No. 20-_____

SUPREME COURT OF THE UNITED STATES

Devin Kugler,

Petitioner,

vs.

People of the State of Illinois,

Respondent.

On Petition for a Writ of Certiorari to
the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

NATE NIEMAN
ATTORNEY AT LAW
329 18TH ST.
ROCK ISLAND, IL 61201
(309) 623-4831
nate@niemanlaw.com

I. Question Presented

Whether this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which prohibits life sentences for juveniles, prevents a court from civilly committing someone for life as a sexually violent person based on a single juvenile adjudication.

II. Parties to the Proceedings

All parties appear in the caption on the cover page.

III. Table of Contents

IV. Table of Authorities

Cases

Statutes and Rules

Other Authority

V. Petition for Writ of Certiorari

Devin Kugler, who has been civilly committed as a sexually violent person since 2008, by and through Nate Nieman, his attorney, respectfully petitions this Court for a writ of certiorari to review the judgment of the Illinois Supreme Court.

VI. Opinion Below

The trial court entered a final order granting the State of Illinois' annual motion for periodic re-examination on May 18, 2018. Kugler filed a timely notice of appeal on May 21, 2018. Illinois' Third District Appellate Court affirmed the trial court's order in a published opinion filed on December 4, 2019. The Third District's opinion is reported at *In re Commitment of Kugler*, 2019 IL App (3d) 180305, and is reproduced in the appendix to this petition at (App. at 1-7). Kugler filed a timely petition for leave to appeal to the Illinois Supreme Court on January 7, 2020. That petition was denied on March 25, 2020. The Illinois Supreme Court's order denying Kugler's petition for leave to appeal is reported at 144 N.E.3d 1181 (Table), and is reproduced in the appendix to this petition at (App. at 9).

VII. Jurisdiction

The trial court had jurisdiction over Kugler's sexually violent person case under Ill. Const. art. VI, § 9 ("Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office. Circuit Courts shall have such power to review administrative action as provided by law."). The Third District Appellate Court had

jurisdiction to hear Kugler's appeal under the Illinois Constitution of 1970, as well as under the various rules prescribed by the Illinois Supreme Court. *JoJan Corp. v. Brent*, 307 Ill. App. 3d 496, 503 (1st Dist. 1999), *as modified on denial of reh'g* (Oct. 20, 1999) (citing Ill. Const.1970 art. VI, § 6; 155 Ill.2d R. 301 *et seq.*). The trial court's judgment was affirmed by the Third District Appellate Court on December 4, 2019. Kugler's petition for leave to appeal was denied on March 25, 2020. *See* (App. at 9). Kugler invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

Furthermore, this petition is timely filed. Under U.S. Supreme Court Rule 13, "Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment," making the original due date for the petition June 23, 2020.

However, due to disruptions to court operations resulting from the COVID-19 pandemic, the Court entered an order on March 19, 2020 extending the time for filing a petition for certiorari to "150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." *See* (App. at 10-11). Accordingly, Kugler's petition for certiorari is due in this Court on August 22, 2020. Where this petition has been filed on that date, it is timely.

VIII. Statutes Involved

725 ILCS 207/15(b)(1)(B) (West 2018):

> A petition filed under this Section shall allege that all of the following apply to the person alleged to be a sexually violent person:…(1) The person satisfies any of the following criteria:…(B) The person has been found delinquent for a sexually violent offense.

U.S. Const. amend. VIII:

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

IX. Statement of the Case

1. Trial court proceedings.

The State filed a petition for sexually violent person commitment with respect to appellant Devin Kugler on April 16, 2007. (C. 25-28). The petition alleged that "In 2002, when the Respondent was 16 years of age, he was convicted of the Aggravated Criminal Sexual Abuse in Rock Island County case #2002JD91 of an 8 year old female victim (V) and sentenced to the Illinois Department of Corrections." (C. 25). The petition also alleged that "During Respondent's treatment at Resolutions Unlimited in 2006, he admitted to treatment providers that he had sexually abused two other young girls. One girl (A) was 6 years old, when according to the Respondent, he digitally penetrated her vagina and forced her to perform fellatio on him." (C. 25-27). The petition also alleged that "Respondent also reported that he exposed himself to an 8 year old girl (O), convinced her to expose herself to him, fondled her vaginal area and performed cunnilingus on her." (C. 27). The petition additionally alleged that Kugler "reported to his treatment providers at Resolutions Unlimited that in January

2007 when he was on a home visit that he came into contact with a young cousin and had sexually deviant fantasies about her." (C. 27).

Lastly, the petition alleged that Kugler had been diagnosed with the mental disorders of "Pedophilia, Sexually Attracted to Females," "Antisocial Personality Disorder," and "Tourette's Disorder by History." (C. 27). These mental disorders, according to the State, were "congenital or acquired conditions affecting the Respondent's emotional or volitional capacity which predispose the Respondent to commit acts of sexual violence." (C. 27).

