APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

SC S065188

LYDELL MARCUS WHITE,
Petitioner on Review,

v.

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

March 7, 2019, Argued and Submitted, Eugene, Oregon; May 31, 2019, Filed

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OPINION

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

WALTERS, C.J.

In *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012), The United States Supreme Court determined that it is cruel and unusual punishment to sentence a juvenile to life without parole unless a court determines that the juvenile's crime does not reflect the "'transient immaturity'" of youth, but instead, demonstrates that the juvenile is "'the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479-80 (quoting *Roper v. Simmons*, 543 US 551, 573, 125 S Ct 1183,

161 L Ed 2d 1 (2005)). In this post-conviction proceeding, petitioner, a juvenile offender, contends that the 800-month sentence he is serving for a single homicide is the functional equivalent of life without parole and was imposed without a hearing that satisfied the procedural and substantive requirements of the Eighth Amendment. For the reasons that follow, we hold that petitioner is not procedurally barred from seeking post-conviction relief and that his sentence is subject to *Miller*'s protections. Because this record does not convince us that the sentencing court determined that petitioner's crime reflects irreparable corruption, we reverse the decisions of the Court of Appeals and the post-conviction court and remand to the post-conviction court for further proceedings.

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

decided *Miller*, and, in 2013, petitioner filed this petition for post-conviction relief.[1] The superintendent responded with a motion for summary judgment, asserting that the petition was procedurally barred; the post-conviction court agreed and dismissed the petition. The Court of Appeals affirmed, and we allowed review. *White v. Premo*, 285 Or App 570, 397 P3d 504 (2017), *rev allowed*, 363 Or 727 (2018).

Three procedural barriers to post-conviction relief are relevant here: a statute of limitations, a claim preclusion limitation, and a successive petition limitation. ORS 138.510(3),[2] 138.550(2), (3).[3] The

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

[2] ORS 138.510(3) provides:

> "(3) A petition pursuant to [the Post-Conviction Hearing Act (PCHA)] must be filed within two years of the following, unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition:
>
> > "(a) If no appeal is taken, the date the judgment or order on the conviction was entered in the register.
> >
> > "(b) If an appeal is taken, the date the appeal is final in the Oregon appellate courts.
> >
> > "(c) If a petition for certiorari to the United States Supreme Court is filed, the later of:
> >
> > > "(A) The date of denial of certiorari, if the petition is denied; or

petition before us now is barred by all three of those procedural limitations, unless review is permitted by what we refer to as their "escape" clauses. Each of those escape clauses permit a petitioner to bring a claim that would be procedurally barred if the "grounds" on which the petitioner relies were not asserted and could not reasonably have been either asserted or raised in certain described circumstances.

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

[3] ORS 138.550 provides in relevant part:

> "(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under [the PCHA] unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. * * *
>
> "(3) All grounds for relief claimed by petitioner in a petition pursuant to [the PCHA] must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition."

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

In the first case -- *Verduzco v. State of Oregon*, 357 Or 553, 355 P3d 902 (2015) -- this court considered whether the procedural bar against successive post-conviction petitions barred the petitioner's claim, and, in doing so, focused not on whether the petitioner had asserted the same general type of claim in both petitions, but, rather, on whether the petitioner had relied on the *same legal rule* to prove both claims of ineffective assistance of counsel. In his successive post-conviction petition, the petitioner relied on his lawyer's failure to give him the advice required by *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010): When the immigration consequences of pleading guilty to certain crimes are

"'truly clear,'" defense attorneys must advise their clients that deportation and other adverse immigration consequences will be "'practically inevitable'" as a result of the plea. *Verduzco*, 357 Or at 559 (quoting *Padilla*, 559 US at 364, 369). In his original petition, the petitioner did not cite *Padilla* because the Court had not yet decided that case, but the petitioner had alleged that his lawyer had failed to give him the very advice that the Court later required. *Id.* at 557-58. We concluded that the bar against successive petitions precluded the petitioner from relitigating a virtually identical claim. *Id.* at 573.

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

as a basis for a claim, not the general nature of the claim.[4]

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

In *Chavez*, this court discussed the reason that it reached a different result in that case than it had in *Verduzco*. 364 Or at 661-63. We explained that, in *Verduzco*, the petitioner had "litigated a virtually identical Sixth Amendment claim at roughly the same time that Padilla was pursuing his claim";

