IN THE
MISSOURI SUPREME COURT

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

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTION AND STATEMENT OF FACTS

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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 "the consistency of direction" is that juveniles convicted of offenses have the opportunity for parole consideration at a meaningful age, a consensus is not required as to the imposition of sentences constituting the functional equivalent of life without parole, but evolving standards of decency actually show a consensus towards parole eligibility at a meaningful age, and penological justifications for the harshest sentences are inapplicable to juveniles because of the distinctive attributes of youth.

Further, Ledale's rights to be free from cruel and unusual punishment and due process were violated because his total sentence was 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."

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

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

Atkins v. Virginia, 536 U.S. 304 (2002);

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

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 "the consistency of direction" is that juveniles convicted of offenses have the opportunity for parole consideration at a meaningful age, a consensus is not required as to the imposition of sentences constituting the functional equivalent of life without parole, but evolving standards of decency actually show a consensus towards parole eligibility at a meaningful age, and penological justifications for the harshest sentences are inapplicable to juveniles because of the distinctive attributes of youth.

Further, Ledale's rights to be free from cruel and unusual punishment and due process were violated because his total sentence was 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."

Ledale's sentences, which total 300 years, are the functional equivalent of life without parole and do not afford him the meaningful opportunity to be considered for parole. Ledale is not guaranteed parole, but must be sentenced so that he has a meaningful opportunity to be considered for parole based on demonstrated maturity and rehabilitation. That meaningful opportunity to be considered for parole requires that his sentence reflect that he will be eligible for parole consideration after serving 25 years, or sooner, if otherwise authorized by law.

Reviewability

Respondent has argued that Ledale cannot challenge the sentences previously imposed and not the subject of the retrial because they are final judgments(Resp.Br.22-24). Respondent also points to final judgment arguments that defense counsel made for wanting the retrial jury to be apprised of the sentences that were imposed on counts from the original trial(Resp.Br. relying on Tr.264-65,1009).

This Court's opinion in Ledale's case stated the following:

> In this latter instance—but only in this instance—Nathan argues that he also should be re-sentenced on the remaining 21 non-homicide counts on which he was found guilty and sentenced below. Nathan did not appeal those convictions, however. He did not argue in the trial court that any one of the sentences for the non-homicide crimes (or the combined effect of all of those sentences) was unlawful or unconstitutional, and Nathan asserts no such claim in any of his points relied on in this Court. Because this claim was not

> preserved or presented, it will not be addressed. 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 253, 271 n.12 (Mo. banc 2013) (emphasis added) (internal citations omitted).

The Appellant's/Cross-Respondent Substitute Brief in Ledale's first appeal to this Court contained a functional life without parole argument based on all the sentences then imposed on Ledale and their consecutive nature(*See* App. Cross. R. Sub. Brief at 36-37 in SC92979). That argument was continued in the Appellant's/Cross-Respondent Substitute Reply Brief(*See* App. Cross. R. Sub. Repl. Brief at 19 in SC92979). This Court's footnote 12, *supra*, treated the functional life without parole claim as premature because not all the counts against Ledale had been resolved. Without all the counts resolved any complaint about the aggregate sum total of years imposed on Ledale was premature. *See Nathan*, 404 S.W.3d at 271 n.12.

This Court has indicated that a constitutional challenge cannot be presented to it in order to obtain an advisory opinion. *State v. Self*, 155 S.W.3d 756, 761 (Mo. banc 2005). In *Self*, this Court declined to address a statutory vagueness challenge to a prosecution brought under Missouri's compulsory school attendance law. *Id.* at 758. In declining to address that issue, this Court indicated that "it is not this Court's

prerogative to offer advisory opinions on hypothetical issues that are not necessary to the resolution of the case before it." *Id.* at 761. If this Court had addressed the functional life without parole claim on Ledale's first appeal, then it would have been rendering an advisory opinion. *See Self*. The reason Ledale's functional life without parole claim is now properly before this Court is that the present appeal is the first occasion when there are sentences imposed on all the counts Ledale was charged with and convicted of, and therefore, the claim is ripe and will not involve an advisory opinion from this Court. *See Nathan*, 404 S.W.3d at 271 n.12.[1] Like the *Graham* Court, this Court approached Ledale's functional life without parole claim from the perspective "with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility."' *Graham v. Florida*, 560 U.S. 48, 67 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 575 (2005)). 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.

