) If no appeal is taken, the date the judgment or order on the conviction was entered in the register.

"(b) If an appeal is taken, the date the appeal is final in the Oregon appellate courts.

"(c) If a petition for certiorari to the United States Supreme Court is filed, the later of:

"(A) The date of denial of certiorari, if the petition is denied; or

"(B) The date of entry of a final state court judgment following remand from the United States Supreme Court."

[3] ORS 138.550 provides in relevant part:

"(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under [the PCHA] unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. ***

"(3) All grounds for relief claimed by petitioner in a petition pursuant to [the PCHA] must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition."

and could not reasonably have been either asserted or raised in certain described circumstances.

Petitioner argues that because *Miller* had not yet been decided when he filed his direct appeal and his earlier post-conviction claims, he did not assert and reasonably could not have asserted or raised the "grounds" on which he now relies in those earlier proceedings. The superintendent counters that the term "grounds" refers not to a particular legal argument, but to a general type of claim—here, a claim that a sentence imposes cruel and unusual punishment—and that petitioner asserted that type of claim on direct appeal and in his earlier post-conviction proceeding. Alternatively, the superintendent contends that, even if the term "grounds" contemplates more specificity, petitioner previously asserted a claim that was "close" to a *Miller* claim or reasonably could have asserted such a claim, and, therefore, his present claim is procedurally barred. As we will explain, two of our recent cases demonstrate that petitioner has the better argument.

In the first case—*Verduzco v. State of Oregon*, 357 Or 553, 355 P3d 902 (2015)—this court considered whether the procedural bar against successive post-conviction petitions barred the petitioner's claim, and, in doing so, focused not on whether the petitioner had asserted the same general type of claim in both petitions, but, rather, on whether the petitioner had relied on the *same legal rule* to prove both claims of ineffective assistance of counsel. In his successive post-conviction petition, the petitioner relied on his lawyer's failure to give him the advice required by *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010): When the immigration consequences of pleading guilty to certain crimes are "'truly clear,'" defense attorneys must advise their clients that deportation and other adverse immigration consequences will be "'practically inevitable'" as a result of the plea. *Verduzco*, 357 Or at 559 (quoting *Padilla*, 559 US at 364, 369). In his original petition, the petitioner did not cite *Padilla* because the Court had not yet decided that case, but the petitioner had alleged that his lawyer had failed to give him the very advice that the Court later required. *Id.* at 557-58. We concluded that the bar against successive petitions

precluded the petitioner from relitigating a virtually identical claim. *Id.* at 573.

In our most recent post-conviction case, *Chavez v. State of Oregon*, 364 Or 654, 438 P3d 381 (2019), this court followed a path similar to the one it took in *Verduzco*, but reached a different destination. In *Chavez*, the petitioner, like the petitioner in *Verduzco*, filed a petition for post-conviction relief based on *Padilla*. *Id.* at 656. The petitioner's claim was untimely, but he argued that the escape clause applied. *Id.* at 658-59. The petitioner argued that *Padilla* had not been decided until some 12 years after his conviction and that he reasonably could not have raised a *Padilla* claim in the time permitted by the statute. *Id.* We agreed and, in doing so, said that the petitioner reasonably could not have anticipated the "ground for relief" on which he later relied—the legal rule adopted in *Padilla*. *Id.* at 663. Thus, *Chavez* and *Verduzco* both demonstrate that, as used in the escape clauses in the Post-Conviction Hearings Act, the term "grounds" means the legal rule asserted as a basis for a claim, not the general nature of the claim.[4]

We therefore turn to the superintendent's alternative argument that, even though petitioner did not cite and could not have cited the *Miller* rule in his previous proceedings, he previously made claims that were "close" to *Miller* claims or reasonably could have asserted that legal rule. Consequently, the superintendent contends, the escape clauses do not permit his current claim. Again, *Chavez* and *Verduzco* answer the argument advanced.

In *Chavez*, this court discussed the reason that it reached a different result in that case than it had in *Verduzco*.