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

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

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

To explain why we reach that conclusion, it is necessary to briefly describe the state of the law before *Miller* was decided in 2012. *See Chavez*, 364 Or at 659-61 (describing the state of the law before *Padilla* was decided). In 1988, a plurality of the United States Supreme Court explained in *Thompson v. Oklahoma*, 487 US 815, 108 S Ct 2687, 101 L Ed 2d 702 (1988), that "contemporary standards of decency" counsel against executing a person who was under 16 years of age at the time of his or her offense, and the Court thus held that the Eighth Amendment prohibited the practice. *Id.* at 823, 838. A year later, in *Stanford v. Kentucky*, 492 US 361, 109 S Ct 2969, 106 L Ed 2d 306 (1989), the Court also "referred to contemporary standards of decency in this country," but it reached a contrary conclusion with respect to the execution of juvenile offenders over 15 but under 18. *Roper*, 543 US at 562. In *Stanford*, the Court rejected arguments that the death penalty failed to serve the legitimate goals of penology because there was evidence that juveniles possess less developed cognitive skills than adults, are less likely to fear death, and are less mature and responsible, and therefore less morally blameworthy. 492 US at 377-78. *Stanford* remained the law until 12 years after petitioner's conviction and eight years after petitioner's first post-conviction petition, when in 2005, the Court decided *Roper* and held that the Eighth Amendment categorically prohibits states from putting juveniles to death. 543 US at 578-79.

In *Roper*, the Court found persuasive certain scientific studies of the characteristics of juvenile offenders and recognized that juveniles typically possess three characteristics that make them

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

The Court again considered the penological justifications for punishing juveniles in *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825 (2010). The issue in *Graham* was whether juvenile offenders could be sentenced to life in prison without parole for nonhomicide crimes. *Id.* at 52. Retribution, the Court said, "is a legitimate reason to punish," but must be directly related to the personal culpability of the offender and does not justify imposing the most severe penalty short of death on a juvenile nonhomicide offender who is less culpable than an adult offender, for the reasons set out in *Roper*. *Id.* at 71-72. Moreover, the Court explained, the legitimate goal of deterrence is not a sufficient justification for imposing such a sentence on juveniles, because that punishment is rarely imposed and juveniles are less likely than adults to consider consequences before they act. *Id.* at 72. Incapacitation for life "improperly denies the juvenile offender a chance to demonstrate growth" and "[t]he penalty forswears altogether the rehabilitative ideal." *Id.* at 73-74. Accordingly, the Court adopted a categorical rule giving all juvenile offenders "a chance

to demonstrate maturity and reform," prohibiting the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. *Id.* at 79.

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

differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

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

Understanding, then, the genesis of *Miller*, we return to the question of whether petitioner's claim is procedurally barred, either because he previously raised a *Miller* claim or because he reasonably could have anticipated and raised a *Miller* claim. On the

first point, the superintendent contends that, in his direct appeal, petitioner raised a claim that was so "close" to a *Miller* claim that it constitutes a procedural bar to this proceeding. The superintendent is correct that, in his direct appeal, petitioner noted his age at the time of his offense as a reason why the court should find his sentence unconstitutional. However, the whole of petitioner's argument was as follows:

> "There can be no doubt that the crimes in this case were violent and offensive to society. However, defendant was only 15 at the time the crimes were committed and 17 at the time of sentencing. The philosophy of the juvenile criminal code should be one of rehabilitation and not vindictive justice. The sentence of 800 months imposed upon defendant was excessive, and for the reasons given, constituted cruel and unusual punishment."[5]

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

As to the superintendent's second point, we are not convinced that petitioner reasonably could have asserted a *Miller* claim at the time of his direct

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

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

As noted, petitioner and his brother murdered an elderly couple. Petitioner was convicted of three crimes -- aggravated murder of one of the victims, murder of the other victim, and first-degree robbery. On the aggravated murder charge, petitioner was sentenced to life in prison *with* the possibility of parole; on the murder charge, petitioner was sentenced to a determinate 800-month minimum sentence; and on the first-degree robbery charge, petitioner was sentenced to 36 months, to run consecutively to his sentence for murder. The 800-month sentence -- almost 67 years -- for the murder of

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

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

The superintendent's first point -- that this court should not extend *Miller* to any term-of-years sentence, no matter how long, finds little support. In

Miller, the Court stated that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" but then quoted from its decision in *Graham*: "'A State is not required to guarantee eventual freedom,'" but it must provide "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" 567 US at 479 (quoting *Graham*, 560 US at 75). Most courts that have considered the matter have understood the inquiry to focus, not on the label attached to a sentence, but on whether its imposition would violate the principles that the Court sought to effectuate.[6] *See e.g.*, *State v. Zuber*, 227 NJ 422, 446-47, 152 A3d 197, 211-12, *cert den*, __ US __, 138 S Ct 152, 199 L Ed 2d 38 (2017) (*Miller*'s principles "appl[y] with equal strength to a sentence that is the practical equivalent of life without parole"); *State v. Ramos*, 187 Wash 2d 420, 438-39, 387 P3d 650, 660, *cert den*, __ US __, 138 S Ct 467, 199 L Ed 2d 355 (2017) (rejecting "notion that *Miller* applies only to literal, not de facto, life-without-parole sentences" because holding otherwise would contravene *Miller*'s core holding); *People v. Caballero*, 55 Cal 4th 262, 267-68, 282 P3d 291, 294-95 (2012) (applying *Graham* to 110-year-to-life sentence for nonhomicide offenses); *Casiano v. Comm'r of Corr.*, 317 Conn 52, 72-74, 115 A3d 1031, 1043-45 (2015), *cert den*, ___ US ___, 136 S Ct 1364, 194 L Ed 2d 376 (2016) ("[M]ost courts that have considered the issue agree that a lengthy term of years for a juvenile offender will become a de facto

