

No. SC98268

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

DAVID M. BARNETT,

Appellant.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Joseph Walsh, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals a St. Louis County Circuit Court conviction imposing two sentences of life imprisonment without eligibility for probation or parole on two counts of first-degree murder. The circuit court imposed these sentences during a penalty-phase proceeding following a federal district court's judgment setting aside Defendant's death sentences after finding that Defendant received ineffective assistance of counsel during the penalty-phase proceeding in his state murder trial. Defendant asserts one claim in this appeal: that section 565.020, RSMo 1994, is unconstitutional as applied to Defendant on the ground that this section imposed a mandatory minimum sentence of life without parole for first-degree murder on Defendant even though he was only 19 years old when committing the offenses.

The facts of the underlying criminal case, as taken from this Court's 1998 opinion affirming Defendant's murder conviction and death sentences, are as follows¹:

During January and the first few days of February 1996, David Barnett had been living with friends in the Glendale area. He had spoken several times to his friends about his grandparent's car, a 1995 Dodge Intrepid, and had told them that his grandparents were going to

¹ The record citations in Defendant's Statement of Facts show that it consists of a recitation of findings made by the federal district-court judge who set aside Defendant's death sentences. (*See* L.F. D90) Defendant presented no evidence or witnesses during the circuit court's re-sentencing proceeding.

rent this car to him. About 8:00 a.m. on Sunday, February 4, 1996, Barnett walked to the home of his grandparents, who were away attending Sunday school and church services at the Kirkwood Baptist church. Barnett entered the home, apparently through a bedroom window, sat down on the couch, turned on the television, and soon fell asleep. When he awoke, he phoned his stepbrother Scott and boasted that he had just won the lottery last night and had suddenly come into of a large sum of money.

Barnett was waiting for his grandparents when they returned home around 1:00 p.m. He confronted his grandmother and pushed her down in the hallway. He then pushed his grandfather to the floor and grabbed a knife that was lying on the nearby kitchen table. As his grandfather rose from the floor, Barnett kicked him in the head, and when he fell to the floor again, Barnett stabbed him repeatedly in the neck area. All told, Barnett inflicted ten stab wounds and numerous cuts to his grandfather's neck, face and hands. Satisfied that he had killed his grandfather, Barnett returned to the kitchen to get another knife and then began stabbing his grandmother in her neck as well. Once again, Barnett returned to the kitchen to get more knives. This time he retrieved two knives with which he continued to stab his grandmother until she, too, was killed. She suffered a total of 12 stab wounds to her neck and numerous cuts to her face.

After the attack, Barnett concealed one of the knives by placing it between two mattress pads in his grandparents' bedroom. Next, he went into the bathroom and washed the blood off his hands. He then removed the keys to the 1995 Dodge Intrepid that were dangling from the lock in the back door, retrieved his coat, and took approximately 120 dollars from his grandmother's purse. Before leaving the house, Barnett stood silently next to his victims to hear if they were still breathing. After determining that his victims were dead, Barnett lowered two of the shades in the house, locked up, and drove off in the victims' car.

Early the next morning, police officers found the victims' car parked in a residential area of Glendale. Barnett walked up to the uniformed officers and confessed that he had committed the murders.

State v. Barnett, 980 S.W.2d 297, 301 (Mo. banc 1998) (*Barnett I*).²

In 2015, the United States District Court for the Eastern District of Missouri entered an order granting Defendant’s application for habeas corpus on the ground that Defendant had received ineffective assistance of counsel during the penalty-phase proceeding in his original trial. (L.F. D90 pp. 188–89.) The district court further ordered that the State “shall either sentence [Defendant] to life imprisonment without eligibility for probation or parole, or grant him a new penalty-phase trial....” (L.F. D90 p. 188–89.) The United States Court of Appeals, Eighth Circuit, affirmed the federal district court’s order. *See Barnett v. Roper*, 904 F.3d 623 (8th Cir. 2018).

After the State waived the death penalty in Defendant’s case, Defendant filed a “Sentencing Memorandum” in which he asked the circuit court to declare section 565.020, RSMo, unconstitutional under both the Eighth Amendment and article I, section 28 of the Missouri Constitution³ and “to impose a sentence permitting parole.” (L.F. D62 p. 36, D67 p. 15.) The memorandum cited journal, newspaper, and magazine articles for the

² In a later case, this Court affirmed the circuit court’s judgment denying Defendant’s Rule 29.15 motion for postconviction relief. *See Barnett v. State*, 103 S.W.3d 765 (Mo. banc 2003) (*Barnett II*).

