

**IN THE  
MISSOURI SUPREME COURT**

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**STATE OF MISSOURI,** )  
 )  
 **Respondent,** )  
 )  
 **vs.** ) **No. SC95473**  
 )  
 **LEDALE NATHAN,** )  
 )  
 **Appellant.** )

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS CITY, MISSOURI  
TWENTY-SECOND JUDICIAL CIRCUIT  
THE HONORABLE ROBERT DIERKER, JUDGE**

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**APPELLANT'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

Ledale Nathan was convicted of twenty-six counts all arising from a single incident. There were thirteen (odd numbered) substantive offense counts and a corresponding armed criminal action, §571.015 (even numbered) count associated with each substantive offense for a total of thirteen counts of armed criminal action.

Ledale was convicted of the following: (1) one count of second degree murder, §565.021; (2) two counts of first degree assault, §565.050; (3) four counts first degree robbery, §569.020; (4) one count of first degree burglary, §569.160; and (5) five counts of kidnapping §565.110. The trial court ordered all the sentences imposed for each of the thirteen substantive offenses served consecutively to one another for a total of three hundred years. On each of the thirteen armed criminal action counts a life sentence was imposed and each armed criminal action life sentence was ordered served concurrently to its corresponding substantive offense.

These convictions and associated sentences occurred following both a jury trial and a jury retrial (retrial ordered by this Court in *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013) in the Circuit Court of the City of St. Louis before the Honorable Robert Dierker, Division 18.

After the Missouri Court of Appeals, Eastern District, issued its opinion in ED 101806, this Court granted Ledale's application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 10, Mo. Const.

## **STATEMENT OF FACTS**

### **Procedural History**

Ledale Nathan was charged with twenty-six counts arising out of events occurring at 902 Hickory Street in the City of St. Louis on or about October 5, 2009(L.F.29-36).<sup>1</sup> The charges all alleged that Ledale acted with Mario Coleman(L.F.29-36). At the time of the acts in question, Ledale was sixteen years old(L.F.29-36). *See State v. Nathan*, 404 S.W.3d 253, 256 (Mo. banc 2013). There were thirteen charges that charged specific offenses committed against the following individuals: (1) Gina Stallis; (2) Isabella Lovadina; (3) Nicholas Koenig; (4) Rosemary Whitrock; and (5) Ida Rask(L.F.29-36). For each of those thirteen counts, (odd numbered) there was a corresponding armed criminal action, §571.015 count, (even numbered) that alleged the particular offense was committed by, with and through, the knowing use, assistance and aid of a deadly weapon(L.F.29-36).

The specific acts alleged were the following: (1) Count I - first degree murder, §565.020 of Gina Stallis; (2) Count III - first degree assault, §565.050 of Isabella

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<sup>1</sup> The record on appeal is referenced as follows: (1) Transcript from the Original Trial (Orig.Trial.Tr.); (2) Legal File from the Original Trial (Orig.Trial.L.F.); (3) Transcript from the Retrial (Tr.); and (4) Legal File from the Retrial (L.F.). On May 2, 2016, this Court granted undersigned counsel's request to judicially notice all the contents of this Court's file in Ledale's prior appeal to this Court in *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013).

Lovadina; (3) Count V - first degree assault, §565.050 of Nicholas Koenig; (4) Count VII - first degree robbery, §569.020 of Nicholas Koenig; (5) Count IX - first degree robbery, §569.020 of Rosemary Whitrock; (6) Count XI - first degree robbery, §569.020 of Gina Stallis; (7) Count XIII - first degree robbery, §569.020 of Ida Rask; (8) Count XV - first degree burglary, §569.160 of 902 Hickory Street and owned by Ida Rask; (9) Count XVII - kidnapping, §565.110 for unlawfully confining Isabella Lovadina for a substantial period of time for the purpose of terrorizing her; (10) Count XIX - kidnapping, §565.110 for unlawfully confining Nicolas Koenig for a substantial period of time for the purpose of terrorizing him; (11) Count XXI - kidnapping, §565.110 for unlawfully confining Gina Stallis for a substantial period of time for the purpose of terrorizing her; (12) Count XXIII - kidnapping, §565.110 for unlawfully confining Rosemary Whitrock for a substantial period of time for the purpose of terrorizing her; (13) Count XXV - kidnapping, §565.110 for unlawfully confining Ida Rask for a substantial period of time for the purpose of terrorizing her(L.F.29-36). All acts were alleged to have occurred on or about October 5, 2009(L.F.29-36).

Ledale was convicted of all twenty six counts. *Nathan*, 404 S.W.3d at 256. After the jury's verdicts, the trial court dismissed all four of the Whitrock counts (Counts IX, X, XXIII, and XXIV) because she was not named in Ledale's juvenile petition. *Id.* at 258-59. This Court reversed the decision of the trial court on the dismissal of the Whitrock counts. *Id.* at 258-60. This Court directed that on remand Ledale be sentenced on those Whitrock counts. *Id.* at 258-60.

On the first degree murder count, the trial court sentenced Ledale to then mandatory life without parole. *Nathan*, 404 S.W.3d at 256-57. The trial court also sentenced Ledale to five parolable life sentences and five fifteen year sentences for the non-homicide offenses all of which were to be served consecutively to one another and consecutively to the life without parole sentence imposed for first degree murder. *Id.* at 256-57. Additionally, the trial court sentenced Ledale to eleven parolable life sentences for armed criminal action to be served concurrently with the sentences for the other offenses and concurrently to each other. *Id.* at 256-57.

This Court reversed Ledale's life without parole first degree murder sentence as required under the decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012). *See Nathan*, 404 S.W.3d at 269-70. This Court directed that if the resentencing jury was persuaded life without parole was appropriate, then life without parole could then be re-imposed. *Nathan*, 404 S.W.3d at 270-71. If the state was not successful in persuading the jury that life without parole was an appropriate punishment, then the trial court was directed it must set aside the conviction for first degree murder and enter a finding that Ledale was guilty of second degree murder. *Id.* at 270-71. Assuming the circumstance where a finding of second degree murder was entered, then Ledale was to be sentenced within the statutorily authorized range of punishment for second degree murder. *Id.* at 270-71.

### **Original Trial Sentencing Proceedings**

At the original trial, on April 11, 2011, the jury found Ledale guilty of first degree murder(Orig.Trial.Tr.971;Orig.Trial.L.F.8).<sup>2</sup> After the jury returned its verdicts, the court advised the jury that there would be a “second phase,” but it had to meet with the attorneys for a few minutes before those proceedings commenced(Orig.Trial.Tr.976-77).

When the court reconvened on the record, it indicated to Ledale that his counsel had informed the court that Ledale wished to waive jury sentencing and Ledale acknowledged that was his wish(Orig.Trial.Tr.977-78). The court advised Ledale that he had the right to have the jury assess punishment on all but the Count I, first degree murder conviction(Orig.Trial.Tr.977-78). The court informed Ledale that the jury had “a range of discretion” as to the remaining counts(Orig.Trial.Tr.977-78). Ledale indicated that he did wish to waive sentencing(Orig.Trial.Tr.977-78). The court then informed the jury that “in light of your verdict” Ledale had chosen to waive jury sentencing(Orig.Trial.Tr.979).

On May 27, 2011, the court conducted sentencing(Orig.Trial.Tr.980). At sentencing, respondent presented written and in-person victim impact statements(Orig.Trial.Tr.982-83). A written statement was submitted by Chris Whitrock, the brother of Gina Stallis and son of Rose Whitrock(Orig.Trial.Tr.983). The court heard in-person victim impact statements from Nicholas Koenig, Isabella

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<sup>2</sup> Judge Dierker was the judge at both the original trial and the remand/retrial this Court ordered.

Lovadina, Ida Rask, and Rose Whitrock(Orig.Trial.Tr.983-90). Those statements highlighted the multi-faceted sense of loss they have experienced because of the events at issue here(Orig.Trial.Tr.983-90). The statements included Ledale and Coleman described as “very bad people,” a request for the court to not be “lenient,” and a wish for Ledale to “suffer the way we have”(Orig.Trial.Tr.988-90).

The prosecutor in arguing for consecutive sentences told the court that in reading the alternative sentencing report that while Ledale “had a tough upbringing” as to drug use “those were all choices that he made”(Orig.Trial.Tr.991-94). The prosecutor stated that the alternative sentencing report reflected that an acquaintance referred to Ledale as “intelligent,” Ledale’s aunt called him “bright and intelligent,” and Ledale’s school principal described Ledale as “a bright kid academically”(Orig.Trial.Tr.991). The prosecutor continued that this was an “intelligent kid” who did “some horrific things”(Orig.Trial.Tr.991).

Defense counsel did point out that despite having been characterized as intelligent that Ledale’s I.Q. had been measured as 78(Orig.Trial.Tr.995). Counsel also noted that his family had physically and sexually abused him, while abandoning him(Orig.Trial.Tr.995). Counsel also observed that they were aware the court was limited as to sentencing because of the jury’s first degree murder verdict(Orig.Trial.Tr.995).

The court responded to counsel stating the following:

THE COURT: I think I've addressed those views in the memorandum that will be filed. **I don't really have anything, Mr. Nathan, that I can add to the statements of the victims.**

**Many years ago, I sentenced an individual to death on two counts and the prosecution asked that I run those consecutively, even though that seemed rather silly, but the purpose then and now was to send a message to future Judges and Governors as to what this Court believes is the appropriate future for you, Mr. Nathan. This Court believes that that future should be that you be permanently incapacitated from repeating this kind of behavior.**

Does either the defendant or his counsel know of any legal cause or reason why sentence and judgment of the Court should not now be pronounced?

MS. FOX: No legal cause, other than that's already contained in the motions presented to the Court.

(Orig.Trial.Tr.995-96)(emphasis added).

On the same day of sentencing, the court entered a "MEMORANDUM AND ORDER"(Orig.Trial.L.F.232-60). Immediately under that title appeared the following:

. . . the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's

understanding and judgment . . . . and in these cases our maxim is, that ‘malitia supplet aetatem.’ . . .

4 Bl. Comm. \*23

(Orig.Trial.L.F.232)(ellipses in order).<sup>3</sup>

In explaining its rationale for its sentencing decisions, the trial court drew from this Court’s decision in *State v. Andrews*, 329 S.W.3d 369 (Mo. banc 2011) (Orig.Trial.L.F.249). The trial court rejected Judge Wolff’s *Andrews* dissent that the Eighth Amendment’s evolving standards of decency precluded imposition of life without parole for juveniles convicted of homicide offenses(Orig.Trial.L.F.253-54). *See Andrews*, 329 S.W.3d at 380-89 (dissenting opinion of Wolff, J.).