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

life sentence at some point[.]"); *Henry v. State*, 175 So 3d 675, 680 (Fla 2015) (applying *Graham* to nonhomicide offender's aggregate sentence); *Brown v. State*, 10 NE3d 1, 8 (Ind 2014) (applying *Miller* to juvenile offender's aggregate sentence of 150 years for murder and robbery); *State v. Null*, 836 NW2d 41, 71 (Iowa 2013) (determining that *Miller* applies to a "lengthy term-of-years sentence"); *Bear Cloud v. State*, 334 P3d 132, 144 (Wyo 2014) (holding that *Miller* applies to aggregate sentences that "result in the functional equivalent of life without parole"); *see also Moore v. Biter*, 725 F3d 1184, 1191-92 (9th Cir 2013) (determining that *Graham*'s focus "was not on the label of a 'life sentence' -- but rather on the difference between life in prison with, or without, possibility of parole"). As the Court explained in *Montgomery*, *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" __ US at __, 136 S Ct at 734 (quoting *Miller*, 567 US at 472). The superintendent does not cite any additional penological justifications for a sentence that is the functional equivalent of life, and we see no reason to treat such a sentence differently.

Whether petitioner's sentence is, in fact, functionally equivalent to a life sentence is the next question we must answer. Here, as noted, petitioner's 800-month sentence would result in his release at age 81, and he argues that that is a de facto life sentence because his life expectancy is only 75-76 years. In making that argument, petitioner relies on the life expectancy of black males -- a

statistic from the Center for Disease Control -- and the superintendent does not take issue with that measure. Instead, the superintendent cites regulations that demonstrate that petitioner may be released after serving 54 years of his sentence, at age 68, potentially giving him 7-8 years of life outside of prison.

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

the opportunity to earn early release may factor into such a decision.[7]

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

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[7] As petitioner notes, the Department of Corrections may or may not grant petitioner credits to reduce his sentence, and it may revoke the credits it awards. *See* OAR 291-097-0215(4) (permitting credit for compliance with case plan and appropriate institution conduct); OAR 291-097-0250 (bases for retracting credits); *see also Pepper v. United States*, 562 US 476, 501 n 14, 131 S Ct 1229, 179 L Ed 2d 196 (2011) (noting that, under federal law, an award of good-time credit "does not affect the length of a court-imposed sentence" and is rather an "administrative reward" to provide incentive for compliance with institutional regulations); *Bear Cloud*, 334 P3d at 136 n 3 (declining to rely on good-time credit in analysis for whether sentence is de facto life sentence without parole).

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

foreclose a future argument that a sentence in excess of 50 years would leave a particular juvenile offender with a meaningful opportunity for release. But in this case, that argument has not been developed. Accordingly, we turn to the superintendent's better-developed argument that petitioner's 800-month sentence was not mandatory, that the sentencing court in fact provided petitioner with the individualized sentencing process that *Miller* requires,[9] and that the sentence it imposed was not excessive under *Miller*.

The superintendent is factually correct in his observation that the 800-month sentence that the sentencing court imposed was not a mandatory sentence and that the court took petitioner's individual characteristics into consideration in imposing it. But, as noted, *Miller* did more than require that a trial court engage in individualized sentencing; it prohibited a trial court from irrevocably sentencing a juvenile to life in prison without

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

determining that the juvenile is one of the "rare" offenders "whose crimes reflect irreparable corruption." *Montgomery*, __ US at __, 136 S Ct at 734.[10]

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

Before we discuss our decision in *Kinkel*, we think it important to note two aspects of the Supreme Court's ruling in *Miller* (as discussed in *Montgomery*)

