IN THE SUPREME COURT OF THE STATE OF OREGON

KIPLAND PHILIP KINKEL,	)	
	)	
Petitioner-Appellant,	)	
Petitioner on Review,	)	
	)	Marion County
v.	)	Circuit Court No. 13C13698
	)	
ROB PERSSON,	)	CA A155449
Chairperson of the Oregon Board of Parole	)	
and Post-Prison Supervision,	)	S Ct S063943
	)	
Defendant-Respondent,	)	
Respondent on Review.	)	

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, KIPLAND PHILIP KINKEL

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable THOMAS M. HART, Judge

Opinion Filed: February 10, 2016
Author of Opinion: Sercombe, P.J.
Joined by: Hadlock, C.J. and Tookey, J.

ANDY SIMRIN #914310
Andy Simrin PC
405 NW 18th Avenue
Portland, OR 97209
(503) 265-8940

Attorney for Relator

PAUL L. SMITH # 001870
Assistant Attorney General
ELLEN F. ROSENBLUM #75239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
400 Justice Building
1162 Court St. NE
Salem, OR 97301
(503) 378-4402

Attorneys for Defendant

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PETITIONER'S BRIEF ON THE MERITS

Questions Presented

1) Does a 112-year prison sentence without any possibility of parole for a juvenile offender violate the Eighth Amendment's proscription against cruel and unusual punishment?

2) May the State of Oregon insist that Petitioner serve a sentence that violates the Eighth Amendment?

Petitioner's Proposed Rules of Law

1) A sentence that requires a juvenile to spend a lifetime in prison without any possibility of parole violates the Eighth Amendment without a finding that the person is irretrievably depraved. Sentencing courts cannot make an assessment of irretrievable corruption while the brain is still immature and developing.

2) A sentence that violates the Eighth Amendment is void. A state cannot insist that an offender serve an unconstitutional sentence.

Nature of the Action

Petitioner filed a petition for post-conviction relief under the Post-Conviction Hearing Act, ORS 138.680, in which he alleged that his nearly 112-year cumulative sentence violated the Eighth Amendment to the United States Constitution under the principles set forth in *Miller v. Alabama*, ___ US ___,

132 S Ct 2455, 183 L Ed 2d 407 (2012). The Marion County Circuit Court granted summary judgment in favor of Defendant on the ground that the petition was an untimely and impermissible successor petition. ORS 138.510(3); ORS 138.550(3). Petitioner appealed. Relying on this court's opinion in *Verduzco v. State of Oregon*, 357 Or 553, 355 P3d 902 (2015), the Court of Appeals affirmed on the ground that the Petition was barred, because Petitioner had raised an Eighth Amendment claim in the appeal in his underlying criminal case. *Kinkel v. Persson*, 276 Or App 427, 367 P3d 956 (2016). This court allowed review.

Summary of Facts

The facts that are relevant to this appeal are mostly procedural and are taken from the Court of Appeals' opinion in this case except where otherwise indicated.

While delusional and hallucinating from mental illness with features of paranoid schizophrenia, schizo-affective disorder (a combination of schizophrenia and depression) and bipolar disorder,[1] Petitioner murdered his parents. The next day, he went to Thurston High School, where he was a

[1] (Tr 385-454). Transcript references in this brief are to the transcript from Petitioner's underlying criminal case. That transcript was admitted as Defendant's Exhibit 104.

freshman, and killed two students and shot several others. After being arrested, he tried to attack a police officer with a knife.[2]

Petitioner pled guilty to four counts of murder and 25 counts of attempted murder, and pled no contest to one count of attempted murder. The court imposed 25-year prison terms for each of the murder convictions and 90-month terms for each of the convictions for attempted murder.[3] The court ordered him to serve the incarceration terms for the murders concurrently and ordered him to serve the remaining prison terms partially consecutively, for a total incarceration term of 1,340 months (111 years and eight months).

Petitioner appealed. He was represented by attorney Jesse Barton. In his brief to the Court of Appeals court, Barton asserted that the nearly 112-year cumulative sentence violated the proscriptions against cruel and unusual punishment found in Article I, section 16, of the Oregon Constitution and the

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[2] *State v. Kinkel* (*Kinkel I*), 184 Or App 277, 279-80, 56 P3d 463, 464 (2002), *rev den* 335 Or 142 (2002).

[3] Petitioner's sentencing hearing was conducted in November of 1999. (Tr 264, 493, 663, 755). Nine months earlier, the Court of Appeals ruled that life with a 25-year minimum for murder violated Article I, section 16, of the Oregon Constitution and that "the proper sentence is the 25–year mandatory minimum sentence required by [Measure 11], followed by post-prison supervision for life." *State v. McLain*, 158 Or App 419, 427, 974 P2d 727, 732 (1999).

Eighth Amendment to the United States Constitution. (Exhibit 107, page 49). Barton's Eighth Amendment argument was limited to a footnote and is quoted here in its entirety:

> "In pertinent part the Eighth Amendment states that 'cruel and unusual punishment [shall not be] inflicted.' The amendment applies against the States by virtue of the Fourteenth Amendment[.]' Harmelin v. Michigan, 501 US 957,962, I I I S Ct 2321,115 L Ed.2d 271 (1991). Defendant's true-life sentence violates the Eighth Amendment's ban on cruel and unusual punishment, for it is ''grossly disproportionate' to the crime.' 501 US at 1001 (quoting Solem v. Helm, 463 US 277, 288,303, 103 S Ct 3001,77 L Ed 2d 637 (1983)). For this reason too, this court should reverse the trial court's sentencing decision."

(Exhibit 107, page 53 n 15).

The Court of Appeals affirmed. In doing so, it recognized that the nearly 112-year sentence amounted to a true life sentence, because it was "a greater length than the defendant's life expectancy[.]" *State v. Kinkel* (*Kinkel I*), 184 Or App 277, 291, 56 P3d 463, 464 (2002), *rev den* 335 Or 142 (2002). In affirming, it expressly addressed and rejected Petitioner's argument based on Article I, sections 15 and 16, of the Oregon Constitution, but made no mention of his Eighth Amendment argument. This court denied review.