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[4] The superintendent's argument that our decision in *Datt v. Hill*, 347 Or 672, 678, 227 P3d 714 (2010), compels a contrary result is not persuasive. In *Datt*, this court considered the meaning of the term "grounds" and the phrase "grounds for relief" in *other* statutes included in the PCHA—ORS 138.530, which identifies the available "grounds" for post-conviction relief, and ORS 138.550, which describes the necessary components of a petitioner's claim. *Id.* at 677-79. We said that the legislature apparently used the term "grounds " in ORS 138.530(1) to refer to the types of claims a petitioner may assert, but that the legislature may have used that word or the phrase "grounds for relief" differently in ORS 138.550. *Id.* at 678-79. In *Datt*, we did not consider how the legislature used the word "grounds" in the escape clauses that are at issue here, and *Verduzco* and *Chavez* provide the relevant authority on that point.

364 Or at 661-63. We explained that, in *Verduzco*, the petitioner had "litigated a virtually identical Sixth Amendment claim at roughly the same time that Padilla was pursuing his claim"; *Chavez*, we said, "arises in a different posture." *Id.* at 662-63. In *Chavez*, the petitioner had never asserted a claim that was "virtually identical" to the claim that the Court later decided in *Padilla*, and we were not persuaded that a *Padilla* claim reasonably could have been raised within two years of the date that the petitioner's conviction became final—"five years before the petitioners in *Verduzco* and *Padilla* raised that claim." *Id.* at 663. In reaching that conclusion, we recognized that some litigants had raised *Padilla*-type claims before *Padilla* was decided, but we reasoned that the statutory question is not whether a claim *conceivably* could have been raised but, rather, whether it *reasonably* could have been raised. *Id.* The answer to that question, we explained, depends on where the legal rule that forms the basis for a claim lies in a continuum: "[W]hen the underlying principle is 'novel, unprecedented, or surprising,' and not merely an extension of settled or familiar rules, the more likely it becomes that the ground for relief could not reasonably have been asserted." *Id.*

For the reasons that follow, we conclude that this case arises in the same posture as did *Chavez*. Like the petitioner in *Chavez*, petitioner relies on a rule articulated by the Supreme Court many years after petitioner's conviction, and petitioner did not previously litigate a "virtually identical" claim or do so "at roughly the same time" that the Supreme Court was considering that claim. And, we, like the court in *Chavez*, are not persuaded that petitioner reasonably could have raised a *Miller* claim within two years of his conviction or his later post-conviction proceedings.

To explain why we reach that conclusion, it is necessary to briefly describe the state of the law before *Miller* was decided in 2012. *See Chavez*, 364 Or at 659-61 (describing the state of the law before *Padilla* was decided). In 1988, a plurality of the United States Supreme Court explained in *Thompson v. Oklahoma*, 487 US 815, 108 S Ct 2687, 101 L Ed 2d 702 (1988), that "contemporary standards of decency" counsel against executing a person who was under 16 years of age at the time of his or her offense, and

the Court thus held that the Eighth Amendment prohibited the practice. *Id.* at 823, 838. A year later, in *Stanford v. Kentucky*, 492 US 361, 109 S Ct 2969, 106 L Ed 2d 306 (1989), the Court also "referred to contemporary standards of decency in this country," but it reached a contrary conclusion with respect to the execution of juvenile offenders over 15 but under 18. *Roper*, 543 US at 562. In *Stanford*, the Court rejected arguments that the death penalty failed to serve the legitimate goals of penology because there was evidence that juveniles possess less developed cognitive skills than adults, are less likely to fear death, and are less mature and responsible, and therefore less morally blameworthy. 492 US at 377-78. *Stanford* remained the law until 12 years after petitioner's conviction and eight years after petitioner's first post-conviction petition, when in 2005, the Court decided *Roper* and held that the Eighth Amendment categorically prohibits states from putting juveniles to death. 543 US at 578-79.

In *Roper*, the Court found persuasive certain scientific studies of the characteristics of juvenile offenders and recognized that juveniles typically possess three characteristics that make them different than adults and, consequently, less blameworthy: juveniles often are more impetuous and reckless; they often are more vulnerable to negative influences and peer pressure; and their traits are more transitory and less fixed. *Id.* at 569-70. Accordingly, the Court reasoned, the penological justifications for the imposition of the death penalty have less force than they do when applied to adults, and, the Court concluded, a state cannot extinguish a juvenile's life and "potential to attain a mature understanding of his own humanity." *Id.* at 574.