³ Article I, section 28 pertains to eminent domain and prohibits the taking of private property without compensation.

proposition that the adolescent brain is still developing after the age of 18 and since Defendant was 19 years old when he committed the murders section 565.020's mandatory minimum sentence of life without parole was unconstitutional. (L.F. D67 pp. 5–15.) Defendant requested relief in the form of a sentence that provided an opportunity for parole. (L.F. D67 p. 15.)

Defendant did not present any witnesses or evidence during the re-sentencing proceeding. (Tr. 2–3.) Defense counsel informed the court that several individuals had written letters to the court in support of Defendant. (Tr. 4.) He then argued that the statutorily mandated minimum sentence of life without parole for first-degree murder violated the Eighth Amendment on the ground that Defendant was only 19 years old when he committed the murders. (Tr. 4–14.) Counsel then asked the court to impose a sentence of “straight life,” which would be calculated as 30 years for determination of parole eligibility. (Tr. 10.) Defense counsel agreed that the defense had not previously raised this particular constitutional challenge to the statute. (Tr. 15.) The court rejected the constitutional challenged and sentenced Defendant on both murder counts to life without parole. (Tr. 23.)

ARGUMENT

The trial court did not err, plainly or otherwise, by both sentencing Defendant to life imprisonment without eligibility for probation or parole on two counts of first-degree murder he committed when he was 19 and refusing to declare the first-degree murder statute, section 565.020, RSMo 1994, unconstitutional because: (1) mandatory life-without-parole sentences imposed on adult offenders do not violate the Eighth Amendment; and (2) the United States Supreme Court has explicitly held that *Miller v. Alabama*, which bars mandatory life-without-parole sentences on juvenile homicide offenders, applies only to offenders who are under 18.

A. Standard of review.

The record shows that Defendant's constitutional challenge to the first-degree-murder statute, lodged for the first time 21 years after his trial, is untimely. Moreover, the constitutional claim asserted in this appeal is not preserved for appellate review because it differs from the claim made before the circuit court.

Defendant's trial occurred in 1997, and this Court affirmed Defendant's murder convictions in 1998. (L.F. D62 pp. 27–35.) Although Defendant challenged Missouri's death-penalty scheme on Eighth Amendment grounds in the 1998 appeal, his challenge did not specifically assert that section

565.020's mandatory minimum sentence of life without parole was unconstitutional either facially or as applied. *See Barnett I*, 980 S.W.2d at 308–09. Defendant also did not raise this specific constitutional challenge in the state postconviction proceeding. *See Barnett II*, 103 S.W.3d at 768–74.⁴ Defendant's sentencing memorandum challenged the constitutionality of the first-degree murder statute in effect when he committed his offense, but did not specifically assert that his particular sentence was unconstitutional. (L.F. D67 p. 15.)

“The rule has long been established that to preserve constitutional questions for review on appeal, the constitutional issue must be raised in the trial court at the earliest opportunity, consistent with good pleading and orderly procedure.” *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008). *See also State v. Fassero*, 256 S.W.3d 109, 117 (Mo. banc 2008) (holding that a criminal defendant waived a constitutional claim raised for the first time on appeal). “This rule is necessary to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue.” *Carpenter*, 250 S.W.3d at 701. “To properly raise a

⁴ Defendant also apparently did not assert this specific Eighth Amendment challenge to section 565.020 in either of his federal habeas proceedings. (Tr. 14.)

constitutional challenge, a party must: (1) raise the constitutional question at the first opportunity; (2) state with specificity the constitutional provision on which the challenge rests; (3) set forth facts showing the violation; and (4) preserve the question throughout the proceedings for appellate review.”

Peters v. Johns, 489 S.W.3d 262, 269 (Mo. banc 2016). Constitutional claims are waived if they are not presented to the trial court at the first opportunity. *State v. Parker*, 886 S.W.2d 908, 925 (Mo. banc 1994).