The court entered a temporary order of detention on the date on which the petition was filed. (C. 32). The court found that there was probable cause that Kugler was a sexually violent person on April 18, 2007 and ordered Kugler to be "detained at a facility approved by the Illinois Department of Human Services." (C. 33). Kugler and the State waived their rights to a jury trial on October 22, 2007. (C. 46-47; R. 37). The matter proceeded to a bench trial on January 9, 2008. (R. 40). The court took the matter under advisement, (C. 55; R. 283), and issued an order on January 31, 2008, finding Kugler to be a sexually violent person. (C. 58; R. 293). The court committed Kugler to institutional care in a secure facility without a dispositional hearing on January 31, 2008. (C. 58; R. 293). Timely notice of appeal was filed on February 22, 2008. (C. 60).

The State filed its first motion for periodic re-examination and finding of no probable cause on August 13, 2008. (C. 75-76). The State's motion was granted on September 4, 2008. (C. 153). The State filed its second motion for periodic re-

examination on August 12, 2009, (C. 178-79), which was granted on September 3, 2009. (C. 215). The Third District Appellate Court issued a Rule 23 order and opinion on July 28, 2009, affirming Kugler's initial commitment. (C. 225-44).

The State filed its third motion for periodic re-examination on August 16, 2010, (C. 277), and its fourth motion for periodic re-examination on August 19, 2011, (C. 315-16). The State's motion was granted on September 26, 2011. (C. 355). The State filed its fifth motion for periodic re-examination on August 6, 2012, (C. 375), which was granted on August 17, 2012. (C. 411). The State filed its sixth motion for periodic re-examination on August 6, 2013, (C. 432-34), which was granted on May 20, 2014. (C. 453). The State filed its seventh motion for periodic re-examination on August 7, 2014, (C. 455-57), which was granted on September 4, 2014. (C. 495). The State filed its eighth motion for periodic re-examination on August 11, 2015, (C. 512-14), which was granted on November 5, 2015. (C. 556). The State filed its ninth motion for periodic examination on August 29, 2016, (C. 586-88), which was granted on September 21, 2016. (C. 618).

The State filed its tenth and most recent motion for periodic re-examination on September 14, 2017, (C. 653-55). Kugler filed a motion for appointment of independent evaluator on February 7, 2018, (C. 706-11), which was denied on April 4, 2018. (C. 718; R. 354). Kugler filed a motion to vacate order of commitment/motion to dismiss on May 14, 2018. (C. 729-34). The motion argued that "even setting aside the seemingly immutable legal fiction that SVP confinement is civil treatment as opposed to criminal punishment, the fact that an SVP respondent can be committed

following a juvenile adjudication is itself at odds with the teachings of *Miller*." (C. 732). The State filed a response to this motion on May 18, 2018. (C. 735-38). After a hearing on May 18, 2018, the court denied Kugler's motion to vacate order of commitment/motion to dismiss, (C. 739; R. 363), and granted the State's motion for periodic re-examination. (C. 739; R. 369). Kugler filed a timely notice of appeal on May 21, 2018. (C. 740).

2. Direct Appeal

Kugler argued on direct appeal that "his SVP commitment is unconstitutional in light of *Miller* and recent decisions from this district. Respondent made an 'as-applied' challenge to the constitutionality of his commitment. In making an as-applied challenge, respondent contends that the pertinent sections of the Act are unconstitutional as applied to the particular circumstances of respondent's situation." *In re Commitment of Kugler*, 2019 IL App (3d) 180305, ¶ 11 (citing *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 17). Kugler argued that "involuntary commitment is punitive, such that it violates the eighth amendment proscription against cruel and unusual punishment." *Id.* Because Kugler, "present[ed] th[e appellate] court with a question of constitutional validity of a statute," the appellate court reviewed the issue under a *de novo* standard of review review. *Id.* (citing *People v. Doll*, 371 Ill. App. 3d 1131, 1138 (2d Dist. 2007)).

The Third District Appellate Court acknowledged that this United States Supreme Court held in *Miller v. Alabama*, 567 U.S. 460 (2012) that "'the Eighth Amendment forbids a sentencing scheme that mandates life in prison without

possibility of parole for juvenile offenders.'" *Id.* at ¶ 12. The appellate court also acknowledged that the Illinois Supreme Court extended *Miller* to *de facto* life sentences. *Id.* (citing *People v. Reyes*, 2016 IL 119271, ¶ 10). The appellate court characterized Kugler's argument as contending that ""his SVP commitment is a *de facto* life sentence, bringing him under the *Miller* umbrella. He asks this court to hold that SVP commitment is punitive in nature, relying on cases that no longer have precedential force because the Illinois Supreme Court vacated the judgments." *Id.* at 13. The appellate court noted that "Respondent can cite no case holding that SVP commitment is considered punishment or applying *Miller* and its progeny to the Act." *In re Commitment of Kugler*, 2019 IL App (3d) 180305, ¶ 13.