The Court again considered the penological justifications for punishing juveniles in *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825 (2010). The issue in *Graham* was whether juvenile offenders could be sentenced to life in prison without parole for nonhomicide crimes. *Id.* at 52. Retribution, the Court said, "is a legitimate reason to punish," but must be directly related to the personal culpability of the offender and does not justify imposing the most severe penalty short of death on a juvenile nonhomicide

offender who is less culpable than an adult offender, for the reasons set out in *Roper*. *Id.* at 71-72. Moreover, the Court explained, the legitimate goal of deterrence is not a sufficient justification for imposing such a sentence on juveniles, because that punishment is rarely imposed and juveniles are less likely than adults to consider consequences before they act. *Id.* at 72. Incapacitation for life "improperly denies the juvenile offender a chance to demonstrate growth" and "[t]he penalty forswears altogether the rehabilitative ideal." *Id.* at 73-74. Accordingly, the Court adopted a categorical rule giving all juvenile offenders "a chance to demonstrate maturity and reform," prohibiting the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. *Id.* at 79.

In *Miller*, the court considered whether juvenile offenders could be sentenced to life in prison without the possibility of parole for the crime of homicide. The court knit together two strands of precedent. 567 US at 470. From *Roper* and *Graham*, it took the principle that the Constitution categorically bans mismatches between the culpability of a class of offenders—juveniles—and the severity of a penalty. *Id.* From its death penalty cases, the Court took the principle that the sentencing authority must consider the individual characteristics of the defendant and the details of the offense before imposing that penalty. *Id.* Likening life without parole for juveniles to the death penalty, the Court then held 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.* What is required, the Court explained, is individualized decision-making and a determination whether the juvenile offender who is being sentenced is typical of those juvenile offenders whose crime "'reflects unfortunate yet transient immaturity,'" or whether the offender, instead, is "'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479-80 (quoting *Roper*, 543 US at 573). Although the Court did not foreclose a sentencer's ability to make that judgment in homicide cases, it required the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

Miller did not impose only a procedural rule, however. As the Court later explained in *Montgomery v. Louisiana*, __ US __, 136 S Ct 718, 193 L Ed 2d 599 (2016), *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* at __, 136 S Ct at 734 (quoting *Miller*, 567 US at 472). Thus, the Court amplified, "[e]ven 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.'" *Id.* at __, 136 S Ct at 734 (quoting *Miller*, 567 US at 479). *Miller* created a substantive rule that sentencing a child who has committed homicide to life without parole is excessive for all but the "rare" offender whose crime reflects irreparable corruption. *Id.* at __, 136 S Ct at 734. Thus, *Miller* made a novel, unprecedented change in the law. "Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence." *Montgomery*, __ US at __, 136 S Ct at 734.

Understanding, then, the genesis of *Miller*, we return to the question of whether petitioner's claim is procedurally barred, either because he previously raised a *Miller* claim or because he reasonably could have anticipated and raised a *Miller* claim. On the first point, the superintendent contends that, in his direct appeal, petitioner raised a claim that was so "close" to a *Miller* claim that it constitutes a procedural bar to this proceeding. The superintendent is correct that, in his direct appeal, petitioner noted his age at the time of his offense as a reason why the court should find his sentence unconstitutional. However, the whole of petitioner's argument was as follows:

> "There can be no doubt that the crimes in this case were violent and offensive to society. However, defendant was only 15 at the time the crimes were committed and 17 at the time of sentencing. The philosophy of the juvenile criminal code should be one of rehabilitation and not vindictive justice. The sentence of 800 months imposed upon defendant

> was excessive, and for the reasons given, constituted cruel and unusual punishment."[5]

In his subsequent post-conviction proceeding, petitioner again raised the Eighth Amendment as a basis for relief, but he did not rely on *Miller* or the rule set out in *Miller*. In *Chavez* terms, we conclude that petitioner did not litigate "a virtually identical *** claim at roughly the same time that [Miller] was pursuing his claim." 364 Or at 662.