Constitutional claims concerning mandatory life-without-parole sentences in general or as applied to juvenile offenders were not unknown when Defendant’s 1997 trial occurred. For example, *Harmelin v. Michigan*, 501 U.S. 957 (1991), involved a challenge to a mandatory life-without-parole sentence for drug possession. Moreover, the argument that “the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s” was asserted before the Supreme Court eight years before Defendant’s murder trial. *See Stanford v. Kentucky*, 492 U.S. 361, 396 (1989) (Brennan, J. dissenting). Defendant’s newly minted constitutional claim asserted for the first time after his original direct appeal, a state postconviction proceeding, and two federal habeas actions is untimely and is thus waived. *See State v. Martin*, 466 S.W.3d 565, 567–68 (Mo. App. S.D. 2015) (refusing to consider the defendant’s constitutional claim, raised

for the first time on appeal, challenging his life-without-parole under *Miller v. Alabama* on the ground that he was 18 years old when he committed first-degree murder).

Additionally, Defendant's constitutional challenge and the relief requested has not remained the same from trial to appeal. In his sentencing memorandum and during the sentencing hearing, Defendant challenged the constitutionality of the imposition of any life-without-parole sentence and requested that he be given a sentence with parole eligibility. (L.F. D67 p. 15; Tr. 11.) Although *Miller v. Alabama*, 567 U.S. 460 (2012), and this Court's decision in *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013), were decided several years before Defendant's re-sentencing proceeding, Defendant did not present any evidence attempting to prove that he should not be given a life-without-parole sentence under *Miller* and *Hart*. For the first time on appeal, however, Defendant now asks this Court to remand for a re-sentencing proceeding under the procedures laid out in *Hart*. Deft's Brief, p. 57. The trial court never had the opportunity to consider this newly minted constitutional claim raised for the first time on appeal. Instead, the trial court was asked to

impose a sentence neither authorized by section 565.020 nor the order issued by the federal district court.⁵

Because Defendant did not assert a constitutional challenge to the statute at the earliest opportunity and because that constitutional challenge has been altered for the first time on appeal, Defendant's constitutional claim is either waived or not preserved for appellate review. If Defendant's unpreserved constitutional claim is considered, it may be reviewed only for plain error.

"[P]lain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20. "Substantial rights are involved if, facially, there are significant grounds for believing that the error is of the type from which manifest injustice or miscarriage of justice could result if left uncorrected." *State v. Johnson*, 524 S.W.3d 505, 513 (Mo. banc 2017). "[I]f plain error affecting substantial rights is found, the

⁵ Further complicating matters is that a federal court retains jurisdiction to determine whether a state has complied with the terms of a conditional order in a habeas proceeding. *See Mason v. Mitchell*, 729 F.3d 545, 549–50 (6th Cir. 2013). The failure of the state to comply with such an order can result in the imposition of sanctions, including barring re-prosecution. *Id.* The federal district-court's order here directed the state to either sentence Defendant to life *without* parole or grant a new sentencing proceeding. (L.F. D90 pp. 188–89.)

[appellate court] determines whether the error actually did result in manifest injustice or a miscarriage of justice.” *Id.* An appellate court should “exercise its discretion to conduct plain error review *only* when the” proponent “establishes facially substantial grounds for believing that the trial court's error was ‘evident, obvious, and clear’ and ‘that manifest injustice or miscarriage of justice has resulted.’” *State v. Jones*, 427 S.W.3d 191, 195 (Mo. banc 2014) (quoting *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009)) (emphasis added). Unless the [defendant] makes this facial showing,” an appellate court should “decline to review for plain error under Rule 30.20.” *Id.* at 195–96.

“The plain language of Rule 30.20 demonstrates that not every allegation of plain error is entitled to review.” *State v. Nathan*, 404 S.W.3d 253, 269 (Mo. banc 2013). “The plain error rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review.” *Jones*, 427 S.W.3d at 195. “Rule 30.20 is no panacea for unpreserved error, and does not justify review of all such complaints, but is used sparingly and limited to error that is evident, obvious, and clear.” *State v. Phillips*, 319 S.W.3d 471, 476 (Mo. App. S.D. 2010) (quoting *State v. Smith*, 293 S.W.3d 149, 151 (Mo. App. S.D. 2009)). “[N]ot all prejudicial error—that

is, reversible error—can be deemed plain error.” *Id.* An appellate court is not required to grant plain-error review; it does so solely within its discretion. *Id.*

“Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice.”