On December 18, 2003, Petitioner filed a petition for post-conviction relief in the Marion County Circuit Court. The petition alleged that, due to his mental illness, he was "mentally unable to knowingly, voluntarily and intelligently waive his constitutional rights" when he entered his guilty and no

contest pleas in the underlying criminal case. (Exhibit 111). The circuit court denied the petition. (Exhibit 113). Petitioner appealed. The Court of Appeals affirmed, and the Supreme Court denied review. *Kinkel v. Lawhead* (*Kinkel II*), 240 Or App 403, 246 P3d 746, *rev den* 350 Or 408 (2011).

On March 27, 2013, Petitioner filed a second petition for post-conviction relief. In that petition, which initiated the present case, he asserted that his cumulative sentence "violated petitioner's rights against Cruel and Unusual Punishments, which are proscribed by the Eighth and Fourteenth Amendments to the United States Constitution." *Kinkel v. Persson*, Marion County case no. 13C13698, Petition for Post-Conviction Relief, ¶ 11. In making that claim, Petitioner asserted a different Eighth Amendment claim than the proportionality claim that Barton had raised in his direct appeal. This time, he alleged:

> "On June 25, 2012, the United States Supreme Court issued its opinion in *Miller v. Alabama*, ___ US ___, 132 S Ct 2455, 183 L Ed 2d 407 (2012), in which it held that the Eighth Amendment to the United States Constitution precludes mandatory imprisonment for life for a juvenile convicted of murder."

Kinkel v. Persson, Marion County case no. 13C13698, Petition for Post-Conviction Relief, ¶ 10.

Petitioner and Defendant filed competing motions for summary judgment. The circuit court granted Defendant's motion, denied Petitioner's motion and entered judgment in favor of Defendant. Petitioner appealed. *Citing Moore v. Biter*, 725 F3d 1184 (9th Cir 2013), *rehearing denied* 742 F3d

917 (2014), Petitioner argued that his cumulative sentence was the functional equivalent of the true life sentences that the United States Supreme Court had held were unconstitutional in *Miller v. Alabama*, ___ US ___, 132 S Ct 2455, 183 L Ed 2d 407 (2012) and *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825 (2010), and that the rule announced in *Graham* applies retroactively. Defendant argued the opposite on both issues.

Oral argument was conducted in the Court of Appeals on September 15, 2015. On January 25, 2016, while the case was still under advisement, the United States Supreme Court issued its opinion in *Montgomery v. Louisiana*, ___ US ___, 136 S Ct 718, 193 L Ed 2d 599 (2016), in which it held that the rule of *Miller* applied retroactively, no matter when the conviction occurred. In doing so, the court explained that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Montgomery*, 136 S Ct at 731. The court went on to hold that, "If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings. *Id.*

Pursuant to ORAP 5.85(1), the Court of Appeals permitted Petitioner to file a post-argument Memorandum of Additional Authority based on *Montgomery*. In that memorandum, Petitioner argued:

> "The state may not erect procedural barriers that preclude Petitioner, in the wake of *Miller*, from challenging what is effectively a life sentence without any possibility of parole. ([*Montgomery*,] Slip Opinion at 13). In that regard, all of the procedural disputes in this case must be resolved in Petitioner's favor.
>
> The sole remaining issue for this court to resolve is the substantive issue of whether Petitioner's cumulative sentence violates the Eighth Amendment under *Miller*. On that issue, this court should be guided by *Moore v. Biter*, 725 F3d 1184 (9th Cir 2013), *rehearing denied* 742 F3d 917 (2014), which is discussed on pages 26-28 of Petitioner's opening brief."

(Memorandum of additional Authority at 3).

The Court of Appeals did not address Petitioner's substantive argument under the Eighth Amendment and dispensed with Petitioner's procedural argument in a footnote:

> "We do not interpret *Montgomery* to preclude operation of ORS 138.510(3) or ORS 138.550(2) and (3). Therefore, *Montgomery* does not affect our conclusion, discussed below, that petitioner's successive petition is procedurally barred by ORS 138.550."

Kinkel III, 276 Or App at 438.

Summary of Argument

A juvenile offender may not be required to serve a lifetime in prison unless that offender has been found to be irretrievably corrupted. Absent such a finding, there is an unacceptable risk, prohibited by the Eighth Amendment, that the

juvenile offender will spend a disproportionate part of his life in prison. Sentencing courts lack the prescience to make that finding. Such a finding can only be contemplated after opportunities for maturation and rehabilitation have been provided.

No such finding has ever been contemplated in Petitioner's case -- neither by the sentencing court nor by any tribunal after the provision of opportunities for maturation and rehabilitation. Petitioner's sentence of nearly 112 years in prison without any chance of parole violates the Eighth Amendment's proscription against the infliction of cruel and unusual punishments.

A state may not require an offender to serve an unconstitutional sentence, no matter when it was imposed. That proscription, recently announced by the United States Supreme Court, means that procedural barriers in the Post-Conviction Hearing Act cannot preclude Petitioner from having his sentence addressed in the light of substantive law that did not develop until years after he was sentenced.

ARGUMENT

I. Petitioner's Sentence Violates the Eighth Amendment

Not quite six years ago, this court made the following observation:

> "To state the obvious, the penalty of <u>death is different</u> in kind from incarceration."

State v. Haugen, 349 Or 174, 203, 243 P3d 31, 48 (2010) (emphasis added).

This court's observation in *Haugen* echoed a phrase first used by the United States Supreme Court forty years ago, when it observed that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 US 153, 188, 96 S Ct 2909, 2932, 49 L Ed 2d 859 (1976) (emphasis added) (citing *Furman v. Georgia*, 408 US 238, 92 S Ct 2726, 33 L Ed 2d 346 (1972)). Consequently, the court summarized its holding as this:

> "We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it."

Id. at 187.