The appellate court observed that "Before *Miller*, our supreme court addressed the constitutionality of the Act in *In re Detention of Samuelson*, 189 Ill. 2d 548, 559, 244 Ill.Dec. 929, 727 N.E.2d 228 (2000)." *Id.* at ¶ 14. The Illinois Supreme Court found that sexually violent civil commitment proceedings are "civil rather than criminal in nature." *Id.* (citing *Samuelson*, 189 Ill. 2d at 559). The *Samuelson* holding "echoed the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), that held involuntary confinement pursuant to a similar Kansas statute was not punitive." *Id.*

The Third District ultimately determined that "*Samuelson* controls. Here, respondent is asking this court to declare the Act unconstitutional because of principles the Supreme Court enumerated in a criminal case. Respondent attempts to persuade us that involuntary commitment is punishment such that *Miller* applies.

Our supreme court, and the United States Supreme Court, have held otherwise." *In re Commitment of Kugler*, 2019 IL App (3d) 180305, ¶ 15. The Court further stated that "'The appellate court lacks authority to overrule decisions of [the supreme] court, which are binding on all lower courts.'" *Id.*, citing *People v. Artis*, 232 Ill. 2d 156, 164 (Ill. 2009). "For this reason, we reject respondent's constitutional challenge and affirm the circuit court's grant of the State's motion for periodic reexamination." *Id.*

X. REASONS FOR GRANTING THE WRIT

The question presented here is whether this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which prohibits life sentences for juveniles, prevents a court from civilly committing someone for life as a sexually violent person based on a single juvenile adjudication. Kugler asks this Court to resolve this issue in his favor by holding that *Miller* protections should apply to civil committees who committed their qualifying offense under the Sexually Violent Persons Act when they were juveniles.

1. *Roper/Graham/Miller* trilogy.

In *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010), "the Supreme Court established that 'children are constitutionally different from adults for purposes of sentencing' in several important ways." *People v. Harris*, 2018 IL 121932, ¶ 55, citing *Miller v. Alabama*, 567 U.S. 460, 471 (2012). First, children are less mature and have an underdeveloped sense of responsibility, leading to recklessness, impulsive behavior, and heedless risk-taking. *Id.*, citing *Miller*, 567 U.S. at 471, citing *Roper*, 543 U.S. at 569. Second, children are more vulnerable to

negative influences and pressures, including from their family and peers. *Id*., citing *Miller*, 567 U.S. at 471, citing *Roper*, 543 U.S. at 569. And third, a child's character is less fixed, making his or her actions less likely to be indicative of irretrievable depravity. *Id*., citing *Miller*, 567 U.S. at 471, citing *Roper*, 543 U.S. at 570. Those differences between adults and juveniles diminish a juvenile's moral culpability and result in increased prospects for reform. *Id*., citing *Miller*, 567 U.S. at 471-73. The *Miller* Court, therefore, held that a sentencing scheme mandating life in prison without the possibility of parole for juvenile offenders violates the Eighth Amendment prohibition on cruel and unusual punishment. *People v. Harris*, 2018 IL 121932, ¶ 55, citing *Miller*, 567 U.S. at 479.

The Supreme Court emphasized that a mandatory sentencing scheme for juveniles prevents the trial court from considering numerous mitigating factors, such as the juvenile offender's age and attendant characteristics; the juvenile's family and home environment and the circumstances of the offense, including the extent of the juvenile's participation and the effect of any familial or peer pressure; the juvenile's possible inability to interact with police officers or prosecutors or incapacity to assist his or her own attorneys; and "the possibility of rehabilitation even when the circumstances most suggest it." *People v. Reyes*, 2016 IL 119271, ¶ 3, *citing Miller,* 132 S.Ct. at 2468. The Illinois Supreme Court went a step further in *Reyes* to declare *de facto* life sentences—or, sentences that are not natural life sentences *per se* but are tantamount to natural life sentences—were also constitutional under *Miller*. *Reyes*, 2016 IL 119271, ¶ 10.

The Supreme Court's recent decisions regarding juvenile sentencing "rested not only on common sense—on what 'any parent knows'—but on science and social science as well." *Miller*, 567 U.S. at 471–72, citing *Roper*, 543 U.S. at 569. In *Roper,* the Supreme Court cited studies showing that " '[o]nly a relatively small proportion of adolescents' " who engage in illegal activity " 'develop entrenched patterns of problem behavior.' " *Id.,* citing *Roper*, 543 U.S. at 570, quoting Steinberg & Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty," 58 *Am. Psychologist* 1009, 1014 (2003)).