State v. Baxter, 204 S.W.3d 650, 652 (Mo. banc 2006); *see also State v.*

Schallon, 341 S.W.3d 795, 799 (Mo. App. E.D. 2011) (“It is a defendant’s burden to demonstrate manifest injustice or a miscarriage of justice.”).

B. Defendant’s claim is without merit because he was 19 when he committed first-degree murder, and the Eighth Amendment bars mandatory life-without-parole sentences only on juvenile offenders, which the Supreme Court has explicitly defined as persons under 18.

The first-degree-murder statute in effect when Defendant committed his murders provided two possible sentences: death or life imprisonment without probation or parole. Section 565.020.2, RSMo 1994 (“Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole....”). Because the State waived the death penalty before the resentencing proceeding, the only statutorily authorized sentence the court could impose on Defendant was life without parole.

A statutorily mandated sentence of life without parole on an adult offender does not not violate the Eighth Amendment.⁶ *See Harmelin*, 501 U.S. at 994–96 (upholding a statutorily mandated life-without-parole for drug possession and rejecting a requirement permitting a defendant to present mitigating evidence). It follows then that a statutorily mandated life-without-parole sentence on an adult, or non-juvenile, offender convicted of first-degree murder also would not violate the Eighth Amendment’s ban on cruel and unusual punishments.

Defendant, who was 19 years old when he committed two counts of first-degree murder, nevertheless contends that his life-without-parole sentences should be set aside because the reasoning outlined by the United States Supreme Court in its Eighth Amendment juvenile-offender cases equally applies to 18-, 19-, and even 20-year-old offenders.⁷ But this argument is foreclosed by the United States Supreme Court holdings in those cases. The

⁶ The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The Missouri Constitution contains a nearly identical provision: “That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” MO. CONST. art. I, § 21

⁷ Defendant suggests in his brief that “a cutoff of 21 makes much more sense than 18.” Deft’s Brief at 51.

Court explicitly recognized that the reasoning supporting its judgment about juvenile offenders might also apply to non-juveniles, but it nevertheless determined that a bright-line age limit of under 18 was necessary. The Missouri Court of Appeals has also rejected the argument Defendant advances here, and other Missouri cases recognize the bright line drawn by the United States Supreme Court. Finally, courts in other jurisdictions have rejected arguments nearly identical to the one Defendant advances here.

1. The United States Supreme Court has unequivocally drawn the line for application of its Eighth Amendment precedents to offenders who were under 18 when they committed their offenses.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court declared that the imposition of capital punishment on *juvenile* offenders—those who were under 18 when the offense was committed—violated the Eighth Amendment. *Id.* at 578–79. Although the Court acknowledged that 18-year-old offenders may possess the same attributes as juvenile offenders, it nevertheless held that a line must be drawn:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, *a line must be drawn*. ...The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest

Id. at 574 (emphasis added).

Five years later, in *Graham v. Florida*, 560 U.S. 48 (2010), the Court prohibited the imposition of life-without-parole sentences for *juveniles* committing non-homicide offenses. The Court again held that the bright line for this categorical rule was 18 because this is the age where society—for many purposes—distinguishes childhood from adulthood:

This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. *This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.* Because “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,” those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.

Id. at 74–75 (quoting *Roper*, 543 U.S. at 574) (alteration in original)

(emphasis added). The Court rejected an approach that would require courts to consider an offender’s age when imposing sentence because the “case-by-case approach to sentencing must...be confined by some boundaries.” *Id.* at 77. Although the Court acknowledged that “[c]ategorical rules tend to be imperfect,” it nevertheless held that “one is necessary here.” *Id.* at 75.

Two years after *Graham*, the Court held in *Miller v. Alabama* that the Eighth Amendment does not permit a sentencing scheme that mandates the imposition of a life-without-parole sentence on a *juvenile* offender. *Miller*, 567

U.S. at 479 (“We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for *juvenile* offenders.”) (emphasis added). The Court explicitly noted that psychological and brain-science studies conducted after *Roper* and *Graham* reinforced the conclusion that fundamental differences exist between juvenile and adult brains. *Id.* at 472 n.5. The Court also declined to consider whether the Eighth Amendment categorically bars a life-without-parole sentence for any *juvenile*, even those “14 and younger.” *Id.* at 479. The Court also rejected the argument that its decision would effectively overrule *Harmelin* because that case “had nothing to do with *children* and did not purport to apply its holding to the sentencing of *juvenile* offenders.” *Id.* at 481. The Court then outlined several of its Eighth Amendment cases that had recognized a distinction between adults and “children.” *Id.* at 481–82.