In drawing that conclusion regarding the need to consider the circumstances of the offense, the character of the offender and the procedure followed in reaching a decision to impose it, the court was of course describing requirements of the Eighth Amendment to the United States Constitution. It provides that:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

"The command of the Eighth Amendment * * * is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." *Robinson v. California*, 370 US 660, 675, 82 S Ct 1417, 1425, 8 L Ed 2d 758 (1962).

In an emerging line of Eighth Amendment jurisprudence, the Supreme Court recently observed that, "So if 'death is different,' children are different too." *Miller v. Alabama*, ___ US ___, 132 S Ct 2445, 2470, 183 L Ed 2d 407 (2012) (emphasis added; citations omitted). The concept that when it comes to punishment, children are different was the subject of this court's recent opinion in *State v. J. C. N.-V.*, 359 Or 559, ___ P3d ___ (2016). In that case, this court was called upon to construe the phrase "sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved" as it appears in ORS 419C.349(3), which is at the heart of the question of whether a child is to be prosecuted as an adult.

Ultimately, this court concluded that:

> "to authorize waiver of a youth who otherwise is eligible for waiver under ORS 419C.349 or ORS 419C.352, a juvenile court must find that the youth possesses sufficient adult-like intellectual, social and emotional capabilities to have an adult-like understanding of the significance of his or her conduct, including its wrongfulness and its consequences for the youth, the victim, and others."

J. C. N.-V., 359 Or at 559 (emphasis added).

In reaching that conclusion, this court considered the testimony of two experts, Dr. Nagel and Dr. Bolstad.[4] Nagel testified that the undeveloped pre-frontal

[4] Although the opinion doesn't say so, Nagel is a pediatric neuropsychologist. http://www.oregonlive.com/hillsboro/index.ssf/2011/12/doctor_testifies_about_adolesc.html. The opinion does indicate that Bolstad is a psychologist. *J. C. N.-V.*, 359 Or at 564.

cortex of juveniles "makes it harder for adolescents to access the brain's higher level, logical functions." *J. C. N.-V.*, 359 Or at 564. That, coupled with the neurological disequilibrium that is manifested at the onset of puberty, means that juveniles "have significantly more trouble than both adults and younger children in making moral choices in emotionally-charged or social reward-based situations." *Id.*

Bolstad testified that "young adolescents as a whole are considerably less capable of independent thinking than are adults" and that, because of their "immature brains" they:

> "generally lack sophistication in terms of understanding abstract principles and have difficulty in weighing alternatives and in anticipating the consequences of their actions and decisions."

J. C. N.-V., 359 Or at 565.

The fact that young adolescents have immature brains that generally render them less capable than adults of "appreciate[ing] the nature and quality of the conduct involved"[5] in their criminal activity provides the underpinning for the line of Supreme Court cases fleshing out the concept that "children are different." *Montgomery v. Louisiana*, 136 S Ct 718, 733, 193 L Ed 2d 599 (2016) (quoting *Miller*). In *Roper v. Simmons*, 543 US 551, 569, 125 S Ct

[5] *J. C. N.-V.*, 359 Or at 562.

1183, 161 L Ed 2d 1 (2005), the court described three "general differences" between juvenile and adult offenders.

First, the court noted the "lack of maturity and underdeveloped sense of responsibility" that often "result[s] in impetuous and ill-considered actions and decisions." *Roper*, 543 US at 569. Next, the court observed that juveniles are more susceptible to "negative influences and outside pressures, including peer pressure." *Id.* Finally, the court recognized that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* (emphasis added).

These differences between juvenile offenders and adult offenders mirror the distinctions between them that this court contemplated in *State v. J. C. N.-V.* Because of those differences, the Supreme Court held that the Eighth Amendment forbids the imposition of a death penalty for a juvenile offender. *Roper*, 543 US at 578.

Building from the premise that the "personality traits of juveniles are more transitory, less fixed"[6] than those of adults, the Supreme Court five years later declared:

> "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. [It is] 'the rare juvenile offender whose crime reflects irreparable corruption.'"

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[6] *Roper*, 543 US at 569.

Graham v. Florida, 560 US 48, 68, 130 S Ct 2011, 176 L Ed 2d 825 (2010) (quoting *Roper*; emphasis added).

Because juvenile offenders are so rarely irreparably corrupted, the court held that the Eighth Amendment categorically:

> "forbids the sentence of life without parole" for a juvenile offender who did not commit a homicide. [T] those who were below [the age of adulthood] when the offense was committed may not be sentenced to life without parole for a nonhomicide crime."

Graham, 560 US at 74-75.

At this point, it is important to recall that the Court of Appeals observed that Petitioner's nearly 112-year sentence amounted to life without any possibility of parole, because it was "a greater length than the defendant's life expectancy[.]" *State v. Kinkel* (*Kinkel I*), 184 Or App at 291. Considering that the portion of that sentence for Petitioner's four homicides consisted of concurrent 25-year terms, it was the consecutive terms in Petitioner's sentence for the non-homicide offenses that deprived him of any possibility of parole. That portion of the sentence, in and of itself, violated the proscription in *Graham* against a sentence of life without parole for juveniles convicted of non-homicide offenses.

Two years after deciding *Graham*, the Supreme Court decided *Miller v. Alabama*, ___ US ___, 132 S Ct 2455, 183 L Ed 2d 407 (2012). Quoting *Roper*, the court reiterated that it is "the rare juvenile offender whose crime

reflects irreparable corruption." *Miller*, 132 S Ct at 2469. Consequently, the court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" convicted of homicides. *Id.*

In the Court of Appeals, the State argued that, even if *Miller* applies retroactively (which the Supreme Court subsequently held), it would not apply to Petitioner's case because "he was not sentenced to life without parole and his sentence was not mandatory." *Kinkel III*, Respondent's Brief at 32. Specifically, the State argued:

> "On the 26 counts of attempted murder, petitioner faced a mandatory minimum of 90 months per count. ORS 137.707(4)(a)(C). But the trial court was free to make those sentences concurrent with the murder sentences or with each other."

Id. at 33.

The thrust of the State's argument was that no statute mandated the consecutive sentences. Consequently, the State contended, "petitioner's sentence satisfied *Miller*'s procedural requirements, to the extent that they even apply to him." *Kinkel III*, Respondent's Brief at 34.