While rejecting Judge Wolff’s *Andrews* dissent, the trial court stated it rejected “our annually improvised Eighth Amendment jurisprudence”(Orig.Trial.L.F.253). The order continued stating that there has not been an evolution of society’s standards of decency toward increased leniency for juveniles convicted of “deliberate murder,”

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<sup>3</sup> The court’s citation did not provide a year of publication or translation of the Latin phrase used. Blackstone’s Commentaries On the Laws of England are attributed to the period 1765-1769. *See* [lonang.com/library/reference/blackstone-commentaries-law-england/](http://lonang.com/library/reference/blackstone-commentaries-law-england/). (Visited on April 27, 2016). The phrase “malitia supplet aetatem” means: “malice supplies age.” *See* Free Online Dictionary of Law Terms and Legal Definitions at [legaldictionary.lawin.org/militia-supplet-aetatem/](http://legaldictionary.lawin.org/militia-supplet-aetatem/) (Visited on April 27, 2016). (Introductory lettering to all web addresses is removed to avoid hyperlinking).

but rather “an evolution of the views of an elite group of philosopher kings”(Orig.Trial.L.F.253-54). That order found that there was ““objective”” indicia of a national consensus in favor of punishing juveniles as adults “for cold-blooded, deliberate murder”(Orig.Trial.L.F.254). The order stated that statistics relied on by “Eighth Amendment Darwinists” were flawed(Orig.Trial.L.F.254). The order continued that “the ‘consensus’ outside judicial ivory towers” favored life without parole for juveniles convicted of “deliberate murder”(Orig.Trial.L.F.254-55).

The order stated that “the moral prism” of a majority of the U.S. Supreme Court had failed to reveal the cruelty of life without parole for juveniles convicted of “deliberate murder”(Orig.Trial.L.F.255). Relying on the *Andrews* majority, the order stated that no appellate court had ruled that a life without parole sentence for a homicide committed by a juvenile violated the Eighth Amendment(Orig.Trial.L.F.255). The order continued invoking its opening quote from Blackstone as proof that life without parole for a juvenile who committed a homicide did not violate the Eighth Amendment(Orig.Trial.L.F.255-56). The court stated: **“It is entirely consistent with any rational standard of decency to treat a deliberate murderer as irretrievably depraved, regardless of relative youthfulness”**(Orig.Trial.L.F.256)(emphasis added).

The court stated that life without parole for “deliberate murder” here was not cruel and unusual because “to paraphrase Blackstone, it would be a cruelty to the

public to give the defendant the opportunity to repeat the worst of villainies. 4 Bl. Comm. \*12”(Orig.Trial.L.F.257).

### **Respondent’s Remand Evidence**

In 2009, Rosemary Whitrock was living in a three level row house at 902 Hickory in the LaSalle Park/Soulard neighborhood, near Busch Stadium(Tr.282-85). Rosemary was living with her mother, Ida Rask (Roxie), and her sister, Diane Koenig(Tr.283,57-72). The floors broke down as follows: (1) first floor - living room, kitchen, and dining room; (2) second floor - family room and two bedrooms; and (3) third floor - two bedrooms (Tr.285). Rosemary and her mother slept on the second floor, while Diane slept on the third floor(Tr.285).

Gina Stallis was Rosemary’s daughter and Ida’s granddaughter(Tr.286,570-72). Gina was staying at the Hickory address because she had just been released from the hospital(Tr.286-87). Gina had two children, nine year old, Sam and seven year old, Ben(Tr.287-88,571). Gina and Ben were sleeping in the family room and Sam was sleeping in Rosemary’s room(Tr.288).

Nicholas was Rosemary’s nephew and Diane’s son(Tr.289). Ida Rask was Nicholas’ grandmother and Gina Stallis was his cousin(Tr.416-17,570-72,583).

Rosemary went to bed on October 4<sup>th</sup> about 10:00-10:30 p.m.(Tr.290). Gina came into Rosemary’s room and woke her up(Tr.292-93). Ledale, who was wearing a red hooded sweatshirt, pointed a gun at Rosemary and Gina and ordered them into the family room(Tr.292-95,317). Ledale directed Rosemary to get on her knees and put

her head down, but she refused telling Ledale to take whatever he wanted and leave(Tr.294-95,338). Coleman took money from Rosemary's wallet and some jewelry(Tr.300,320). Ledale made threatening statements interspersed with profanity(Tr.301-02). Someone held a gun to Ida's head and threatened her(Tr.340,342-45).

Rosemary fled out a side door and banged on neighbors' doors, getting someone to call the police(Tr.304-06).

Isabella Lovadina recounted that in 2009 she was a police officer and was dating Nicholas(Tr.350-51). Isabella and Nicholas were taking an EMT class together(Tr.352). On Sunday, October 4<sup>th</sup>, Isabella had worked until 9:30 p.m. and went over to Hickory to study with Nicholas for a Monday test(Tr.352). At about 11:40 p.m., Isabella packed up her study materials and some of her police uniform items to leave(Tr.353-54). Isabella and Nicholas walked out to her car and she put those items in her car, which included her police ballistic vest and gun belt(Tr.353-54). Isabella went back to hug Nicholas and heard a car's tires squealing and driving in a direction away from them(Tr.355-56). Two black males, Coleman, wearing a black hooded sweatshirt, and Ledale, wearing a red hooded sweatshirt, walked towards them with guns directed at them(Tr.355-57).

The two men demanded that they give them anything that they had, but they had nothing to turn over(Tr.356-58). Ledale and Coleman directed Isabella and Nicholas to go in the house(Tr.358-59). Isabella told Ledale and Coleman to take

whatever they wanted and leave(Tr.359). Coleman directed Isabella and Nicholas to get on their knees and put their heads on the ground, while Coleman held a gun on them(Tr.359-61).

Isabella saw Ledale directing Gina as she carried a large television downstairs(Tr.362-63). Gina was directed to put her head on the floor and kneel between Isabella and Nicholas(Tr.364-65). Coleman touched Isabella in a sexual way that made her think he was going to rape her(Tr.364). One of the men directed Gina to go to the basement(Tr.367-68). Because of how Coleman touched Isabella, she thought Gina was going to be raped(Tr.367-68). Isabella told Gina to stay and she would go in her place to the basement, but at that point they were all told to go to the basement(Tr.368-69). Isabella thought that they would all be killed in the basement, so she started fighting with Coleman, hoping to disarm him(Tr.369-70,401,404).

Gunshots were fired and all the shooting was done by Coleman and not Ledale(Tr.370,390,405-06,412). Isabella was shot five times and had multiple surgeries(Tr.377-80). The emotional upset this incident caused Isabella has prevented her from returning to work as a police officer(Tr.382-84).

Nicholas recounted that in 2009, he was working as a firefighter(Tr.415). Nicholas and Isabella had finished studying and she went out to put things in her car(Tr.417-18). Isabella came back to give him a hug when he heard tires squealing(Tr.417-18). Two black males were walking towards them with guns drawn and demanding they turn over anything of value(Tr.419-20). The two men wanted to

know what was in the house and Nicholas told them women and children(Tr.420-21). The two men pressed guns into their bodies and directed them towards the house(Tr.421). Coleman forced Nicholas and Isabella to get on the ground on their hands and knees, while making threats(Tr.421-23). Ledale was upstairs with Gina and Nicholas heard her screams when she was made to carry a heavy television downstairs(Tr.424-26). After Gina got downstairs, she was on her hands and knees between Isabella and Nicholas(Tr.425-26).

Ledale wanted Gina to go to the basement with him and Nicholas thought she was going to be raped(Tr.427-28). Isabella offered to go to the basement, instead of Gina(Tr.428). Isabella then tried to disarm Coleman(Tr.428). Nicholas grabbed Ledale and tried to disarm him(Tr.429). Nicholas was shot three times by Coleman(Tr.430,433-34,461). Coleman stood over Isabella and shot her(Tr.431). Ledale and Coleman fled(Tr.430). Coleman did all the shooting(Tr.458-59).

Nicholas has been unable to return to work as a firefighter and has spent time being homeless(Tr.438-41).

Ida recounted going to bed in her second floor room at 9:30-10:00 p.m.(Tr.574). Rosemary came in Ida's bedroom with a man who had a gun pointed at Rosemary(Tr.574-75). The man took jewelry from Ida's room and made her give him jewelry that she was wearing(Tr.577-78). Ida turned over everything she was asked to give up(Tr.584-86). The man placed the gun to her head and threatened to kill her(Tr.579-80).

Ida described the impact on her and her family of what happened here and that she did not get to continue to live in her home because it went into foreclosure(Tr.588-90).

Sam described having seen Isabella, Nicholas, and his mother, Gina, on the floor and hearing gunshots(Tr.598-99). Sam called 911(Tr.599). Sam described the sense of loss he feels over his mother's death(Tr.601-05).

Ledale went to Barnes Hospital because he was shot in his left hand(Tr.497-98). While Ledale was there, he asked X-ray technician, Mary Roberts, to throw away his red hooded sweatshirt(Tr.499-500). Roberts thought that was unusual and later Ledale's sweatshirt was found in a dirty linen cart(Tr.501-03). Initially, Ledale told the police that he was with his girlfriend when he was robbed and shot(Tr.508-11).

Ledale's mother was at Barnes(Tr.509-10). She told the police that the people who brought Ledale to the hospital were in the waiting room(Tr.513). The police pursued on foot two women and one male into Forest Park and all three were taken into custody(Tr.513,524-25,528,533). The male was Coleman and during that pursuit Coleman dropped jewelry on the ground(Tr.528). Also, a small black gun was found in some grass(Tr.534-35). Found inside Ledale's car was a silver handgun and Gina's cell phone(Tr.514-16).

Officer Menendez conducted testing on two guns - a .22 and a .25(Tr.539-46). Recovered casings and bullets matched the .25(Tr.539-46). Coleman's DNA was found on the .22(Tr.559). Ledale's DNA was found on the .25(Tr.560-61).

Gina Stallis died from a gunshot wound to the chest(Tr.568-69).

Rosemary now has custody of Sam and Ben(Tr.310-11). Rosemary recounted how Sam and Ben have been impacted by their mother's death(Tr.312-14).

### **Evidence On Behalf of Ledale**

Deandre Armstead is Ledale's brother(Tr.606-07). In addition to Deandre, Ledale's siblings were Jayla Nathan, Melvin Westbrook, Brianna Westbrook, Yvonne Armstead, and Garry (little Garry) (Tr.607-08). The children all lived with their mother(Tr.607-08). Their mother, Yvonne Pordos, was married to Melvin Westbrook and Westbrook beat her(Tr.626-27).

There were multiple occasions when the family was homeless and lived in a shelter and in a minivan(Tr.608-10). The homelessness was caused by their mother's crack addiction(Tr.608-09,612).

When they were homeless, they also lived with their maternal grandmother, who was also a crack addict(Tr.610-12). At their grandmother's house, their aunt also lived there with her own three children(Tr.613). When their mother and grandmother were both doing crack, they would fight both verbally and physically(Tr.614-15). When those fights happened, everyone would be out on the street and have to live in a

minivan(Tr.615). There was an incident where their grandmother took a gas can and poured gasoline on everything in a bedroom(Tr.623-24).