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

that bear on our analysis. First, the fact that the trial court considered a juvenile's age in sentencing the juvenile does not mean that the sentence comports with *Miller*'s requirements. *Montgomery*, __ US at __, 136 S Ct at 734 ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" (Quoting *Miller*, 567 US at 479-80.)). Second, the Court has instructed that only the "rare" juvenile who commits a homicide may be sentenced to life without parole. *Id.* As a general rule, when appellate courts find *Miller* applicable, they send challenges to the sentences imposed back to the sentencing court for reconsideration in light *Miller*. *See id.* at __, 136 S Ct at 736-37 (remanding for petitioner to have opportunity to show his crime did not reflect irreparable corruption); *Null*, 836 NW2d at 76 (remanding to trial court to apply principles of *Miller*); *People v. Araujo*, 2013 WL 840995, at *5 (Cal Ct App Mar 7, 2013) (same); *State v. Simmons*, 99 So 3d 28 (La 2012) (per curiam) (same); *Bear Cloud*, 334 P3d at 147 (same); *see also Adams v. Alabama*, __ US __, 136 S Ct 1796, 1796-97, 195 L Ed 2d 251 (2016) (vacating the petitioner's sentence and remanding to state appellate court for further consideration in light of *Montgomery*).

As we will explain, *Kinkel* is an exception to that rule. As a preliminary matter, it is important to remember that, in *Kinkel*, there was a significant question about whether *Miller* applied at all to an aggregate sentence such as the sentence imposed in that case -- approximately 112 years for four murders

and 26 attempted murders. In affirming that sentence, this court determined that "the reasoning in *Graham* and *Miller* permits consideration of the nature and the number of a juvenile's crimes in addition to the length of the sentence that the juvenile received and the general characteristics of juveniles in determining whether a juvenile's aggregate sentence is constitutionally disproportionate." 363 Or at 21. We indicated that a juvenile who intentionally commits four murders and 26 attempted murders may be subject to a greater sentence than a juvenile who commits a single homicide and that the sentencing court's determination that petitioner should serve 40 months for each classmate whom he shot with the intent to kill "reflects a legitimate interest in retribution that is proportionate to each attempted murder and results in a correspondingly proportionate aggregate sentence for all [the] petitioner's crimes." *Id.* at 23. We observed that it might be possible to uphold the petitioner's sentence based *solely* on the number and magnitude of his crimes; but, given the strength of the other evidence in the record, we demurred. *Id.* at 24. Instead, we upheld the petitioner's sentence because the record demonstrated that the petitioner is one of "'the rare juvenile offender[s] whose crime reflects irreparable corruption,'" rather than "the transience of youth." *Id.* (quoting *Miller*, 567 US at 479).

In reaching that conclusion, we relied on the fact that the sentencing court had held a six-day hearing at which it had considered evidence that the petitioner provided regarding his youth, his psychological profile, and his character. *Id.* at 27.

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

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

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

them with their fists and weapons. The trial court described that brutality in detail:

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

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

> "I don't think you have the internal control to control your behavior. I don't know fully the reasons for that, perhaps some of it is genetic, perhaps some of it is the way your father

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

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

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

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF OREGON

A154435

LYDELL MARCUS WHITE,
Petitioner-Appellant,

v.

JEFF PREMO, Superintendent,
Oregon State Penitentiary,
Defendant-Respondent.

September 15, 2015, Argued and Submitted, Eugene, Oregon; May 17, 2017, Filed

OPINION

Before Sercombe, Presiding Judge, and Hadlock, Chief Judge, and Tookey, Judge.

SERCOMBE, P. J.

In 1993, at 15 years old, petitioner and his twin brother murdered an elderly couple.[1] Petitioner was waived into adult court and, based on a stipulated facts trial, was convicted of one count of aggravated murder, one count of murder, and one count of first-degree robbery. Following a sentencing hearing, the

[1] As petitioner notes in his brief, petitioner and his brother, Laycelle, received similar convictions and sentences. Laycelle's appeal from a post-conviction judgment is currently pending in *White v. Premo*, A154420.

trial court sentenced petitioner to an indeterminate life sentence on the aggravated murder conviction, an 800-month term of imprisonment, to be served concurrently with the life sentence, on the murder conviction, and a 36-month term of imprisonment, to be served consecutively to the aggravated murder and murder sentences, on the first-degree robbery conviction. In 2013, following the United States Supreme Court's decision in *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012), petitioner filed a successive petition for post-conviction relief.[2] The superintendent filed a motion for summary judgment, asserting that the petition was successive and untimely and, therefore, "barred by both ORS 138.510(3) and ORS 138.550(3)." The post-conviction court agreed and, accordingly, granted the motion for summary judgment and dismissed the petition. Petitioner appeals the resulting judgment and, on appeal, we conclude, as we did in *Kinkel v. Persson*, 276 Or App 427, 367 P3d 956, *rev allowed*, 359 Or 525 (2016), and *Cunio v. Premo*, 284 Or App 698, ___ P3d ___ (2017), that the statutory rule against successive petitions bars petitioner from raising the grounds for relief set forth in his petition in this case. Accordingly, we affirm the judgment of the post-conviction court.