What the State missed was that the rule of *Miller* is not procedural. Rather, the rule is substantive. That distinction was the foundation of the Supreme Court's subsequent decision in *Montgomery v. Louisiana* and will be discussed in more detail in the next section.

Courts that have considered sentences that were effectively life without any possibility of parole for juveniles have held that they run afoul of the rule in *Miller*. For example, one year after *Miller*, the Ninth Circuit Court of Appeals decided *Moore v. Biter*, 725 F3d 1184 (9th Cir 2013), *rehearing denied* 742 F3d 917 (2014). Roosevelt Moore committed 24 non-homicide crimes at the age of sixteen. A California court imposed consecutive sentences totaling 254 years and four months under which would not be eligible for parole consideration until after serving more than 127 years in custody. The circuit court explained that, "Because Moore would have to live to be 144 years old to be eligible for parole, his chance for parole is zero." *Moore*, 725 F3d at 1186. In that regard, Moore was situated in the exact same position as the Court of Appeals found Petitioner to be in.

However, when the Court of Appeals equated Petitioner's 112-year cumulative sentence to a true life sentence, it could not have been informed by either *Graham* or *Miller*, which weren't decided until eight and ten years later, respectively. In *Moore*, with the wisdom of those cases in mind, the Ninth Circuit Court of Appeals held:

> "The facts in *Graham* are materially indistinguishable from the facts in Moore's case. Accordingly, the state court's failure to

> apply *Graham* was 'contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.'"

Moore, 725 F3d at 1186 (quoting 28 USC § 2254(d)(1)).[7]

While *Moore* did not explicitly state that a discretionary sentencing scheme that authorizes a court to mandate life without parole violates the Eighth Amendment, that is the necessary implication of its conclusion that Moore's cumulative sentence was contrary to clearly established precedent from the United States Supreme Court. The Seventh Circuit Court of Appeals is in accord. *See also McKinley v. Butler*, 809 F3d 908, 911 (7th Cir 2016) (in discretionarily imposing consecutive terms totaling 100 years, sentencing court "said nothing to indicate that he thought the defendant's youth at all relevant to the sentence").

More recently, the Connecticut Supreme Court expressly addressed that very issue. Ackeem Riley, like Petitioner, committed murder and a number of non-homicide offenses. Under a sentencing scheme, like Oregon's, that authorized a judge to impose consecutive sentences, the sentencing court

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[7] *See also Bear Cloud v. State*, 334 P3d 132, 145 (Wyo 2014) ("the application of *Miller* to aggregate sentences [is] a logical application of the *Miller* rationale"); *Henry v. State*, 175 So 3d 675, 679-80 (Fla 2015) (aggregate sentence of 90 years for juvenile violates Eighth Amendment because there is no "meaningful opportunity to obtain release based on demonstrable maturity during his or her natural life"); *Brown v. State*, 10 NE3d 1, 8 (Ind 2014) (quoting *Miller* for the proposition that cumulative sentence of 150 years for juvenile offender "forswears altogether the rehabilitative ideal").

imposed a cumulative sentence of 100 years imprisonment. Thus, like Petitioner in this case, Mr. Riley "ha[d] no possibility of parole before his natural life expires." *State v. Riley*, 315 Conn 637, 640, 110 A3d 1205, 1206 (2015), *cert den,* 136 S Ct 1361 (2016).

The Connecticut Supreme Court observed that:

> "*Miller* did not specifically address the constitutional parameters of when a life sentence without parole may be imposed in the exercise of the sentencing authority's discretion on a juvenile homicide offender. The present case requires us to consider this question."

Riley, 315 Conn at 640.

Thus, the issue before that court was exactly the same as the issue before this court in this case. That court "agree[d] with the defendant's *Miller* claim." *Riley*, 315 Conn at 641. In concluding that Riley's cumulative sentence violated the Eighth Amendment, the court explained:

> "We begin by acknowledging that *Miller* is replete with references to 'mandatory' life without parole and like terms. Nonetheless, the Supreme Court's incremental approach to assessing the proportionality of juvenile punishment counsels against viewing these cases through an unduly myopic lens."

Riley, 315 Conn at 653.

The Connecticut court surveyed the responses of other jurisdictions to *Miller* and concluded:

> "For the foregoing reasons, we conclude that *Miller* does not stand solely for the proposition that the eighth amendment demands that the sentencer have discretion to impose a lesser punishment than life without parole on a juvenile homicide

> offender. Rather, *Miller* logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court must consider the offender's 'chronological age and its hallmark features' as mitigating against such a severe sentence."

Riley, 315 Conn at 658.[8]

Although defense counsel had urged the trial court to consider Riley's youth in mitigation of his sentence, "the record in the present case [did not] reflect, as the state contend[ed], that the trial court adequately considered the factors identified in *Miller*." *Riley*, 315 Conn at 660. In remanding the case for re-sentencing, the court observed:

> "The main thrust of the court's comments at sentencing related to the innocence of the victims and the choice made by the defendant to commit these senseless crimes. * * * The court made no mention of facts in the presentence report that might reflect immaturity, impetuosity, and failure to appreciate risks and consequences."

Riley, 315 Conn at 661.

Riley mirrors what happened in Petitioner's case. Petitioner's attorneys presented evidence relating to Petitioner's youth and mental health. In closing, attorney Sabbitt argued, "We're asking the court to consider * * * the clinical

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[8] In *State v. Long*, 138 Ohio St 478, 8 N E 3d 890 (2014), the court cited *Miller* in support of its conclusion that, "For juveniles, like Long, a sentence of life without parole is the equivalent of a death penalty." The court vacated the sentence of life without parole because, although defense counsel argued that juvenile's age was mitigating, *Miller* had not yet been decided, and the record did conclusively establish that the sentencing court had considered immaturity to be mitigating.

nature of his mental disease or defect as a mitigating factor." (Tr 978). In response to the prosecutor's comparison of Petitioner to notorious killers Conan Hale, Timothy McVeigh, Ted Bundy and Jeffrey Dahmer, Sabbitt emphasized that "those weren't juvenile offenders." (Tr 979). Sabbitt argued:

> "We're seeking to have you understand his conduct and to apply that understanding to your discretion in this case, based on his youthfulness and his mental disease and his neurologic dysfunction."