Deandre's and Ledale's mother would abandon the children for days and weeks at a time to do crack(Tr.616-18). The children would be without food and have to go to neighbors' houses to ask for food(Tr.618).

Garry Armstead had a son, Garry, and a daughter with Ledale's mother, Yvonne(Tr.644-50). Garry recounted that Yvonne had a significant crack habit and spent her government assistance money on crack(Tr.645-50). Yvonne would disappear for extended periods and Ledale, who was twelve years old, became a caregiver for his siblings(Tr.645-50). Garry recounted that he had custody of their son, Garry, because when Yvonne was pregnant with Garry she tested positive for crack(Tr.649-51).

In 2009, Garry Armstead witnessed a disturbing incident where Ledale's father, Ledale Sr., "whopped" Ledale while Ledale had no clothes on(Tr.652-59).

Jasmine Pordos is Ledale's mother's sister(Tr.669). There were periods where Jasmine lived with Yvonne and her children(Tr.669-70). During those times that they lived together, there were Jasmine's six children and four of Yvonne's children all living there(Tr.670). While Yvonne was pregnant with Ledale, she used crack and drank alcohol(Tr.671-72). Yvonne had a serious crack addiction(Tr.670-71). Yvonne's substance addiction led to the children missing school and the family being

homeless(Tr.672-73). The money Yvonne did have went to pay for her crack use(Tr.674-75).

Jasmine recounted seeing arguing and fighting between Yvonne and their mother because both were crack users(Tr.675). The household was frequented by other drug addicts(Tr.675-76). Ledale's grandmother was physically and mentally abusive towards Ledale(Tr.675-77). Ledale was exposed to the men Yvonne stayed with physically abusing her(Tr.677-80). Jasmine would take the children food and let them stay with her when Yvonne disappeared for extended time periods(Tr.681-83). Even though Yvonne had gone to drug rehabilitation, she continued to be a substance abuser(Tr.689-90).

Jayla Nathan is Ledale's sister(Tr.693-94). Ledale looked out for Jayla and took care of her(Tr.693-94). Their mother left them alone for days to do crack and she did not care about her children(Tr.694-95,700-01,712). Their mother left the children on the streets or to live out of a minivan(Tr.700-01).

Yvonne's cousin, Yolanda Pordos, recounted that while Yvonne was pregnant with Ledale she used acid, crack, and alcohol(Tr.716-18). Yvonne had a crack and alcohol problem all of Ledale's life(Tr.722). Ledale's grandmother had a crack problem, cursed at the children, and was not a good caregiver(Tr.719-21). Yvonne received government assistance for her children and they were Yvonne's "meal ticket"(Tr.723-24). Yolanda did not allow her children to stay at Yvonne's house because her house was always chaotic and Yvonne did not act appropriately(Tr.724).

Ledale's mother, Yvonne Pordos, recounted that she has seven children(Tr.737). Yvonne testified that Coleman, accompanied by two women, drove her to Barnes Hospital(Tr.738). Coleman told her that Ledale had been shot(Tr.738).

Yvonne recounted that she had been married to Ledale's father, who went to prison before Ledale was a year old(Tr.740). Ledale did not see his father until he was at least fifteen years old, when his father was released from prison(Tr.740-41).

Yvonne admitted that she is addicted to cocaine and alcohol which impaired her ability to care for her children(Tr.741-42). The children were left to care for themselves because of Yvonne's crack use(Tr.775-77). Because of Yvonne's drug use the family became homeless and they bounced between different homes and shelters(Tr.751).

Yvonne's mother did crack with the children present(Tr.744). Yvonne's mother had a sexual relationship with Ledale's father, Ledale Sr., which was based on his providing her crack(Tr.745-46). Ledale Sr. was a drug dealer(Tr.745-46). Yvonne's mother "whopped" Ledale with a belt(Tr.746-47).

Yvonne's relationship with her mother was "Hell" and it frequently escalated into physical violence(Tr.747-48). Those physically violent exchanges took place in front of Ledale and the other children(Tr.748-49). The fights included the use of knives, sledge hammers, and other objects(Tr.749). There was an incident where Yvonne's mother poured gasoline in their room and tried to light the room on fire while Ledale and the other children were present(Tr.749-50).

The father of two of Yvonne's children was Melvin Westbrook(Tr.752). Ledale was present for physical beatings that Westbrook inflicted on Yvonne(Tr.752-53). Westbrook had a severe alcohol problem(Tr.754). Drug and alcohol use contributed to the violent environment existing between Westbrook and Yvonne(Tr.754-55).

Ledale also was present for beatings inflicted on Yvonne by other men Yvonne lived with(Tr.753,772). When the father of one of Yvonne's children was assaulting her, Ledale, who was then ten years old, tried to help Yvonne(Tr.753).

When Yvonne gave birth to Garry, he tested positive for cocaine and the state took custody of Garry from Yvonne(Tr.762-63).

In 2006, Yvonne was diagnosed as being bipolar with suicidal tendencies(Tr.761,771). Yvonne also reported having thoughts of killing her children(Tr.771-72).

Yvonne recounted that at school Ledale was provided special services because of the problems he was having with his school work(Tr.766-68). Ledale also received treatment from a psychiatrist(Tr.770).

Fred Pordos is Ledale's maternal grandfather(Tr.975,978-79). Fred knew about Yvonne's drug problems and tried to get custody of Ledale because he thought Ledale would benefit from a stable male influence(Tr.978-79). Fred recounted the children would call him looking for their mother and being in need of food(Tr.979-80).

Fred witnessed a physical altercation between Yvonne and Westbrook(Tr.981-83). Westbrook hit Yvonne with a can and cut her head(Tr.981-83). Because of what Westbrook did to Yvonne, Fred and Westbrook also got into a fight(Tr.981-83). All the events involving Westbrook happened in front of the children(Tr.981-83).

On October 4<sup>th</sup>, Fred saw Ledale with Coleman at Fred's house(Tr.976-77). Fred was concerned about Ledale spending time with Coleman because Fred had heard that Coleman had just gotten out of jail and because Ledale was too young to be with Coleman(Tr.977,984). Fred also did not want Ledale spending time with Coleman because Fred's sons had told him that Coleman was "bad news"(Tr.991). Fred cautioned Ledale against being with Coleman(Tr.978).

Dr. Robert Fucetola did a neuropsychological examination of Ledale(Tr.827-28). In school, Ledale was diagnosed as learning disabled and received special education services(Tr.817-18). Specific areas of difficulty included reading, spelling, and written expression(Tr.819). Ledale's school records showed that he was functioning at a borderline level of intelligence(Tr.821-22).

Dr. Fucetola measured Ledale's I.Q. as 62 which placed him in the lower 1% of the population(Tr.822,858,962-64). Ledale has low cognitive and intellectual abilities compared to his peers(Tr.826).

Dr. Fucetola reviewed records from the Social Security Administration and the St. Louis Metropolitan Police which contained reports of Ledale having been sexually abused by a maternal uncle(Tr.834-36). Abused children have difficulty developing

social cognitive skills and Ledale is very limited in that area(Tr.837-39). Ledale's cognitive skills fell within the bottom 1% - 2% of the population(Tr.841-42).

Ledale's scores on tests of memory, attention, math, reading, comprehension, and reasoning were similarly impaired and were what one would expect for someone who was learning disabled(Tr.842-43). Ledale's scores were in the range that would be expected for a second to a fifth grader, even though Dr. Fucetola's testing was done when Ledale was 20 years old(Tr.842-43).

The social adversity that Ledale experienced served only to compound his educational deficits(Tr.845-46). That combination of factors made Ledale especially vulnerable both as an adolescent and adult(Tr.845-46). Moreover, that combination adversely impacted Ledale's moral reasoning skills making them very low(Tr.847-48).

Generally adolescents' ability to reason compared to adults' ability is lower by reason of age and brain development(Tr.847-51,855-56). Similarly, adolescents exhibit less degree of impulse control(Tr.853-54). Ledale's reasoning ability was even lower and less well-developed than other adolescents of the same age(Tr.847-51). Ledale's deficits make him less able to exercise proper impulse control(Tr.853-54).

Coleman was 22 years old at the time of the offense(Tr.852-53). Because of Ledale's deficits, he was particularly vulnerable to Coleman's influence(Tr.853).

### **Jury Verdicts**

The jury entered a verdict that it was unable to unanimously decide or agree that life without parole was appropriate under all of the circumstances(L.F.120). Because the jury did not agree on a sentence of life without parole, the trial court vacated the conviction for first degree murder and declared Ledale was guilty of second degree murder(Tr.1053-54).

The case was then re-submitted to the jury for consideration of sentences for all of the following: (1) Count I - second degree murder of Gina Stallis; (2) Count II - armed criminal action based on Count I; (3) Count IX - first degree robbery of Rosemary Whitrock; (4) Count X - armed criminal action based on Count IX; (5) Count XXIII - kidnapping of Rosemary Whitrock; and (6) Count XXIV - armed criminal action based on Count XXIII(Tr.1054-55). For purposes of submitting the counts to the jury, they were renumbered chronologically as Counts I - VI(Tr.1054-55).

The jury's verdicts (L.F.178-79;Tr.1066-67) were as follows: (1) second degree murder of Gina Stallis - life in prison (L.F.166-67); (2) armed criminal action based on the Gina Stallis second degree murder - life in prison (L.F.168-69); (3) first degree robbery of Rosemary Whitrock - thirty years (L.F.170-71); (4) armed criminal action based on the first degree robbery of Rosemary Whitrock - life in prison (L.F.172-73); (5) kidnapping of Rosemary Whitrock - fifteen years (L.F.174-75); and (6) armed criminal action based on the kidnapping of Rosemary Whitrock - life in prison (L.F.176-77).

### Retrial Sentencing Hearing

At the July 25, 2014 sentencing following the retrial, the court stated that it intended to impose additional consecutive sentences and adhere to the previously imposed consecutive sentences(Tr.1074-75). The court stated that the decisions in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012) did not foreclose imposing consecutive sentences even if the sum total of those sentences was the functional equivalent of life without parole(Tr.1075). Counsel objected to the imposition of consecutive sentences(Tr.1075).

At that sentencing, the court heard from Ida Rask, Isabella Lovadina, and Rose Whitrock(Tr.1076-1080). During Rose Whitrock's sentencing statements she said that her grandsons wanted Ledale to never be released from prison(Tr.1080). That was followed by:

[ROSE WHITROCK]: So . . . I hope we're not back here again, Your Honor, because I don't think I could do it again. I really want to find some peace and I just have not been able to do that.

[THE COURT]: Well, I understand, Miss Whitrock. **Perhaps Justice Kennedy and Justice be [sic] Kagan will read your remarks some day.**

MS. ROSE WHITROCK: I just – I can't – I just can't sit through this again.

(Tr.1080)(emphasis added).

At the conclusion of Rose Whitrock's statements, respondent urged the court "to run all of these consecutively."(Tr.1081).