To the extent retrial defense counsel urged that the jury ought to hear the length of sentences imposed as to those counts that the retrial jury would not be deciding because those sentences were final judgments, those sentences were only final in the limited sense that there was a sentence imposed, but not final for purposes

[1] A 29.15 motion challenging the non-homicide non-Whitrock offenses was filed in *Nathan v. State*, St. Louis City No. 1322-CC09963 and raised a functional life without parole claim. Findings were entered and Notice of Appeal was filed August 16, 2016.

of the functional life without parole issue which this Court said had to wait until Ledale was sentenced on all counts. *See Nathan*, 404 S.W.3d at 271 n.12.

That counsel intended any final judgment argument made during trial to be so limited is apparent from reviewing counsel's motion for new trial(L.F.190-97). The motion for new trial raised separate claims of error as to both functional life without parole and the refusal to allow evidence of Ledale's convictions and sentences.

Paragraph 1 of the motion for new trial alleged that it was error to have sentenced Ledale to consecutive sentences on the non-homicide counts and cited *Miller* and *Graham* as being violated(L.F.190). The motion for new trial continued stating that on Ledale's appeal to this Court it "indicated that a claim that the practical effect of consecutive sentences for the non-homicide counts and the sentence for murder violated Miller and Graham was premature. Since Defendant has been convicted and sentenced for Murder in the Second Degree the claim is ripe for review." (L.F.190-91). Paragraph 1 continued: "This court's ten consecutive Life sentences for the non-homicide crimes run consecutive to the life sentence for the Murder in the Second Degree are contrary to Graham v. Florida, 130 S.Ct. 2011 (2010), as well as Miller's command that lengthy sentences that stretch outside of a child's natural life expectancy are in violation of the Eighth Amendment. Miller, 132 S.Ct. at 2469 . . . ." Paragraph 1 further asserted: "this court's consecutive Life sentences in the instant case is the functional equivalent of a sentence of Life without Parole as they give Defendant no meaningful chance at parole." (L.F.192).

Paragraph 5 of the motion for new trial argued it was error to exclude evidence of Ledale's "prior conviction and sentence as the convictions had been appealed and a mandate issued. Hence they were a final judgment and admissible as evidence." (L.F.196).

Parole Eligibility At A Meaningful Age –

A Consistency of Direction

Respondent argues that Ledale has failed to establish a national consensus against the imposition of consecutive sentences that amount to the functional equivalent of life without parole(Resp.Br 40-42). However, that is not the issue. The issue is where consecutive sentences imposed constitute a functional life without parole sentence there must also be the opportunity to be considered for parole at a meaningful age in light of the values espoused in *Graham* and *Miller*.

In *Miller v. Alabama*, 132 S.Ct. 2455, 2470-71 (2012), the Court indicated that in considering whether a punishment violates due process and the prohibition against cruel and unusual punishment "part of the analysis [is] whether objective indicia of society's standards, as expressed in legislative enactments and state practice, show a national consensus against a sentence for a particular class of offenders." (*Miller* relying on *Graham v. Florida*, 560 U.S. 48, 61 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)) (internal quotation marks omitted). The *Miller* Court noted that in *Graham* it prohibited life without parole for juveniles committing non-homicide offenses even though 39 jurisdictions allowed that sentence and 29

jurisdictions mandated life without parole. *Miller*, 132 S.Ct. at 2471. In deciding *Miller*, the Court observed that 29 jurisdictions made life without parole mandatory for some juveniles convicted of murder in adult court. *Id*. at 2470-71. The states argued in *Miller* such numbers established a lack of consensus against life without parole for juvenile offenders. *Id*. at 2471. That contention was rejected with the Court observing the determinative factor was "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." *Id*. at 2471 (emphasis added). What *Miller* indicates is that whether due process and the prohibition against cruel and unusual punishment are violated in the context of juvenile sentences is not a matter governed by any purely numerical majority of states "consensus" or stringent numerical cutoff.

In *Graham*, the Court observed that while consensus is entitled substantial weight, consensus "is not itself determinative of whether a punishment is cruel and unusual." *Graham*, 560 U.S. at 67. The *Graham* Court went on to note that "with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility.'" *Graham*, 560 U.S. at 67 (quoting *Roper*, 543 U.S. at 575). Moreover on the issue of whether a punishment violates the Eighth Amendment, "[c]onsensus is not dispositive." *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008). Moreover, in *State v. Lyle*, 854 N.W.2d 378, 387 (Ia. 2014), it was noted that "as *Miller* demonstrates, constitutional protection for the rights of juveniles in sentencing

for the most serious crimes is rapidly evolving in the face of widespread sentencing statutes and practices to the contrary."