As to the superintendent's second point, we are not convinced that petitioner reasonably could have asserted a *Miller* claim at the time of his direct appeal or his earlier post-conviction proceeding. At those times, the Court had not yet held that juveniles typically possess traits that make them less blameworthy than adults, and certainly had not held that mandatory life-without-parole sentences for juveniles who commit homicide violate the Eighth Amendment. The state may be correct that, in the years preceding *Miller*, certain offenders were arguing that sentencing authorities must take their youth into consideration, but, under *Chavez*, the statutory question is not whether a claim *conceivably* could have been raised, but, rather, whether it *reasonably* could have been raised. *Chavez*, 364 Or at 663. The rule that the Court articulated in *Miller*, in 2012, was sufficiently "novel, unprecedented, [and] surprising" that we cannot conclude that petitioner reasonably could have anticipated it within two years of his conviction in 1995 or at the time of his later post-conviction proceeding. *See id.* (describing *Padilla*). We hold that petitioner's claim for post-conviction relief is not procedurally barred, and we turn to its merits.

As noted, petitioner and his brother murdered an elderly couple. Petitioner was convicted of three crimes—aggravated murder of one of the victims, murder of the other victim, and first-degree robbery. On the aggravated murder charge, petitioner was sentenced to life in prison *with* the possibility of parole; on the murder charge, petitioner was sentenced to a determinate 800-month minimum sentence; and on the first-degree robbery charge, petitioner was sentenced to 36 months, to run consecutively to his sentence

[5] Appellant's Brief at 12-13, *State v. White (Lydell)*, 139 Or App 136, 911 P2d 1287 (1996) (A87437).

for murder. The 800-month sentence—almost 67 years—for the murder of one victim is the only sentence that petitioner challenges as violative of the Eighth Amendment. Petitioner will be 81 years old when he is released on that charge. Petitioner argues that, although that sentence was not explicitly a sentence to life without parole, it is a sentence that exceeds his life expectancy and is the functional equivalent of such a sentence and subject to the protections of *Miller*.

The superintendent acknowledges that petitioner's sentence for murder is lengthy, but he argues that it does not violate the Constitution for three reasons. First, he argues, because petitioner was sentenced to a term of years and not to life, *Miller* does not apply. Second, the superintendent argues, even if some determinate sentences may be subject to *Miller*, petitioner's sentence is not so long as to make it certain that he will die in prison; in fact, the superintendent notes, petitioner is eligible for good-time credit and possibly other forms of relief that could reduce his nearly 67-year sentence to 54 years, permitting his release when he is 68 years old. *See* OAR 291-097-0215 (setting out rules for credits that reduce time of incarceration). Such a sentence, the superintendent contends, is not a sentence to which *Miller* applies. Finally, the superintendent argues, the sentencing court did not impose a mandatory sentence; it took petitioner's age into consideration and imposed a sentence that reflects the brutality of petitioner's crime—a crime that demonstrates that petitioner is irreparably corrupt.

The superintendent's first point—that this court should not extend *Miller* to any term-of-years sentence, no matter how long, finds little support. In *Miller*, the Court stated that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" but then quoted from its decision in *Graham*: "'A State is not required to guarantee eventual freedom,'" but it must provide "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" 567 US at 479 (quoting *Graham*, 560 US at 75). Most courts that have considered the matter have understood the inquiry to focus, not on the label attached

to a sentence, but on whether its imposition would violate the principles that the Court sought to effectuate.[6] *See e.g.*, *State v. Zuber*, 227 NJ 422, 446-47, 152 A3d 197, 211-12, *cert den*, __ US __, 138 S Ct 152, 199 L Ed 2d 38 (2017) (*Miller*'s principles "appl[y] with equal strength to a sentence that is the practical equivalent of life without parole"); *State v. Ramos*, 187 Wash 2d 420, 438-39, 387 P3d 650, 660, *cert den*, __ US __, 138 S Ct 467, 199 L Ed 2d 355 (2017) (rejecting "notion that *Miller* applies only to literal, not de facto, life-without-parole sentences" because holding otherwise would contravene *Miller*'s core holding); *People v. Caballero*, 55 Cal 4th 262, 267-68, 282 P3d 291, 294-95 (2012) (applying *Graham* to 110-year-to-life sentence for nonhomicide offenses); *Casiano v. Comm'r of Corr.*, 317 Conn 52, 72-74, 115 A3d 1031, 1043-45 (2015), *cert den*, ___ US ___, 136 S Ct 1364, 194 L Ed 2d 376 (2016) ("[M]ost courts that have considered the issue agree that a lengthy term of years for a juvenile offender will become a de facto life sentence at some point[.]"); *Henry v. State*, 175 So 3d 675, 680 (Fla 2015) (applying *Graham* to nonhomicide offender's aggregate sentence); *Brown v. State*, 10 NE3d 1, 8 (Ind 2014) (applying *Miller* to juvenile offender's aggregate sentence of 150 years for murder and robbery); *State v. Null*, 836 NW2d 41, 71 (Iowa 2013) (determining that *Miller* applies to a "lengthy term-of-years sentence"); *Bear Cloud v. State*, 334 P3d 132, 144 (Wyo 2014) (holding that *Miller* applies to aggregate sentences that "result in the functional equivalent of life without parole"); *see also Moore v. Biter*, 725 F3d 1184, 1191-92 (9th Cir 2013) (determining that *Graham*'s focus "was not on the label of a 'life sentence'—but rather on the difference between life in prison with, or without, possibility of parole"). As the Court explained in *Montgomery*, *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" __ US at __, 136 S Ct at 734 (quoting *Miller*, 567 US at 472). The superintendent does not cite any additional penological justifications for a sentence that is the functional equivalent of life, and we see no reason to treat such a sentence differently.