In *Graham*, the Supreme Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." *Miller*, 567 U.S. at 471-72, citing *Graham*, 560 U.S. at 68. The Supreme Court reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his " 'deficiencies will be reformed.' " *Id.* at 472, quoting *Roper,* 543 U.S., at 570. This idea that a juvenile's criminal acts should be viewed differently from those of an adult have not yet, to Kugler's knowledge, been extended to the context of the civil commitment of juvenile offenders in Illinois, despite these sweeping changes to our law brought on by the *Roper*/*Graham*/*Miller* trilogy and the *Reyes* decision that broadened *Miller* to apply to *de facto* life sentences for juveniles.

Kugler argues here that he should not face the specter of a potential lifetime of civil commitment on the basis of his juvenile offense conduct for the same reasons that a juvenile criminal defendant should not face the specter of a potential life sentence on the basis of his juvenile offense conduct. Kugler argues that *Miller* principles should prohibit the civil commitment of individuals who committed their qualifying offenses as juveniles.

2. Sexually violent person commitment is punishment.

This Court previously held in *Kansas v. Hendricks* that "involuntary confinement pursuant to a similar Kansas statute was not punitive." *Kugler*, 2019 IL App (3d) 180305, ¶ 14. The categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." *Hendricks*, 521 U.S. 346, 361 (citing *Allen v. Illinois,* 478 U.S. 364, 368 (1986)). The Court must "initially ascertain whether the legislature meant the statute to establish 'civil' proceedings. If so, the Court "ordinarily defer[s] to the legislature's stated intent." *Id.* Here, "Section 20 of the SVP Act provides that SVP proceedings are civil in nature and are controlled by provisions of the civil practice law unless the SVP Act provides otherwise: 'The proceedings under this Act shall be civil in nature. The provisions of the Civil Practice Law, and all existing and future amendments of that Law shall apply to all proceedings hereunder except as otherwise provided in this Act.'" *In re Commitment of Clark*, 2014 IL App (1st) 133040, ¶ 12 (citing 725 ILCS 207/20 (West 2008)).

However, although the Court recognizes that a "civil label is not always dispositive," *Allen,* 478 U.S. at 369, 106 S.Ct., at 2992, the Court will reject the

legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it 'civil.'" *Hendricks*, 521 U.S. at 361 (citing *United States v. Ward,* 448 U.S. 242, 248–249 (1980)). In those limited circumstances, the Court will consider the statute to have established criminal proceedings for constitutional purposes. *Id.*

Justice Breyer, writing in dissent in *Hendricks*, noted that "In *Kennedy v. Mendoza–Martinez,* 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), this Court listed seven factors that helped it determine whether a particular statute was primarily punitive for purposes of applying the Fifth and Sixth Amendments. Those factors include whether a sanction involves an affirmative restraint, how history has regarded it, whether it applies to behavior already a crime, the need for a finding of scienter, its relationship to a traditional aim of punishment, the presence of a nonpunitive alternative purpose, and whether it is excessive in relation to that purpose." *Hendricks*, 521 U.S. at 394 (citing *Mendoza–Martinez*, 372 U.S. at 169) (J. Breyer, dissenting). This Court has said that these seven factors are "neither exhaustive nor dispositive," but nonetheless "helpful." *Id*. (citing *Ward*, 448 U.S. at 249).

Justice Breyer concluded that "the Act before us involves an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint, namely, confinement, serves a traditional aim of punishment, does not primarily serve an alternative purpose (such

as treatment), and is excessive in relation to any alternative purpose assigned." *Id.* Justice Breyer further explained that "I have pointed to those features of the Act itself, in the context of this litigation, that lead me to conclude, in light of our precedent, that the added confinement the Act imposes upon Hendricks is basically punitive. This analysis, rooted in the facts surrounding Kansas' failure to treat Hendricks, cannot answer the question whether the Kansas Act, as it now stands, and in light of its current implementation, is punitive toward people other than he. And I do not attempt to do so here." *Id.* at 395.

Justice Breyer, of course, was writing in dissent when he wrote this. But given that *Hendricks* was decided in 1997, it is worth revisiting the *Mendoza–Martinez* factors as they apply to modern civil commitment. If the same *Mendoza–Martinez* factors are applied to modern SVP civil commitment in Illinois, then this Court should reach the same conclusion that Justice Breyer reached in his dissent—that sexually violent person civil commitment is punitive.

As to the first *Mendoza–Martinez* factor, there is no question that SVP civil commitment involves "affirmative disability or restraint." The SVP Act allows for commitment "in a secure facility." 725 ILCS 207/40(b)(2) (West 2018). That "secure facility" is "provided by the Department of Corrections." 725 ILCS 207/50(a) (West 2018). The State places an "affirmative disability or restraint" on someone when they are committed to a secure facility.