(Tr 979-80).

Sabbitt summed up:

> "But given the lesser culpability of children for bad actions, their capacity for growth, and society's special obligation to its children, isn't twenty-five years enough in the way of a payback?"

(Tr 997).

In pronouncing sentence, the court discussed Petitioner's schizophrenia, observing that:

> "one of the last things Dr. Bolstad said was to the effect that there is no cure for Mr. Kinkel's condition * * * We cannot predict what advances medical science will make in the treatment of whatever mental illness he has. We cannot guarantee that he will receive the treatment these doctors believe is necessary while in prison."

(Tr 1024).

The court made no mention of the concept of the "immature brain" that is now understood to mean that "children are different" for sentencing purposes. Instead, the court stated:

> "It became very apparent [from victim impact testimony] yesterday that this sentence needed to account for each of the wounded, who rightly call themselves survivors, and for Mr. Kinkel to know there was a price to be paid for each person hit by his bullets."

(Tr 1025).

So, although the trial court was asked to take Petitioner's youth into consideration, counsel's argument and the court's comments confirm that it did not "consider the offender's 'chronological age and its hallmark features' as mitigating against such a severe sentence." *Riley*, 315 Conn at 658.

More recently, the Florida Supreme Court decided *Atwell v. State*, ___ So 3d ___, 2016 WL 3010795 (Fla 2016). Atwell was 16 years old when he committed armed robbery and first-degree murder. For the murder, he was sentenced to life imprisonment with the possibility of parole after 25 years. After 25 years, the parole board conducted a hearing and set his presumptive parole date for the year 2130, which "far exceed[ed] Atwell's life expectancy." *Atwell*, ___ So 3d at ___ (slip opinion at 2). In doing so, the board gave "primary weight" to the "seriousness of the offender's present offense and the

offender's past criminal record" as required by a Florida statute. *Id.* at ___ (slip opinion at 1). The Florida Supreme Court concluded:

> "Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by Miller, and that his sentence, which is virtually indistinguishable from a sentence of life without parole, is therefore unconstitutional."

Id. at ___ (slip opinion at 2).

The court explained:

> "The current parole process similarly fails to take into account the offender's juvenile status at the time of the offense, and effectively forces juvenile offenders to serve disproportionate sentences of the kind forbidden by Miller."

Id. at ___ (slip opinion at 2).

If Atwell's sentence, as implemented by the Florida parole process, violated the Eighth Amendment, then certainly Petitioner's sentence does as well. "[T]echnically Atwell [was] parole eligible [after 25 years], it [was] a virtual certainty that Atwell [would] spend the rest of his life in prison" under that system. *Atwell*, ___ So 3d at ___ (slip opinion at 2). In contrast, Oregon's system provides no possibility of parole, not even a technical possibility, during Petitioner's lifetime.

In *People v. Caballero*, 55 Cal 4th 262, 265, 282 P3d 291 (2012), the defendant was convicted of three counts of attempted murder and sentenced to consecutive terms totaling "110 years to life." Like Petitioner in the present

case, Caballero was afflicted with schizophrenia when he committed his crimes. *Id.* The California Supreme Court quoted *Graham* for the proposition that:

> "the Eighth Amendment requires the state to afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' and that '[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.'"

Id. at 266.

Most recently, the Iowa Supreme Court decided *State v. Sweet*, ___ NW 2d ___, 2016 WL 3023726 (May 27, 2016). Isaiah Sweet was 17 years old when he murdered his grandparents, who had been his surrogate parents for 13 years. He subsequently pled guilty to two counts of first-degree murder under a plea agreement that his sentences would run concurrently. *Sweet*, ___ NW at ___ (slip opinion at 2-4). A pre-sentence investigation report indicated that Sweet had mental health issues, including attention deficit disorder with possible bipolar disorder. *Id.* at ___ (slip opinion at 6). At sentencing, the defense presented evidence of a clinical psychologist who "summarized advancements in the past twenty to thirty years regarding the understanding of the development of the adolescent brain." *Id.* at 8. The psychologist characterized Sweet's mental health issues as "serious" and projected Sweet's prospects for rehabilitation as "mixed." *Id.* at 9. The psychologist indicated that it "was simply not possible to determine whether Sweet would develop a

full-blown psychopathic personality disorder as an adult, and even if he did, psychologists could not say whether it would be untreatable." *Id.*

The trial court sentenced Sweet to life in prison without the possibility of parole. In doing so, the court considered his youth and "debatable" maturity level, but "stressed that the crimes were premeditated" and opined that the psychologist's prognosis "was overly optimistic." *Sweet*, ___ NW at ___ (slip opinion at 10). Thus, in many respects, the psychologist's testimony and the trial court's ruling mirrored the testimony and ruling in Petitioner's case.

The Iowa Supreme Court outlined Eighth Amendment jurisprudence beginning with *Weems v. United States*, 217 US 349, 30 S Ct 544, 54 L Ed 793 (1910) and traced it through the line of juvenile cases from *Roper* to *Montgomery*. *Sweet*, ___ NW at ___ (slip opinion at 13-17). It summarized that jurisprudence with the following observations:

1. For sentencing purposes, juveniles are different from adults.
2. Those differences mean that "the penological objectives behind harsh sentences are diminished."
3. The "traits of youth that diminish ordinary criminal culpability * * * and are present even in juveniles who commit heinous crimes."
4. A sentence of life without any possibility of parole "shares some of the characteristics with death sentences that are shared by no other sentences [and that] Life in prison is especially harsh for juveniles, who will almost inevitably serve more years and a greater percentage of life in prison than adult offenders."

5. The differences between juveniles and adults do not "disappear" at the age of 18, though that is the age that society generally uses to distinguish juveniles from adults.

6. "Because the signature qualities of youth are transient, incorrigibility is inconsistent with youth."