As noted, based on acts committed when he was 15 years old, petitioner was convicted of aggravated murder, murder, and first-degree robbery. We

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[2] Petitioner filed a *pro se* petition for post-conviction relief in December 2011 and then, in February 2013, filed an amended petition through counsel in which he relied on *Miller*.

affirmed the trial court's judgment without opinion on direct appeal, and the Supreme Court denied review. *See State v. White*, 139 Or App 136, 911 P2d 1287, *rev den*, 323 Or 691 (1996). In 1997, petitioner sought post-conviction relief, requesting that the judgment of conviction be set aside and the sentences be vacated. Among other things, petitioner asserted that defense counsel was inadequate for failing to object to the sentence as "illegal and unauthorized." He also claimed that "[t]he trial court was in error for imposing a life sentence and 836 month[s] on petitioner[,] a remanded juvenile. The sentence violates the Eighth Amendment protection against Cruel and Unusual punishment." The post-conviction court denied relief and, on appeal from the post-conviction judgment, we, again, affirmed without opinion and the Supreme Court, again, denied review. *See White v. Thompson*, 163 Or App 416, 991 P2d 63 (1999), *rev den*, 327 Or 607 (2000). Petitioner later filed a second unsuccessful petition for post-conviction relief. We summarily affirmed the judgment in that case, and the Supreme Court entered an order denying review.

In 2012, the Board of Parole and Post-Prison Supervision held a prison term hearing and issued an order establishing petitioner's prison term on the life sentence imposed for the aggravated murder conviction. *See State ex rel Engweiler v. Felton*, 350 Or 592, 629, 260 P3d 448 (2011) ("[P]risoners sentenced for aggravated murder are entitled to a parole hearing at which the board must either set a release date or explain why it has chosen not to do so."). As petitioner set out in his petition for post-

conviction relief, the board "set a prison term of 288 months on the conviction for Aggravated Murder."[3]

Also in 2012, the United States Supreme Court decided *Miller*, in which it held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." 567 US at ___, 132 S Ct at 2469. The Court explained:

> "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. * * * And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."

Id. at ___, 132 S Ct at 2468.

In his petition in this case, petitioner claimed that he had been denied adequate assistance of trial

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[3] As petitioner notes in his brief, his projected release date on the aggravated murder sentence is 2018 and, at time the brief was filed, his expected release date on the 800-month sentence was June 3, 2051.

counsel in a number of ways, including that counsel failed to "object to, as unconstitutionally disproportionate punishment, the imposition of the 800-month sentence on the Murder conviction that would likely greatly exceed the sentence on the more serious charge of Aggravated Murder," and failed to "object to the constitutionality of the 800-month sentence on the grounds that it constituted a *de facto* sentence of Life without the possibility of parole."[4] He also asserted that he had received inadequate and ineffective assistance of post-conviction counsel and was, therefore, deprived of the "ability to fully challenge the validity of his sentences in subsequent proceedings." Petitioner acknowledged that the petition was successive but noted that ORS 138.550 "allows for successive petitions when 'the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the initial or amended petition.'" He asserted that he could not reasonably have raised the ground for relief set forth in the petition prior to, among other things, the Supreme Court's decision in *Miller*.

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[4] In his petition, petitioner also stated several other ways in which, in his view, his criminal trial counsel had been inadequate. For example, he claimed counsel had failed to investigate or articulate "any sentencing facts in mitigation" and failed to object to the imposition of an upward departure sentence on the ground that the court "failed to articulate findings supporting application of aggravating factors to support such a departure." He does not specifically discuss those claims on appeal, nor does he articulate any reason that those claims could not have been raised in his original post-conviction petition. Accordingly, we do not understand him to challenge the post-conviction court's dismissal of those claims.

The superintendent filed a motion for summary judgment asserting, among other things, that the petition was time barred under ORS 138.510(3) and did not fall within the escape clause under that statute.[5] Furthermore, the superintendent asserted that the grounds for relief in the petition either had been or could have been raised in the original petition for post-conviction relief and, therefore, the successive petition was barred under ORS 138.550(3).[6] The post-conviction court held a hearing

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[5] ORS 138.510(3) provides:

"A petition pursuant to ORS 138.510 to 138.680 must be filed within two years of the following, unless the court upon hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition:

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

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

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

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

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

[6] ORS 138.550 provides, in part:

"The effect of prior judicial proceeding concerning the conviction of petitioner which is challenged in the petition shall be as specified in this section and not otherwise:

on the motion and, ultimately, agreed with the

"(1) The failure of petitioner to have sought appellate review of the conviction, or to have raised matters alleged in the petition at the trial of the petitioner, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of the conviction of the petitioner, a motion for new trial, or a motion in arrest of judgment remains available.

"(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. If petitioner was not represented by counsel in the direct appellate review proceeding, due to lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided by the appellate court may be asserted in the first petition for relief under ORS 138.510 to 680, unless otherwise provided in this section.