The court stated that it considered it "appropriate" to impose consecutive sentences and it did that(Tr.1082-85).

As it did at the original trial, the trial court entered a "MEMORANDUM AND ORDER" addressing sentencing(L.F.224-39).

That order noted that respondent had urged that the court was prohibited from revisiting the sentences it had imposed at the original trial(L.F.225-26). The court, however, indicated that pursuant to this Court's opinion that it was obligated to do so because that opinion had directed that any claim that the combined effect of sentences imposed on Ledale violated the Eighth Amendment was premature and would be moot if the jury elected to impose life without parole(L.F.225-26 relying on *State v. Nathan*, 404 S.W.3d 253, 271 (Mo. banc 2013)). The court stated that in deciding whether it was precluded from imposing further consecutive sentences the "[r]esolution of that question necessarily implicates the constitutional status of the subsisting sentences."(L.F.226).

The order noted that the original trial did not include evidence of Ledale's character and background because he waived jury sentencing after he was found guilty of first degree murder(L.F.228).

The order noted that at the retrial the jury "could not find that the punishment of life imprisonment without probation or parole was just and appropriate"(L.F.229).

The order stated that the court would assume that the jury’s rejection of life without probation or parole was “tantamount to a failure by the State to prove the appropriateness of that punishment”(L.F.229). The court stated that “the jury did not find defendant to exhibit ‘irreparable corruption.’ See *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012).”(L.F.229).

The court found that “[n]otwithstanding” the jury’s rejection of life without parole that *Graham* and *Miller* did not preclude the consecutive sentences already imposed or the imposition of additional consecutive sentences(L.F.229). The Court continued that *Graham* and *Miller* could be construed to prohibit sentencing that amounted to the “functional equivalent” of life without parole(L.F.229). The court continued that *Graham* and *Miller*:

acknowledge no limiting principle that would prevent the “evolving standard of decency,” as perceived at any time by any judge, from being applied to invalidate any sentence for anyone. [Footnote omitted]. **Indeed, this lack of any anchor in the text of the Constitution or any other objective source is cast in sharp relief by the opinion of the notorious Judge Weinstein, soundly reversed** in *United States v. Reingold*, 731 F.3d 204 (2<sup>nd</sup> Cir. 2013). (L.F.229-30)(emphasis added). The court then acknowledged that some courts had interpreted *Graham* and *Miller* to prohibit multiple consecutive sentences that result in imprisonment for a period that exceed a juvenile’s life expectancy(L.F.230). The court then discussed cases that had adopted the opposite position(L.F.230-31).

The court then went on to find that facts here warranted consecutive sentences, even taking into account Ledale's age related characteristics(L.F.232-36).

The court stated that its original consecutive sentences were deliberately imposed notwithstanding the then mandatory life without parole sentence(L.F.233). The basis for those consecutive sentences were the juvenile court's findings, report of the juvenile officer, and the SAR/PSI(L.F.233).

The court stated that under §558.019.4 that assuming consecutive sentencing that Ledale would be required to serve 85% of 75 years which would be 63.75 years(L.F.233-34).

The court stated that consecutive sentencing was appropriate under the facts and circumstances(L.F.234). The stated reasons were: (1) Ledale's participation was active and direct victimizing multiple people and placed children at risk(L.F.234); (2) Ledale does not suffer from any mental disease or defect so as to constitute diminished capacity(L.F.234-35); (3) Ledale was prone to fighting and disruption at school including a suspension for fighting(L.F.235); and (4) the jury that rejected life without parole assessed the maximum punishments on each count it considered(L.F.235).

The court continued stating that because Ledale's conduct was deliberate that the interests of justice were served by multiple consecutive sentences(L.F.235). The court stated the jury rejected the minimum punishment on each count it considered

expressing the community sense that Ledale deserves severe punishment, even if not life without parole(L.F.236).

The court sentenced Ledale as follows: (1) Count I - second degree murder of Gina Stallis - life in prison; (2) Count II - armed criminal action based on Count I - life in prison with that sentence to be served concurrently to the sentence imposed in Count I; (3) Count IX - first degree robbery of Rosemary Whitrock - thirty years which is to be served consecutively to the sentences imposed in Counts I through VIII; (4) Count X - armed criminal action based on Count IX - life in prison with that sentence to be served concurrently with the sentence imposed in Count IX and consecutively with the sentences imposed in in Counts I through VIII; (5) Count XXIII - kidnapping of Rosemary Whitrock - fifteen years with that sentence to be served consecutively with the sentences imposed in Counts I through XXII; and (6) Count XXIV - armed criminal action based on Count XXIII - life in prison with that sentence to be served concurrently to the sentence imposed in Count XXIII and consecutively to all other counts previously imposed(Tr.1082-85;L.F.240-46).

### **Sentences - Chart Summary**

For this Court's convenience, Ledale's sentences are summarized below in the following chart.

<b>Count</b>	<b>Charge</b>	<b>Sentence</b>	<b>Running</b>
1	Murder 2nd	Life	N/A
2	ACA	Life	Concurr. to 1

3	Assault 1st	Life	Consec. to 1-2
4	ACA	Life	Concurr. to 3 Consec. to 1-2
5	Assault 1st	Life	Consec. to 1-4
6	ACA	Life	Concurr. to 5 Consec. to 1-4
7	Robbery 1st	Life	Consec. 1-6
8	ACA	Life	Concurr. to 7 Consec. to 1-6
9	Robbery 1st	30 yrs.	Consec. to 1-8
10	ACA	Life	Concurr. to 9 Consec. to 1-8
11	Robbery 1st	Life	Consec. to 1-10
12	ACA	Life	Concurr. to 11 Consec. to 1-10
13	Robbery 1st	Life	Consec. to 1-12
14	ACA	Life	Concurr. to 13 Consec. to 1-12
15	Burglary 1st	15 yrs.	Consec. to 1-14
16	ACA	Life	Concurr. to 15 Consec. to 1-14

17	Kidnapping	15	Consec. to 1-16
18	ACA	Life	Concurr. to 17 Consec. to 1-16
19	Kidnapping	15 yrs.	Consec. to 1-18
20	ACA	Life	Concurr. to 19 Consec. to 1-18
21	Kidnapping	15 yrs.	Consec. to 1-20
22	ACA	Life	Concurr. to 21 Consec. to 1-20
23	Kidnapping	15 yrs.	Consec. to 1-22
24	ACA	Life	Concurr. to 23 Consec. to 1-22
25	Kidnapping	15 yrs.	Consec. to 1-24
26	ACA	Life	Concurr. to 25 Consec. to 1-24

(L.F.240-46 Amended Judgment). The practical meaning and consequence of all these sentences in terms of all consecutive sentence time is that Ledale has: six life sentences + one thirty year sentence + six fifteen year sentences. Under §558.019.4, a life sentence is to be calculated at thirty years. Thus, the total number of years Ledale was sentenced to is:  $(6 \times 30) + 30 + (6 \times 15) = 300$  years.

From these convictions and sentences this appeal followed.

**POINTS RELIED ON**

**I.**

**CONSECUTIVE SENTENCES - FUNCTIONAL LIFE**

**WITHOUT PAROLE SENTENCE**

The trial court erred in ordering all the non-homicide offenses and the second degree murder offense sentence served consecutively to one another without also directing that Ledale Nathan have a meaningful opportunity for parole consideration, no later than when he had served twenty-five years, or sooner if otherwise authorized by law, because those actions denied Ledale his rights to be free from cruel and unusual punishment and due process, U.S. Const. Amends. VIII and XIV and Mo. Const. Art. I §§10 and 21, in that consecutive time that totals 300 years is the functional equivalent of life without parole such that there is no meaningful opportunity for release during Ledale's lifetime for events that happened when he was sixteen and the resentencing proceedings reflect that he was sentenced in a manner that violated the noted constitutional rights based on Judge Dierker's determination at the original sentencing, before any mitigating evidence was ever heard at the retrial, that Ledale should be "permanently incapacitated" as Judge Dierker viewed "malice supplies age" to "a deliberate murderer" who was "irretrievably deprived."

*Graham v. Florida*, 560 U.S. 48 (2010);

*Miller v. Alabama*, 132 S.Ct. 2455 (2012);

*State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003);

*Montgomery v. Louisiana*, 136 S.Ct. 718 (2016);

U.S. Const. Amends. VIII and XIV;

Mo. Const. Art. I §§10 and 21;

Truly Agreed To And Finally Passed Senate Bill No. 590 for the 98<sup>th</sup> Missouri

General Assembly (2016).

## II.

### BRADY VIOLATION - INVOLUNTARY JURY

#### SENTENCING WAIVER

The trial court erred in denying the motion to grant a new sentencing hearing on all the non-homicide non-Whitrock offenses which were not part of this Court's ordered remand because that ruling denied Ledale Nathan his rights to be free from cruel and unusual punishment and due process, U.S. Const. Amends. VIII and XIV and Mo. Const. Art. I §§10 and 21, in that respondent, in violation of *Brady v. Maryland*, failed to disclose to original guilt and sentencing trial counsel a police report that documented sexual abuse of Ledale Nathan and that the defense having that information about the sexual abuse would not have waived jury sentencing on those counts such that the waiver of jury sentencing entered was not knowingly, intelligently, and voluntarily made.

*Brady v. Maryland*, 373 U.S. 83 (1963);

*State ex rel. Taylor v. Steele*, 341 S.W.3d 634 (Mo. banc 2011);

U.S. Const. Amends. VIII and XIV;

Mo. Const. Art. I §§10 and 21.

## **ARGUMENT**

### **I.**

#### **CONSECUTIVE SENTENCES - FUNCTIONAL LIFE**

##### **WITHOUT PAROLE SENTENCE**

The trial court erred in ordering all the non-homicide offenses and the second degree murder offense sentence served consecutively to one another without also directing that Ledale Nathan have a meaningful opportunity for parole consideration, no later than when he had served twenty-five years, or sooner if otherwise authorized by law, because those actions denied Ledale his rights to be free from cruel and unusual punishment and due process, U.S. Const. Amends. VIII and XIV and Mo. Const. Art. I §§10 and 21, in that consecutive time that totals 300 years is the functional equivalent of life without parole such that there is no meaningful opportunity for release during Ledale's lifetime for events that happened when he was sixteen and the resentencing proceedings reflect that he was sentenced in a manner that violated the noted constitutional rights based on Judge Dierker's determination at the original sentencing, before any mitigating evidence was ever heard at the retrial, that Ledale should be "permanently incapacitated" as Judge Dierker viewed "malice supplies age" to "a deliberate murderer" who was "irretrievably depraved."