[6] The superintendent does not cite any contrary authority.

Whether petitioner's sentence is, in fact, functionally equivalent to a life sentence is the next question we must answer. Here, as noted, petitioner's 800-month sentence would result in his release at age 81, and he argues that that is a de facto life sentence because his life expectancy is only 75-76 years. In making that argument, petitioner relies on the life expectancy of black males—a statistic from the Center for Disease Control—and the superintendent does not take issue with that measure. Instead, the superintendent cites regulations that demonstrate that petitioner may be released after serving 54 years of his sentence, at age 68, potentially giving him 7-8 years of life outside of prison.

Courts that have grappled with the issue of how lengthy a sentence must be to trigger the protections of *Miller* often reference *Graham*'s instruction that juvenile offenders must retain a meaningful opportunity for release. *See Null*, 836 NW2d at 71-72 (explaining that it does "not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*"); *Caisano*, 317 Conn at 74-75, 115 A3d at 1044-45 (noting that most courts that have considered the issue have determined that a sentence that exceeds life expectancy or that would make the individual eligible for release near the end of her life expectancy is a de facto life sentence). In this case, the superintendent does not raise an objection to use of life expectancy tables to analyze that question, nor does he contest the particular table on which petitioner relies. However, other courts have pointed to "a tangle of legal and empirical difficulties" that arise in such an analysis. *People v. Contreras*, 4 Cal 5th 349, 361, 411 P3d 445, 449 (2018); *see United States v. Grant*, 887 F3d 131, 149, *reh'g granted*, 905 F3d 285 (3rd Cir 2018) (discussing difficulties). Whether gender, race, or a juvenile's particular medical condition should be taken into consideration and, if so, how and when, are significant questions. So, too, is the question of how the opportunity to earn early release may factor into such a decision.[7]

[7] As petitioner notes, the Department of Corrections may or may not grant petitioner credits to reduce his sentence, and it may revoke the credits it awards. *See* OAR 291-097-0215(4) (permitting credit for compliance with case plan and appropriate institution conduct); OAR 291-097-0250 (bases for retracting credits);

We decline, however, to take up those questions here. First, the parties' briefing on those issues is scanty. The superintendent does no more than to state, summarily, and without case citation, that, with good-time credit, petitioner's sentence is not a sentence that offers "no hope or incentive for reformation." Second, even allowing for good-time credit, petitioner will serve at least 54 years and will be released, at the earliest, when he is 68 years old. We know of no state high court that has held that a sentence in excess of 50 years for a single homicide provides a juvenile with a meaningful opportunity for release. *See Contreras*, 4 Cal 5th at 369, 411 P3d at 455 (citing cases and so noting).[8] Given those particular circumstances, we conclude that petitioner's sentence is sufficiently lengthy that a *Miller* analysis is required. We do not mean to foreclose a future argument that a sentence in excess of 50 years would leave a particular juvenile offender with a meaningful opportunity for release. But in this case, that argument has not been developed. Accordingly, we turn to the superintendent's better-developed argument that petitioner's 800-month sentence was not mandatory, that the sentencing court in fact provided petitioner with the individualized sentencing process that *Miller* requires,[9] and that the sentence it imposed was not excessive under *Miller*.