As to the second *Mendoza–Martinez* factor, how history has regarded SVP commitment, the SVP Act is relatively new and does not have a long history to draw

from. However, when analyzing this factor as it relates to SORA, which the Sixth Circuit also found "has no direct ancestors in our history and traditions," *Does #1-5 v. Snyder*, 834 F.3d 696, 700 (6th Cir. 2016), the *Snyder* court determined that SORA met "the general, and widely accepted, definition of punishment offered by legal philosopher H.L.A. Hart: (1) it involves pain or other consequences typically considered unpleasant; (2) it follows from an offense against legal rules; (3) it applies to the actual (or supposed) offender; (4) it is intentionally administered by people other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offense was committed." *Snyder*, 834 F.3d 696, 700 (citing H.L.A. Hart, *Punishment and Responsibility* 4–5 (1968)). Being separated from one's family in a prison-like environment following an offense against the law is painful and unpleasant. An SVP respondent's confinement is intentionally administered by the State, not the offender, as a function of the legal system that incarcerated him in the first place. This factor weighs in favor of punishment, too.

As to the third *Mendoza–Martinez* factor, SVP commitment applies to behavior already a crime. SVP committees are, by law, required to transition from DOC custody to DHS custody. *See* 725 ILCS 207/15(a) (West 2018) ("A petition alleging that a person is a sexually violent person must be filed before the release or discharge of the person or within 30 days of placement onto parole, aftercare release, or mandatory supervised release..."). Once committed, an SVP respondent "is confined in a 'secure facility' (725 ILCS 207/40(b)(2) (West 2000)) and cannot obtain a discharge without a favorable hearing in the committing court." *People v. Botruff*, 331

Ill. App. 3d 486, 492 (3rd Dist.2002), *rev'd on other grounds,* 212 Ill. 2d 166 (2004). Furthermore, an SVP respondent's commitment is a direct result of the sex crimes they have committed, as one must have a predicate offense to be committed under the Act. *See* 725 ILCS 207/15(b) (West 2018).

As to the fourth *Mendoza–Martinez* factor, the Act does not contain a scienter requirement, which weighs in favor of the law being civil in nature. See *Hendricks*, 521 U.S. 346, 362 (1997) ("...unlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator; instead, the commitment determination is made based on a 'mental abnormality' or 'personality disorder' rather than on one's criminal intent.").

The remaining factors, however, weigh in favor of the Act being punitive. In considering the Act's relationship to a traditional aim of punishment, whether a nonpunitive alternative purpose is present, and whether it is excessive in relation to that purpose," these factors suggest that SVP commitment is punitive. If "the Act is aimed at care and treatment, rather than punishment and deterrence," *In re Commitment of Hardin*, 2013 IL App (2d) 120977, ¶ 27 (citing *In re Detention of Hunter,* 2013 IL App (4th) 120299, ¶ 29), its broad application, to include individuals like Kugler who committed their illegal sex acts when they were juveniles, and its harsh liberty restrictions to include physical confinement similar to imprisonment, extend beyond the purpose's treatment purview. As with sex offender statutes, the SVP statute's liberty restrictions, in situations like Kugler's, fall within the continuum of possible punishments ranging from solitary confinement in a

maximum-security facility to a few hours of mandatory community service." *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). Justice Breyer's dissent was correct. SVP commitment should be considered punishment. *Hendricks* must therefore be re-examined and overruled.

3. If SVP commitment is considered punishment, as it should be, it is cruel and unusual punishment under the Eighth Amendment to civilly commit someone like Kugler, whose qualifying offense conduct was committed when he was a juvenile.

The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Roper*, 543 U.S. at 560. The provision is applicable to the States through the Fourteenth Amendment. *Id*. (citations omitted). The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. *Id*. The right flows from the basic " 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Atkins v. Virginia*, 536 U.S., 304, 311 (2002), quoting *Weems v. United States,* 217 U.S. 349, 367 (1910).

The Eighth Amendment allows defendants to challenge sentences as disproportionate "given all the circumstances in a particular case." *Graham*, 560 U.S. at 59. Courts must consider "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Graham*, 560 U.S. at 59. In doing so, courts must be mindful that the Eighth Amendment contains a "narrow proportionality principle, that does not require strict proportionality between crime and sentence but rather forbids only extreme sentences that are grossly

disproportionate to the crime.' " *Graham*, 560 U.S. at 59-60 (citing *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991)).

Life in prison without parole is disproportionate unless the juvenile defendant's crime reflects irreparable corruption. *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 53, *reh'g denied* (Apr. 29, 2016), citing *Montgomery v. Louisiana,* 577 U.S. at ——, 136 S.Ct. 718, 726 (2016). Sentencing courts must consider a child's diminished culpability as well as his heightened capacity for change. *Id.*, citing *Montgomery,* 577 U.S. at ——, 136 S.Ct. at 726. Children are immature, irresponsible, reckless, impulsive and vulnerable to negative influence. *Id.*, citing *Miller,* 567 U.S. at ——, 132 S.Ct. at 2464. Additionally, they lack control over their environment and the ability to extricate themselves from crime-producing circumstances. *Id.*, citing *Miller,* 567 U.S. at ——, 132 S.Ct. at 2464.