In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court, in declaring that the holding in *Miller* applied retroactively, reiterated that the Eighth Amendment cases outlined above applied only to juvenile offenders and that children are less culpable than adults. *Id.* at 732–35. The opinion repeatedly referred to juvenile offenders or children as being the targets of Eighth Amendment protection under these cases. *Id.* The Court suggested that in giving *Miller* retroactive effect, States could permit “*juvenile* homicide

offenders to be considered for parole rather than by resentencing them.” *Id.* at 736 (emphasis added).

Defendant contends that the Court’s bright-line rule of limiting its application of these Eighth Amendment cases to juveniles under 18 should be reconsidered after the decision in *Hall v. Florida*, 572 U.S. 701 (2014).

Defendant contends that *Hall* represents a change in the Court’s reliance on bright-line rules under the Eighth Amendment. This argument misinterprets *Hall* and is without merit.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment prohibits the execution of intellectually disabled offenders. *Id.* at 321. *Atkins* did not attempt to define what constituted an intellectual disability for Eighth Amendment purposes. After acknowledging there was “serious disagreement” about which offenders are in fact intellectually disabled, the Court left it to the States to develop appropriate ways to enforce this constitutional mandate. *Id.* at 317. Florida later enacted a law requiring an offender to make a threshold showing of an IQ 70 or below before that offender could present additional evidence of intellectual disability. *Hall*, 572 U.S. at 707. The Court in *Hall* held only that an IQ score standing alone was insufficient to categorically reject an Eighth Amendment claim that an

offender was intellectually disabled and should not be subjected to capital punishment.

Hall simply has no application to the Court’s Eighth Amendment juvenile-offender cases. First, while the *Atkins* Court declined to define intellectual disability and left it to the States to make that determination, the Court in *Roper*, *Graham*, and *Miller* explicitly defined a juvenile offender as one who was under 18 when the crime was committed. Second, the Court in *Hall* only addressed whether a State could restrict a finding of intellectual disability under *Atkins* solely by an IQ score. In *Roper*, *Graham*, and *Miller*, on the other hand, the Court explicitly limited its holdings to juveniles under 18 while fully recognizing that the basis for that decision might also apply to those 18 and older; the Court simply declared that a line had to be drawn. *See Martin*, 466 S.W.3d at 567–68 (holding that *Hall* did not invalidate section 565.020’s statutorily mandated life-without-parole sentence imposed on a defendant who committed first-degree murder when he was 18½ years old). Finally, the Court in *Montgomery v. Louisiana*, which was decided after *Hall*, acknowledged the bright line drawn in its prior cases. *Montgomery*, 136 S. Ct. at 732 (considering the question whether “*Miller’s* prohibition on mandatory life without parole for *juvenile* offenders” was retroactive) (emphasis added); *id.* at 733 (noting that *Miller* held that “mandatory life-

without-parole sentences for *children* pose to great a risk of disproportionate punishment”) (internal quotation marks and alterations omitted) (emphasis added).

The Court in *Roper*, *Graham*, and *Miller* deliberately drew a bright line defining a juvenile offender who would receive Eighth Amendment protection. If those holdings are to be extended to offenders who were 18, 19, or 20, it is for the United States Supreme Court alone to redefine what age groups are to be protected. Defendant’s argument that this Court may redraw that line based on evolving standards of decency is inconsistent not only with the Court’s bright-line rule defining a juvenile as someone under 18, it is also inconsistent with the Court’s unequivocal statements that it is the Supreme “Court’s prerogative *alone* alone to overrule one of its precedents.” *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (quoting *Unites States v. Hatter*, 532 U.S. 557, 567 (2001) (emphasis added); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). United States Supreme Court “decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.” *Bosse*, 137 S. Ct. at 2. *See also Roper*, 543 U.S. at 594 (O’Connor, J. dissenting) (noting that the Court’s precedents are binding “even where subsequent decisions of factual developments may appear to have ‘significantly undermined’ the rational for

[its] earlier holding”) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)). *See also United States v. Duncan*, 413 F.3d 680, 684 (7th Cir. 2005) (“[I]t certainly is not our role as an intermediate appellate court to overrule a decision of the Supreme Court or even to anticipate such an overruling by the Court.”).⁸

2. Missouri courts have already rejected Defendant’s constitutional claim, and the policy in Missouri is to treat offenders 18 or older as adults.