"(3) All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition."

superintendent that the petition was untimely and successive and that petitioner had "not demonstrated * * * that [any of his] allegations qualify for any escape clause." Accordingly, the court granted the superintendent's motion for summary judgment and dismissed the petition.

On appeal, in his first assignment of error, petitioner contends that the trial court erred when it denied him relief on his claim of inadequate and ineffective assistance of trial counsel. In particular, he asserts that the 1995 judgment in his criminal case imposed a de facto life sentence without the possibility of release.[7] He asserts that he is entitled to relief because his sentences "violate the ban on cruel and unusual punishments in Article I, section 16, of the Oregon Constitution, [and] * * * the Eighth Amendment to the United States Constitution," and the 800-month sentence for murder is "disproportionate to a life sentence with the possibility of release" for aggravated murder. Furthermore, he contends that his late and successive petition for post-conviction relief satisfies the escape clauses in ORS 138.510 and ORS 138.550 because (1) he "could not reasonably have anticipated the rule from *Miller* and thus * * * could not have raised the grounds for relief here in a timely post-conviction proceeding" and (2) he could not reasonably have

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[7] Petitioner points out that, when he was sentenced, his earliest release date would not have been until he was in his 80s. As noted, he also states that, at the time he filed his brief, his release date from the 800-month sentence was June 3, 2051, when he would be in his early 70s.

raised his disproportionality challenge until after the board's 2012 order setting his prison term on the aggravated murder sentence.[8] The superintendent responds, in part, that the petition is untimely and successive and that petitioner's claims are barred in light of ORS 138.510 and ORS 138.550. He also asserts that, even if petitioner's claims were not barred, they would nevertheless fail on the merits. Because it is dispositive, we address the question whether ORS 138.550 precludes petitioner from obtaining relief on the grounds raised in his petition.

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[8] As noted, petitioner claims in this case that trial counsel was constitutionally ineffective. That claim is irreconcilable with his assertion that his claims fall within the escape clauses of ORS 138.510 and ORS 138.550. As we explained in *Lutz v. Hill*, 205 Or App 252, 256, 134 P3d 1003, *rev den*, 341 Or 140 (2006):

> "[T]he factual premise of petitioner's invocation of the 'escape clauses' in ORS 138.510(3) and ORS 138.550(3), *viz.*, that his present claim 'could not reasonably have been raised' before [new Supreme Court case law], is irreconcilable with the factual premise of his claim of inadequate assistance of counsel, *viz.*, that, as of [the time of his trial], reasonable criminal defense counsel would have anticipated [that development of the law] and raised a * * * challenge [based on that expected development of the law]. Although it *may* be abstractly possible, in some case, that an otherwise time-barred claim of inadequate assistance of counsel could be cognizable under the 'escape clauses,' this is not such a case. Bluntly, post-conviction petitioners in this petitioner's position are statutorily 'whipsawed.'"

(Emphasis in original.)

The state post-conviction relief act provides "that post-conviction petitions must be filed within two years after the challenged conviction becomes final, ORS 138.510(3), and it also bars successive petitions, ORS 138.550(3)." *Verduzco v. State of Oregon*, 357 Or 553, 561, 355 P3d 902 (2015). However, both of those procedural bars "contain identically worded 'escape clauses.'" *Id.* Under the escape clauses, "[e]ssentially, if [a] petitioner could not reasonably have raised the grounds for relief alleged in his [successive] petition either in a timely fashion or in the first petition, then those state procedural bars do not prevent petitioner from pursuing the grounds for relief alleged in his second post-conviction petition." *Id.*

In *Verduzco*, the Oregon Supreme Court interpreted and applied ORS 138.550. As the court explained, under ORS 138.550(2), if a petitioner

> "has appealed from a judgment of conviction and if the petitioner could have raised a ground for relief on direct appeal, then the petitioner cannot raise that ground for relief in a post-conviction petition 'unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding.'"

Id. at 565 (quoting ORS 138.550(2)). Similarly, under ORS 138.550(3), "all grounds for relief must be raised in the original or amended petition for post-conviction relief unless the post-conviction court 'on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised

in the original or amended petition.'" *Id.* (quoting ORS 138.550(3)).

> "Those two statutory provisions 'express a complete thought' and, read together, 'express the legislature's determination that, when a petitioner has appealed and also has filed a post-conviction petition, the petitioner must raise all grounds for relief that reasonably could be asserted.' A 'failure to do so will bar a petitioner from later raising an omitted ground for relief.'"

Kinkel, 276 Or App at 440 (quoting *Verduzco*, 357 Or at 565).