Because a juvenile's character is not well formed, his actions are less likely to demonstrate irretrievable depravity. *Id.*, citing *Miller,* 567 U.S. at ——, 132 S.Ct. at 2464. It follows that youth diminishes penological justifications: (1) reduced blameworthiness undermines retribution; (2) impetuosity undermines deterrence; and (3) ordinary adolescent development undermines the need for incapacitation. *Nieto*, 2016 IL App (1st) 121604, ¶ 53, citing *Miller,* 567 U.S. at ——, 132 S.Ct. at 2465. Additionally, life without parole entirely negates the possibility of rehabilitation. *Id.*, citing *Miller,* 567 U.S. at ——, 132 S.Ct. at 2465. Consequently, "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those

differences counsel against irrevocably sentencing them to a lifetime in prison.' " *Id*. *at* ¶ 54, citing *Montgomery,* 577 U.S. at ——, 136 S.Ct. at 733, quoting *Miller,* 567 U.S. at ——, 132 S.Ct. at 2469.

Kugler's commitment does not comply with the dictates of *Miller* because the committing judge did not take into account how children are different and how those differences counsel against irrevocably civilly committing a respondent for life who committed his qualifying offense conduct when he was a juvenile.

Holding that *Miller* protections do not apply to Kugler ignores the primary teachings of the *Roper*/*Graham*/*Miller* trilogy. *Roper* cited the Steinberg and Scott study for the proposition that "'For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 U.S. at 570. In other words, juvenile offense conduct is not a reliable indicator that an individual will have problem behavior that will persist into adulthood. If that is the case, then an individual who is committed on the basis of his juvenile offense conduct could be committed even though he is not at risk to offend into adulthood. If that happens, that individual will likely be unsuccessful in his attempts as an adult to complete treatment because there is no future risk to abate. If an individual is unsuccessful in treatment, then he really has no ability to free himself by completing treatment, as the State would argue. Therefore, the committed individual is just as imprisoned as a defendant who receives a life sentence.

Kugler's most recent evaluation describes someone who has grown out of his juvenile sexual tendencies and does not understand why he is in treatment. In the "Summary of Treatment Record and Other Information" section, for instance, the evaluator states that,

> Overall, the picture provides by Therapist Barnes, contact with Mr. Kugler, and other records was consistent with a treatment participant who had made progress since his last re-examination, but who also continued to struggle with many of the same issues that he had previously de-railed his treatment progress (e.g. denial of recidivism risk, inappropriate sexual interests). Mr. Kugler continued to demonstrate a lack of insight as to the full range of his treatment needs and risk factors. It is not certain, at this point, whether Mr. Kugler will be able to maintain the treatment progress he has made. (C. 676).

Kugler likely denied his recidivism risk because, as he has aged, he grew out his sexual preferences as a juvenile. This is reflected in the "inappropriate sexual interest" he had with *adult* female therapists. *See* (C. 671). It is easy to see why an evaluator would question "whether Mr. Kugler will be able to maintain the treatment progress he has made" in treatment when Kugler, now an adult, no longer has the deviant sexual interests that he did as a juvenile. If Kugler has outgrown these juvenile interests, he will be unable to address them in treatment because he no longer has them. If he will be unable to address these deviant interests in treatment, he will never successfully complete treatment and will never be released. Because Kugler has simply grown up, he is now serving an indeterminate term of imprisonment in a "treatment" facility.

The statutory purpose underlying the SVP civil commitment scheme—treating individuals' sexually related mental disorders so that they do not engage in future

illegal sex acts—is significantly undermined when someone like Kugler is committed because offense conduct committed as a juvenile should not qualify an individual for SVP commitment. Where it has, SVP commitment becomes much like a punishment that is disproportionate to the original offense. The SVP commitment becomes unconstitutional under the Eighth Amendment for reasons described in the *Roper/Graham/Miller* line of cases.

XI. CONCLUSION

For the foregoing reasons, Kugler respectfully requests that this Court issue a writ of certiorari to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

____/s/ Nate Nieman___

NATE NIEMAN
ATTORNEY AT LAW
329 18TH ST.
ROCK ISLAND, IL 61201
(309) 623-4831
nate@niemanlaw.com

XII. Appendix

2019 IL App (3d) 180305

Opinion filed December 4, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

In re COMMITMENT OF DEVIN M. KUGLER	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois.
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	Appeal No. 3-18-0305
	)	Circuit No. 07-MR-214
v.	)	
Devin M. Kugler,	)	
Respondent-Appellant).	)	Honorable Frank R. Fuhr, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court, with opinion. Justices Carter and Lytton concurred in the judgment and opinion.