7. Juveniles who are "irredeemably corrupt may be subject to life in prison" in rare cases.

8. Even experts cannot accurately predict which juvenile offenders are "incorrigible."

9. There is an "unacceptable risk" that the brutality of a crime will overcome mitigating arguments related to youth.

10. Juveniles are less able than adults to meaningfully assist their lawyers, thus increasing the probability of "erroneous conclusions regarding juvenile culpability."

11. Life without any possibility of parole for a juvenile presents an unacceptable risk of "disproportionate punishment."

12. Accurate evaluation of whether a juvenile is incorrigible is important due to the similarities between capital punishment and life without any possibility of parole.

13. A sentence of life without any possibility of parole for a juvenile is disproportionate "because that judgment was made at the outset."

14. Even if life without parole is no longer available, a juvenile sentenced to life without parole has no guarantee that he will ever be entitled to release.

Sweet, ___ NW at ___ (slip opinion at 37-40).

The court then observed that:

> "the Supreme Court has already established that except in very rare cases, life without the possibility of parole is not available under the Federal Constitution even for heinous crimes committed by juvenile offenders."

Sweet, ___ NW ___ (slip opinion at 46).

The court then addressed the question of whether identification of a juvenile offender as "irretrievable" could be made at the time of sentencing or whether it would need to be made later by a parole board "after the offender's juvenile brain has been fully developed and a behavior patter established by a substantial period of incarceration." *Sweet*, ___ NW ___ (slip opinion at 46). The court answered that question under the Iowa Constitution, but its reasoning was guided by and applies equally to the bullet points listed above that it gleaned from its detailed consideration of the Eighth Amendment cases:

> "[A sentencing] court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is 'irretrievably corrupt' at a time when even trained professionals with years of clinical experience would not attempt to make such a determination."

Sweet, ___ NW at ___ (slip opinion at 50).

The Iowa Supreme Court concluded:

> "[S]entencing courts should not be required to make speculative up-front decisions on juvenile offenders' prospects for rehabilitation because they lack adequate predictive information supporting such a decision. The parole board will be better able to discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available."

Sweet, ___ NW at ___ (slip opinion at 54).

The United States Supreme Court has made clear that life imprisonment for a juvenile offender violates the Eighth Amendment except for "the rarest of children, those whose crimes reflect 'irreparable corruption.'" *Montgomery*, 136 S Ct at 726 (quoting *Roper*). An ever-growing number of courts agree that *Miller* does not limit the proscription against life imprisonment for juveniles to those statutory schemes that mandate life imprisonment. Even where courts have discretion to impose sentences less than life, courts are in agreement that juveniles can only be required to serve the rest of their lives in prison only if they are "irredeemably corrupt." Additionally, a growing consensus is emerging that the constitutional proscription against true life sentences for juveniles applies to aggregate sentences, like Petitioner's, that have the practical effect of requiring the juvenile offender to spend the rest of his life in prison.

As a final matter, a trend is arising to preclude sentencing courts from making a finding up front that a juvenile offender is irretrievable. Consequently, the Eighth Amendment categorically precludes a court from imposing a sentence of life imprisonment without any possibility of parole for juvenile offenders. In light of the Eighth Amendment case law that guided it, the reasoning of the Iowa Supreme Court in *Sweet* is compelling, and its conclusion is ineluctable. Courts simply don't have the crystal ball that would be necessary to make an assessment of irretrievable corruption while the brain is still immature and developing.

This court should reach the same conclusion under the Eighth Amendment to the United States Constitution. This is particularly true in light of the fact that Petitioner committed his crimes while hallucinating from untreated schizophrenia, an illness that recent research suggests may ultimately be reversible. Science Daily, *Imaging Study Shows Promising Results for Patients With Schizophrenia*, www.sciencedaily.com/releases/2016/05/160527190417.htm.

Neither the Marion County Circuit Court nor the Court of Appeals reached the merits of Petitioner's post-conviction claim. Instead, both courts concluded that Petitioner was procedurally barred from having his constitutional claim addressed. Had they done so, properly informed by the line of cases from *Roper* to *Montgomery* and the cases applying the principles developed therein, they would have had to conclude that Petitioner's effective life sentence violates the Eighth Amendment's proscription against inflicting punishment that is cruel and unusual. That is so because the sentencing court did not put the proper focus on Petitioner's "'chronological age and its hallmark features' as mitigating against such a severe sentence,"[9] and no tribunal has addressed the issue of whether Petitioner is one of those "rarest of children,

[9] *Riley*, 315 Conn at 658.

those whose crimes reflect 'irreparable corruption.'" *Montgomery*, 136 S Ct at 726 (quoting *Roper*).

The propriety of denying Petitioner a remedy for his unconstitutional sentence is discussed in the following section. Suffice it to say here, Petitioner's sentence is unconstitutional.

II. Oregon Cannot Require Petitioner to Serve an Unconstitutional Sentence

The circuit court did not reach the merits of Petitioner's claim. It concluded that ORS 138.510(3) (two-year statute of limitations) and ORS 138.550(3) (limitation on successive petitions) procedurally barred Petitioner's second petition for post-conviction relief. Likewise, the Court of Appeals concluded that Petitioner's current Eighth Amendment claim was procedurally barred, but on different grounds. It concluded that ORS 138.550(2) barred Petitioner's claim. *Kinkel III*, 276 Or App at 439. It provides, in part:

> "(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding."

In reaching that conclusion, the Court of Appeals relied on this court's opinion in *Verduzco v. State of Oregon*, 357 Or 553, 355 P3d 902 (2015). In doing so, the Court of Appeals reasoned:

> "Here, as in *Verduzco*, petitioner cannot succeed in asserting that he could not have raised his Eighth Amendment challenge to his

> sentence earlier because he, in fact, earlier challenged the sentence on that basis."

Kinkel III, 276 Or App at 443.