The superintendent is factually correct in his observation that the 800-month sentence that the sentencing

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see also Pepper v. United States, 562 US 476, 501 n 14, 131 S Ct 1229, 179 L Ed 2d 196 (2011) (noting that, under federal law, an award of good-time credit "does not affect the length of a court-imposed sentence" and is rather an "administrative reward" to provide incentive for compliance with institutional regulations); *Bear Cloud*, 334 P3d at 136 n 3 (declining to rely on good-time credit in analysis for whether sentence is de facto life sentence without parole).

[8] The superintendent does not cite such a case.

[9] The transcript of the sentencing hearing was not before the post-conviction court. Petitioner asks this court to take judicial notice of that transcript for purposes of determining whether petitioner's sentence complies with *Miller*. The superintendent also asks this court to take such notice, but he further requests that this court take notice of evidence and other records that were before the sentencing court when it sentenced petitioner. We will take judicial notice of the materials requested, *see Eklof v. Steward*, 360 Or 717, 722 n 4, 385 P3d 1074 (2016) (taking judicial notice of case registers), though we note that we will not make a habit of taking judicial notice of the kinds of additional materials submitted by the superintendent. There are several determinations that would usually take place at the trial level before materials like that could be admitted.

court imposed was not a mandatory sentence and that the court took petitioner's individual characteristics into consideration in imposing it. But, as noted, *Miller* did more than require that a trial court engage in individualized sentencing; it prohibited a trial court from irrevocably sentencing a juvenile to life in prison without determining that the juvenile is one of the "rare" offenders "whose crimes reflect irreparable corruption." *Montgomery*, __ US at __, 136 S Ct at 734.[10]

As to that substantive limitation, the superintendent contends that, although the sentencing court did not use that precise phrasing, its rationale in sentencing petitioner, as well as its findings, are consistent with a determination that petitioner's criminal conduct resulted not from the transience of youth, but from his irreparable corruption. The superintendent argues that, as in *Kinkel v. Persson*, 363 Or 1, 417 P3d 401 (2018), the sentencing court in this case took petitioner's age and mental condition into consideration and nevertheless imposed a lengthy sentence. The court found that petitioner's crime was premeditated and particularly brutal, and society, the court said, could not "afford to take a chance" on petitioner "ever again."

Before we discuss our decision in *Kinkel*, we think it important to note two aspects of the Supreme Court's ruling in *Miller* (as discussed in *Montgomery*) that bear on our analysis. First, the fact that the trial court considered a juvenile's age in sentencing the juvenile does not mean that the sentence comports with *Miller*'s requirements. *Montgomery*, __ US at __, 136 S Ct at 734 ("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.'" (Quoting *Miller*, 567 US at 479-80.)). Second,

[10] We are aware of only one court that has decided, after *Montgomery*, that *Miller* applies only to mandatory sentences—*Jones v. Commonwealth*, 293 Va 29, 795 SE2d 705, *cert den*, __ US __, 138 S Ct 81, 199 L Ed 2d 25 (2017). The court's statement in *Jones* may not have been necessary to its decision, *see id.* at 45, 795 SE2d at 714-15 (determining that principles of waiver were dispositive of the issue before the court), and the Fourth Circuit reached a contrary conclusion in a case that the United States Supreme Court is set to review. *Malvo v. Mathena*, 893 F3d 265, 274 (2018), *cert granted*, __ US __, 139 S Ct 1317 (2019).

the Court has instructed that only the "rare" juvenile who commits a homicide may be sentenced to life without parole. *Id.* As a general rule, when appellate courts find *Miller* applicable, they send challenges to the sentences imposed back to the sentencing court for reconsideration in light *Miller*. *See id.* at __, 136 S Ct at 736-37 (remanding for petitioner to have opportunity to show his crime did not reflect irreparable corruption); *Null*, 836 NW2d at 76 (remanding to trial court to apply principles of *Miller*); *People v. Araujo*, 2013 WL 840995, at *5 (Cal Ct App Mar 7, 2013) (same); *State v. Simmons*, 99 So 3d 28 (La 2012) (per curiam) (same); *Bear Cloud*, 334 P3d at 147 (same); *see also Adams v. Alabama*, __ US __, 136 S Ct 1796, 1796-97, 195 L Ed 2d 251 (2016) (vacating the petitioner's sentence and remanding to state appellate court for further consideration in light of *Montgomery*).