The trial court's ordering all the non-homicide offenses and the homicide offense sentences served consecutively without directing that Ledale have a

meaningful opportunity for parole consideration, no later than when he had served twenty-five years, or sooner if otherwise authorized by law, is the functional equivalent of a life without parole sentence. The imposition of these sentences without directing that Ledale be parole eligible when he had served twenty-five years, or sooner if otherwise authorized by law, means that there is no meaningful opportunity for release during Ledale's lifetime for events that arose when he was a sixteen year old juvenile. Moreover, Judge Dierker had determined at the original sentencing, before any mitigating evidence was ever heard at the retrial, that Ledale should be "permanently incapacitated" as Judge Dierker viewed "malice supplies age" to "a deliberate murderer" who was "irretrievably depraved." Ledale's sentences violate his rights to be free from cruel and unusual punishment and due process. The practical effect of Judge Dierker's imposition of consecutive time totaling 300 years was a judicial override of the jury's verdict which was that Ledale should not be sentenced to life without parole.

### **Preservation**

In the Court of Appeals, respondent argued that Ledale cannot now challenge the sentences for "the 21 non-homicide (non-Whitrock) offenses that the trial court previously imposed following his 2011 trial"(Resp.Ct.App.Br. at 19). Respondent urged the claim was not reviewable because the **initial** portion of this Court's footnote 12 commented that Ledale had not argued or briefed that he should be resentenced on the 21 non-homicide counts on the grounds that they were unlawful or

unconstitutional and this Court had indicated it would not then address such claim(Resp.Ct.App.Br. at 19). *See State v. Nathan*, 404 S.W.3d 253, 271 n.12 (Mo. banc 2013). Respondent contended because those sentences were part of a final judgment, and they were not appealed previously, that the time for challenging such judgment had passed(Resp.Ct.App.Br. at 19).

Respondent also argued in the Court of Appeals that at the resentencing proceedings defense counsel opposed a state's motion to prohibit mention to the jury of those 21 non-homicide sentences on the grounds that those sentences were part of a "final judgment." (Resp.Ct.App.Br. at 19-20). From trial counsel's position, respondent argued that as a final judgment Ledale could not now bring his functional life without challenge(Resp.Ct.App.Br. at 19-20).

What respondent's preservation arguments failed to acknowledge was the concluding portion of this Court's footnote 12. *See State v. Nathan*, 404 S.W.3d at 271 n.12. This Court's opinion indicated in the **concluding** portion of its footnote 12 the following:

To the extent that Nathan was attempting to assert a claim based on the combined effect of the non-homicide sentences and his sentence for the murder charge, such a claim is **premature** until after the re-sentencing procedure described above, and will be moot if Nathan is sentenced to life without parole. *See State v. Nathan*, 404 S.W.3d at 271 n.12 (emphasis added). This portion of footnote 12 indicated that the present claim was not one that could be brought and

decided until after the ordered remand and the resolution of the sentences that remained to be imposed. Because this Court directed that the time for bringing the present challenge was “premature” until the resentencing had occurred, respondent’s final judgment timing argument has no merit.

At resentencing, the court’s written order noted that respondent had urged that the court was prohibited from revisiting the sentences it had imposed at the original trial(L.F.225-26). The court, however, indicated that pursuant to this Court’s opinion that it was obligated to do so because that opinion had directed that any claim that the combined effect of sentences imposed on Ledale violated the Eighth Amendment was premature and would be moot if the jury elected to impose life without parole(L.F.225-26 relying on *State v. Nathan*, 404 S.W.3d at 271). The court stated that in deciding whether it was precluded from imposing further consecutive sentences the “[r]esolution of that question necessarily implicates the constitutional status of the subsisting sentences.”(L.F.226).

The law of the case doctrine mandates “that a previous holding in a case constitutes the law of the case and precludes relitigation of that issue on remand and subsequent appeal.”” *State v. Davis*, 32 S.W.3d 603, 609 (Mo.App., E.D. 2000) (quoting *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999)). The law of the case for Ledale’s case, under footnote 12, is that this claim is reviewable because this Court held it was reviewable now on this remand, if Ledale was not sentenced to life without parole on the homicide offense, which he was not. *See*

*Davis* and *Rodriguez*. Moreover, the trial court's resentencing order acknowledged that to comply with this Court's directives it was required to revisit the consecutive sentences it previously imposed(L.F.225-26).

The motion for new trial asserted that the imposition of consecutive sentences constituted the functional equivalent of life without parole(L.F.190-92).

Because this Court indicated that this claim could only be raised on remand, and it was presented then, this claim was fully preserved.

### **Standard of Review**

In the usual case, the trial court's decision whether to impose concurrent or consecutive time is committed to the trial court's discretion. *State v. Mort*, 321 S.W.3d 471, 484-85 (Mo.App., S.D. 2010).

This Court reviews claims of constitutional violations *de novo*. *State v. Sisco*, 458 S.W.3d 304, 312 (Mo. banc 2015). Because the issue presented here is governed by application of the decisions in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012) as to what sentences imposed on juveniles are constitutional under the Eighth Amendment and Fourteenth Amendment Due Process Clause, the proper standard of review is *de novo*. *See, Sisco*. Moreover, this Court's observation in *Ledale's* appeal that the issue of the functional equivalent to life without parole issue was premature until after the resentencing proceeding supports that this matter is to be reviewed *de novo*. *Nathan*, 404 S.W.3d at 271 n.12.

### **Ledale's Sentences**

Under the chart set out in the Statement of Facts the practical meaning and consequence of all Ledale's sentences is that Ledale has: six life sentences + one thirty year sentence + six fifteen year sentences. Under §558.019.4, a life sentence is to be calculated at thirty years. Thus, the total number of years Ledale was sentenced to is:  $(6 \times 30) + 30 + (6 \times 15) = 300$  years.

The court stated that under the terms of §558.019.4 that assuming consecutive sentencing that Ledale would be required to serve 85% of 75 years which would be 63.75 years(L.F.233-34).

### **Respondent's Court of Appeals Merits Arguments**

In the Court of Appeals, respondent urged that Ledale's sentences did not violate *Graham v. Florida*, 560 U.S. 48 (2010) because he was convicted of both multiple non-homicide offenses and a homicide offense and *Graham* was limited to non-homicide offenses(Resp.Ct.App.Br. at 24-28).

In the Court of Appeals, respondent urged that Ledale's sentences did not violate *Miller* because the jury did not sentence Ledale to life without parole(Resp.Ct.App.Br. at 28-29).

### **Court of Appeals' Memorandum Opinion**

The Court of Appeals rejected Ledale's claim on the grounds that the decision in *Graham* was confined to those cases where the juvenile was convicted of non-homicide offenses. *See* Slip op. at 3. The Court of Appeals rejected Ledale's claim

based on *Miller* because the jury considered and chose not to impose life without parole. *See* Slip op. at 4.

**Ledale’s Consecutive Sentences Violate *Roper*,**

***Graham, and Miller***

In *Graham*, the defendant was sixteen years old when he committed non-homicide acts that resulted in his being sentenced to life without parole. *Graham*, 560 U.S. at 53, 57. The *Graham* Court reasoned that the state must give youthful offenders like Graham “some **meaningful opportunity** to obtain release based on **demonstrated maturity and rehabilitation.**” *Id.* at 75 (emphasis added). While a state is not required to guarantee eventual release, it is prohibited from making the determination at the outset that a juvenile offender will never be fit to reenter society. *Id.* at 75. The state is required to give a youthful offender the opportunity to demonstrate that he is fit to rejoin society. *Id.* at 79. The *Graham* Court found that the Eighth Amendment and Due Process clause prohibited the imposition of life without parole on a juvenile offender who did not commit a homicide. *Id.* at 82.

In *Graham*, the Court noted that its rationale for invalidating the death penalty as applied to juveniles who commit a homicide before age 18 in *Roper v. Simmons*, 543 U.S. 551 (2005) had equal force in the context of imposing life without parole on a non-homicide juvenile offender. *Graham*, 560 U.S. at 68. Those rationale are: (1) juveniles have lessened culpability and are less deserving of the most severe punishments; (2) when compared to adults juveniles have a lack of maturity and an

underdeveloped sense of responsibility; (3) juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; (4) juveniles' characters are not as well formed as adults; and (5) the difficulty in differentiating between the juvenile offender whose offense reflects unfortunate, transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption. *Id.* at 68 (relying on *Roper v. Simmons*).

The *Graham* Court also reasoned:

As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”

*Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)) (alteration made by *Graham* Court).

In *Graham*, the Court noted the following:

Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a

nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

*Graham*, 560 U.S. at 79.

In *Miller*, two fourteen year old offenders were convicted of murder and sentenced to life without parole. *Miller*, 132 S.Ct. at 2460. The Court ruled that a mandatory life without parole sentence for juvenile homicide offenders violated the Eighth Amendment. *Id.* at 2469. The *Miller* Court noted “that children are constitutionally different from adults for purposes of sentencing.” *Id.* at 2464. Children differ from adults because juveniles have diminished culpability and greater prospects for reform, and therefore, are less deserving of the most severe punishments. *Id.* at 2464.

The *Miller* Court identified three “significant gaps” between juveniles and adults. *Miller*, 132 S.Ct. at 2464. First, children have a lack of maturity and an undeveloped sense of responsibility. *Id.* at 2464. Second, children are more vulnerable to negative influences and outside pressures. *Id.* at 2464. Third, a child’s character is not as well formed as an adult such that his traits are less fixed and his actions less likely to be evidence of irretrievable depravity. *Id.* at 2464. Mandatory life without parole for a homicide offense “prohibit[s] a sentencing authority from assessing whether the law’s harshest term of imprisonment **proportionately** punishes a juvenile offender.” *Id.* at 2466 (emphasis added).

In *Miller*, the Court in discussing *Graham* noted the following:

*Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, *Graham's* flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. (Citation omitted). But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.

**Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham's* reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.**

*Miller*, 132 S.Ct. at 2465 (emphasis added) (parentheticals in *Miller* opinion). This language quoted from *Miller*, interpreting *Graham*, makes expressly clear that *Graham's* applicability was not limited to nonhomicide cases so that respondent's Court of Appeals argument that *Graham* was so limited, which the Court of Appeals adopted, is incorrect.

In *Miller*, the Court emphasized that its decisions in *Roper v. Simmons* and *Graham*

rested not only on common sense—on what “any parent knows”—but on science and social science as well. (Citation omitted). In *Roper*, we cited studies showing that “[o]nly a relatively small proportion of adolescents’ ”

who engage in illegal activity “develop entrenched patterns of problem behavior.”” (*Roper* citation omitted) (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003)). And in *Graham*, we noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.” (Citation omitted). We reasoned that those findings—of 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.””(citation omitted).

*Miller*, 132 S.Ct. at 2464-65.