As a matter of historical fact, the Court of Appeals misapplied *Verduzco*. As explained above, Petitioner's Eighth Amendment claim on direct appeal from the judgment in his criminal case was limited to a footnote paragraph asserting that the 112-year sentence was "grossly disproportionate to the crime." Petitioner's current claim rests on the concept that "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption." *Montgomery*, 136 S Ct at 726 (citations omitted). Life without parole is disproportionate unless the juvenile offender is found to be "irretrievabl[y] deprav[ed]." *Id.* at 733. The Eighth Amendment requires that punishments be proportioned not only to the crime, but to the offender.

In that regard, *Verduzco* ought to be distinguished. The procedural issue, under ORS 138.550(2) is whether, at the time of Petitioner's sentencing, the *Graham*, *Miller* and *Moore* issue was to reasonably be anticipated. *Verduzco*, 357 Or at 571 (quoting *Long v. Armenakis*, 166 Or App 94, 999 P2d 461 (2000) with approval).

In *Verduzco*, the petitioner contended that his trial counsel provided inadequate assistance because the attorney had failed to advise him, prior to

entering a guilty plea, that it was "virtually inevitable" that he would be deported. *Id.* at 572. This court observed:

> "Were it not for one fact [that the petitioner had previously litigated the same issue], it might be a close call whether petitioner reasonably could have raised those two grounds for relief in his first post-conviction petition. As the United States Supreme Court recognized in *Padilla*, Kentucky was 'far from alone' in holding in 2008 that the effect of a state conviction on a defendant's immigration status was a collateral consequence of a guilty plea that did not implicate the Sixth Amendment. * * * .
>
> "There was, of course, countervailing authority. * * * . [F]ederal courts of appeals had recognized for 20 years before petitioner filed his first post-conviction petition that failing to ask for a binding recommendation from a sentencing court that the defendant not be removed violated the Sixth Amendment."

Verduzco, 357 Or at 572.

In contrast to *Verduzco*, it cannot be said here that the dispositive "irretrievable depravity" issue could reasonably have been anticipated at the time Petitioner's sentencing hearing was conducted in 1999. *Roper v. Simmons*, from which the court in *Graham* adopted the phrase, wasn't decided until 2005 -- three years after the Court of Appeals issued its opinion in *Kinkel I.* The central substantive issue in Petitioner's current post-conviction case, could not reasonably have been anticipated by attorney Barton when he drafted the appellate brief in Petitioner's criminal case. *Miller* "obviously had no bearing on the original sentencing of [Petitioner] since it hadn't been decided yet." *McKinley*, 809 F3d at 914. To the extent that having raised an Eighth Amendment claim in Petitioner's appeal in his criminal case case could

preclude raising a different Eighth Amendment claim in this post-conviction proceeding, *Verduzco* should be distinguished.

To the extent that ORS 138.510(3), ORS 138.550(2) or ORS 138.550(3) can be read as procedurally barring Petitioner's Eighth Amendment claim based on *Graham*, *Miller* and *Moore* in this post-conviction proceeding, those provisions are unconstitutional under the circumstances of this case.

As noted above, while Petitioner's current case was under advisement in the Court of Appeals, the United States Supreme Court issued its decision in *Montgomery v. Louisiana*. In that case, the court addressed the issue of whether *Miller*'s proscription of presumptive life sentences for juveniles in homicide cases applied retroactively. In that case, the court distinguished *Teague v. Lane*, 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989) as establishing the test to determine whether newly announced constitutional rules of criminal procedure apply retroactively. *Montgomery*, 136 S Ct at 728-30.

The Supreme Court held that the rule of *Miller* applies "regardless of when the defendant's conviction became final." *Montgomery*, 136 S Ct at 730. That is so, because "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Id.* at 731. As a result:

> "[A] State may not constitutionally insist that a prisoner remain in jail on federal habeas review, [likewise] it may not constitutionally insist on the same result in its own postconviction proceedings.

> Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. * * * If a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'"

Montgomery, 136 S Ct at 731 (citation omitted).

Requiring Petitioner to serve a 112-year sentence without parole, absent an adjudication of whether his crimes reflect "irretrievable depravity," would violate his Eighth Amendment right not to have cruel and unusual punishment inflicted. Due process requires Oregon to afford him a procedure to properly resolve his claim under *Graham*, *Miller* and *Moore*. The circuit court's judgment denying post-conviction relief, without an adjudication on the merits, violated Petitioner's right to due process. US Const, Amend XIV; *Boumediene v. Bush*, 553 US 723, 781, 128 S Ct 2,229, 2268, 171 L Ed 2d 41 (2008) (citing *Mathews v. Eldridge*, 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976) for the proposition that due process requires appropriate "procedural safeguards" to ensure that no "erroneous deprivation" occurs when liberty interest is at stake).

Vindicating Petitioner's constitutional rights in this case does not require resort to the due process clause, however. Article I, section 10, of the Oregon Constitution provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and

> *every man shall have remedy by due course of law for injury done him in his person, property, or reputation*."

(Emphasis added).

The above-emphasized portion of Article I, section 10 is commonly called the "remedy clause" of the Oregon Constitution. *Howell v. Boyle*, 353 Or 359, 364, 298 P3d 1 (2013) (citing *Juarez v. Windsor Rock Products, Inc.*, 341 Or 160, 144 P3d 211 (2006)). Various cases have addressed whether statutory limitations on remedies violate that clause. *E.g., Howell v. Boyle*; *Clarke v. OHSU*, 343 Or 581, 175 P3d 418 (2007); *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001); *Greist v. Phillips*, 322 Or 281, 906 P2d 789 (1995).

Most recently, this court addressed the scope of the remedy clause in *Horton v. OHSU*, 359 Or 168, 220, ___ P3d ___ (2016). In overruling *Smothers*, this court recognized the difficulty in "reduc[ing] our remedy clause decisions to a simple formula." In doing so, this court observed that "one of the functions of the legislature is to adjust the duties that one person owes another and the remedies for a breach of that duty as societal conditions change." *Id.* (citing Or Const, Art XVIII, § 7).[10] The legislature may abolish some

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[10] Article XVIII, section 7, of the Oregon Constitution provides:

> "All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered, or repealed."

common law remedies, and it "may provide a substitute remedial process for common-law injuries to absolute rights." *Id.* at 176.