OPINION

¶ 1 Following a bench trial, the court found that respondent, Devin M. Kugler, was a sexually violent person (SVP) subject to commitment under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2006)) based on acts he committed when he was 16. Respondent appealed his commitment. This court affirmed. See *In re Detention of Kugler*, No. 3-08-0123 (2009) (unpublished order under Illinois Supreme Court Rule 23). In September 2017, the State filed its tenth motion for periodic reexamination as required by the Act. In May 2018, respondent filed a combined motion to vacate order of commitment/dismiss. On May

18, 2018, the circuit court held a hearing on the motions. It denied respondent's combined motions and granted the State's motion. On appeal, respondent argues that his commitment is unconstitutional as applied to him in light of *Miller v. Alabama*, 567 U.S. 460 (2012). We affirm.

¶ 2 I. BACKGROUND

¶ 3 The actions underlying respondent's commitment are detailed in this court's order affirming his commitment. See *Kugler*, No. 3-08-0123. We will repeat only those facts necessary to our analysis.

¶ 4 In April 2007, the State filed a petition alleging respondent, then age 21, was an SVP subject to commitment under the Act. The petition alleged that in 2002, when respondent was 16 years old, a court adjudicated respondent delinquent for the offense of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(2)(i) (West 2002)) because he penetrated the anus of an 8-year-old girl with his finger and rubbed her buttocks. At the time of conviction, he admitted that he fantasized about having sex with young children between the ages of 8 and 11. Treatment providers for respondent alleged he reported sexually abusing two other young girls, ages six and eight. Also, respondent had sexually deviant fantasies about his young cousin. A doctor diagnosed respondent with (1) pedophilia, sexually attracted to females, and (2) antisocial personality disorder. The petition contended that these mental disorders affected respondent's emotional and volitional capacity and created a substantial probability that he would commit future acts of sexual violence.

¶ 5 The court held a bench trial on the matter. A clinical psychologist testified as an expert in the evaluation and treatment of SVPs. She interviewed respondent as part of the SVP commitment proceedings. Respondent admitted to the offense that led to his 2002 conviction.

The psychologist reviewed his records from a treatment facility where he admitted to engaging in sexual activities with his foster sister when she was 4 or 6 and he was 12. He would take showers with her, masturbate in front of her, fondle her, and place his penis against her buttocks when they were in a pool. Respondent performed oral sex on another girl when she was eight or nine. Respondent denied these acts when the psychologist questioned him. He did admit to having sexual fantasies about his underage cousin but claimed he did not act on them. The psychologist was concerned that respondent's deviant behavior had persisted from age 12 through age 20.

¶ 6 Respondent also committed several nonsexual offenses, including two convictions and an additional charge for aggravated battery. In 2006, a young woman obtained an order of protection against respondent. She alleged that respondent threatened to kill everyone she loved, called her multiple times a day, stalked her at the mall, tried to get her alone, begged her for sex, and told her that he wanted to rape her. The psychologist opined that these offenses indicated respondent's tendency to disobey the law and demonstrate violent, sometimes sexually violent, behavior.

¶ 7 The circuit court found the State proved beyond a reasonable doubt that respondent was an SVP under the Act. Respondent chose not to have a dispositional hearing. The court ordered respondent committed for institutional care in a secure facility. Respondent appealed, arguing that the State failed to meet its burden of proof. This court affirmed.

¶ 8 The Act requires the State to file a motion for periodic reexamination at least annually. 725 ILCS 207/55 (West 2006). In September 2017, the State filed its tenth motion for periodic reexamination. In May 2018, respondent filed a motion to vacate order of commitment/motion to dismiss, citing *Miller*'s holding "that the Eighth Amendment forbids a sentencing scheme

that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479.

¶ 9 On May 18, 2018, the court held a hearing on the pending motions. The court considered Dr. David Suire's written report based on his July 2017 examination of respondent. Suire opined that respondent remained in the self-application (or third) phase of the treatment program for SVPs. Although respondent made progress since his last reexamination, he continued to struggle with many reoccurring issues like denial of his recidivism risk and inappropriate sexual interests. Respondent remained ignorant as to the full range of his treatment needs and risk factors. He stopped taking his psychotropic medication. Suire found this decision concerning due to respondent's therapist's observation that respondent was developing a romantic/sexual interest in a female therapist. This was a reoccurring issue for respondent over the course of his treatment. Respondent denied behaving inappropriately toward the woman who obtained a restraining order against him, suggesting a lack of insight into his behavior. Suire scored respondent on the STATIC-99, which is an actuarial assessment that measures an offender's sexual recidivism risk. Respondent's risk of recidivism was between three and a half and four times higher than the typical sex offender in the normative sample. Suire found that respondent met the diagnostic criteria for pedophilic disorder, sexually attracted to females, nonconsenting females, delusional disorder, erotomanic type (currently in an acute episode), antisocial personality disorder with borderline features, and other specific paraphilic disorder. Suire believed that it was "substantially probable" that respondent would reoffend. Ultimately, the court denied respondent's combined motions and granted the State's motion for periodic reexamination.