The issue before this Court is whether the values, principles, and spirit reflected in *Roper v. Simmons*, *Graham*, and *Miller* apply with equal force to sentences whose practical effect is the equivalent of a life without parole sentence, functional life without parole, even though such sentences are not assigned the technical label of “life without parole.” Some Courts have found sentences that are

the functional equivalent to life without parole violate the Eighth Amendment<sup>4</sup>, while others have reached the opposite conclusion.<sup>5</sup>

In *State v. Ragland*, 836 N.W.2d 107, 109 (Ia. 2013), the juvenile defendant was convicted of first degree murder and sentenced to life without parole, which the Iowa governor commuted to life without parole for 60 years. The postconviction court resentenced Ragland to life in prison with the possibility of parole after 25 years based on *Miller*. *Id.* at 112-13. In upholding the postconviction court's sentence modification, the *Ragland* Court reasoned: "the rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole. Oftentimes, it is important that **the spirit of the law not be lost in the application of the law.**" *Id.* at 121 (emphasis added).

This Court should follow here its "consistency of direction" analytical framework that it employed in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003) to conclude there that the Eighth Amendment and Due Process Clause prohibited applying the death penalty to individuals who committed a homicide while

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<sup>4</sup> See, e.g., *Bear Cloud v. State*, 334 P.3d 132 (Wy. 2014); *State v. Null*, 836 N.W.2d 41 (Ia. 2013); and *State v. Riley*, 110 A.3d 1205 (Conn. 2015).

<sup>5</sup> See, e.g., *State v. Denzmore*, 436 S.W.3d 635 (Mo.App., E.D. 2014); and *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011).

less than eighteen years old. This Court's decision in *State ex rel. Simmons v. Roper* was upheld by the U.S. Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). Because the *Graham* Court premised its decision on the values identified in *Roper v. Simmons*, which was itself the product of this Court's decision in *State ex rel. Simmons v. Roper*, and *Miller* is premised on both *Roper v. Simmons* and *Graham* this Court should now approach the question presented here from a similar analytical perspective as this Court employed in *State ex rel. Simmons v. Roper*.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court held that executing the mentally retarded did not violate the Eighth Amendment. See *State ex rel. Simmons v. Roper*, 112 S.W.3d at 399. The *Penry* decision was overruled in *Atkins v. Virginia*, 536 U.S. 304 (2002). See *State ex rel. Simmons v. Roper*, 112 S.W.3d at 399.

At issue in *State ex rel. Simmons v. Roper* was whether the decision in the prior year of *Atkins v. Virginia*, 536 U.S. 304 (2002) holding that executing mentally retarded offenders violated the Eighth Amendment could then be extended to prohibit the execution of defendants, like Simmons, who committed their offense before they were eighteen years old. *State ex rel. Simmons v. Roper*, 112 S.W.3d at 399. That issue in *State ex rel. Simmons v. Roper* was presented with the backdrop being that the decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989) permitted the execution of juveniles whose acts occurred before they were 18 years old. *State ex rel. Simmons v. Roper*, 112 S.W.3d at 399. This Court concluded that "the approach taken in *Atkins*" warranted that the Eighth Amendment prohibited the execution of someone who

committed their offense while less than 18 years old. *State ex rel. Simmons v. Roper*, 112 S.W.3d at 399. While so holding, this Court observed that the change reflected in *Atkins* mirrored not so much the number of states that had acted to prohibit executing the mentally retarded, but instead “*the consistency of the direction of change.*” *State ex rel. Simmons v. Roper*, 112 S.W.3d at 405 (quoting *Atkins v. Virginia*, 536 U.S. at 315) (emphasis added by this Court). *Cf. State v. Riley*, 110 A.3d 1205, 1208-17 (Conn. 2015) (ordering reconsidered discretionary 100 years sentence imposed on juvenile because the “trilogy” of *Roper v. Simmons*, *Graham*, and *Miller* reflects an “incremental approach” that should not be viewed “through an unduly myopic lens,” but rather the “logical implications of its reasoning”). *See, also, Bear Cloud v. State*, 334 P.3d 132, 141-44 (Wy. 2014) (*Roper v. Simmons*, *Graham*, and *Miller* characterized as a “trilogy” that requires individualized sentencing determinations for juveniles and that “the reality” of lengthy aggregate sentences is not in keeping with what those cases require).

In opposing what this Court did in *State ex rel. Simmons v. Roper* respondent argued that this Court was bound to follow *Stanford v. Kentucky*, 492 U.S. 361 (1989). In rejecting that argument, this Court observed that “*Atkins* recently reaffirmed that decisions as to standards of decency are to be decided by current standards, not ones of years ago.” *State ex rel. Simmons v. Roper*, 112 S.W.3d at 406. This Court continued: “This Court clearly has the authority and the obligation to

determine the case before it based on current—2003—standards of decency.” *State ex rel. Simmons v. Roper*, 112 S.W.3d at 407.

The decisions in *Graham* and *Miller* reflect a “consistency of direction” for the U.S. Supreme Court’s perspective that a sentence which denies all hope such that good behavior and character improvement are immaterial and denies any meaningful chance to demonstrate a person is fit to rejoin society violates the Eighth Amendment. *See Graham*, 560 U.S. at 70, 79. *Miller*, 132 S.Ct. at 2464. Such a consistency of direction requires that a sentence that is functionally a life without parole sentence violates the Eighth Amendment under *Graham* and *Miller*.

Unlike in *State ex rel. Simmons v. Roper* there is no U.S. Supreme Court case that respondent can assert this Court is “bound” to follow. Rather, this Court should do as it did in *State ex rel. Simmons v. Roper* look to today’s standards of decency, not ones of years ago, or as the trial court did, to the 1700s standards of Blackstone. Today’s standards of decency, as reflected in *Graham* and *Miller*, are that juveniles have lessened culpability, an underdeveloped sense of responsibility, greater vulnerability to negative influences, and character traits that are less fixed so as to be more amenable to modification. *See Graham*, 560 U.S. at 68 and *Miller*, 132 S.Ct. at 2464. Those standards of decency call for the recognition that a sentence while not life without parole in name has the same practical effect so as to deny hope such that no amount of good behavior and character improvement matters. *See Graham*, 560 U.S. at 70, 79.

The decisions in *Roper v. Simmons* and *Graham* “adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.” *Miller*, 132 S.Ct. at 2463. In *Miller*, the Court indicated that

Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments.

*Miller*, 132 S.Ct. at 2471.

### **Ledale’s Consecutive Sentences Violate the Eighth**

#### **Amendment And Due Process**

The records from the original and retrial sentencing establish Ledale did not receive the individualized sentencing required under *Roper v. Simmons*, *Graham*, and *Miller* for purposes of whether he was sentenced to consecutive time totaling 300 years, a functional life without parole sentence. At the original sentencing following the victim impact statements, when the court had not heard any mitigating witness

evidence, it stated that it had nothing to add to the victims statements

(Orig.Trial.Tr.995-96). The Court continued:

Many years ago, I sentenced an individual to death on two counts and the prosecution asked that I run those consecutively, even though that seemed rather silly, but **the purpose then and now was to send a message to future Judges and Governors as to what this Court believes is the appropriate future for you, Mr. Nathan. This Court believes that that future should be that you be permanently incapacitated from repeating this kind of behavior.**

(Orig.Trial.Tr.995-96)(emphasis added). The court’s statement, before it ever heard any mitigating evidence, was that it was imposing consecutive time “to send a message” to future judges and governors that Ledale should be “permanently incapacitated” (Orig.Trial.Tr.995-96). The Court’s focus was not the mitigating factors of youth found in *Roper v. Simmons*, *Graham*, and *Miller*.

The Court’s original trial “MEMORANDUM AND ORDER” began with the following:

. . . the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent’s understanding and judgment . . . . and in these cases our maxim is, that ‘malitia supplet aetatem.’ . . .

4 Bl. Comm. \*23

(Orig.Trial.L.F.232)(ellipses in order). Blackstone’s Commentaries On the Laws of England are attributed to the period 1765-1769. *See* [lonang.com/library/reference/blackstone-commentaries-law-england/](http://lonang.com/library/reference/blackstone-commentaries-law-england/). (Visited on April 27, 2016). The phrase “malitia supplet aetatem” means: “malice supplies age.” *See* Free Online Dictionary of Law Terms and Legal Definitions at [legaldictionary.lawin.org/militia-supplet-aetatem/](http://legaldictionary.lawin.org/militia-supplet-aetatem/) (Visited on April 27, 2016). The court’s decision on Ledale’s sentencing was based on Blackstone’s 1765-1769 commentaries that “malice supplies age” (Orig.Trial.L.F.232,255-56) and not the mitigating factors of youth found in *Roper v. Simmons, Graham, and Miller*.

The trial court also stated that its decision was based on *State v. Andrews*, 329 S.W.3d 369 (Mo. banc 2011) (Orig.Trial.L.F.249,253-54) which upheld mandatory life without parole for a juvenile convicted of first degree murder, but which can no longer be considered valid under *Miller*. The degree to which the court was committed to ensuring Ledale was “permanently incapacitated” was demonstrated by its order’s statements: (1) society’s standards of decency had not evolved towards juveniles convicted of “deliberate murder,” but rather reflected “an evolution of the views of **an elite group of philosopher kings**”(Orig.Trial.L.F.253-54)(emphasis added); (2) existence of ““objective”” indicia of a national consensus favoring punishing juveniles as adults “for cold-blooded, deliberate murder”(Orig.Trial.L.F.254); (3) statistics relied on by “**Eighth Amendment Darwinists**” were flawed(Orig.Trial.L.F.254)(emphasis added); (4) “the ‘consensus’

**outside judicial ivory towers**” favored life without parole for juveniles convicted of “deliberate murder”(Orig.Trial.L.F.254-55)(emphasis added); (5) “the moral prism” of a majority of the U.S. Supreme Court had failed to reveal the cruelty of life without parole for juveniles convicted of “deliberate murder”(Orig.Trial.L.F.255); and (6) reliance on *Andrews* while stating no court had found life without parole for a juvenile convicted of a homicide violated the Eighth Amendment(Orig.Trial.L.F.255).

The court’s order continued:

“It is entirely consistent with any rational standard of decency to treat a deliberate murderer as **irretrievably deprived, regardless of relative youthfulness**”

(Orig.Trial.L.F.256)(emphasis added). Notably the court added:

“to paraphrase Blackstone, it would be a cruelty to the public to give the defendant the opportunity to repeat the worst of villainies. 4 Bl. Comm. \*12”

(Orig.Trial.L.F.257). All of the court’s statements are inconsistent with the values and ideals which are the premise of *Roper v. Simmons*, *Graham*, and *Miller*.