But there are some rights that the legislature may not abrogate. Among them are the rights protected by the United States Constitution by virtue of the Fourteenth Amendment and the Supremacy Clause.[11] The Eighth Amendment describes a set of those rights. *Montgomery*, 136 S Ct at 732. Where a right exists that may not be legislatively abrogated, Oregon's remedy clause requires that a remedy be available and that that remedy cannot be "insubstantial." *Horton*, 359 Or at 219.

In *Montgomery*, the US Supreme Court held that a state collateral proceeding complies with the Supremacy Clause so long is it does not "deny a controlling right asserted under the [United States] constitution" and as long as it gives that right "retroactive effect" when required. *Montgomery*, 136 S Ct at 732. *Montgomery* precludes a state from requiring an offender to serve an unconstitutional sentence, no matter when that sentence was imposed. Viewed

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[11] Article VI, cl 2 of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

in that context, any procedural barriers erected by the Post-Conviction Hearing Act must fall under the particular circumstances of Petitioner's case.

There is no question that the right to seek *habeas corpus* existed when the drafters wrote the Oregon Constitution in 1857. Article I, section 23, of the Oregon Constitution clearly states:

> "The privilege of the writ of *habeas corpus* shall not be suspended unless in case of rebellion, or invasion the public safety require it."

The legislature enacted the Post-Conviction Hearing Act in 1959. *Ogle v. Nooth*, 355 Or 570, 577, 330 P3d 572 (2014). As this court explained in *State v. Jacob*, 344 Or 181, 188, 180 P3d 6, 10 (2008), " by designating post-conviction relief as the 'exclusive' means for challenging the lawfulness of a final judgment, the legislature intended to prohibit *other*, collateral, challenges to such a judgment." The legislature did not intend to -- and could not permissibly -- suspend the writ of *habeas corpus*. Injuries that could be addressed by the writ were and clearly are within the ambit of the remedies clause.

"In Oregon, the writ of *habeas corpus* is intended to allow a detained person the opportunity to inquire into the legality of that detention, with a view to an order releasing the petitioner." *Bartz v. State*, 314 Or 353, 365, 839 P2d 217 (1992) (citing *Gibbs v. Gladden*, 227 Or 102, 359 P2d 540, *cert den*, 368 US 862 (1961), and *Long v. Minto*, 81 Or 281, 158 P 805 (1916)). "If the

procedures provided by [the Post-Conviction Hearing Act] are a reasonable substitute for the writ of *habeas corpus*, they are constitutional." *Bartz*, 314 Or at 364.

Even before the Post-Conviction Hearing Act was adopted, direct appeal was available to challenge a sentence that imposed cruel and unusual punishment. Consequently, the writ of *habeas corpus* was "not available to those who neglected to appeal." *Barber v. Gladden*, 210 Or 46, 62, 309 P2d 192, 195 (1957), *cert den*, 359 US 948 (1959). But, it hardly needs saying that a procedure has to be available to escape the clutches of a cruel and unusual sentence that violated the Eighth Amendment to the United States Constitution. That is what *Montgomery* requires.

Petitioner did timely raise an Eighth Amendment claim on direct appeal from the judgment of conviction in his underlying criminal case. He didn't "neglect" anything. Promptly after the United States Supreme Court announced the substantive rules in *Graham* and *Miller*, he raised a new Eighth Amendment claim based on those cases. The Ninth Circuit Court of Appeals subsequently confirmed in *Moore* that his substantive contention in the new claim is legally correct. Petitioner's nearly 112-year prison term is void under *Montgomery* and subject to correction "regardless of when [his] conviction[s] became final." *Montgomery*, 136 S Ct at 730. This court has long held that a "void judgment

may be disregarded and treated as a nullity." *Henry and Henry*, 301 Or 185, 189 n 3, 721 P2d 430 (1986) (quoting *Trullenger v. Todd*, 5 Or 36 (1873)).

To the extent that ORS 138.510(3), ORS 138.550(2) or ORS 138.550(3) could be read as erecting procedural barriers to Petitioner's Eighth Amendment claim, they violate the remedy clause in Article I, section 10, of the Oregon Constitution, because they act impermissibly to suspend the writ of *habeas corpus* that is guaranteed by Article I, section 23. Likewise, they violate the Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner's sentence violates the Eighth Amendment, as shown in the preceding section. It is not his fault that he was sentenced before the Oregon courts were properly informed by the line of cases from *Roper* to *Montgomery*. The rule of *Miller* applies retroactively, which means that it applies to Petitioner. The State of Oregon cannot insist that he serve that unconstitutional sentence, regardless of when it was imposed.

CONCLUSION

The Marion County Circuit Court erred when it concluded it lacked authority to address the constitutionality of Petitioner's sentence. It erred by granting summary judgment to Defendant. That judgment should be reversed.

Respectfully Submitted,

/s/Andy Simrin
Andy Simrin #914310*
Andy Simrin PC
405 NW 18th Ave
Portland, OR 97209
(503) 265-8940
andysimrin@reogonappeals.net

Attorney for Petitioner on Review
Kipland Philip Kinkel

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05
AND PROOF OF FILING AND SERVICE

I certify that (1) this Brief on the Merits complies with the word-count limitation in ORAP 5.05(2)(b)(i)(A) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a) is 8,666 words.

I certify that the size of the type in this Brief on the Merits is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

I certify that, on June 11, 2016, I filed this Brief on the Merits electronically with the State Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that, on the same date, I served the foregoing Brief on the Merits by electronic service on the attorney listed below by using the court's electronic filing system:

Paul L. Smith
DOJ Appellate Division
1162 Court St NE
Salem OR 97301
(503) 378-4402
paul.l.smith@state.or.us
Attorney for Respondent on Review
Heidi Steward

/s/ Andy Simrin
Andy Simrin #914310
Andy Simrin PC
405 NW 18th Ave
Portland, OR 97209
(503) 265-8940
andysimrin@oregonappeals.net

Attorney for Petitioner on Review
Kipland Philip Kinkel