In *Verduzco*, the petitioner filed a successive petition for post-conviction relief, claiming that counsel in his underlying criminal proceeding had been ineffective for failing to advise him of the immigration consequences of pleading guilty to distribution of a controlled substance. In an earlier unsuccessful post-conviction petition, the petitioner had alleged essentially the same grounds for relief. Thereafter, the United States Supreme Court had decided *Padilla v. Kentucky*, 559 US 356, 369, 130 S Ct 1473, 176 L Ed 2d 284 (2010), in which it held that, "when the deportation consequence [of a conviction] is truly clear, as it was in this case, the duty to give correct advice is equally clear," and the failure to give such advice amounts to a violation of the Sixth Amendment to the United States Constitution. In support of his successive petition, the petitioner contended that he could not have raised his current claims for relief until after the Court announced its decision in *Padilla*. Thus, he asserted,

the change in the law brought his claims within the escape clauses in ORS 138.510 and ORS 138.550. *Verduzco*, 357 Or at 561. The Oregon Supreme Court rejected that assertion, concluding that it need not decide whether the petitioner reasonably could have earlier raised his claims because the petitioner had, in fact, raised his constitutional claims in his earlier petition for post-conviction relief. *Id*. at 573.

Because the petitioner had earlier raised those claims, the court concluded that he could not "claim that he could not reasonably have raised them." *Id*. As the court explained, "[t]he escape clause does not preclude petitioner from relitigating only those grounds for relief that he was certain he could win when he filed his first post-conviction petition." *Id*.

> "In other words, the fact that, in an earlier appeal or petition for post-conviction relief, a petitioner unsuccessfully raised a ground for relief that would have been successful under later case law does not bring a claim for relief within the escape clauses of ORS 138.550(2) and (3). On the contrary, the fact that a petitioner earlier raised the same ground for relief demonstrates that that ground for relief *could* reasonably have been raised on appeal or in a first petition for post-conviction relief."

Kinkel, 276 Or App 442 (emphasis added); *see Hardin v. Popoff*, 279 Or App 290, 304 n 10, 379 P3d 593, *rev den*, 360 Or 465 (2016) ("Our analysis simply requires us to ask whether a claim could reasonably have been raised, not whether that claim could have been raised fruitfully.").

As noted, in this case, petitioner asserts, in part, that he is entitled to relief from the 1995 judgment because the sentence imposed, particularly, the 800-month murder sentence, is a de facto life sentence that constitutes cruel and unusual punishment in violation of the Eighth Amendment and Article I, section 16. Furthermore, he asserts that he could not have raised that challenge earlier because *Miller* announced a new rule that he could not have reasonably anticipated.[9] However, with respect to this challenge to his sentence, as in *Verduzco*, *Kinkel*, and *Cunio*, petitioner cannot successfully assert that he could not have raised his claim earlier because he, in fact, earlier challenged his sentence on that basis. As discussed above, in his original petition for post-conviction relief, petitioner asserted that the sentences imposed on him in the 1995 judgment violated "the prohibition against cruel and unusual

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[9] As in *Kinkel* and *Cunio*, in their briefs, with respect to the merits of petitioner's "cruel and unusual punishment" challenge to his sentences, the parties make arguments regarding whether the Court's decision in *Miller* applies retroactively. As we recognized in both of those cases, in *Montgomery v. Louisiana*, ___ US ___, ___, 136 S Ct 718, 732, 193 L Ed 2d 599 (2016), the Court explained that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." As we explained in *Kinkel*, however, we "do not interpret *Montgomery* to preclude operation of ORS 138.510(3) or ORS 138.550(2) and (3)." 276 Or App at 438 n 6. "In other words, whether petitioner would be entitled to relief on the merits if his petition were permitted under the statutes does not affect our consideration, in the first instance, of whether petitioner's successive petition is procedurally barred by ORS 138.550." *Cunio*, 284 Or App at 706 n 6.

punishment secured by the Eighth Amendment [to] the United States Constitution." In particular, he asserted that the "life" and "836 month" sentences imposed on him, "a remanded juvenile," violated the "Eighth Amendment protection against Cruel and Unusual punishment." As in *Cunio*, having raised that claim in his original post-conviction petition, he cannot now assert that he could not have earlier challenged his sentence as violating the constitutional provision on cruel and unusual punishment.[10] *See Cunio*, 284 Or App at 709.