The Court of Appeals has twice rejected an argument nearly identical to the one Defendant advances here.

In *State v. Bates*, 464 S.W.3d 257 (Mo. App. E.D. 2015), the defendant, who was 18 years and 11 days old and had a learning disability, argued that his mandatory life-without-parole sentence for first-degree murder violated the Eighth Amendment. The court rejected this argument because the “holdings of *Roper*, *Graham*, *Miller*, and [*State v.*] *Hart* are confined to juvenile offenders.” *Id.* at 268. The court further held that because the

⁸ In 2019, the Court denied a petition for writ of certiorari filed on behalf of an offender who was sentenced to death for a murder he committed when he was 19 years old. The question presented in the petition was whether *Roper* should be expanded to offenders 18 years old or older because “neuroscientific research” conducted after *Roper* “has proven that a juvenile’s brain development...continues well beyond the age of 18.” *Samra v. Alabama*, No. 18-9033, 139 S. Ct. 2050 (2019) (order denying a stay of execution and denial of a writ of certiorari).

defendant committed the offense when he was 18 years old, he was an “adult.” *Id.* Finally, the court noted that the United States Supreme Court “recognized that a clear line was necessary” and drew that line at 18 years old. *Id.*

In *State v. Perdomo-Paz*, 471 S.W.3d 749 (Mo. App. W.D. 2015), the defendant, who was 18 years old when he committed two counts of first-degree murder, argued that the statutorily mandated life-without-parole sentence for first-degree murder violated the Eighth Amendment. *Id.* at 763–64. The defendant in *Perdomo-Paz*, like Defendant here, claimed that because 18 year olds “lack the same maturity and sense of responsibility as” 17 year olds, the Eighth Amendment precluded a mandatory life-without-parole sentence. *Id.* at 764. The court rejected this argument because the United States Supreme Court had unequivocally drawn the line with offenders under 18. *Id.* The court also noted that Missouri had drawn the line for criminal responsibility between adults and children at 17 years old. *Id.* (citing sections 211.021 and 211.041, RSMo).⁹ The court held that because the defendant was not a juvenile when he committed first-degree murder the holdings in *Miller* and *State v. Hart* did not apply to him: “A mandatory life-without-parole

⁹ These sections are discussed below.

sentence for an eighteen-year-old does not violate the prohibition against imposing such a sentence on a defendant under the age of eighteen.” *Id.* at 765.

This Court has also repeatedly recognized that *Roper*, *Graham*, and *Miller* apply only to *juvenile* offenders. *See State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 59 (Mo. banc 2017) (noting that *Miller* applies to “juveniles convicted of homicide”); *Willbanks v. Department of Corrections*, 522 S.W.3d 238, 241 (Mo. banc 2017); and *State v. Hart*, 404 S.W.3d 232, 237–39 (Mo. banc 2013).

In the wake of the Supreme Court’s Eighth Amendment decisions pertaining to juvenile offenders, Missouri has reaffirmed its policy of treating offenders who were 18 years old or older as adults. After *Roper*, *Graham*, and *Miller* were decided, the General Assembly enacted section 558.047, which granted parole eligibility after 25 years to anyone who had received a sentence of life without parole before August 28, 2016, and who was “*under eighteen years of age* at the time of the commission of the offense or offenses.” *See* section 558.047.1(1), RSMo 2016 (emphasis added). The legislature also amended section 565.020 in 2016 to impose a mandatory minimum sentence of life without parole for anyone committing first-degree murder on or after their 18th birthday. *See* section 565.020.2, RSMo 2016. A special sentencing provision providing for a sentence of life with parole or term-of-years

sentence between 30 and 40 years was also enacted to apply exclusively to anyone “found guilty of murder in the first degree who was under the age of eighteen at the time of the commission of the offense.” Section 565.033, RSMo 2016.