Ledale’s trial judge’s comments about sentencing parallel statements the trial judge made in *State ex rel. McCulloch v. Drumm*, 984 S.W.2d 555 (Mo.App., E.D. 1999) and underscore why Ledale’s sentences violate the Eighth Amendment and due process. In *Drumm*, the defendant was convicted of first degree murder and sentenced to life without parole. *Drumm*, 984 S.W.2d at 556-57. At sentencing, Judge Drumm made statements that if he had been the finder of fact, rather than the

jury, then he would not have convicted the defendant, but would have found her not guilty by reason of mental disease or defect. *Id.* at 556-58. After the defendant's conviction was reversed, the case was returned to Judge Drumm for retrial and Drumm granted the defendant's request for a bench trial. *Id.* at 557. The state then moved to disqualify Drumm from the bench trial because of his sentencing statements. *Id.* at 556-58. At the hearing on the motion to disqualify, Drumm "testified that even though he had formed opinions on the case at that time [prior trial], he would not let his former opinions on the issue of mental disease or defect affect his judgment in the upcoming jury-waived trial." *Id.* at 557. The Court of Appeals noted that it had "no doubt" Drumm could fairly serve, but the standard for disqualification was whether a reasonable person would have factual grounds to doubt Drumm's impartiality, and therefore, he was required to be disqualified. *Id.* at 557-58.

Judge Dierker's comments at the original sentencing, *supra*, underscore why when he revisited the consecutive time already imposed, as he was required to do under this Court's opinion, and he considered the additional jury recommended sentences that Ledale did not receive a fair sentencing proceeding that took into account the mitigating factors of youth, as required under *Roper v. Simmons*, *Graham*, and *Miller*. Those comments reflect contempt and disdain for what *Roper v. Simmons*, *Graham*, and *Miller* embody. The court, in violation of *Graham*, at the

outset determined Ledale would never be fit to reenter society. *Graham*, 560 U.S. at 75.

The trial judge's contempt for the U.S. Supreme Court's views, reflected in *Roper v. Simmons*, *Graham*, and *Miller*, were even verbalized at the resentencing. Justice Kennedy authored the majority opinion in *Graham*, while Justice Kagan authored *Miller*. See *Graham* and *Miller*. When Rose Whitrock expressed the hope that she would not have to return for additional court proceedings on this matter the judge replied:

[THE COURT]: Well, I understand, Miss Whitrock. **Perhaps Justice Kennedy and Justice be [sic] Kagan will read your remarks some day.**

MS. ROSE WHITROCK: I just – I can't – I just can't sit through this again.

(Tr.1080)(emphasis added).

The trial judge's disdain for adhering to the principles that *Roper v. Simmons*, *Graham*, and *Miller* embody appears in his retrial written order when discussing *Graham* and *Miller* as standing for:

acknowledge[ing] no limiting principle that would prevent the “evolving standard of decency,” as perceived at any time by any judge, from being applied to invalidate any sentence for anyone. [Footnote omitted]. **Indeed, this lack of any anchor in the text of the Constitution or any other objective source is cast in sharp relief by the opinion of the notorious**

**Judge Weinstein, soundly reversed** in *United States v. Reingold*, 731 F.3d 204 (2<sup>nd</sup> Cir. 2013).

(L.F.229-30)(emphasis added).

The court's assertions at the resentencing that it then had particularized reasons for continuing to impose the original sentences as consecutive and for imposing new consecutive time(L.F.233-36) simply do not matter under *Drumm, supra*. The reason Judge Drumm was not allowed to serve was that he had rendered an opinion as to his belief as to the proper disposition on sentencing before that role was assigned to him. It did not matter that Judge Drumm later testified that he could set aside his former opinions and those would not influence him at the retrial. *Drumm*, 984 S.W.2d at 557. The court's statements here at Ledale's original sentencing, as well as those at the resentencing, establish both an appearance of unfairness and actual unfairness in the court's inability to adhere to what is required under *Roper v. Simmons, Graham, and Miller. See Drumm*. Moreover, there was prejudgment at the original sentencing that Ledale should be "permanently incapacitated" and that he was "irretrievably deprived."(Orig.Trial.Tr.995-96)(Orig.Trial.L.F.256). For these reasons, Ledale's consecutive sentences must be set aside for resentencing as Ledale's sentences violate his rights to due process and to be free from cruel and unusual punishment because there was a prejudgment that Ledale should be "permanently incapacitated" and that he was "irretrievably deprived."(Orig.Trial.Tr.995-96)(Orig.Trial.L.F.256).

Moreover, the court's own retrial sentencing order facially demonstrates that Ledale's consecutive sentences violate the Eighth Amendment. The order noted that at the retrial the jury "could not find that the punishment of life imprisonment without probation or parole was just and appropriate"(L.F.229). The order continued that the court would assume that the jury's rejection of life without probation or parole was "tantamount to a failure by the State to prove the appropriateness of that punishment"(L.F.229). The court stated that "the jury did not find defendant to exhibit 'irreparable corruption.' See *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012)."(L.F.229). Despite these acknowledgements that the jury's will was that Ledale not be sentenced to life without parole, the court re-imposed consecutive sentencing and imposed new additional consecutive sentences that effectively constituted life without parole. That consecutive time re-imposed and the imposing of new additional consecutive time was the product of the court's predetermination at the original trial that the court wanted Ledale "permanently incapacitated" (Orig.Trial.Tr.995-96) as it viewed "malice supplies age" (Orig.Trial.L.F.232,255-56) for a "deliberate murderer" (Orig.Trial.L.F.256) who was "irretrievably depraved"(Orig.Trial.L.F.256). Judge Dierker's imposition of 300 years had the practical effect of a judicial override of the jury's determination that Ledale should not be sentenced to life without parole, something he was not permitted to do. Cf. *Hurst v. Florida*, 136 S.Ct. 616, 622 (2016) (judge may not increase punishment based on judge's own fact finding).

When this offense happened Ledale was sixteen years old(L.F.29-36). Whether the total years imposed is viewed as 300 years (L.F.240-246 Amended Judgment) or 85% of 75 years which would be 63.75 years(L.F.233-34), Ledale's consecutive sentences violate *Roper v. Simmons, Graham, and Miller*. The *Graham* Court reasoned that the state must give youthful offenders "some **meaningful opportunity** to obtain release based on **demonstrated maturity and rehabilitation.**" *Graham*, 560 U.S. at 75 (emphasis added). If Ledale served 63.75 years he would be eligible for release when he was 79.75 years old - this is not a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Ledale is being denied the opportunity to demonstrate that he is fit to rejoin society. *See, Graham*, 560 U.S. at 79.

In *State v. Null*, 836 N.W.2d 41, 45 (Ia. 2013), the defendant was required to serve 52.5 years of his 75 year sentence for second degree murder and first degree robbery. While finding 52.5 years violated the Eighth Amendment, the *Null* Court's reasoning included:

we believe that while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections. Even if lesser sentences than life without parole might be less problematic, we do 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*. The

prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a “meaningful opportunity” to demonstrate the “maturity and rehabilitation” required to obtain release and reenter society as required by *Graham*, 560 U.S. at —, 130 S.Ct. at 2030, 176 L.Ed.2d at 845–46.

*Null*, 836 N.W.2d at 71.

This Court has indirectly addressed the practical problems posed by a sentence of 300 years in the analogous situation of resolving approximately 80 cases where those juveniles, already sentenced to life without parole, were ordered to be parole eligible when they had served 25 years. *See, e.g., State ex rel. McRoberts v. Denney*, SC 93272 (March 15, 2016 Order).<sup>6</sup> In Ledale’s case, this Court should remand this case for resentencing with directions that Ledale be sentenced so that he is parole eligible after serving no more than 25 years, or sooner if otherwise authorized by law, when he would be 41 years old. *See* this Court’s March 15, 2016 orders in *McRoberts* and other cases like it (relying on *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016) for *Montgomery*’s citing with approval a Wyoming statute making juveniles parole eligible after serving 25 years).

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<sup>6</sup> The Truly Agreed To And Finally Passed Senate Bill No. 590 for the 98<sup>th</sup> Missouri General Assembly (2016) provides for in §558.047 that for anyone sentenced to life without parole for an offense committed before eighteen years of age and before August 28, 2016 that such person is parole eligible after serving twenty-five years.

## Mitigating Evidence Establishes Consecutive Sentences

### Violate Eighth Amendment

Ledale's consecutive sentences ignore *Miller's* recognition that juveniles have a lack of maturity and an undeveloped sense of responsibility, children are more vulnerable to negative influences and outside pressures, and a child's character is not as well fixed as an adult's such that his actions are less likely to be evidence of irretrievable depravity. *See Miller*, 132 S.Ct. at 2464. For those reasons under *Miller*, Ledale's sentences do not proportionately punish him as a juvenile who has experienced the deprivation he has encountered. *Id.* at 2466.

Throughout Ledale's childhood his mother, Yvonne, was addicted to crack and alcohol(Tr.608-09,612,645-51,670-71,741-42). Ledale's mother did crack, acid, and drank alcohol while she was pregnant with him(Tr.671-72,716-18).

Yvonne's crack use caused the family to be homeless so that they lived in shelters and a minivan(Tr.608-10,672-73,700-01,751). Yvonne's government assistance checks went to pay for her crack habit and her children were her "meal ticket" to pay for that habit(Tr.645-50,674-75,723-24). The household was frequented by other drug addicts(Tr.675-76).

Yvonne abandoned the children for days and weeks to do crack(Tr.616-18). When Yvonne left the children without supervision, twelve year old Ledale took on the role of caregiver for his siblings(Tr.645-50,775-77). The children had to rely on other family and neighbors to provide them food(Tr.618,681-83,979-80). Yvonne's

father tried to obtain custody of Ledale because of how severe his daughter's crack habit was(Tr.978-79).

Ledale was raised in a violent abusive environment. When Ledale's mother and grandmother both were doing crack they fought verbally and physically(Tr.614-15,675,747-48). Those fights included the use of knives, sledge hammers, and other objects(Tr.749). The violent physical exchanges between Ledale's mother and grandmother took place in front of Ledale and the other children(Tr.748-49). Their grandmother tried to set the house on fire pouring gasoline on everything in a bedroom, while Ledale and the other children were present(Tr.623-24,749-50).

Ledale's grandmother was physically and emotionally abusive towards Ledale(Tr.675-77). She "whopped" Ledale with a belt(Tr.746-47).

Ledale's father went to prison before he was one year old and Ledale did not see him again until Ledale was at least fifteen years old, when he was released from prison(Tr.740-41). Ledale's father, Ledale Sr. was a drug dealer(Tr.745-46).

Ledale's grandmother (his mother's mother) had a sexual relationship with Ledale's father that was based on him supplying her crack(Tr.745-46). Ledale's father "whopped" Ledale while Ledale had no clothes on(Tr.652-59).

Ledale was exposed to the violence that the men who Yvonne stayed with inflicted on her(Tr.677-80,981-83). Ledale was present for beatings that Westbrook, the father of two Yvonne's children, did to her(Tr.626-27,752-53). One incident involving Westbrook, in which Westbrook hit Yvonne with a can and cut her head,

resulted in Yvonne's father fighting with Westbrook(Tr.981-83). During one assault on Yvonne by the father of one of her children, Ledale, who was only ten years old, tried to defend her(Tr.753).