As noted, petitioner also claims that the 800-month sentence for murder is vertically disproportionate to the sentence for aggravated murder, and asserts that he could not have raised that challenge before the parole board established a release date on his aggravated murder sentence in 2012, and, therefore, it falls within the escape clauses in ORS 138.510 and ORS 138.550. We are unpersuaded. As petitioner notes, his vertical proportionality challenge "involves a comparison between the sentence for murder and the sentence for

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[10] As in *Cunio*, petitioner's argument that the sentence in this case is cruel and unusual under Article I, section 16, are based on Eighth Amendment arguments. He relies on *Miller* in support of his position and essentially argues that, because the sentences are cruel and unusual for Eighth Amendment purposes, they violate Article I, section 16, as well. "In light of petitioner's earlier challenges to his sentence, his Article I, section 16, claim" that the sentence is cruel and unusual, which is based on his Eighth Amendment claim, "could have also been raised earlier" and does "not fall within the statutory escape clause." *Cunio*, 284 Or App at 710 n 8.

aggravated murder." However, his sentence on each conviction was set forth in the 1995 judgment in this case and those sentences have not changed in the years since they were imposed. Thus, a challenge based on the premise that the 800-month sentence for murder is vertically disproportionate to an indeterminate life sentence for aggravated murder could have been raised at that time. *See Cunio*, 284 Or App at 706 n 7. Furthermore, to the extent that his challenge is based on the board's decision, as the state correctly notes, petitioner cannot challenge the board's decision in post-conviction relief. *See id.*; *see also* ORS 138.530(1);[11] ORS 138.540(2).[12]

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[11] Under ORS 138.530(1), post-conviction relief is to be granted when a petitioner establishes:

> "(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.
>
> "(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.
>
> "(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.
>
> "(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted."

[12] Under ORS 138.540(2),

> "[w]hen a person restrained by virtue of a judgment upon a conviction of a crime asserts the illegality of the restraint upon grounds other than the unlawfulness of

Accordingly, we reject petitioner's assertion that his vertical disproportionality challenge to his sentences could not have been raised earlier.

In a second assignment of error, petitioner asserts that the court erred when it denied relief on his claim of inadequate or ineffective assistance of post-conviction counsel. In particular, he asserts that his procedural default should be excused based on the inadequacy of counsel in his original post-conviction proceeding. That is, he asserts that he "satisfies the escape clauses in the [Post-Conviction Hearing Act] if he proves that his * * * counsel unreasonably failed to raise a ground for relief in a prior post-conviction proceeding." We reject that contention.

First, as we recently reiterated in *Cunningham v. Premo*, 278 Or App 106, 124, 373 P3d 1167, *rev den*, 360 Or 422; 360 Or 751 (2016), *cert den*, ___ US ___, 2017 WL 1040930 (Mar 20, 2017), "the adequacy of post-conviction counsel may not be challenged in a later post-conviction proceeding." Furthermore, in support of his argument, petitioner relies on the United States Supreme Court's decision in *Martinez v. Ryan*, 566 US 1, 17, 132 S Ct 1309, 182 L Ed 272 (2012), in which the Court held that,

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such judgment or the proceedings upon which it is based or in the appellate review thereof, relief shall not be available [under the post-conviction relief statutes] but shall be sought by habeas corpus or other remedies, if any, as otherwise provided by law."

> "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."

However, as we explained in *Cunningham*, the Court's decision in *Martinez* "applies narrowly to procedurally barred claims of ineffective trial counsel in federal habeas corpus petitions, where barred claims will only be reviewed upon demonstration of cause and prejudice for the procedural default, or that a failure to review the claim will result in the fundamental miscarriage of justice." *Cunningham*, 278 Or App at 124. That is a very different standard than that set forth in ORS 138.550(3). Thus, in *Cunningham*, we "decline[d] to extend the Supreme Court's rationale in *Martinez* to post-conviction claims that are barred as successive, and conclude[d] that petitioner may not avail himself of the escape clause based on his claim that former post-conviction counsel was inadequate." *Id.* at 124-25. Accordingly, petitioner's contention that he can satisfy the escape clauses based on his claim that his former post-conviction counsel was inadequate is unavailing.

In sum, the post-conviction court did not err in granting the superintendent's motion for summary judgment and dismissing petitioner's claims as improperly successive pursuant to ORS 138.550(3).

Affirmed.

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

Case No. 11C-24315

LYDELL MARCUS WHITE,
Petitioner,

v.

JEFF PREMO, Superintendent,
Oregon State Penitentiary,
Defendant.

May 09, 2013, Filed

GENERAL JUDGMENT

Before: Honorable Thomas M. Hart

The above case came on for hearing on defendant's Motion for Summary Judgment on Apri129, 2103 before the Honorable Thomas M. Hart. Petitioner appeared via his attorney, Mark Brownlee, and defendant appeared by and through his attorney, Paul E. Reim, Assistant Attorney General. This case raised state and federal questions. All questions were presented and decided.

The court having considered all evidence before it and, based on the Findings of Fact and Conclusions of Law separately entered,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that defendant's Motion for Summary

Judgment is granted, and this action is dismissed with petitioner taking no relief.

DATED this 9th day of May, 2013.

/s/ THOMAS M. HART
HONORABLE THOMAS M. HART
Circuit Court Judge