The Court has recognized that in deciding whether a punishment violates the Eighth Amendment "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). This Court applied the "consistency of direction" analytical framework in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 405 (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 less than eighteen years old.

The consistency of direction of both decisional law and legislative action shows that sentencing Ledale so that he cannot be considered for parole until he is in his 80s violates due process and the Eighth Amendment's prohibition against cruel and unusual punishment. That consistency of direction also reflects a consensus as that term was construed and interpreted under *Graham* and *Miller*, *supra*.

Many courts have found aggregate sentences imposed on juveniles that are the functional equivalent to life without parole violate the Eighth Amendment. *See, e.g.*, *Henry v. State*, 175 So.3d 675 (Fla. 2015); *People v. Caballero*, 282 P.3d 291 (Cal. 2012); *Bear Cloud* v. *State*, 334 P.3d 132 (Wy. 2014); *State v. Null*, 836 N.W.2d 41 (Ia. 2013); *Gridine v. State*, 175 So.3d 672 (Fla. 2015); *People v. Lewis*, 165 Cal. Rptr.3d 624 (Cal. Ct. App. 2013); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013);

Thomas v. Pennsylvania, 2012 WL 6678686 (E.D. Pa. 2012); *U.S. v. Mathurin*, 2011 WL 2580775 (S.D. Fla. 2011); *State v. Riley*, 110 A.3d 1205 (Conn. 2015); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *Hayden v. Keller*, 2015 WL 5773634 (E.D. N.C. 2015); and *State v. Ronquillo*, 361 P.3d 779 (Wash. Ct. App. 2015).

"Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Kennedy v. Louisiana*, 554 U.S. at 420. State statutes are now authorizing parole consideration to include juvenile offenders with sentences that amount to functional life without parole sentences. Examples of such statutes evidencing a consistency of direction favoring parole eligibility for juveniles include:

- California requires the Board of Parole Hearings to conduct a youth offender parole hearing during the inmate's 25th year of incarceration for offenses committed by juvenile offenders if the offender received sentences of 25 years to life or greater. Cal. Penal Code § 3051(b).
- Colorado recently enacted Senate Bill 16-180 (signed into law on June 10, 2016) which allows a prisoner to petition for release after serving 20-25 years for crimes committed as a juvenile.
- Connecticut allows a person convicted of one or more crimes committed while under 18 years of age, who received a definite sentence or total effective sentence of more than 10 years for such crime or crimes, to receive parole, provided, if such person is serving a sentence of more than

50 years, such person shall be eligible for parole after serving 30 years. Conn. Gen. Stat. Ann. § 54-125a(f)(1).

- Delaware allows any offender sentenced to an aggregate term of incarceration in excess of 20 years for any offense or offenses other than first-degree murder that were committed prior to the offender's 18th birthday to be eligible to petition for sentence modification after the offender has served 20 years of the originally imposed sentence. 11 Del.C. § 4204A(d)(1).
- Florida allows a juvenile offender who is sentenced to lengthy prison sentences a review of his or her sentence after 15-25 years in prison, with the length being dependent on the offense(s) committed. Fla. Stat. Ann. §921.1402.
- Nevada allows for parole eligibility after 15 years in prison for a juvenile offender who committed non-homicide crimes. NRS 213.12135.
- Washington allows any person convicted of one or more crimes committed prior to the person's 18th birthday to petition for early release after serving no less than 20 years of total confinement. RCW 9.94A.730.
- West Virginia provides that a person who is convicted of one or more offenses, for which the sentence or any combination of sentences imposed is for a period that renders the person ineligible for parole until he or she has served more than 15 years, shall be eligible for parole after he or she

has served 15 years, if the person was less than 18 years of age at the time each offense was committed. W. Va. Code Ann. §61-11-23.

- Wyoming allows a person sentenced to life imprisonment for an offense committed before the person reached the age of 18 years to be eligible for parole after commutation of his or her sentence to a term of years or after having served 25 years of incarceration. Wyo. Stat. Ann. § 6-10-301(c).