As we will explain, *Kinkel* is an exception to that rule. As a preliminary matter, it is important to remember that, in *Kinkel*, there was a significant question about whether *Miller* applied at all to an aggregate sentence such as the sentence imposed in that case—approximately 112 years for four murders and 26 attempted murders. In affirming that sentence, this court determined 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." 363 Or at 21. We indicated that a juvenile who intentionally commits four murders and 26 attempted murders may be subject to a greater sentence than a juvenile who commits a single homicide and that 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 [the] petitioner's crimes." *Id.* at 23. We observed that it might be possible to uphold the petitioner's sentence based *solely* on the number and magnitude of his crimes; but, given the strength of the other evidence in the record, we demurred. *Id.* at 24. Instead, we upheld the petitioner's sentence

because the record demonstrated that the petitioner is one of "'the rare juvenile offender[s] whose crime reflects irreparable corruption,'" rather than "the transience of youth." *Id.* (quoting *Miller*, 567 US at 479).

In reaching that conclusion, we relied on the fact that the sentencing court had held a six-day hearing at which it had considered evidence that the petitioner provided regarding his youth, his psychological profile, and his character. *Id.* at 27. We also relied on that court's specific findings that petitioner suffered from a mental disorder, confirmed by multiple mental health experts, that motivated him to commit his crimes and that his crimes reflected "a deep-seated psychological problem that will not diminish as [the] petitioner matures." *Id.* at 28. Those crimes, we concluded, were not only heinous, but no reasonable person could dispute that they reflected, not the transient immaturity of youth, but an "'irretrievably depraved character.'" *Id.* (quoting *Roper*, 543 US at 570). The petitioner killed his father while he sat at the kitchen counter; killed his mother once she returned home from running an errand; and, the next day, went to his school and began shooting. He killed two classmates and intended to kill over two dozen more. *Id.*

This case is different. Petitioner received a de facto life sentence for one murder as opposed to an aggregate life sentence for many more, and we cannot conclude that the trial court's decision reflects a determination that petitioner is one of the rare juvenile offenders whose crimes demonstrate irreparable corruption.

To be sure, the trial court found that the crimes that petitioner committed were heinous. Petitioner planned for over a week to steal a car and obtained a weapon and wore gloves to do so. Petitioner was aware that he might murder someone in the process and sought out victims who would be unable to fight back—a couple in their 80s with significant health problems. When petitioner and his brother broke into their home, they brutally beat both victims, striking them with their fists and weapons. The trial court described that brutality in detail:

> "You and your brother beat these people for a long, long time until they were dead. Human beings are tough. *** It

> is very hard to kill a person with your fists and even with a club. It's brutal, it is ugly, it is noisy and there is a lot of screaming, it is messy, you yourself got covered with their gore and it goes on for a long, long time and you can stop at any point during the process, but you weren't overcome by the brutality or the gore or the horror of what you were engaged in.
>
> "*** [M]ost of us cannot even imagine the scene as messy and as gruesome as you participated in and yet you didn't stop, you kept on and on and after you found the car keys didn't fit, you went back *** and you continued to brutalize one of those individuals who wasn't yet dead."

It does not appear, however, that the sentencing court in this case "[took] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 US at 480. The sentencing court recognized that petitioner lacked internal controls, but it expressed an inability to determine the cause of that inability. The court said,

> "I don't think you have the internal control to control your behavior. I don't know fully the reasons for that, perhaps some of it is genetic, perhaps some of it is the way your father treated your family. I'm sure some is related to your gang affiliation and your close involvement with that subculture, but ultimately the responsibility for our conduct, each of us, is ourselves. No matter the past, no matter the reasons, no matter the failures of the system to intervene earlier, to give more treatment at an earlier stage, no matter about anything else, you did what you did. And the simpl[e] matter is we can't afford to take a chance on you ever again."

The court did not make a finding, as the sentencing court did in *Kinkel*, that petitioner's crime was motivated by an incurable psychological condition, but, instead, expressed its hope that petitioner would be rehabilitated. That rehabilitation, the court said, should occur "inside the walls [of prison] rather than outside the walls." This record does not convince us that the sentencing court reached the conclusion that petitioner is one of the rare juvenile offenders who is irreparably depraved or that no reasonable trial court could reach any other conclusion. Accordingly, we reverse the judgments of the lower courts barring petitioner's claim

for post-conviction relief and remand to the post-conviction court for further proceedings.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.