Moreover, section 211.021, which currently defines an “adult” as “a person seventeen years of age or older” and a “child” as “any person under seventeen years of age,” was amended effective January 1, 2021, to redefine an “adult” as “a person eighteen years of age or older” and a child as “any person under eighteen years of age.” Section 211.021(1) and (2), RSMo 2016 and RSMo Supp. 2018. Thus, even after these redefinitions take effect 20 years after Defendant committed his murders, Missouri law will define a juvenile offender as a person under 18 years old. Defendant, who was 19 when he committed double homicide, clearly does not fall into that class.

3. Courts in other jurisdictions have overwhelmingly rejected the constitutional claim Defendant makes in this case.

Courts in other states have overwhelmingly rejected the argument that *Miller v. Alabama* should be expanded to categorically bar a life-without-parole sentence, or even death, for a homicide offense committed when the offender was 18 or older. *See Foster v. State*, 258 So.3d 1248 (Fla. 2018) (rejecting the argument that *Miller* should be expanded to apply to an 18-

year-old convicted of first-degree murder and sentenced to death despite a claim that “newly discovered evidence reveals an emerging consensus in the scientific community that young adults are developmentally akin to juveniles”); *State v. Ceasar*, — So.3d —, 2018 WL 1082436 (La. App. 2018) (rejecting the argument that *Miller* should apply to an 18-year-old convicted of murder and sentenced to life without parole despite his claim “that the same science relied on by the *Miller* court demonstrates that the neurological maturation process continues well into a young person's twenties); *Commonwealth v. Furgess*, 149 A.2d 90, 94 (Penn. Super. Ct. 2016) (refusing to apply *Miller* to a 19 year old convicted of murder and sentenced to life imprisonment despite a claim that he was a “technical juvenile” and that “neuroscientific theories regarding immature brain development” applied to him); *State v. Hart*, 353 P.3d 253 (Wash. App. 2015) (rejecting the argument that *Miller* should apply to a 27-year-old convicted of murder and sentenced to mandatory life without parole despite a claim that “emerging neuroscience discussed in *Miller*” applies to 18 to 25 year olds); *State v. Wetherell*, 855 N.W.3d 359 (Neb. 2014) (rejecting the argument that *Miller* should apply to an 18-year-old convicted of first-degree murder despite her classification as a “minor” under state law), disapproved on other grounds by *State v. Goynes*, 876 N.W.2d 912, 919 (Neb. 2016); *Sloan v. State*, 418 S.W.3d 884, 891–92

(Tex. App. 2013) (rejecting the argument that *Miller* should apply to an adult offender convicted of capital murder and sentenced to mandatory life without parole because “*Miller’s* holding is limited to juveniles”); *Romero v. State*, 105 So. 3d 550, 552–54 (Fla. App. 2012) (refusing to expand *Graham* to to an 18 year old convicted of murder and sentenced to life without parole). *See also Nicodemus v. State*, 392 P.3d 408 (Wyo. 2017) (refusing to extend *Miller* to invalidate consecutive life sentences imposed on an 18-year-old offender despite the claim that the age of majority in Wyoming was 19 when the offenses were committed).

The federal Court of Appeals has also refused to expand *Roper*, *Graham*, or *Miller* to offenders who were 18 or older when they committed their offenses. *See United States v. Sierra*, 933 F.3d 95 (2nd Cir. 2019) (rejecting the argument that *Miller* should apply to offenders who were between 18 and 22 years old when they committed murder and were sentenced to mandatory life without parole despite the claim that “scientific research purportedly shows that the biological factors that reduce children’s ‘moral culpability’ likewise affect individuals through their early 20s”); *United States v. Marshall*, 736 F.3d 492, 500 (6th Cir. 2013) (holding that because the defendant was “at the very most an immature adult” but was not a “juvenile,” he did “not qualify for the Eighth Amendment protections accorded to

juveniles.”); *Melton v. Fla. Dep't of Corrections*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015) (holding that “*Roper* prohibits only the imposition of the death penalty on a defendant who committed the capital crime when he was younger than 18 years old,” whereas the defendant “was 18 years, 25 days old when he committed the crime.”).