In school, Ledale was diagnosed as learning disabled and received special education services(Tr.817-18). Ledale's school records showed that he was functioning at a borderline level of intelligence(Tr.821-22). Ledale's 62 I.Q. placed him in the lower 1% of the population(Tr.822,858,962-64). Ledale has low cognitive and intellectual abilities compared to his peers(Tr.826). Ledale's cognitive skills fell within the bottom 1% - 2% of the population(Tr.841-42).

The social adversity that Ledale experienced served only to compound his educational deficits(Tr.845-46). That combination of factors made Ledale especially vulnerable(Tr.845-46). Moreover, that combination adversely impacted Ledale's moral reasoning skills making them very low(Tr.847-48).

The shooter, Coleman, was 22 years old at the time of the offense(Tr.852-53). Because of Ledale's deficits, he was particularly vulnerable to Coleman's influence(Tr.853).

All of these circumstances surrounding Ledale's youthful years establish that the multiple consecutive sentences imposed do not proportionately punish him. *See Miller*, 132 S.Ct. at 2466. Rather, Ledale's sentences reflect that he does not have a meaningful or realistic opportunity to obtain release as required under *Graham*. Ledale's sentences reflect a judgment at the outset that he will never be fit to reenter

society and violate *Graham*. Ledale's sentences are the functional equivalent to life without parole and do not provide him a meaningful or realistic opportunity for release.

This Court should reverse all of Ledale's consecutive sentences and remand for resentencing with directions that any sentences imposed must comport with the principles recognized in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012) so as to not constitute the functional equivalent of life without parole. In particular, this Court should direct that any term of years imposed expressly provide that Ledale shall be parole eligible no later than after having served twenty-five years, or sooner if otherwise authorized by law. *See, e.g., State ex rel. McRoberts v. Denney*, SC 93272 (March 15, 2016 Order) and other cases like it with orders from this Court on March 15, 2016.

This Court should reverse Ledale's sentences and remand this case for resentencing.

## II.

### BRADY VIOLATION - INVOLUNTARY JURY

#### SENTENCING WAIVER

The trial court erred in denying the motion to grant a new sentencing hearing on all the non-homicide non-Whitrock offenses which were not part of this Court's ordered remand<sup>7</sup> because that ruling denied Ledale Nathan his rights to be free from cruel and unusual punishment and due process, U.S. Const. Amends. VIII and XIV and Mo. Const. Art. I §§10 and 21, in that respondent, in violation of *Brady v. Maryland*, failed to disclose to original guilt and sentencing trial counsel a police report that documented sexual abuse of Ledale Nathan and that the defense having that information about the sexual abuse would not have waived jury sentencing on those counts such that the waiver of jury sentencing entered was not knowingly, intelligently, and voluntarily made.

The state failed to disclose to the original guilt and sentencing trial counsel a police report that documented sexual abuse of Ledale Nathan. That information was required to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963). That report

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<sup>7</sup> As discussed in Point I, the non-homicide non-Witrock offenses sentences are properly part of this Court's ordered remand under its footnote 12 for purposes of the combined effect of the sentencing imposed. See Point I discussion *State v. Nathan*, 404 S.W.3d at 271 n.12.

included information that Ledale's brother and cousin, C.G., could have testified to regarding the sexual abuse. If prior counsel had had that information, then jury sentencing would not have been waived on the non-homicide non-Whitrock counts (Counts III through VIII, Counts XI through XXII, and Counts XXV through XXVI). It was error for the trial court to fail to order a new jury sentencing proceeding on those counts.

### **Preservation**

Counsel filed a motion to order a new sentencing proceeding that included Counts III through VIII, Counts XI through XXII, and Counts XXV through XXVI (the non-homicide non-Whitrock counts)(L.F.180-83). The motion for new trial reasserted this matter as a claim of error(L.F.190-97).

Because this matter was asserted by motion and was then renewed in the motion for new trial, it should be treated as preserved.

In the Court of Appeals, respondent argued that the motion claim for a new sentencing proceeding based on the failure to disclose to the original guilt and sentencing trial counsel a police report that documented sexual abuse of Ledale Nathan was waived. (Resp.Ct.App.Br.34-35). Respondent argued waiver because the resentencing proceedings were conducted on Monday, June 2, 2014 through Friday, June 6, 2014 (Tr.2-6) and the motion for a new sentencing proceeding on Counts III through VIII, Counts XI through XXII, and Counts XXV through XXVI) (the non-

homicide and the non-Whitrock counts) was filed June 18, 2014(L.F.180-83).  
(Resp.Ct.App.Br.34-35).

On the same day as sentencing was conducted on the remand, July 25, 2014, the trial court entered a memorandum and order(L.F.224-39). That order found: “There **is no dispute that the State belatedly disclosed a police report** concerning possible sexual abuse of the defendant in 2009.”(L.F.237)(emphasis added). Thus, the trial court did not regard the motion as untimely, and did not find a waiver, because it addressed the motion on the merits.

For all these reasons, this Court should review this matter as preserved.

### **Standard of Review**

The decision whether to waive jury sentencing or not is a matter of law that is reviewed de novo on appeal. *See State ex rel. Taylor v. Steele*, 341 S.W.3d 634, 647-48 (Mo. banc 2011).

### **Contents of Motion To Order Resentencing**

The resentencing proceedings were conducted on Monday, June 2, 2014 through Friday, June 6, 2014 (Tr.2-6).

On June 18, 2014, counsel filed a motion requesting that the court order a new sentencing proceeding that included Counts III through VIII, Counts XI through XXII, and Counts XXV through XXVI) (the non-homicide and non-Witrock counts)(L.F.180-83).

The motion alleged that respondent violated the decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963)(L.F.180-83). That motion set forth that on May 5, 2010, defense counsel from the original proceedings filed a request for discovery under Rule 25.03(L.F.181). Prior counsel waived jury sentencing after the guilt verdicts in the original proceedings(L.F.181).

The motion set forth that on January 17, 2014, the trial court issued an order that discovery for purposes of the remand was to be completed by May 9, 2014(L.F.181). That same order directed that the defense was to endorse its witnesses by February 28, 2014(L.F.181).

The motion recounted that on May 27, 2014, respondent provided discovery of an investigation that the City of St. Louis Police Department had conducted of sexual abuse of Ledale Nathan on December 23, 2009(L.F.181). The police investigation reported that Ledale had been raped and that Ledale's brother and a juvenile cousin, C.G., were present when Ledale awoke with his pants down and a sore anus(L.F.181-82).

The motion continued that the police report was never disclosed to counsel who represented Ledale at the original trial proceedings prior to waiving Ledale's right to jury sentencing(L.F.182). The decision to waive jury sentencing was made based on less than all the mitigating evidence being available to the prior counsel(L.F.182).

On June 25, 2014, counsel filed a motion for new trial which reasserted that the decision to waive jury sentencing was made without prior counsel having the information about the police investigation of the sexual abuse of Ledale(L.F.195-96).

### **Court's Sentencing Memorandum and Order**

Sentencing on the remand occurred on Thursday, July 25, 2014(Tr.6).

On the same day as sentencing was conducted on the remand, July 25, 2014, the trial court entered a memorandum and order(L.F.224-39). That order found: “There **is no dispute that the State belatedly disclosed a police report** concerning possible sexual abuse of the defendant in 2009.”(L.F.237) (emphasis added).

The order found that the police report came to the attention of respondent's counsel through Children's Division records supplied to respondent by the defense(L.F.237). The order continued: “Because the report contained information that would have related only to punishment, the failure to disclose it prior to the first trial surely worked no prejudice to defendant, as he elected to waive jury sentencing for independent reasons.”(L.F.237).

### **Jury Sentencing Waiver - Brady Violation**

The verdicts in the original proceedings were entered on April 11, 2011(L.F.19). On the same day as those verdicts the court entered an order which stated: “Defendant having been found guilty of Murder 1<sup>st</sup> which carries a sentence of life without the possibility of probation or parole waives jury sentencing.”(L.F.19).

The decision to waive jury sentencing on the non-homicide and non-Witrock counts was made when the respondent had not disclosed the police investigation of the sexual abuse of Ledale. Specifically, the police report was not disclosed until May 27, 2014(L.F.181) and the trial court expressly found “[t]here is no dispute that the State belatedly disclosed a police report concerning possible sexual abuse of the defendant in 2009.”(L.F.237).

The prosecution must disclose favorable evidence material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). For purposes of due process, no distinction between exculpatory and impeachment evidence exists. *U.S. v. Bagley*, 473 U.S. 667, 676-78 (1985). Nondisclosure of *Brady* evidence violates due process “irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87.

The decision to waive jury sentencing and to proceed with judge sentencing requires that the defendant have made a knowing, voluntary, and intelligent waiver. *State ex rel. Taylor v. Steele*, 341 S.W.3d at 647-48. In Ledale’s case, there was not a knowing, voluntary, and intelligent waiver of jury sentencing because respondent did not disclose the police report to counsel in the original proceedings, in violation of *Brady*, and the sexual abuse contents of that report would have caused jury sentencing to not be waived.

**If Found Unpreserved – Plain Error Review Requested**

If this Court should find that counsel's motion was untimely, as was previously urged by respondent, then this Court is requested to review for plain error. *See, e.g., State v. Coyne*, 112 S.W.3d 439, 442-43 (Mo.App., E.D. 2003). In reviewing for plain error, this Court will only reverse where the trial court's ruling resulted in a miscarriage of justice or a manifest injustice. *Id.* at 442-43. This Court is requested to conduct plain error review because a miscarriage of justice and a manifest injustice resulted.

The miscarriage of justice and manifest injustice that took place was that Ledale waived jury sentencing on the applicable counts without first having access to the police report in question. The decision to waive jury sentencing and to proceed with judge sentencing requires that the defendant have made a knowing, voluntary, and intelligent waiver. *State ex rel. Taylor v. Steele*, 341 S.W.3d at 647-48. In Ledale's case, there was not a knowing, voluntary, and intelligent waiver of jury sentencing because respondent did not disclose the police report to counsel in the original proceedings, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and the sexual abuse contents of that report would have caused jury sentencing to not be waived.

This Court should reverse and remand for jury sentencing on Counts III through VIII, Counts XI through XXII, and Counts XXV through XXVI (the non-homicide and non-Witrock counts).

## CONCLUSION

For the reasons discussed in Point I, this Court should reverse Ledale's sentences and remand this case for resentencing. This Court should direct that any term of years imposed expressly provide that Ledale shall be parole eligible no later than after having served twenty-five years, or sooner if otherwise authorized by law.

For the reasons discussed in Point II, this Court should reverse and remand for jury sentencing on Counts III through VIII, Counts XI through XXII, and Counts XXV through XXVI (the non-homicide and non-Witrock counts).

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, William J. Swift, hereby certify to the following.

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 15,371 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in May, 2016. According to that program the brief is virus-free.

A true and correct copy of the attached brief has been served electronically using the Missouri State Courts electronic filing system this 25th day of May, 2016, on Assistant Attorney General Evan Buchheim at [evan.buchheim@ago.mo.gov](mailto:evan.buchheim@ago.mo.gov) at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

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