¶ 10 II. ANALYSIS

¶ 11 On appeal, respondent argues that his SVP commitment is unconstitutional in light of *Miller* and recent decisions from this district. Respondent made an "as-applied" challenge to the constitutionality of his commitment. In making an as-applied challenge, respondent contends that the pertinent sections of the Act are unconstitutional as applied to the particular circumstances of respondent's situation. *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 17. He argues that involuntary commitment is punitive, such that it violates the eighth amendment proscription against cruel and unusual punishment. Respondent presents this court with a question of constitutional validity of a statute, which calls for *de novo* review. *People v. Doll*, 371 Ill. App. 3d 1131, 1138 (2007).

¶ 12 In *Miller*, the United States Supreme Court addressed whether a mandatory sentencing scheme that imposed a life-without-parole sentence on a 14-year-old child was unconstitutional under the eighth amendment. *Miller*, 567 U.S. at 474. A jury found the named petitioner guilty of murder. *Id.* at 469. The trial court sentenced him to the mandatory punishment as part of the relevant sentencing scheme. *Id.* When addressing whether the sentencing scheme violated the eighth amendment proscription against cruel and unusual punishment, the Court found these mandatory punishments "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender," noting that youth is a factor the sentencing court should be able to take into consideration. *Id.* at 474. The Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 479. The holding was narrow and specific, as the Court refused to fashion a bright line rule barring life-without-parole sentences

for juveniles. See *id.* Attendant facts and circumstances matter; the eighth amendment requires the sentencing court take them into account. *Id.* at 480.

¶ 13 Illinois went a step further with its application of the *Miller* rule. Our supreme court declared *de facto* life sentences unconstitutional as well. *People v. Reyes*, 2016 IL 119271, ¶ 10. Respondent contends his SVP commitment is a *de facto* life sentence, bringing him under the *Miller* umbrella. He asks this court to hold that SVP commitment is punitive in nature, relying on cases that no longer have precedential force because the Illinois Supreme Court vacated the judgments. Respondent can cite no case holding that SVP commitment is considered punishment or applying *Miller* and its progeny to the Act.

¶ 14 Before *Miller*, our supreme court addressed the constitutionality of the Act in *In re Detention of Samuelson*, 189 Ill. 2d 548, 559 (2000). The defendant argued the Act was unconstitutional in that it (1) denied due process and equal protection, (2) violated the prohibition against double jeopardy and *ex post facto* principles, and (3) infringed upon the right to trial by jury. *Id.* at 557-58. The court emphasized that "proceedings under the [Act] are civil rather than criminal in nature." *Id.* at 559. It echoed the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that held involuntary confinement pursuant to a similar Kansas statute was not punitive. *Samuelson*, 189 Ill. 2d at 559. Our supreme court noted "[t]he flaw in defendant's analysis is that this is not a criminal case." *Id.* at 560.

¶ 15 *Samuelson* controls. Here, respondent is asking this court to declare the Act unconstitutional because of principles the Supreme Court enumerated in a criminal case. Respondent attempts to persuade us that involuntary commitment is punishment such that *Miller* applies. Our supreme court, and the United States Supreme Court, have held otherwise.

"The appellate court lacks authority to overrule decisions of [the supreme] court, which are binding on all lower courts." *People v. Artis*, 232 Ill. 2d 156, 164 (2009). For this reason, we reject respondent's constitutional challenge and affirm the circuit court's grant of the State's motion for periodic reexamination.

¶ 16 III. CONCLUSION

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Rock Island County.

¶ 18 Affirmed.

No. 3-18-0305

Cite as:	*In re Commitment of Kugler*, 2019 IL App (3d) 180305
Decision Under Review:	Appeal from the Circuit Court of Rock Island County, No. 07-MR-214; the Hon. Frank R. Fuhr, Judge, presiding.
Attorneys for Appellant:	Nate Nieman, of Rock Island, for appellant.
Attorneys for Appellee:	Kwame Raoul, Attorney General, of Chicago (Jane Elinor Notz, Solicitor General, and Michael M. Glick and Rachel L. Barbat, Assistant Attorneys General, of counsel), for the People.

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Nathaniel Abel Nieman
Attorney At Law
329 18th Street
Rock Island IL 61201

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

March 25, 2020

In re: In re Commitment of Devin M. Kugler (People State of Illinois, respondent, v. Devin M. Kugler, petitioner). Leave to appeal, Appellate Court, Third District.
125638

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 04/29/2020.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

(ORDER LIST: 589 U.S.)

THURSDAY, MARCH 19, 2020

ORDER

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.