Courts considering *Miller* in other contexts have held that *Miller* does not apply to non-juvenile offenders. *See United States v. Hoffman*, 710 F.3d 1228, 1233 (11th Cir. 2013) (“Nothing in *Miller* suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence *as an adult*, after committing a further crime as an adult.”) (emphasis in original); *United States v. Orona*, 724 F.3d 1297, 1307 (10th Cir. 2013) (“Unlike the defendants in *Roper* and *Graham*, [the defendant] is being punished for his adult conduct.”); *United States v. Hunter*, 735 F.3d 172, 176 (4th Cir. 2013) (holding that “*Miller*, with its concerns particular to juvenile offenders,” did not apply to the defendant’s case because he “was no juvenile when he committed the crime for which he was sentenced here”). *See also United States v. Pierre*, 435 Fed. Appx. 905 (11th Cir. 2011) (“*Graham v. Florida* does not apply to adult offenders....”).

Defendant principally relies on two cases to support his position that *Miller* should apply to offenders 18 years old and older: *People v. House*, No.

1-11-0580, 2019 WL 2718457 (Ill. App. May 16, 2019), and *United States v. Cruz*, No. 11-CV-787, 2018 WL 1541898 (D. Conn. Mar. 29, 2018).

Subsequent developments in both cases, however, have obviated their holdings. On January 29, 2020, the Illinois Supreme Court granted the State leave to appeal the lower appellate court's decision in *House*. See *People v. House*, No. 125124, 2020 WL 473514 (Ill. 2020). In *Cruz*, not only has the United States filed an appeal to the Second Circuit, the district court's decision also appears to be directly contrary to the Second Circuit's decision in *United States v. Sierra*, cited above, which was decided four months after the federal district court issued its opinion in *Cruz*.

4. Defendant's remaining argument that a national consensus exists against imposing mandatory life-without-parole sentences against 18- to 21-year-old offenders is without merit.

In arguing that "evolving standards of decency" demonstrate a national consensus against mandatory life-without-parole sentences for 18 to 21 year-old offenders who commit first-degree murder, Defendant fails to identify how many states preclude this sentencing scheme, or even how many states permit life-without-parole sentences generally. In *Roper* and *Graham* the Court addressed the number of states that permitted either the death penalty or mandatory life-without-parole sentences on juvenile offenders who committed non-homicide offenses. Here, Defendant supports his claim of a

national consensus by looking at statutes that address entirely different matters, i.e., sentencing schemes for youthful offenders, foster-care eligibility, or the minimum age for gun ownership. Whether Missouri and other states have statutes that treat persons between 18 and 21 years old differently, does not obviate the fact that Missouri has made a specific policy decision to treat only those under 18 differently when it comes to sentencing for first-degree murder. Defendant cites no case holding that the Eighth Amendment demands that age classifications in criminal-sentencing statutes precisely mirror the age-related distinctions the states and federal government regularly make in the nearly endless variety of other matters upon which they legislate.

Defendant also relies on studies showing that brain development continues beyond a person's 18th birthday. But Defendant concedes that these same studies were before the Court when it decided *Roper*, *Graham*, and *Miller*. That is precisely why the Court in *Roper* noted that "objections [are] always raised against categorical rules." *Roper*, 543 U.S. at 574. The Court even went so far to state that "some under 18 have already attained a level of maturity some adults will never reach." *Id.* But in *Roper* and *Graham* the court explicitly rejected individualized sentencing in favor of a categorical rule defining a juvenile as someone under 18. In *Miller*, the Court declined

the juvenile defendants' invitation to categorically ban the imposition of a life-without-parole sentence on juveniles, or even children 14 years old and younger. *Miller*, 567 U.S. at 479. If the Court was unwilling to categorically ban life-without-parole sentences for juveniles, even young ones, it is unlikely that it would find a national consensus exists to expand *Roper* and *Graham* to 18 or 19 year olds. Moreover, as outlined above, if such a national consensus is to be found, it is the Supreme Court's prerogative to find it and to alone determine whether the reach of *Roper*, *Graham*, and *Miller* should be expanded to non-juvenile offenders.

The trial court did not plainly err in refusing to declare section 565.020, RSMo 1994, unconstitutional.

CONCLUSION

The circuit court committed no reversible error, and Defendant's life-without-parole sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,154 words, excluding the cover, certification, and appendix, if any, as determined by Microsoft Word 2016 software, and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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