Respondent's brief concedes that Ledale would not be parole eligible until at least when he is in his 80s(Resp.Br.25-26). Respondent asserts that Ledale has not offered any guidance or authority for at what point consecutive sentences become a functional life without parole sentence as it relates to the offender's age(Resp.Br.40-41). The issue before this Court is not establishing a threshold age at which a juvenile sentenced to many years becomes parole eligible. Instead, the threshold for parole eligibility should be when the juvenile has served 25 years. That 25 year threshold of time served is the one this Court endorsed in resolving approximately 80 cases for juveniles who were sentenced to life without parole. *See, e.g., State ex rel. McRoberts v. Denney*, SC93272 (March 15, 2016 Order) (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). In this Court's final order entered in each of those approximately 80 cases, it vacated its March 15, 2016 order and referred the parties to Senate Bill 590 for the 98th General Assembly. *See, e.g., State ex rel. McRoberts v. Denney*, SC93272 (July 19, 2016 Order). The Truly

Agreed To And Finally Passed Senate Bill No. 590 for the 98th 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. This Court and the Missouri Legislature have relied on when a juvenile offender has served 25 years as the threshold for that offender becoming parole eligible, and therefore, respondent's objection based on at what age do juveniles become parole eligible is irrelevant. The determinative factor is having served 25 years. Thus, whenever a court imposes on a juvenile offender a sentence that is greater than 25 years the trial court should also be required to direct that the offender be eligible for parole consideration after no later than having served 25 years or sooner if otherwise authorized by law.

Related to respondent's argument about setting a threshold age for when a sentence becomes functionally life without parole is respondent's assertion that the decision whether to impose consecutive versus concurrent sentences is a matter committed to trial court discretion(Resp.Br.41-42). While that decision is a matter of trial court discretion, if the trial court exercises discretion to impose any sentence that is greater than 25 years it also should be required to include in its sentencing order that the defendant shall be eligible for parole consideration after having served 25 years or sooner if otherwise authorized by law.

Also instructive on the consistency of direction favorable to parole eligibility for juveniles are state statutes dealing with parole eligibility for cases including homicide offenses:

- Alabama: 30 years; Ala. Code §13A-5-39, 13A-6-2.
- Arizona: 25 or 35 years (depending on victim's age); Ariz. Rev. Stat. Ann. §§ 13-751, 13-1105.
- Arkansas: 28 years; Ark. Code Ann. §§5-4-104(b), 5-10-101.
- California: 25 years; Penal Code §§ 3046(c), 3051(b).
- Connecticut: 30 years; Conn. Gen. Stat. Ann. § 54-125a(f)(1).
- Florida: 25 years; Fla. Stat. Ann. §§ 775.082, 921.1402.
- Massachusetts: 30 years; Mass. Gen. Laws Ann. ch. 279, § 24.
- Missouri: 25 years (for LWOP sentences before 8/28/2016); §558.047, RSMo 2016 (S.B. 590, eff. 7/13/2016).
- Nevada: 20 years; NRS 213.12135.
- North Carolina: 25 years; N.C. Gen. Stat. Ann. § 15A–1340.19A.
- West Virginia: 15 years; W. Va. Code Ann. § 61-11-23.
- Wyoming: 25 years; Wyo. Stat. Ann. § 6–10–301(c).

Respondent has argued that Ledale has failed to show that the sentence imposed on him does not serve legitimate penological goals(Resp.Br.42-43). The penal sanctions generally recognized as legitimate are retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 71.

In *Miller*, the Court noted the following: "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S.Ct. at 2465. The *Miller* Court stated that the heart of retribution rationale relates to an offender's blameworthiness and the case for retribution is not as strong for a minor as compared to an adult. *Id.* at 2465. Further, deterrence is not a factor because the same characteristics that cause juveniles to be less culpable than adults, their immaturity, recklessness, and impetuosity cause them to be less inclined to consider potential punishment. *Id.*. at 2465. Incapacitation is not an appropriate consideration as to a life without parole sentence for a juvenile because doing so requires a judgment that the juvenile offender will forever be a danger to society and incorrigible, but incorrigibility is inconsistent with youth. *Miller*, 132 S.Ct. at 2465 (relying on *Graham*, 560 U.S. at 72-73). Rehabilitation cannot justify a sentence of life without parole because that sentence '"forswears altogether the rehabilitative ideal."' *Miller*, 132 S.Ct. at 2465 (relying on *Graham*, 560 U.S. at 74). Additionally, as to rehabilitation, life without parole is not justified because that sentence reflects "an irrevocable judgment" about an offender's value and place in society that is directly at odds with a child's capacity for change and limited moral culpability. *Miller*, 132 S.Ct. at 2465 (relying on *Graham*, 560 U.S. at 74). What *Miller* established is that what may be customary penological goals as to adults is inoperative when applied to juvenile offenders, and therefore, respondent's argument that Ledale

must establish his sentences do not serve legitimate penological goals should be rejected under *Miller's* analysis.

The *Miller* Court noted that what *Graham* said about children as to their distinctive transitory mental traits and environmental vulnerabilities is not crime specific. *Miller*, 132 S.Ct. at 2465. In *Graham*, the Court observed 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. *Graham*, 560 U.S. at 68 (relying on *Roper v. Simmons*). The same considerations characteristic of youthful offenders are a constant whether the sentenced imposed is death, actual life without parole, or functional life without parole, and therefore, all should be treated the same.

In recognizing the factors characterizing youthful offenders are not crime specific the *Miller* Court observed:

> 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). What this statement from *Miller* made expressly clear is that the characteristics of youthful offenders apply whether an offense is a non-homicide or a homicide offense and *Graham's* rationale and reasoning was not limited to non-homicide cases. Thus, respondent's argument that *Graham* was limited to non-homicide offenses is incorrect in light of the Court's explanation of *Graham* in *Miller*(*See* Resp.Br.26-28).

While some courts have limited the reach of *Miller* to literal life sentences, others have looked to the Supreme Court's focus in *Graham* and *Miller* which was not the label attached to a life sentence, but rather whether a juvenile would actually be imprisoned for the rest of his life. *Casiano v. Commissioner of Correction*, 115 A.3d 1031, 1044 (Conn. 2015). This language from *Miller* that "**any life** without parole sentence" must be governed by *Graham's* reasoning and principles means whether a sentence is an actual life without parole sentence or a functional life without parole sentence is irrelevant. Thus, respondent's argument that *Miller* was limited to statutorily mandated sentences of life without parole should be rejected(*See* Resp.Br.33-34). Further, *Miller's* explanation that "**any life** without parole sentence" must be governed by *Graham's* reasoning and principles means respondent's

argument that because the jury elected not to impose life without parole on the homicide charge Ledale does not have an Eighth Amendment claim should be rejected(Resp.Br.33-34).

Judge Dierker's Statements Establish *Graham* and *Miller* Were Violated

Respondent asserts that the decision in *State ex rel. McCulloch v. Drumm*, 984 S.W.2d 555 (Mo.App., E.D. 1999) is inapplicable to whether Ledale's sentence violates the Eighth Amendment and due process when taking into account many statements the trial judge made(Resp.Br.38-39). Respondent reproduces one sentence in a footnote of its brief without the trial court's other associated contextual commentary for that one particular occurrence (Resp.Br.38 n.11) asserting that the court's statement was prompted by the then requirement to sentence Ledale to life without parole for first degree murder(Resp.Br.38-39). Further, respondent's brief does not address the trial court's many statements from the original trial and the retrial evidencing 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. *See* App.Br. 49-56 (reproducing trial judge's numerous statements). The one incomplete statement respondent relied on with the trial court's entire textual commentary is as follows:

> 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 emphasized in *Roper v. Simmons*, *Graham*, and *Miller*.

Respondent also reproduces a single isolated statement following the retrial by the trial court immediately before sentence was imposed for the proposition that the court "acknowledged that it was bound by the United States Supreme Court decisions in exercising its discretion to impose consecutive sentences" (Resp.Br.39). Respondent's brief does not address the multitude of statements found in the court's oral and written statements from both the original trial and the retrial. *See* App.Br. 49-56 (reproducing trial judge's numerous statements). All of those statements taken together, like in *State ex rel. McCulloch v. Drumm*, 984 S.W.2d 555 (Mo.App., E.D. 1999), 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. The 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).

Respondent asserts that Judge Dierker's statements are irrelevant because "the dictates of the Eighth Amendment apply to sentencing practices, not to the individual views and opinions of sentencing judges"(Resp.Br.37). The views and opinions Judge Dierker expressed establish he did not follow what *Roper v. Simmons, Graham, and Miller* require under the Eighth Amendment.

Under *Graham* and *Miller*, Ledale is not guaranteed parole, but instead he must be afforded a meaningful opportunity to be considered for parole based on demonstrated maturity and rehabilitation. *See Miller*, 132 S.Ct. at 2469 and *Graham*, 560 U.S. at 75.

This Court should reverse Ledale's sentences and remand this case for resentencing which allows for him to become parole eligible after serving 25 years, or sooner, if otherwise authorized by law. This Court should direct that any sentence imposed expressly provide that Ledale shall be parole eligible after serving 25 years, or sooner, if otherwise authorized by law.

CONCLUSION

For the reasons discussed in Point I of the original and reply briefs, 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 of Ledale's briefs, 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 2010, 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 5,399 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

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

A true and correct copy of the attached reply brief has been served electronically using the Missouri Supreme Court's electronic filing system this 26th day of August, 2016, on Assistant Attorney General Evan J. Buchheim at evan.buchheim@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift