No.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL J. BEVER,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a judge's decision to sentence a juvenile offender to consecutive terms is exempt from Eighth Amendment review.

2. Whether a judge's decision to run Petitioner's sentences consecutively for an aggregate no-parole term of 215 years violates the Eighth Amendment when a jury has made a specific finding that the State had not proven Petitioner to be permanently incorrigible and irreparably corrupt.

3. Whether – given the jury's finding that the State had not proven Petitioner to be permanently incorrigible and irreparably corrupt – the Sixth Amendment requires Petitioner's sentences to run concurrently in order to provide him with a meaningful opportunity for release.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Bever respectfully petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at *Bever v. State,* 2020 OK CR 13, 467 P.3d 693.

JURISDICTIONAL STATEMENT

The Oklahoma Court of Criminal Appeals affirmed Petitioner's convictions on June 25, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT REGARDING PROCEEDING *IN FORMA PAUPERIS*

Petitioner was represented by appointed counsel both at the trial level and the appellate level in Oklahoma. A motion to proceed *in forma pauperis* has been filed with this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Sixth Amendment to the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section I provides: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

22 O.S.2011, § 976 provides: If the defendant has been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses. Provided, that the sentencing judge shall, at all times, have the discretion to enter a sentence concurrent with any other sentence.

INTRODUCTION

This case presents an opportunity for this Court to clarify the parameters of the United States Constitution's application to life-without-parole sentences for juvenile offenders. The Oklahoma Court of Criminal Appeals has refused to extend Eighth Amendment protection to a judge's decision to impose consecutive life terms when sentencing a juvenile offender. The question presented – whether the Eighth Amendment applies to the consecutive sentencing decision – is narrow, but this Court's ruling will have broad application.[1] Granting certiorari will provide much needed direction to numerous state courts that have struggled with this Court's efforts to limit no-parole sentences to only "the rare juvenile offender whose crime reflects irreparable corruption." See *Roper v. Simmons,* 543 U.S. 551, 573 (2005).

Through its judicial branch, Oklahoma has implemented a procedure for separating juveniles "whose crime reflects unfortunate yet transient immaturity" from "the rare juvenile offender whose crime reflects irreparable corruption." In *Stevens v. State,* 2018 OK CR 11, 422 P.3d 741, the Oklahoma Court of Criminal Appeals crafted – with legislative precision – a sentencing procedure for courts to

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[1] The United States is the only country in the world that sentences children to die in prison. Well over 1,000 inmates are serving life-without-parole sentences in this country for offenses committed when they were children. See *The Campaign for the Fair Sentencing of Youth, Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children* 2, 7 (2018). https:www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf [https://prma.cc/GD4E-VC6G] While the number serving these sentences solely because of consecutive sentencing decisions is unknown, the sheer number of states refusing to apply Eighth Amendment analysis to juvenile offender consecutive sentencing decisions suggests a significant number. *See* list on pages 12-14 of this petition.

follow when a juvenile offender is charged with an offense carrying the possibility of life without parole. The *Stevens* decision requires an Oklahoma jury to make a finding that a juvenile is permanently incorrigible and irreparably corrupt[2] by proof beyond a reasonable doubt before it can consider imposing a sentence of life without parole. Michael Bever's jury concluded that the State had not proven Petitioner to be a juvenile "whose crime reflects irreparable corruption" and imposed a life sentence with the possibility of parole. (Appendix 1-4) The judge who formally sentenced Petitioner accepted this finding, but then reversed course and imposed an aggregate prison sentence from which Michael Bever will never be released.

Realistically, the Oklahoma Court of Criminal Appeals has exempted a class of juvenile offenders – those convicted of multiple crimes and sentenced to consecutive terms – from *Miller's* promise that only those juvenile offenders found to be irreparably corrupt can be sentenced to die in prison. In other words, a juvenile facing a life-without-parole sentence is entitled to the Eighth Amendment protection guaranteed by *Miller* if he is convicted of a single count, while a juvenile convicted of multiple counts is not. Without authority from this Court, the Oklahoma Court of Criminal Appeals has established a class of juvenile offenders for whom the Eighth Amendment has no application, regardless of the offender's culpability or capacity for

[2] The Oklahoma Court of Criminal Appeals requires a finding of permanent incorrigibility *and* irreparable corruption before a sentence of life without possibility of parole can be imposed for an offense committed as a juvenile. Petitioner believes that "permanently incorrigible" and "irreparably corrupt" are synonymous and therefore this petition will often refer only to a finding that the State failed to prove "irreparable corruption." This Court's jurisprudence uses the language interchangeably. See *Montgomery v. Louisiana,* 136 S.Ct. 718, 726, 733-35 (2016); *Miller v. Alabama,* 567 U.S. 460, 471, 479-80 (2016); *Graham v. Florida,* 560 U.S. 48, 68, 76-77 (2010); *Roper v. Simmons,* 543 U.S. 551, 570, 573 (2005).

change. Neither *Graham* nor *Miller* suggest this as acceptable; while nonhomicide juvenile offenders are treated differently than homicide juvenile offenders, all juvenile offenders are entitled to Eighth Amendment protection that requires them to be treated differently than adults. Juvenile offenders are not exempt from this protection simply because they have been convicted of multiple crimes.

It is fitting that this Court choose an Oklahoma case to provide the requested direction. The Oklahoma Court of Criminal Appeals has historically demonstrated an inclination to treat juveniles charged with serious crimes as though they were no different from adults. Since the reinstatement of the death penalty in 1976, only 22 people have been executed in this country for crimes committed as a juvenile. The youngest was an Oklahoman – Sean Sellers – who was executed in 1999 for a triple homicide committed when he was sixteen. Years earlier, when the State of Oklahoma sentenced William Thompson to die in 1984 for a murder committed when he was fifteen, this Court intervened and stopped his execution. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) held that it was unconstitutional to execute a juvenile for a crime committed at age fifteen or younger. *Thompson* was also the first case after the moratorium on capital punishment was lifted in 1976 to identify a juvenile offender's death sentence as a categorical violation of the Eighth Amendment.[3] Finally, Oklahoma holds the dubious distinction of being the last state to execute someone for a crime committed as a juvenile. Scott Allen Hain was executed on April 3, 2003, for

[3] *Eddings v. Oklahoma*, 455 U.S. 104 (1982), while addressing an Oklahoma judge's refusal to consider mitigation in death penalty case where the petitioner was only sixteen at the time of the offense, dealt with mitigation in more general terms and did not categorically prohibit the execution of sixteen-year-old juvenile offenders.

a double homicide he committed when he was seventeen. Two years later, this Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), which finally put an end to the execution of juvenile offenders in the United States.

STATEMENT OF THE CASE

I. Factual Background

Michael Bever and his older brother Robert lived in a middle-class suburban home with their parents and five siblings, all of whom were younger than Michael. Michael Bever's parents distrusted strangers and rarely ventured outside the house unless absolutely necessary.[4] The children were forced to live the lifestyle dictated by their parents; they grew up with few friends in an isolated environment and would sometimes go months without leaving the house.

Mrs. Bever home-schooled the children, but she only had a seventh grade education. Michael never went to school, and as he grew, more and more of his education became the responsibility of his older brother. Robert was Michael's role model, mentor, and best friend. Robert was also a seriously disturbed young man with untreated mental illness whose thoughts became increasingly unhinged from reality as he grew older. Unfortunately, he took his younger brother Michael with him down this path as the two boys retreated into a world filled with fantasy and role-playing

[4] Much of the factual background was included in the decision on direct appeal by the Oklahoma Court of Criminal Appeals. The majority devoted eleven paragraphs of the *Bever* decision to a detailed description of Petitioner's crimes. The sufficiency of evidence was not an issue on appeal.

games. Robert enjoyed playing these games online, where he had created a least a hundred different personalities.

Many of Robert's fantasies were violent and he lay awake at night talking to his younger brother about his plans to kill people. Michael participated in his brother's fantasies by pretending to scout out locations and stock up on supplies; he initially assumed that it was all part of another role-playing game. This all changed in 2015, when Robert purchased body armor and the brothers talked about killing their family before escaping to go on a crime spree that would make them famous.

Michael Bever was only sixteen years old on July 22, 2015, when he and his eighteen-year-old brother carried out the plan to kill their family. Too young to obtain guns, they used knives. By the early morning hours of July 23, 2015, everyone in the Bever family had been stabbed to death except for the youngest, who was only two years old, and Michael's sister, who was seriously injured but ultimately able to recover from her wounds. Unsure as to what to do next after leaving the house, Robert and Michael retreated to a nearby dry creek bed where they were quickly apprehended.

II. Procedural History

A week after the Bever brothers' arrest, the district attorney filed charges alleging five counts of first degree murder and a single count of assault and battery with intent to kill. As an adult, Robert Bever entered pleas of guilty as charged on September 7, 2016. He received a life-without-parole sentence for each of the five

murder counts, along with a life sentence for a single count of assault and battery with intent to kill. All of Robert's sentences were ordered to run consecutively.

Michael Bever, although a juvenile at the time of the alleged offenses, was tried as an adult.[5] A jury convicted him of all counts. Michael Bever requested jury sentencing, as is his right under Oklahoma law,[6] and the jury heard evidence pertaining to the individualized sentencing considerations required by *Miller v. Alabama,* 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Defense counsel presented evidence that Michael Bever had full scale I.Q. of 85, which placed him in the low normal range. A neuropsychologist testified that Michael Bever suffered from brain dysfunction that could have been the result of a traumatic brain injury or a birth defect. There were few medical records available because Michael's parents rarely took the Bever children to the doctor. Given these issues, combined with the well-documented developmental limitations of a sixteen-year-old juvenile's brain, the expert witness testified that in a high stress environment it was very likely that Michael would have frozen in place and not known what to do. *Bever*, ¶41. Although Michael Bever initially confessed to police officers that he killed three family members, during Robert Bever's testimony at trial he took credit for the actual

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[5] 10A O.S.2011, § 2-5-205(A) permits Oklahoma children as young as 13 who are accused of first degree murder to be tried as an adult. Paragraph B of the statute *requires* juveniles charged with first degree murder who are 15, 16, or 17 to be tried as an adult.

[6] 22 O.S.2011, § 926.1 provides:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

murders. According to Robert, Michael acted as an accomplice and did not kill anyone. Neither Robert nor his sister saw Michael attack anyone. *Bever,* ¶3.

On June 25, 2018, the day before the jury received its final instructions in Michael Bever's jury trial, the Oklahoma Court of Criminal Appeals decided *Stevens v. State*, 2018 OK CR 11, 422 P.3d 741. *Stevens* prescribed the procedure to be followed in juvenile life-without-parole cases. In Oklahoma, a jury considering a life-without-parole sentence for a juvenile offender must be instructed that before imposing such a sentence it must unanimously find that the State has proven, beyond a reasonable doubt, that the defendant is irreparably corrupt and permanently incorrigible. Michael Bever's jury was so instructed, and the jury made a specific finding that the State had failed to prove Michael Bever to be irreparably corrupt and permanently incorrigible. (Appendix 1-4) The jury imposed the minimum sentence of life with possibility of parole in each of the five counts of first degree murder, and a twenty-eight year sentence for assault and battery with intent to kill.

Under Oklahoma law, a judge formally imposes the sentence previously determined by a jury.[7] The judge is not free to do as she pleases; Oklahoma law requires that she render judgment according to the jury's verdict.[8] The jury does not, however, determine whether sentences are run consecutively or concurrently. That decision is reserved for the court. On August 9, 2018, the Honorable Sharon Holmes

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[7] 22 O.S.2011, § 926.1
[8] *Id.*

sentenced Michael Bever to consecutive terms.[9] Under Oklahoma law, Michael Bever will not be eligible for parole until he has served over 215 years in custody.[10]

In *Bever v. State*, 2020 OK CR 13, 467 P.3d 693, the Court of Criminal Appeals affirmed Michael Bever's convictions and sentences. The court held that Eighth Amendment analysis only requires a reviewing court to look at each individual sentence, rather than an aggregate total that will never provide any opportunity for a juvenile offender's release.

REASONS FOR GRANTING THE PETITION

A. State courts of last resort are divided as to whether the Eighth Amendment[11] has any application to aggregate sentences served by juvenile offenders.

In at least eleven states, including Connecticut, Florida, Illinois, Iowa, Maryland, Nevada, New Jersey, New Mexico, Ohio, Washington, and Wyoming, state courts of last resort have determined that the rule announced in *Graham* and *Miller* applies to an aggregate term-of-years sentence that results in the functional equivalent of life without parole.

1. *State v. Riley*, 315 Conn. 637, 110 A.3d 1205, *cert. denied,* 136 S.Ct. 1361 (2015)(Juvenile offender was convicted of murder, attempted murder, first

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[9] A number of jurors submitted a letter to the sentencing judge asking that Michael Bever receive parole consideration. (Appendix 35)

[10] 21 O.S.Supp.2015, § 13.1 mandates that for enumerated violent offenses an inmate must serve at least 85% of his sentence before becoming eligible for parole. For first degree murder, juries are instructed that an inmate will not be eligible for parole until he has served 38 years and 3 months (85% of 45 years). Once paroled on one count, Michael Bever would then begin his second life term, and so on, until his death.

[11] The Eighth Amendment applies to the states through the Fourteenth Amendment of the United States Constitution. *Robinson v. State,* 370 U.S. 660 (1962).

degree assault, and conspiracy to commit murder. The court found that the no-parole 100-year aggregate sentence violated 8th Amendment absent *Miller* findings.);

2. *Henry v. State*, 175 So.3d 675 (Fla. 2015), *cert. denied,* 136 S.Ct. 1455 (2016)(Juvenile nonhomicide offender's aggregate no-parole minimum sentence of 90 years provided no meaningful opportunity for release in violation of the 8th Amendment.);

3. *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016)(Juvenile was convicted of first degree murder and two counts of attempted murder. Without *Miller* findings, aggregate no-parole minimum term of 89 years violated the 8th Amendment.);

4. *State v. Null,* 836 N.W.2d 41 (Iowa 2015)(Juvenile was convicted of second degree murder and first degree robbery. His aggregate no-parole minimum sentence of 52.5 years was sufficient to trigger *Miller* protections.);

5. *Carter v. State*, 461 Md. 295, 192 A.3d 695 (2018)(Juvenile was sentenced to 100 years with parole eligibility at 50 years. The court found the sentence of 100 years, comprised of consecutive maximum sentences for assault convictions arising out of a single incident, to be tantamount to a sentence of life without parole for purposes of 8th Amendment.);

6. *State v. Boston*, 363 P.3d 453 (Nev. 2015)(Juvenile was convicted of numerous nonhomicide offenses including burglary, lewdness with minor, battery, kidnapping sexual assault, and robbery. He was sentenced to 14 consecutive life terms with possibility of parole plus a consecutive term of 92 years in prison. The court applied the "functional-equivalent" approach to 8th Amendment analysis. The court denied relief because after the juvenile offender was sentenced, the legislature enacted a statute establishing juvenile parole eligibility at 15 years.);

7. *State v. Zuber*, 227 N.J. 422, 152 A.3d 197, *cert. denied*, 138 S.Ct. 152, (2017)(The court looked at two juvenile sentences. One was an aggregate nonhomicide sentence of 110 years imprisonment with parole eligibility at 55 years; the second sentence was for robbery and murder that totaled 75 years with parole eligibility at 68 years and 3 months. The New Jersey Supreme Court found these aggregate sentences lengthy enough to trigger *Miller* for the purpose of 8th Amendment analysis.);

8. *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018)(Juvenile was ultimately sentenced to an aggregate 91½-year sentence for nonhomicide offenses including criminal sexual penetration, aggravated battery, and witness intimidation. The court found that the 8th Amendment applied to an aggregate term-of-years sentence;

however, parole eligibility at age 62 provided a meaningful opportunity for release.);

9. *State v. Moore*, 149 Ohio St.3d 557, 76 N.E.3d 1127 (2016) *cert. denied,* 138 S.Ct. 62 (2017)(Juvenile's aggregate 112-year prison term for multiple nonhomicide offenses violated the 8th Amendment as exceeding juvenile's life expectancy. Juvenile was not eligible to seek judicial release for 77 years.);

10. *State v. Ramos,* 187 Wash.2d 420, 387 P.3d 650, *cert. denied,* 138 S.Ct. 467 (2017)(Court agreed that *Miller* applies to a *de facto* life-without-parole sentence; specifically, to the juvenile offender's 4 consecutive life terms for murder and felony murder which ultimately totaled 85 years. Under the facts of *Ramos*, the court concluded that the juvenile offender had an adequate *Miller* hearing.);

11. *Bear Cloud v. State*, 2014 WY 113, 334 P.3d 132 (Wyo. 2014)(Juvenile was convicted of first degree murder, aggravated burglary, and conspiracy to commit aggravated burglary; aggregate sentence ultimately amounted to life with possibility of parole after serving 25 years, to run consecutively to a previously imposed sentence of 20 to 25 years. The juvenile's earliest opportunity for release would be in just over 45 years. The Wyoming Supreme Court held that *Miller* applied to the aggregate terms for 8th Amendment analysis.).

However, in sixteen other states, including Arizona, Arkansas, Colorado, Georgia, Kansas, Minnesota, Mississippi, Missouri, Nebraska, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, and Texas, courts of last resort have determined that a juvenile offender's aggregate term-of-years sentence was not subject to Eighth Amendment review under *Graham* and *Miller*.

1. *State v. Kasic,* 265 P.3d 410 (Ariz.Ct.App. 2011)(Juvenile offender's enhanced and consecutive prison terms totaling 139.75 years for nonhomicide offenses was not unconstitutionally excessive; proper 8th Amendment analysis focused on the sentence imposed for each crime and not the aggregate sentence.);

2. *Hobbs v. Turner,* 431 S.W.3d 283 (Ark. 2014)(Juvenile sentenced to 40 years for kidnapping and additional crimes totaling 55 years was not "life without parole.");

3. *Lucero v. People*, 2017 CO 49, 394 P.3d 1128 (2017), *cert. denied,* 138 S.Ct. 641 (2018)(Juvenile was sentenced to an aggregate 84-year term for nonhomicide crimes. The court reasoned that life without parole is distinct from a sentence to a term of years; *Graham* and *Miller* do not expressly apply to an aggregate term-of-years sentence.);

4. *Veal v. State*, 303 Ga. 18, 810 S.E.2d 127, *cert. denied,* 139 S.Ct. 320 (2018)(Juvenile ultimately received a sentence of 8 consecutive life terms plus 60 years for murder and other nonhomicide crimes; court concluded that there was no requirement to consider *Miller* mitigation since the sentence was not actually life without parole.);

5. *State v. Redmon,* 380 P.3d 718 (Kan.Ct,App. 2016)(Juvenile was convicted of rape and other nonhomicide crimes and received consecutive sentences totaling 61 years; court refused to extend *Miller* absent express direction from Supreme Court.);

6. *State v. Ali*, 895 N.W.2d 246 (Minn. 2017), *cert. denied,* 138 S.Ct. 640 (2018)(Juvenile was sentenced to 3 consecutive life terms for 3 murders. Each life sentence allowed for possibility of release after 30 years; analysis of each sentence individually did not violate 8th Amendment. Court concluded that *Miller* and *Montgomery* do not apply to an aggregate term.);

7. *Mason v. State*, 235 So.3d 129 (Miss.Ct.App. 2017)(*Miller* only applies to a life-without-parole sentence and not an aggregate 50-year sentence for manslaughter and kidnapping.);

8. *State v. Nathan*, 522 S.W.3d 881 (Mo. 2017)(Juvenile was sentenced to life for second degree murder, 30 years for first degree robbery, 15 years for kidnapping, and three life sentences for related armed criminal action convictions. The Court held that nothing in *Miller* or *Graham* takes away the court's statutory right to impose consecutive sentences.);

9. *State v. Castaneda,* 295 Neb. 547, 889 N.W.2d 87, *cert. denied*, 138 S.Ct. 83 (2017)(Juvenile's aggregate sentence of 105 to 125 years imprisonment for felony murder and other nonhomicide offenses did not violate the 8th Amendment when looking at each sentence individually.);

10. *People v. Aponte*, 981 N.Y.S.2d 902 (Sup.Ct. 2013)(Court determined *Miller* and *Graham* applied only to sentences of life without parole; juvenile

remained "technically" parole eligible in spite of mandatory minimums that guaranteed he will never be released.);

11. *Bever v. State,* 2020 OK CR 13, 467 P.3d 693 (8th Amendment only requires examination of the sentence for each crime committed; aggregate 215-year no-parole sentence for multiple murders did not violate the 8th Amendment in spite of State's failure to prove irreparable corruption.);

12. *Kinkel v. Persson,* 417 P.3d 401 (Or. 2018)(Juvenile offender received a mix of concurrent and consecutive sentences for multiple crimes, including murder. The aggregate terms added up to almost 112 years in prison. The court justified its decision: "To date, the [Supreme] Court has not extended its *Roper, Miller,* and *Graham* holdings to lesser minimum sentences.");

13. *Commonwealth v. Foust*, 2018 PA Super 39, 180 A.3d 416 (2018)(Juvenile ultimately received consecutive sentences of 30 years to life for two first degree murder convictions. Although the court acknowledged *Miller's* application to *de facto* LWOP sentences, it concluded that the 8th Amendment only required analysis of each individual sentence rather than the aggregate total.);

14. *State v. Slocumb*, 827 S.E.2d 148 (S.C. 2019)(Juvenile's 80-year aggregate sentence for nonhomicide offenses did not violate 8th Amendment; *Graham* and *Miller* cases only applied to *de jure* LWOP sentences and not *de facto* LWOP sentences.);

15. *State v. Merritt*, No. M2012-00829-CCA-R3CD, 2013 WL 6505145 (Tenn.Crim.App. 2013)(finding juvenile's sentence of 225 years (9 consecutive 25-year terms) for rape of a child was the equivalent of a life sentence, but court found that *Graham* did not apply to *de facto* life sentences.);

16. *Carmon v. State*, 456 S.W.3d 594 (Tex.Ct.App. 2015)(Court refused to expand *Miller's* application to consecutive sentences of life for murder and 99 years for aggravated robbery when convictions and crimes took place at different times.).

B. A judge's decision to impose consecutive sentences for crimes committed by a juvenile offender is not exempt from Eighth Amendment protection.

The Oklahoma Court of Criminal Appeals concluded that Michael Bever's punishment does not violate the Eighth Amendment for two reasons. The first was a policy justification. The *Bever* majority proclaimed: "[D]efendants convicted of multiple offenses are not entitled to a volume discount on their aggregate sentence." *Bever,* ¶27. According to the *Bever* majority, if the judge imposed concurrent sentences, Michael Bever would effectively go unpunished for five of the six crimes he committed. While perhaps understandable in theory, the majority's policy argument is more prosecutor's lament than valid judicial rationale. Petitioner only has one lifetime to offer the State of Oklahoma for his crimes; he will *never* serve all six of his consecutive sentences. By dying, he will circumvent punishment for his crimes just as surely as if he received concurrent sentences.[12]

The second justification put forth by the Oklahoma court is simply that the judge's decision was authorized by statute, and this Court has never specifically held that the Eighth Amendment applies to consecutive sentencing decisions in juvenile offender cases. The Oklahoma Court of Criminal Appeals applied the *Miller* Eighth Amendment analysis to Michael Bever's individual sentences, but refused to apply the same analysis to his aggregate sentence. If the Court of Criminal Appeals had honestly looked at Michael Bever's punishment, it would have reached the

[12] Additionally, the Oklahoma Court of Criminal Appeals judges are most certainly aware that concurrent sentences are common when a defendant accepts a plea-bargain recommendation. In Oklahoma, concurrent sentences are the norm rather than the exception.

inescapable conclusion that his sentence provides no meaningful opportunity for release. Since this Court has held that a only a juvenile offender proven to be irreparably corrupt can be sentenced to a term with no possibility of parole, Michael Bever's sentence violates the Eighth Amendment to the United States Constitution.

Although 22 O.S.2011, § 976 entrusts a sentencing judge in Oklahoma with the statutory authority to impose consecutive sentences, this statutory authority must yield to the mandate of the Eighth Amendment. This Court has imposed a legal responsibility upon lower courts when juveniles are tried as adults. While it may be constitutionally permissible to sentence a juvenile as an adult, the Eighth Amendment to the United States Constitution demands that juveniles be treated differently than adults. "Because juveniles have diminished culpability and greater prospects for reform "they are [categorically] less deserving of the most severe punishments." *Miller,* 567 U.S. at 471. The Oklahoma Court of Criminal Appeals has – on its own – carved out an exception to *Miller* when a juvenile offender has been convicted of multiple counts.

Correctly applied, the emphasis of *Miller's* analysis must be on the juvenile offender's culpability rather than just the seriousness of his or her crime.[13] The court instructed Michael Bever's jury that it was to determine whether the State had proven him to be irreparably corrupt; there is no offense so heinous that the commission of the offense alone renders a child beyond redemption or rehabilitation. In the decision on direct appeal, the Oklahoma Court of Criminal Appeals was far too

[13] *Montgomery,* 136 S.Ct. at 726, 734; *Miller,* 567 U.S. at 479; *Graham,* 560 U.S. at 73; *Roper,* 543 U.S. at 573.

preoccupied with the crimes that Michael Bever committed, finding that a juvenile "who murders five people (and plans to murder many more) is simply and fundamentally different than a defendant who murders one person." *Bever,* ¶35. The Oklahoma court feigned compliance with *Miller* by emphasizing Michael Bever's eligibility for parole in each of his six sentences, while at the same time ignoring that the punishment imposed will never provide any meaningful opportunity for his release from prison.[14]

The language of the Eighth Amendment does not refer to cruel and unusual *sentences;* the United States Constitution prohibits cruel and unusual *punishments.* Michael Bever's punishment is that he will die in prison, regardless of any steps taken during his life to redeem himself. The sentencing judge's decision rendered the jury's findings meaningless.[15] If the Eighth Amendment does not apply to consecutive sentencing decisions, the judge could have completely ignored *Miller* and imposed consecutive life-with-parole terms immediately after the jury returned its guilty verdicts. No amount of mitigation could have resulted in a shorter sentence than life for each individual murder count (life with the possibility of parole is the minimum under Oklahoma law), and if the judge can do as she pleases, there was really no need

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[14] One need look no farther than the *Bever* opinion on direct appeal to appreciate the chasm separating the opposing views on this issue. *Bever* was a narrowly decided 3-2 decision with both the majority and the dissent referring to the conclusions of the other as "ridiculous." Judge Hudson, *specially concurring* ¶1; Judge Kuehn *concurring in part and dissenting in part* ¶4.

[15] The sentencing judge's decision to impose consecutive terms in this case, knowing full well that the six terms would never be served, was mostly symbolic. The only practical effect of the judge's decision was to nullify the jury's finding that the State had failed to prove Michael Bever to be irreparably corrupt and forever deny him any chance of release.

to seek the jury's opinion. If this Court requires a meaningful opportunity for Michael Bever's release from prison based upon the jury verdict, a 215-year no-parole sentence violates the Eighth Amendment. The Oklahoma Court of Criminal Appeals disingenuously avoids answering the question as to whether Petitioner's *punishment* violates the Eighth Amendment by simply concluding that his individual *sentences* do not.

This Court is urged to resolve the ongoing confusion that exists with regard to the Eighth Amendment's application to juvenile life-without-parole sentences. The Eighth Amendment imposes restrictions on juvenile offender sentencing that state courts are unaccustomed dealing with in adult noncapital cases. Adult Eighth Amendment jurisprudence is comparatively settled, while the Eighth Amendment's application to juvenile offenders is not. Over the last fifteen years this Court has moved from a categorical prohibition against executing juvenile offenders to an absolute prohibition against imposing life-without-parole sentences for nonhomicide crimes committed by juveniles. Even when a juvenile offender has been convicted of murder, this Court now requires the sentencer to take into account a juvenile offender's "age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks" before a juvenile offender can be sentenced to life without parole. *Miller,* 567 U.S at 475. No similar requirements exist in an adult noncapital prosecution. For adults, the Eighth Amendment forbids only those sentences that are grossly disproportionate to the crime or crimes for which they are imposed. See *Ewing v. California*, 538 U.S. 11 (2003). The application of the Eighth

Amendment in juvenile offender sentencing focuses on the differences between juveniles and adults; the emphasis is on culpability rather than just proportionality.

The confusion that exists among state courts is understandable. Historically, this Court's Eighth Amendment jurisprudence could easily leave one with the impression that the amendment has virtually no practical application outside of capital sentencing. Very few noncapital adult sentences have been held to violate the Eighth Amendment. See *Solem v. Helm,* 463 U.S. 277 (1983)(holding a life-without-parole sentence for uttering a "no account" check violated the Eighth Amendment); *Robinson v. State,* 370 U.S. 660 (1962)(Eighth Amendment violated by a statute that punished a drug addict for the "status" of his addiction). For obvious reasons, capital decisions from this Court provide limited assistance to lower courts when it comes to consecutive sentences and the Eighth Amendment. The *Bever* opinion – and others like it – make it clear that additional guidance is necessary for lower courts to apply this comparatively new Eighth Amendment jurisprudence to juvenile punishment. It has been nearly five years since this Court decided *Montgomery v. Louisiana,* 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and juvenile offenders continue to regularly request certiorari sentencing review in the Supreme Court precisely because there is a need for clarity.

While not directly answering the question presented in this case, capital jurisprudence can provide some guidance as to why juvenile "throw away the key" sentences must be limited to only those juvenile offenders who demonstrate no hope of redemption or prospects for rehabilitation. Recognizing the parallels between

capital punishment and juvenile life without parole, this Court has noted that "children are different" just as "death is different" in capital cases.[16] In *Graham,* the Supreme Court based its analysis on *Atkins v. Virginia,* 536 U.S. 304 (2002), *Kennedy v. Louisiana*, 554 U.S. 407 (2008), and *Roper v. Simmons*, 543 U.S. 551 (2005), each of which evaluated the culpability of the offender in the capital context. "[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham v. Florida,* 560 U.S. 48, 69 (2010). "Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'" *Miller v. Alabama,* 567 U.S. 460, 474-475 (2012), quoting *Graham*, 560 U.S. at 69. A life-without-parole sentence is not only a much longer sentence for a juvenile offender, but it also "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Graham,* 560 U.S. at 70.

The Oklahoma Court of Criminal Appeals held that the sentencing judge in Michael Bever's case had unbridled discretion to impose consecutive sentences irrespective of the jury's finding that he was to receive some meaningful consideration for release.[17] *Bever,* ¶39. This sort of standardless sentencing discretion contributed to the Eighth Amendment violation identified in *Furman v. Georgia*, 408 U.S. 238 (1972). Before a system of capital punishment could pass constitutional muster,

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[16] *Miller,* 567 U.S. at 480.

[17] The Oklahoma Court of Criminal Appeals found the decision to impose consecutive sentences was neither an unreasonable nor an arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Bever,* ¶39.

states were required to apply the law in a manner that channeled the sentencer's discretion by "clear and objective standards" that provided "specific and detailed guidance" and that "make rationally reviewable the process for imposing a sentence of death." See *Godfrey v. Georgia,* 446 U.S. 420, 428 (1980). This channeling is accomplished by requiring juries to make a finding of at least one aggravating circumstance (or its equivalent) before a sentence of death can be imposed. If the State cannot prove the existence of any aggravating circumstances to a jury, a judge may not impose a sentence of death. See *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994).

Given the Oklahoma Court of Criminal Appeals decision in *Stevens v. State*, 2018 OK CR 11, 422 P.3d 74, its refusal to acknowledge the parallels between juvenile life-without-parole sentencing and capital sentencing in Michael Bever's case is disappointing. *Stevens* outlined a detailed procedure for prosecutors to follow when seeking a life-without-parole sentence in a juvenile homicide prosecution. For example, an Oklahoma prosecutor must specifically and "in bold type" place the juvenile offender on notice by including prescribed language in the charging document. *Stevens,* ¶33. The prosecutor must allege that the juvenile offender is "irreparably corrupt and permanently incorrigible" and that the State intends to seek a life-without-parole sentence. *Stevens,* ¶33. It is the State's burden to establish this by proof beyond a reasonable doubt to a jury and the jury's finding must be unanimous. *Stevens,* ¶35. In the body of the *Stevens* decision, the Court of Criminal Appeals even provided prosecutors with examples of the evidence it expected them to

present, and the court discussed the mitigating circumstances that the juvenile offender is entitled to present. The framework is already in place; this Court need only address whether a judge's decision to impose consecutive sentences is subject to Eighth Amendment review.

Once a jury makes a specific finding that the State has not proven permanent incorrigibility in a juvenile homicide trial, a judge must not be free to ignore the finding and impose a sentence which forever denies a juvenile any possibility of release. Respecting a finding of parole eligibility is the only way that the maximum penalty can be restricted to a constitutionally eligible group of juvenile offenders. To hold otherwise undermines the limitations imposed by this Court on life-without-parole sentences for juvenile offenders. Absent a finding of irreparable corruption, there remains "a grave risk" that corrigible juveniles will be sentenced to spend the rest of their lives in prison "in violation of the Constitution." *Montgomery,* 136 S.Ct. at 736.

In spite of this Court's decisions in *Miller* and *Montgomery*, there remain two well-defined but wildly divergent opinions among state courts in this country regarding the Eighth Amendment's application to consecutive sentencing decisions. Michael Bever's jury found evidence of irreparable corruption lacking, yet he is still serving a 215-year no-parole sentence based upon a judge's decision to impose his sentences consecutively. All Petitioner seeks is confirmation that a judge's decision to impose consecutive sentences is not immune from Eighth Amendment protection.

C. The sentencing judge was bound under the Sixth Amendment[18] by the jury's finding that the State had failed to prove Petitioner to be irreparably corrupt.

The Oklahoma Court of Criminal Appeals held in *Stevens v. State,* 2018 OK CR 11, 422 P.3d 741 that "[t]he Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived." *Stevens,* ¶34. Just as with the Eighth Amendment, there are Sixth Amendment parallels between capital punishment and juvenile offender life-without-parole sentences. When the *Stevens* court confirmed a juvenile offender's right to have a jury decide whether to impose a life-without-parole sentence, the court cited a capital case: *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Ring,* the Supreme Court held that Arizona's capital sentencing scheme violated the Sixth and Fourteenth Amendments because it was up to a judge – rather than a jury – to determine whether aggravators supported a death sentence. Absent such a finding, the maximum punishment would have been life imprisonment. Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court concluded that if a State makes an increase in a defendant's authorized punishment contingent on the finding of fact (other than a prior conviction), that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.

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[18] The Sixth Amendment right to jury trial applies to the states through the Fourteenth Amendment. *Duncan v. Louisiana,* 391 U.S. 145 (1968)

Petitioner argued to the Oklahoma Court of Criminal Appeals that the judge's decision to impose consecutive terms effectively denied Michael Bever his right to have the jury decide whether he should ever be considered for release. In this way, the finding of irreparable corruption is constitutionally indistinguishable from the finding of an aggravating circumstance in a capital case. The Oklahoma Court of Criminal Appeals conceded that it is the State's burden to establish to a jury that a juvenile offender is irreparably corrupt before imposing a sentence of life without possibility of parole, but the court refused to determine whether the finding of irreparable corruption is akin to the finding of an aggravating circumstance. *Bever,* ¶23. The court *did* conclude "that *Apprendi* does not apply to a trial court's decision to run sentences consecutively, even if the court must make findings of fact beyond those made by the jury before imposing consecutive sentences." *Bever*, ¶25. Petitioner is asking this Court to clarify the parallels between the finding of an aggravator in a capital case and the finding of irrevocable corruption in a juvenile offender case. Just as a judge is prohibited from imposing a sentence of death after a jury has found no aggravators, a judge cannot impose the maximum permissible sentence upon a juvenile offender who has not been found irrevocably corrupt.

The Oklahoma Court of Criminal Appeals relied upon *Oregon v. Ice*, 555 U.S. 160, 168 (2009) as authority for its conclusion that the sentencing judge's decision to impose consecutive terms in Michael Bever's case did not implicate the Sixth Amendment. *Bever,* ¶25. In *Oregon v. Ice,* the controlling statute established a presumption of concurrent sentencing. Before imposing consecutive sentences, the

statute required a judge to make certain factual findings. The majority held that the *Apprendi* rule does not require a jury to make statutorily required findings before a court runs an adult offender's sentences consecutively.

The *Oregon v. Ice* decision did not address juvenile life-without-parole sentencing and was a narrowly decided 5-4 opinion. The Oregon sentencing scheme was different than Oklahoma's insofar as an Oklahoma judge has the statutory authority to impose consecutive sentences without articulating any reason for her decision.[19] The issue of judicial factfinding is not an issue in this case. There was obviously no mention in *Oregon v. Ice* of the judge's decision thwarting a jury's verdict regarding parole eligibility. Michael Bever's case presents a conflict between a juvenile offender's right to a finding of irrevocable corruption before a no-parole life term can be imposed and a judge's right to impose consecutive sentences that result in a no-parole life term. If a judge has the absolute discretion to impose consecutive terms irrespective of the consequences of that sentence, the *Miller* limitations on life-without-parole sentences will fail to accomplish this Court's goal of limiting life without parole to those rare and uncommon children who show irretrievable depravity, permanent incorrigibility, or irreparable corruption.

The dissenting justices in *Oregon v. Ice* pointed out that the Oregon "sentencing scheme allows judges rather than juries to find the facts necessary to commit defendants to longer prison sentences, and thus directly contradicts what we

[19] 22 O.S.2011, § 976 grants absolute discretion to Oklahoma judges to impose consecutive or concurrent sentences.

held eight years ago and have reaffirmed several times since." *Oregon v. Ice,* 555 U.S. at 173. Justice Scalia's words ring true:

> ...[T]he Court attempts to distinguish Oregon's sentencing scheme by reasoning that the rule of *Apprendi* applies only to the length of a sentence for an individual crime and not to the total sentence for a defendant. I cannot understand why we would make such a strange exception to the treasured right of trial by jury. Neither the reasoning of the *Apprendi* line of cases, nor any distinctive history of the factfinding necessary to imposition of consecutive sentences, nor (of course) logic supports such an odd rule. *Oregon v. Ice,* 555 U.S. at 173.[20]

Only this Court can resolve the conflict between a sentencing judge's authority to impose consecutive sentences and the right to the protections guaranteed to juvenile offenders by *Miller.*

CONCLUSION

Eventually, this Court must directly confront an important question: How is a judge or jury to determine – at the time of sentencing – whether a juvenile offender will still be "incorrigible" or "corrupt" decades into the future? *Miller* recognizes the difficulty attendant to predicting how a child will behave as an adult by setting a high bar that theoretically should limit the number of juvenile offenders serving life-without-parole to a very small number. In practice, too many juvenile offenders are still sentenced to die in prison. One way that this is accomplished is through the imposition of consecutive sentences. In Michael Bever's case, concurrent sentencing

[20] Justice Scalia was joined in his dissent by Justices Roberts, Thomas, and Souter.

would permit him to go before the Oklahoma Parole Board no sooner than 38 years and 3 months into his life sentence.[21] It will be far easier for a parole board to evaluate his behavior as an adult and determine whether he should be released at that time. Future conduct is far easier to evaluate in the future.

For now, Petitioner only asks this Court to address whether any constitutional protections exist in the decision to impose consecutive or concurrent sentences when a juvenile offender is tried as an adult. If this Court intended *Graham* and its progeny to impose a limiting standard for "throw away the key" sentences when juvenile offenders are sentenced as adults, this Court's job is not finished. Absent Supreme Court intervention, juvenile offenders will continue to serve no-parole terms by virtue of consecutive sentencing decisions, rather than because a finding of irreparable corruption (or its equivalent) has been made.

Respectfully submitted,

Stuart W. Southerland
Counsel of Record
Tulsa County Public Defender's Office
423 South Boulder Ave. #300
Tulsa, OK 74103
(918) 596-5530

November 2020

[21] *See* 21 O.S.Supp.2015, § 13.1. Petitioner's sentences are all subject to an 85% minimum term prior to becoming eligible for parole. For a life sentence, parole eligibility is calculated as 85% of 45 years.

Appendix

VERIDCT FORM

COUNT 1 – MURDER IN THE FIRST DEGREE

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find the following:

[Check and complete only one.]

_____ The Defendant is irreparably corrupt and permanently incorrigible and sentence the Defendant to _____.

NO ✓ Defendant is not irreparably corrupt and permanently incorrigible and sentence the Defendant to life with the possibility of parole.

David Powers
FOREPERSON

VERIDCT FORM

COUNT 2 – MURDER IN THE FIRST DEGREE

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find the following:

[Check and complete only one.]

_____ The Defendant is irreparably corrupt and permanently incorrigible and sentence the Defendant to _____.

#0 V Defendant is not irreparably corrupt and permanently incorrigible and sentence the Defendant to life with the possibility of parole.

David Hamilton
FOREPERSON

VERIDCT FORM

COUNT 3 – MURDER IN THE FIRST DEGREE

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find the following:

[Check and complete only one.]

_____ The Defendant is irreparably corrupt and permanently incorrigible and sentence the Defendant to _____.

#0 ✓ Defendant is not irreparably corrupt and permanently incorrigible and sentence the Defendant to life with the possibility of parole.

David Hansen
FOREPERSON

VERIDCT FORM

COUNT 4 – MURDER IN THE FIRST DEGREE

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find the following:

[Check and complete only one.]

_____ The Defendant is irreparably corrupt and permanently incorrigible and sentence the Defendant to _____.

No ✓ Defendant is not irreparably corrupt and permanently incorrigible and sentence the Defendant to life with the possibility of parole.

Daniel Flowers
FOREPERSON

VERIDCT FORM

COUNT 5 – MURDER IN THE FIRST DEGREE

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find the following:

[Check and complete only one.]

_____ The Defendant is irreparably corrupt and permanently incorrigible and sentence the Defendant to _____.

#0 ✓ Defendant is not irreparably corrupt and permanently incorrigible and sentence the Defendant to life with the possibility of parole.

David Hawkes
FOREPERSON

VERIDCT FORM

COUNT 6 – ASSAULT & BATTERY WITH INTENT TO KILL

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

Michael Bever is:

_____ Guilty of the crime of ASSAULT & BATTERY WITH INTENT TO KILL and fix punishment at $ 0.00, 2 8 _____ years.

David Hanover
FOREMAN OF THE JURY

IN AND FOR THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff,	)	CASE NO. CF-2015-3983
v.	)	JUDGE HOLMES
MICHAEL JOHN BEVER, Defendant.	)	

TRANSCRIPT OF SENTENCING

HELD ON AUGUST 9, 2018

BEFORE THE HONORABLE SHARON K. HOLMES

DISTRICT JUDGE

A P P E A R A N C E S

For the State of Oklahoma:
Mr. Stephen Kunzweiler, District Attorney
Ms. Julie Doss, Assistant District Attorney
500 South Denver
Tulsa, Oklahoma 74103

For the Defendant:
Mr. Corbin Brewster, Public Defender
Ms. Marny Hill, Assistant Public Defender
423 South Boulder Avenue, Suite 300
Tulsa, Oklahoma 74103

Also present: Detective Rhianna Russell

Reported by: Dee Dee Tanner, CSR

P R O C E E D I N G S

THE COURT: We're on the record in Case Number CF-2015-3983, State of Oklahoma versus Michael John Bever. All parties are present. Mr. Bever is present. This matter is set for sentencing.

The last time we were here, I believe I had stated that I would be writing somewhat of an opinion. I've somewhat changed my course. I'm going to be giving a statement pretty much. I'm not going to go into detail about what I researched or what I've considered. I'm basically just going to give my decision today. It is written just for purposes of brevity.

The first thing I need to make Mr. Bever aware of is that you are advised, sir, that you stand convicted of the crimes of murder in the first degree -- five counts of that -- and one count of assault and battery with intent to kill. The jurors recommended terms of life on the first five counts and 28 years on the -- on Count 6, the count of assault and battery with intent to kill.

You have the right to file a motion for a new trial setting forth the reasons why you believe you should be granted a new trial, so I need to make you aware of that first.

At this point I'll give my decision, and after that I will give you your notice of your rights to appeal. For

the record, I've also marked an exhibit as Court's 2 for the Court of Criminal Appeals, just to give them a list of authorities that the Court studied in helping me reach a decision.

This matter came on before this Court on the 24th day of July, 2018, for sentencing. After a jury trial conducted from April 16th, 2018 through May 11th, 2018. The defendant was charged with and convicted of five counts of murder in the first degree and one count of assault and battery with intent to kill. Prior to the scheduled sentencing hearing, the Court received sentencing Miranda from both the State of Oklahoma, represented by District Attorney Stephen Kunzweiler, and the defense represented by Chief Public Defender Corbin Brewster and Assistant Public Defender Marny Hill. The Court was also provided with a Victim's Impact Statement from the adoptive mother of the two surviving children of the Bever family. Additionally, the Court heard argument from the respective parties in support of their memoranda.

Further, several days prior to the sentencing date, the Court also received a letter from six of the jurors who deliberated over the case. That letter is marked as Court's Exhibit Number 1. This Court postponed sentencing until August 9th, 2018, because this case presents issues which in this Court's opinion are novel under the laws of

this State and perhaps throughout the whole country. Some of the extraordinary legal and factual issues involved in this case are unprecedented.

Before I announce my decision, there are a few things I'd like to address on the record: First, the jurors in this case diligently and painstakingly carried out their responsibilities, and the Court very much appreciates their efforts. Also, this Court recognizes how emotionally draining the trial of this matter was. On a daily basis the whole courtroom was filled with people who cried. And finally, this Court must reemphasize the extraordinary nature of this case. There were issues involved in this case that had never arisen in this state factually and a legal standpoint. New legal guidelines evolved literally as the jury instructions were being prepared in this case.

Ultimately, the only decision that this Court must address is whether to run the sentences in this cases concurrently or consecutively. That choice is always within the Court's discretion. In preparing to come to a decision, this Court had to look at the totality of the circumstances in order to decide how the defendant should be sentenced. This Court extensively analyzed all pertinent information in reaching its decision and determines that Michael Bever should be sentenced as

follows: On counts --

Let me just go through and reiterate what the sentences were that were recommended by the jury. Count 1 was life with the possibility of parole. Count 2 was the same. Count 3 was the same. Count 4 was the same. Count 5 was the same. And with regard to the count of -- Count 6, assault and battery with intent to kill, the jury recommended 28 years. At this time the Court has made the decision to run these counts consecutively. There will be no fines or costs assessed. And with that, let me go ahead and advise Mr. Bever of his right to appeal.

Sir, you have the right to appeal your conviction to the Oklahoma Court of Criminal Appeals. And you have the right to be represented by Court-appointed counsel on appeal at public expense. You're further advised that the Notice of Intent to Appeal to the Oklahoma Court of Criminal Appeals and a request for your case to be made should be in writing within the next ten days after today's date and should be filed with the clerk of this court.

At this time, do you, Mr. Brewster, have any idea whether you intend to appeal or not?

MR. BREWSTER: Yes, Your Honor, we will.

THE COURT: All right. And so if you can -- I don't know if you can get that paperwork to me today

because I leave for vacation today. If not, let me know. I'll be around. But I'll need to sign off on that.

MR. BREWSTER: Okay. I'm not sure that we can do it today, but I will do my best, Judge.

THE COURT: Just let my clerk or my bailiff know, and I'll make sure it gets signed off on in a timely manner.

MR. BREWSTER: And as for the formality, I assume that our office will continue to represent Mr. Bever?

THE COURT: Yeah, once you give me the paperwork, I'll assign who needs to be assigned on there.

MR. BREWSTER: Okay.

THE COURT: Is there anything else for the record?

MR. KUNZWEILER: Not from the State.

MR. BREWSTER: Not at this time from the defense.

THE COURT: All right. We'll be in recess.

(Pause in the proceedings.)

THE COURT: I neglected to put something on the record. Let me do that. We're back on the record briefly. The Court needed to mention also that all of these offenses are 85 percent crimes. And I think Mr. Bever was aware of that, but I needed to make a record

of that.

MR. BREWSTER: Judge, one thing while we're on the record, I just want to make sure that Mr. Bever remains at the Tulsa County jail for us to be able to consult with him during this ten-day time period.

THE COURT: Okay. That will be the Court's order.

MR. BREWSTER: Thank you.

THE COURT: We'll be off the record.

(End of proceedings.)

CERTIFICATE

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

I, Dee Dee Tanner, a Certified Shorthand Reporter in and for the State of Oklahoma, do hereby certify that the foregoing transcript in the above-styled case is a true, correct and complete transcript of my shorthand notes of the proceedings in said cause.

Dated this 30th day of November, 2018.

Dee Dee Tanner

Dee Dee Tanner, CSR, No. 01590

Sharon D. Tanner
State of Oklahoma
Certified Shorthand Reporter
CSR # 1590
My Certificate Expires 12-31-18

1041244220

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY, OKLAHOMA

2018 AUG 10 PM 12: 30

State Of Oklahoma, -vs- **BEVER, MICHAEL JOHN** SS.# : XXX-XX-3011 DOB: XX-XX-1998	Case No: **CF-2015-3983**

DISTRICT COURT
FILED
AUG 10 2018
DON NEWBERRY, Court Clerk
STATE OF OKLA. TULSA COUNTY

ORIGINAL

JUDGMENT AND SENTENCE
All Time In Custody

Now, this 9TH day of AUGUST, 2018, this matter comes on before the Court for sentencing and the defendant appears personally and by his or her Attorney of record, CORBIN BREWSTER AND MARNY HILL, and the State of Oklahoma is represented by STEVE KUNZWEILER AND JULIE DOSS, and the Court Reporter, DEE TANNER is present.

The defendant was found guilty by a jury of the crime(s) of :

Count 1: MURDER - FIRST DEGREE , in violation of 21 O.S. 701.7 Date Of Offense: 07/22/2015
Count 2: MURDER - FIRST DEGREE , in violation of 21 O.S. 701.7 Date Of Offense: 07/22/2015
Count 3: MURDER - FIRST DEGREE , in violation of 21 O.S. 701.7 Date Of Offense: 07/22/2015
Count 4: MURDER - FIRST DEGREE , in violation of 21 O.S. 701.7 Date Of Offense: 07/22/2015
Count 5: MURDER - FIRST DEGREE , in violation of 21 O.S. 701.7 Date Of Offense: 07/22/2015
Count 6: ASSAULT & BATTERY WITH INTENT TO KILL , in violation of 21 O.S. 652 C Date Of Offense: 07/22/2015

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the defendant, is guilty of the above described of offenses and is sentenced as follows:

TERM OF IMPRISONMENT

Count 1: **LIFE** all under the custody and control of the **DEPARTMENT OF CORRECTIONS.**
Count 2: **LIFE** all under the custody and control of the **DEPARTMENT OF CORRECTIONS.**
Count 3: **LIFE** all under the custody and control of the **DEPARTMENT OF CORRECTIONS.**

Count 4: **LIFE** all under the custody and control of the **DEPARTMENT OF CORRECTIONS.**
Count 5: **LIFE** all under the custody and control of the **DEPARTMENT OF CORRECTIONS.**
Count 6: **TWENTY-EIGHT (28) YEARS** all under the custody and control of the **DEPARTMENT OF CORRECTIONS.**

ALL COUNTS TO RUN CONSECUTIVELY.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that in addition to the preceding terms, and the general miscellaneous costs of this action, the defendant is also sentenced to:

Count 1: COSTS ONLY.
Count 2: COSTS ONLY.
Count 3: COSTS ONLY.
Count 4: COSTS ONLY.
Count 5: COSTS ONLY.
Count 6: COSTS ONLY.

Although additional costs may accrue after the issuance of this order, currently, **the total cost assessed against the defendant in this case (all counts) is** $ 3,629.36.

IT IS FURTHER ORDERED BY THIS COURT THAT JUDGMENT IS HEREBY ENTERED against the defendant for all costs, fees, fines, and assessments ordered in this action and he or she is ordered to report immediately upon conclusion of this sentencing hearing, or within ten (10) days of discharge, if the defendant is currently incarcerated, to the Tulsa County Court Clerk to pay all costs, fines, fees, and assessments ordered in this action - or - to the Tulsa County Court Cost Administrator to make arrangements to pay the costs, fines, fees, and assessments as ordered pursuant to the Rule 8 Hearing held this day.

The Court further advised the defendant of his or her right to appeal to the Court of Criminal Appeals of the State of Oklahoma and of the necessary steps to be taken by him or her to perfect such appeal, and that if he or she desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State, subject to reimbursement in accordance with 22 § O. S. 1355.14, 20 § O. S. 106.4 (b), and, ADC-72-33.

In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of Tulsa County, Oklahoma, is ordered and directed to deliver the

defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant and authority for the imprisonment of the defendant as provided herein. A second copy of this Judgment and Sentence to be warrant and authority of the Sheriff for the transportation and imprisonment of the defendant as herein before provided. The Sheriff is to make due return to the clerk of this Court with his proceedings endorsed thereon.

COURT CLERK'S DUTY

[TRIAL JUDGE TO COMPLETE THIS SECTION]

IT IS FURTHER ORDERED that the Clerk of this Court shall register or report the following circumstances in accordance with the applicable statutory authority:

(X) As to Count(s) 1-6, the defendant is ineligible to register to vote pursuant to Section 4-101 of Title 26.

( ) Pursuant to Section 985.1 of Title 22, the Court departed from the mandatory minimum sentence of imprisonment as to Count(s) _____.

( ) As to Count(s)_____ , the defendant is subject to the Methamphetamine Offender Registry requirements as set forth in Section 2-701 of Title 63.

( ) Defendant is a lawyer and certified copies of this document shall be transmitted to the Chief Justice of the Supreme Court and the General Counsel of the Bar Association within five (5) days as set forth in Rule 7.2 of the Oklahoma Rules of Professional Conduct, 5 O.S.Supp.2014, ch. 1, app. 1-A.

Witness my hand the day and year first above mentioned.

Witness my hand this 9th DAY OF AUGUST, 2018,

Sharon K. Holmes

JUDGE SHARON K. HOLMES

ATTESTATION:

DON NEWBERRY
District Court Clerk Tulsa County

By: _____
SAMANTHA BROWN Deputy

OFFICER'S RETURN OF SERVICE

Received this order the ____ day of _____, _____, and executed it by delivering said defendant to the Warden of the Lexington Assessment and Reception Center at Lexington, Oklahoma on the _____ day of _____, _____.

VIC REGALADO, SHERIFF, TULSA COUNTY, OKLAHOMA

By:_____
Deputy

COURT CLERK'S CERTIFICATION

I, Don Newberry, District Court Clerk for Tulsa, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears on record in the Court Clerks Office of Tulsa, Oklahoma.

Dated this the _____ day of _____, _____.

DON NEWBERRY, DISTRICT COURT CLERK, TULSA COUNTY, OKLAHOMA

By: _____, Deputy

467 P.3d 693
Court of Criminal Appeals of Oklahoma.

Michael John BEVER, Appellant
v.
STATE of Oklahoma, Appellee.

Case No. F-2018-870
|
FILED JUNE 25, 2020

Synopsis
Background: Defendant, who was 16 years old at time of offenses, was convicted following trial in the District Court, Tulsa County, No. CF-2015-3983, Sharon Holmes, J., of five counts of first degree murder and one count of assault and battery with intent to kill, and received consecutive sentences of life in prison for each count of murder and 28 years in prison for assault and battery count. Defendant appealed.

Holdings: The Court of Criminal Appeals, Lumpkin, J., held that:

[1] imposition of consecutive life sentences did not violate defendant's right to jury sentencing;

[2] imposition of consecutive life sentences did not constitute excessive punishment;

[3] prosecution's failure to preserve evidence did not constitute prosecutorial misconduct;

[4] any prosecutorial misconduct did not require reversal;

[5] neuropsychologist's proffered testimony about defendant's cognitive limitations was irrelevant to defendant's guilt;

[6] photographs of crime scene were not needlessly repetitive; and

[7] defendant was not entitled to present defense of duress.

Affirmed.

Hudson, J., filed specially concurring opinion.

Lewis, P.J., filed opinion concurring in part and dissenting in part, in which Kuehn, V.P.J., joined.

Kuehn, V.P.J., filed opinion concurring in part and dissenting in part, in which Lewis, P.J., joined.

West Headnotes (35)

[1] **Jury** ⚖ Assessment of punishment

The Sixth Amendment requires that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived. U.S. Const. Amend. 6.

[2] **Homicide** ⚖ Murder
Infants ⚖ Sentencing of Minors as Adults
Jury ⚖ Particular cases in general
Sentencing and Punishment ⚖ Juvenile offenders

Trial court's order for each life sentence imposed upon defendant, who was a juvenile at time he committed the five murders, to be served consecutively did not violate defendant's Sixth Amendment right to jury sentencing or Eighth Amendment limitations on juvenile sentencing, even though jury found defendant was not irreparably corrupt or permanently incorrigible; issue of whether sentences were to run consecutively or concurrently was a discretionary decision for judge, not for jury, and analysis for whether sentences imposed on juvenile offenders constituted cruel and unusual punishment focused on each separate sentence rather than cumulative effect of all sentences. U.S. Const. Amends. 6, 8; 22 Okla. Stat. Ann. §§ 926.1, 976.

[3] **Courts** ⚖ Decisions of United States Courts as Authority in State Courts

The Court of Criminal Appeals fully recognizes and faithfully discharges its independent duty

and authority to interpret decisions of the United States Supreme Court.

[4] **Criminal Law** ⟜ Points and authorities

Defendant waived his appellate contention that state parole system did not provide meaningful opportunity for release guaranteed to him as a juvenile offender under the Eighth and Fourteenth Amendments, where defendant failed to set out contention in separate argument within appellate brief, instead discussing it within context of different proposition, namely, that consecutive sentences for murder did not provide defendant with meaningful opportunity for release. U.S. Const. Amends. 8, 14; Okla. Ct. Crim. App. R. 3.5(A)(5).

[5] **Criminal Law** ⟜ Sentencing

Claims of excessive sentence are typically reviewed under the principle that the Court of Criminal Appeals will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it shocks the conscience of the Court. U.S. Const. Amend. 8.

[6] **Sentencing and Punishment** ⟜ Right to have sentences run concurrently

There is no absolute constitutional or statutory right to receive concurrent sentences. 22 Okla. Stat. Ann. § 976.

[7] **Sentencing and Punishment** ⟜ Discretion of court

It is within the trial court's discretion whether sentences are run concurrently or consecutively. 22 Okla. Stat. Ann. § 976.

[8] **Criminal Law** ⟜ Discretion of Lower Court

An "abuse of discretion" is any unreasonable or arbitrary action taken by a court without proper consideration of the facts and law pertaining to the matter at issue.

[9] **Assault and Battery** ⟜ Offenses involving domestic or other particular relationships

Homicide ⟜ Murder

Infants ⟜ Sentencing of Minors as Adults

Sentencing and Punishment ⟜ Juvenile offenders

Trial court's imposition on defendant of consecutive sentences of life in prison for each of five counts of first degree murder and 28 years for one count of assault and battery, all committed when defendant was 16 years old, did not shock the conscience, and thus sentences were not excessive, where defendant received statutory minimum punishment of life in prison with the possibility of parole as to each count of murder, defendant helped plan murders of his family and fully participated in the killings, and assault and battery victim, who was defendant's sister, feared defendant would be released from custody and kill her. U.S. Const. Amend. 8; 21 Okla. Stat. Ann. § 701.9(A); 22 Okla. Stat. Ann. § 976.

[10] **Criminal Law** ⟜ Arguments and conduct of counsel

The Court of Criminal Appeals evaluates alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel.

[11] **Criminal Law** ⟜ Conduct of counsel in general

On a claim of prosecutorial misconduct, relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair.

[12] **Criminal Law** ⟜ Excuse or justification for destruction or loss

Prosecution's failure to preserve evidence, including journal allegedly kept by defendant's sister and hard drive from defendant's family computer, did not constitute prosecutorial misconduct, where defendant did not claim either item of lost evidence was actually exculpatory and nothing indicated prosecution lost evidence in bad faith.

[13] **Criminal Law** ⟜ Discovery and disclosure; transcripts of prior proceedings

Any prosecutorial misconduct occurring in prosecution's failure to preserve evidence, namely, family computer's hard drive and journal kept by defendant's sister, was harmless, where evidence of defendant's guilt was overwhelming, defendant received minimum punishment, namely, life in prison with possibility of parole for each count of first degree murder, and defendant did not claim lost evidence was material or exculpatory.

[14] **Criminal Law** ⟜ Requisites of fair trial

Attorney disciplinary rules do not establish the parameters of a defendant's constitutional right to a fair trial.

[15] **Criminal Law** ⟜ Publicity, media coverage, and occurrences extraneous to trial

Any misconduct in prosecutors' comments to the media three months before murder trial did not deny defendant a fair trial, where jurors were thoroughly screened for media exposure and pre-determined opinions as to defendant's guilt, and defendant did not show jurors who sat on his case were actually prejudiced by prosecutors' statements or by media.

[16] **Criminal Law** ⟜ Expert witnesses

Any prosecutorial misconduct in State's alleged failure to provide notice to defense counsel before directing psychologist to evaluate defendant for possible insanity defense to murder charges did not prejudice defendant, where insanity defense was not pursued, psychologist did not testify at trial, and defense experts' raw data was provided to State's psychologist.

[17] **Criminal Law** ⟜ Opening statement

Criminal Law ⟜ Summing up

Trial court's rulings sustaining defendant's objections to State's comments during opening and closing arguments cured any error arising from such comments.

[18] **Criminal Law** ⟜ Arguments and statements by counsel

Standard of review for trial court's rulings overruling defendant's objections to prosecutorial comments in opening and closing statements was abuse of discretion.

[19] **Criminal Law** ⟜ Arguments and conduct in general

Standard of review for any prosecutorial misconduct arising from State's comments during opening and closing arguments was plain error, where defendant failed to object to comments.

[20] **Criminal Law** ⟜ Necessity of Objections in General

Under the plain error test, a reviewing court determines whether a defendant has shown an actual error which is plain or obvious and which affects his substantial rights.

[21] **Criminal Law** ⟜ Necessity of Objections in General

The Court of Criminal Appeals will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.

[22] **Criminal Law** ⇐ Comments on Evidence or Witnesses

Criminal Law ⇐ Inferences from and Effect of Evidence

During closing argument, counsel enjoy a right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it.

[23] **Criminal Law** ⇐ Statements as to Facts, Comments, and Arguments

Criminal Law ⇐ Sentence or Punishment

A reviewing court will reverse a judgment or modify a sentence based on a prosecutor's comments in opening or closing argument only where grossly improper and unwarranted argument affects a defendant's rights.

[24] **Criminal Law** ⇐ Statements as to Facts, Comments, and Arguments

It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required.

[25] **Criminal Law** ⇐ Summing up

Prosecutor's comments in closing argument at murder trial were not so improper or prejudicial as to render trial fundamentally unfair, where trial court's rulings prevented prosecutor's conduct from determining outcome of trial.

[26] **Criminal Law** ⇐ Admissibility

On appeal, the Court of Criminal Appeals reviews decisions on the admission of evidence for an "abuse of discretion," which is a conclusion or judgment that is clearly against the logic and effect of the facts presented.

[27] **Criminal Law** ⇐ Medical and hospital records

Criminal Law ⇐ Mental condition or capacity

Testimony by neuropsychologist that defendant had specific cognitive limitations was irrelevant to whether defendant committed five charged counts of first degree murder, and, thus, exclusion of testimony and neuropsychological report from guilt phase of trial did not deny defendant the opportunity to present a complete defense as required by Sixth Amendment, where neuropsychologist did not render an opinion as to whether defendant was able to form necessary intent to kill or whether his confession was voluntary, and defendant did not raise defense based on insanity, intoxication, or lack of mental capacity to commit murder. U.S. Const. Amend. 6.

[28] **Criminal Law** ⇐ Relevancy in General

Criminal Law ⇐ Evidence calculated to create prejudice against or sympathy for accused

Criminal Law ⇐ Cumulative evidence in general

The constitutional right of a defendant to present a defense permits trial judges to exclude evidence that is repetitive, is only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues. U.S. Const. Amend. 6.

[29] **Criminal Law** ⇐ Photographs and Other Pictures

Criminal Law ⇐ Photographs arousing passion or prejudice; gruesomeness

Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect.

[30] **Criminal Law** ⇐ Evidence calculated to create prejudice against or sympathy for accused

When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.

[31] **Criminal Law** ⟜ Burden of showing error

Where there is duplication in photographic images introduced at trial, an appellant has the burden to show that the repetition in images was needless or inflammatory.

[32] **Criminal Law** ⟜ Depiction of places; scene of crime

Criminal Law ⟜ Photographs arousing passion or prejudice; gruesomeness

Photographs of crime scene were not needlessly repetitive, and, thus, probative value of photographs at trial on five counts of first degree murder was not outweighed by risk that photographs would prejudicially inflame the jury, where each photograph showed different aspect of crime scene, and any duplication of subject matter shown in photographs was minor.

[33] **Criminal Law** ⟜ Instructions

A trial court's decision regarding jury instructions is reviewed for an abuse of discretion.

[34] **Homicide** ⟜ Compulsion, necessity, or duress

Defendant who was charged with the first degree murder of five family members was not entitled to claim defense of duress, even if duress were an available defense, where defendant failed to take advantage of ample opportunities to escape family home instead of killing family members, including his younger siblings. 21 Okla. Stat. Ann. § 156.

[35] **Criminal Law** ⟜ Compulsion or necessity; justification in general

A person who fails to avail himself of an opportunity to escape a situation of duress is not entitled to claim the defense.

*697 AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY; THE HONORABLE SHARON HOLMES, DISTRICT JUDGE

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OPINION

LUMPKIN, JUDGE:

¶1 Appellant Michael John Bever was tried by jury and found guilty of five (5) counts of First Degree Murder (Counts I-V) (21 O.S.Supp.2012, § 701.7(A)) and one count of Assault and Battery with Intent to Kill (Count VI) (21 O.S.2011, § 652(C)) in the District Court of Tulsa County, Case No. CF-2015-3983. The jury recommended as punishment life in prison in each of Counts I-V, and twenty-eight (28) years in prison in Count VI. The trial court sentenced accordingly, ordering the sentences to be served consecutively.[1] It is from this judgment and sentence that Appellant appeals.

¶2 On July 22, 2015, in Broken Arrow, Oklahoma, 16-year-old Appellant and his 18-year-old brother, Robert Bever, murdered their mother, father, younger sister and two brothers, and severely wounded another sister. The youngest sister, who was almost two (2) years old, survived unharmed.

¶3 Robert Bever pled guilty to five (5) counts of first degree murder and one count of assault and battery with intent to kill. He was sentenced to life in prison without the possibility of parole for each of the five (5) murders and a life sentence for the assault with intent to kill. The sentences were ordered to run consecutively. Robert Bever testified for the defense at Appellant's trial. He testified that he did not see Appellant kill anyone and took credit for killing all of his family members. His testimony was frequently at odds with the State's evidence. In particular, while he claimed he did not see Appellant kill anyone, Appellant told police he had killed three (3) of his family members.

¶4 The story of what happened the night of July 22 is drawn largely from the testimony *698 of C.B., Appellant's thirteen-year-old sister; Robert Bever; and Appellant's pre-trial statements to police. Prior to the day of the murders, Appellant and Robert Bever, also referred to as the brothers, had collected body armor and knives to be used in the murder of their family. Those killings were to be a prelude to a cross-country killing spree. The brothers sought to emulate certain serial killers and intended to exceed the body count of recent well-known mass shootings. The brothers had ordered guns that were to be delivered to a local gun shop. They had yet to be picked up, as the brothers needed someone over 21 to actually pick up the guns. The ammunition, over 2,000 rounds, was to be delivered to their home on July 23.

¶5 Late in the evening on July 22, all the family members were in bed except for Appellant, his brother Robert, C.B., and their mother, April Bever. C.B. testified at trial that around 11:30 p.m., her mother told her to tell her brothers to do the dishes. When she went to their bedroom, she found them putting on body armor. She also noticed they had set several knives out on the bed. C.B. had seen them put on the body armor previously and knew about their extensive collection of knives.

¶6 When she arrived in their room, Appellant asked, "should we do it right now?" Robert replied, "yes." Appellant told C.B. to look at something on his computer. When she did, Robert came up behind her and slit her throat. Robert Bever testified that the plan was for C.B. to die quickly and then they would drag her body to the closet. However, C.B. did not die quickly and fought back as Robert repeatedly stabbed her. C.B. ran screaming from the bedroom and headed toward the front door. As she ran, she heard her mother scream. C.B. ran outside but was dragged back inside the house.

¶7 C.B. suffered multiple stab wounds, including some that appeared to be defensive wounds. Several of the wounds were so severe that her internal organs protruded out of her abdomen. When first responders arrived on the scene, she was thought to be near death. However, despite the severity of the wounds and the massive blood loss, she survived.

¶8 Robert then stabbed his mother, April Bever. She fought back aggressively but ultimately succumbed to the approximately 48 stab wounds to her arms, neck, face, chest, and abdomen.

¶9 Robert then asked Appellant where the others were and Appellant replied that they were hiding. A younger brother, ten-year-old C.P.B., and five-year-old sister, V.B., had heard the commotion and run to a bathroom where they locked themselves in. Appellant knocked on the door and said, "let me in. He's gonna kill me". One of the children opened the door, at which time Appellant entered and stabbed both of them to death. C.P.B. had approximately 21 stab wounds to his back, chest, head and neck. V.B. suffered approximately 23 stab wounds to her neck, back, chest, face and abdomen. Both victims had defensive wounds. (At trial, Robert took credit for killing C.P.B. and V.B. However, in pre-trial statements, Appellant admitted to stabbing them).

¶10 Appellant then went to his father's home office where his twelve-year-old brother, D.B., had locked himself inside. Appellant used the same ruse as before, telling D.B. to open the door, that Robert was going to kill him (Appellant). When D.B. opened the door, Appellant said to Robert, "he's all yours". D.B.'s pleas to be spared were ignored. Robert grabbed D.B. and stabbed him in the stomach. Ultimately, D.B. suffered 21 stab wounds to his stomach, chest, head, neck and back.

¶11 At some point, the brothers' father, David Bever, came out of his room and Robert stabbed him repeatedly. David Bever ultimately suffered 28 stab wounds to his back, chest, neck and abdomen.

¶12 During the murder spree, Appellant had disabled the home alarm system. Prior to his death, D.B. used Appellant's phone to call 911. Appellant admitted he took the phone from D.B. and smashed it to the floor.

¶13 With the murders concluded, the brothers ran to a creek behind their house to hide. Officers arrived on the scene at approximately 11:30 p.m. In their subsequent search of the house, they discovered 23-month-old A.B. asleep in an upstairs bedroom, untouched *699 by the murderous rampage which had occurred on the floor below. Robert Bever testified that they had intended to kill A.B. by cutting off her head. However, it appeared the brothers had forgotten about her in the melee.

¶14 The brothers were ultimately located by police and search dogs near the creek. One of the dogs had bitten Appellant in attempt to subdue him. Appellant was covered in dirt and blood. The blood was later determined to be from his mother.

¶15 Forensic testing later showed Appellant's blood was found on a knife handle, and the blade of that knife had a mixture of blood from which his father, C.P.B. and D.B. could not be excluded. For his part in the murder spree, Appellant was convicted of five (5) counts of first degree murder and one count of assault and battery with intent to kill. He was sentenced to life in prison with the possibility of parole for each of the five (5) murders and 28 years imprisonment for the assault with intent to kill. The sentences were ordered to run consecutively.

¶16 In his first three propositions of error, Appellant challenges his sentence. Specifically, in Proposition I he argues that the trial court's order for his sentences to be served consecutively violates the Sixth and Eighth Amendments to the United States Constitution and Oklahoma and Federal case law because the jury's verdict was that he was "not irreparably corrupt and permanently incorrigible." In Proposition II, Appellant argues his consecutive sentences violate the Eighth Amendment to the United States Constitution and Oklahoma and Federal case law because they do not provide him a meaningful opportunity for release. And finally in Proposition III, Appellant contends his sentence is excessive in violation of the Eighth Amendment to the United States Constitution and Oklahoma and Federal case law. To a certain extent, Appellant's propositions overlap. However, we attempt to address them separately.

¶17 The record on which Appellant's arguments are based shows that at the close of the sentencing stage of trial, the jury was instructed as follows:

> Should you unanimously find that Michael Bever is irreparably corrupt and permanently incorrigible, you are authorized to consider imposing a sentence of life without the possibility of parole.
>
> If you do not unanimously find beyond a reasonable doubt that Michael Bever is irreparably corrupt and permanently incorrigible, you are prohibited from considering the penalty of life without the possibility of parole. In that event, the sentence must be imprisonment for life with the possibility of parole.

(Instruction No. 54).

¶18 The jury was also instructed, in part, "no person who committed a crime as a juvenile may be sentenced to life without the possibility of parole unless you find beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible." (Instruction No. 57).

¶19 As to each murder conviction, the jury found the "Defendant is not irreparably corrupt and permanently incorrigible and sentence the Defendant to life with the possibility of parole." At the sentencing hearing, the judge ordered the five (5) life sentences as well as the 28 years imposed for the assault and battery with intent to kill conviction to be served consecutively.

¶20 The majority of the arguments presented by both sides in the appellate briefs were presented to the trial court in sentencing memoranda from the defense and the prosecution. To the extent Appellant challenges the court's ability to run the sentences consecutively, our review is for abuse of discretion as the state statute leaves that decision in the hands of the trial court. 22 O.S.2011, § 976. However, whether the trial court's ruling is consistent with the current state of the law is an issue this Court reviews *de novo*. *King v. State*, 2008 OK CR 13, ¶ 4, 182 P.3d 842, 843.

¶21 In Proposition I, both the State and Appellant set forth the legal background of the evolving principles of law in the area of juvenile sentencing, focusing primarily on *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *700 *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). The basic premise of Appellant's argument on appeal is that his

Sixth and Eighth Amendment rights were violated by the trial court's ordering of his sentences to run consecutively despite the fact the jury found he was not irreparably corrupt and permanently incorrigible.

¶22 Relying primarily on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) Appellant argues that the finding of "irreparably corrupt and permanently incorrigible" is equivalent to an aggravator in a death penalty case. He asserts that as the jury in his case acquitted him of the alleged aggravator, this acquittal prohibited the jury from imposing a sentence that would deny him a meaningful opportunity for release. He contends that his right to jury sentencing prohibited the judge from imposing a *de facto* sentence of life without parole. Appellant contends that under *Ring*, he may not be exposed to a penalty exceeding the maximum he would have received if punished according to the facts reflected in the jury's verdict. He contends that his five (5) consecutive life sentences did just that in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments.

¶23 It is not necessary for us to determine whether the finding of "irreparably corrupt and permanently incorrigible" is akin to the finding of an aggravating circumstance. The claim on appeal is whether running the sentences consecutively violated federal and state law.

¶24 Initially, none of the authorities cited by either side involves cases of juvenile homicide offenders sentenced to multiple life sentences. Further, none of the authorities cited by Appellant support a conclusion that the trial court's ruling violated federal or state law.

[1] ¶25 No cases have been cited or found where the Supreme Court or this Court have held that a defendant is constitutionally entitled to jury sentencing. The Sixth Amendment requires that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived. *Stevens v. State*, 2018 OK CR 11, ¶ 34, 422 P.3d 741, 750 (citing *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348). However, neither the Supreme Court nor this Court have found a Sixth Amendment right to jury sentencing. In fact, both *Miller* and *Montgomery* recognized that it is appropriate for a judge to make sentencing decisions. In *Oregon v. Ice*, 555 U.S. 160, 168, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), the Supreme Court said that *Apprendi* does not apply to a trial court's decision to run sentences consecutively, even if the court must make findings of fact beyond those made by the jury before imposing consecutive sentences. Judges have long had the discretion to run sentences concurrently or consecutively. *Setser v. United States*, 566 U.S. 231, 236, 132 S.Ct. 1463, 182 L.Ed.2d 455 (2012).

¶26 Under state law, criminal defendants have a statutory right to have a jury help determine the sentence. 22 O.S.2011, § 926.1. Further, sentences for multiple offenses are to run consecutively unless otherwise ordered by the trial court. 22 O.S.2011, § 976.

¶27 A majority of this Court recently found no Eighth Amendment violation in ordering multiple sentences for juvenile homicide offenders to be served consecutively. In *Martinez v. State*, 2019 OK CR 7, 442 P.3d 154 the defendant was sentenced to life in prison for one count of first degree murder and fifteen years in each of two counts of shooting with intent to kill with the sentences ordered to run consecutively. Martinez argued, much as Appellant does, that his consecutive sentences constituted a *de facto* sentence of life without parole for a crime committed as a juvenile and thus, his sentences violated the United States and Oklahoma Constitutions' ban on cruel and unusual punishment pursuant to *Miller* and *Montgomery*. This Court disagreed and explained:

> ... even after *Graham*, *Miller*, and *Montgomery*, defendants convicted of multiple offenses are not entitled to a volume discount on their aggregate sentence. Thus, we hold that where multiple sentences *701 have been imposed, each sentence should be analyzed separately to determine whether it comports with the Eighth Amendment under the Graham/Miller/Montgomery trilogy of cases, rather than considering the cumulative effect of all sentences imposed upon a given defendant.

2019 OK CR 7, ¶ 6, 442 P.3d at 156. (internal citation omitted).

¶28 Relying on *Graham* and *Miller*, this Court found that a State is not required to guarantee eventual freedom to a juvenile offender. *Id.*, at ¶ 8, 442 P.3d at 157 (citing *Graham*, 560 U.S. at 74, 130 S.Ct. 2011; *Miller*, 567 U.S. at 479, 132 S.Ct. 2455). This Court concluded by finding, "[b]ased upon the length of [Martinez's] sentences and the current status of the law, we find that [Martinez] has some meaningful opportunity to obtain release on parole during his lifetime." *Id.*

¶29 This finding was upheld in *Detwiler v. State*, 2019 OK CR 20, 449 P.3d 873, where a majority of this Court said, "[w]e thus find, as we did in *Martinez*, that the Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes. To do otherwise would effectively give crimes away." *Id.*, 2019 OK CR 20, ¶ 6, 449 P.3d at 875. While the juvenile defendant in *Detwiler* was convicted and sentenced for non-homicide offenses, this Court found "[t]he Supreme Court has not explicitly held that stacked sentences imposed in a juvenile case—whether homicide or nonhomicide—should be reviewed in the aggregate when conducting an Eighth Amendment analysis." *Id.* This Court rejected the contention that the defendant's sentences viewed in the aggregate as though they were one constituted a *de facto* sentence of life without parole for crimes he committed as a juvenile. "Based upon the length of each of [the defendant's] sentences, viewed individually, and the current status of the law, we find that [the defendant] has some meaningful opportunity to obtain release on parole during his lifetime." *Id.*, 2019 OK CR 20, ¶ 8, 449 P.3d at 875-876.

[2] ¶30 The fact that the jury found Appellant was not irreparably corrupt and permanently incorrigible and sentenced him to life in prison for the offense of murder is immaterial to the trial court's discretion to order multiple sentences to be served consecutively. Based upon our review of the current state of both federal and state law, the trial court's order for Appellant's five (5) life sentences to be served consecutively does not violate his constitutional rights despite the jury's finding that Appellant was not irreparably corrupt and permanently incorrigible. Proposition I is therefore denied.

¶31 Much of Appellant's Proposition II is a repeat of the argument in Proposition I. However, his main focus in Proposition II is that the consecutive sentences violate the Eighth Amendment and federal and state case law because the sentence does not provide him a meaningful opportunity for release.

¶32 As addressed in Proposition I, a majority of this Court held in *Martinez* that the State is not required to guarantee eventual freedom to a juvenile offender and that consecutive life sentences do not deny a juvenile homicide offender a meaningful opportunity for release on parole during his lifetime.

¶33 Appellant now asserts, as this Court noted in *Martinez*, that both state and federal courts are divided over whether the Eighth Amendment requires individual sentences to be analyzed separately or whether the cumulative effect of multiple sentences is the benchmark for compliance. Appellant's assertion that our rationale in *Martinez* is "nothing more than the expression of resistance to the clear intent expressed in recent Supreme Court jurisprudence" misses the mark.

[3] ¶34 This Court fully recognizes and faithfully discharges its "independent duty and authority to interpret decisions of the United States Supreme Court." *Martinez*, 2019 OK CR 7, ¶ 5, 442 P.3d at 156. As the State asserts, "there is no reason to believe that this Court, and the many other courts which agree with this Court, are willfully disregarding the Constitution."

*702 ¶35 While the Supreme Court has not specifically addressed the issue raised in Appellant's case, the Court's precedent regarding the history and propriety of consecutive sentencing strongly supports this Court's decision in *Martinez*. A defendant, even a juvenile, who murders five people (and who plans to murder many more) is simply and fundamentally different than a defendant who murders one person. Appellant's arguments have not shown that our decision in *Martinez* is contrary to established law.

[4] ¶36 In a second portion of this proposition, Appellant asserts that the parole system in Oklahoma does not provide the meaningful opportunity for release required by the Eighth and Fourteenth Amendments. This is an entirely separate argument from that challenging the consecutive nature of his sentences as ordered by the trial court. As such, we find it is waived pursuant to Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), which requires each proposition of error to be set out separately in the appellate brief. *See Baird v. State*, 2017 OK CR 16, ¶ 28, 400 P.3d 875, 883.[2]

¶37 In Proposition III, Appellant claims his sentence is excessive. He does not challenge any of the sentences individually, but argues that his sentences, when considered in the aggregate are excessive and violate the Eighth Amendment. To this extent, his argument is merely a reprise of his first two propositions.

[5] ¶38 We typically review claims of excessive sentence under the principle that "this Court will not disturb a sentence within statutory limits unless, under the facts and

circumstances of the case, it shocks the conscience of the Court." *Kelley v. State*, 2019 OK CR 25, ¶ 18, 451 P.3d 566, 572. Here, Appellant received the minimum punishment of life in prison with the possibility of parole for each count of first degree murder. These sentences were within statutory range. 21 O.S.2011, § 701.9(A).

[6] [7] [8] ¶39 There is no absolute constitutional or statutory right to receive concurrent sentences. 22 O.S.2011, § 976. It is within the trial court's discretion whether sentences are run concurrently or consecutively. *Id.* An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶40 The record indicates the trial court reached its decision to run the sentences consecutively after much research and deliberation. During the sentencing stage of trial, the State reincorporated all of its first stage evidence. This included evidence that Appellant not only helped plan the massacre of his family but also fully participated in the killings.

¶41 The defense presented three (3) witnesses, Dr. Ana Mazur-Mosiewicz, a licensed clinical psychologist; Assistant Public Defender Adam Barnett; and Sherri Knight, a teacher at the Tulsa County Jail. Dr. Mazur-Mosiewicz testified that she conducted a neuropsychological evaluation of Appellant in May 2016 (two (2) years before trial) at the Tulsa County Jail. She testified that Appellant had an I.Q. of 85, which according to the doctor was in the low range of average intelligence. She testified that his intellectual dysfunction could be the result of traumatic brain injury or a birth defect. Dr. Mazur-Mosiewicz admitted that she did not test Appellant at the time of the crimes. However, it was her opinion that as Appellant was 16 years old at the time of the crimes, and given that his brain had not fully matured by that time, in a high stress environment such as the murder scene, it was very likely Appellant would have frozen in place and not known what to do.

¶42 Mr. Barnett testified that he interacted with Appellant in 2015 when Appellant was in the Tulsa County Jail. Mr. Barnett's impression of Appellant was that he was either "absolutely clueless and naïve as to what was going on or he was institutionalized *703 before he ever came in the door", and that Appellant seemed remorseful.

¶43 Ms. Knight testified that she interacted with Appellant when he was enrolled as a student for the 2015-2016 school year. She said that she provided Appellant with school materials and books to read. It was her opinion that Appellant was respectful and seemed interested in improving himself.

¶44 Additionally, sentencing memorandum prepared by the parties were considered by the judge. Also considered were the wishes of some jurors who had written the judge a letter expressing their desire for the sentences to be run concurrent, as well as a victim impact statement from C.B.'s adoptive mother detailing C.B.'s fear that Appellant would be released from prison and kill her in order to finish what he started.

[9] ¶45 Under the facts of the case and the current state of the law, including this Court's holding in *Martinez*, the trial court did not abuse its discretion in running the sentences consecutively. This proposition is denied.

[10] [11] ¶46 In Proposition IV, Appellant contends he was denied due process by numerous instances of prosecutorial misconduct. It is well established that "[w]e evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. In a claim of prosecutorial misconduct, "[r]elief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair." *Tafolla v. State*, 2019 OK CR 15, ¶ 28, 446 P.3d 1248, 1260.

¶47 Appellant initially argues the State failed to preserve relevant evidence. Two items are at issue. The first is a computer hard drive, identified as Item 18, seized from the Bever home and provided to the Oklahoma State Bureau of Investigation (OSBI) for analysis. The OSBI was unable to analyze the hard drive because it would not "initialize." The hard drive was subsequently retrieved, along with other items of evidence, from the OSBI. However, the prosecution was not able to subsequently locate the hard drive for trial purposes.

¶48 The other item is a journal allegedly kept by C.B. which family members had turned over, along with other property from the Bever home, to an auction house once the police had concluded their investigation. An employee of the auction house informed police that she had read a journal that she thought was written by C.B. and which was thought to contain

references to child abuse. The journal, or one resembling it, was recovered by the police approximately one year after the murders. There were pages torn out of the journal. The employee who had read the journal could not tell if that was the actual journal she had read. No references to child abuse were found in the journal. No one could identify who tore out the missing pages. The journal became part of the property collected by the Broken Arrow Police Department and was available for inspection by the defense.

¶49 Appellant acknowledges that his challenges to the items were raised before the trial court and that his objections were denied. However, he argues this Court is free to grant relief on the grounds of misconduct "especially when the prosecutorial misconduct in this case is weighed in its totality."

¶50 While Appellant's argument on appeal is prosecutorial misconduct for the failure to preserve evidence, his cited authority is *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) which concerns the prosecution's suppression of evidence. Appellant does not claim that the State actually suppressed evidence after it had been requested by the defense, that the evidence was favorable to his defense, or that the evidence was material either to his guilt or punishment, arguments typical of a *Brady* claim.

¶51 If Appellant's claim is that of prosecutorial misconduct due to a loss of evidence, there are two (2) lines of Supreme Court cases dealing with a loss of evidence. One line of cases states that a defendant is entitled to relief if he can show that police destroyed *704 evidence which had apparent exculpatory value and he is unable to reasonably obtain comparable evidence. *See California v. Trombetta*, 467 U.S. 479, 484, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). The other line of cases provides a defendant with relief if he can show the police, acting in bad faith, destroyed potentially useful evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). This Court has recognized and applied both cases. *See Martinez v. State*, 2016 OK CR 3, ¶¶ 19-29, 371 P.3d 1100. No relief is warranted in the present case under either *Trombetta* or *Youngblood*. Appellant has not argued that either item of evidence was exculpatory. At most, he insinuates the items might have been useful to the defense.

[12] ¶52 Regarding the journal, the defense was able to obtain either the actual journal itself or a comparable one. If Appellant's claim is true that the torn out pages referenced abuse, the defense was able to put on evidence of alleged physical abuse from C.B., Robert Bever, and Dr. Mazur-Mosiewicz. Further, the defense did not ask C.B. whether she kept a journal or whether she documented any incidents of abuse.

¶53 As for the computer hard drive, all the evidence showed that it was unreadable. Appellant has made no argument of its materiality.

¶54 Any argument that the loss of the computer hard drive or journal was done in bad faith is not supported by the record. Neither Appellant's cited authorities nor the authorities relevant to a claim of lost evidence nor the record support Appellant's claim of prosecutorial misconduct regarding the handling of the computer hard drive or journal.

[13] ¶55 Even assuming Appellant has made any showing of error, this error is harmless beyond a reasonable doubt. Although it does not appear that this Court has considered whether *Trombetta* and *Youngblood* errors can be harmless, there appears to be no reason why such errors could not be harmless. In fact, "most constitutional errors can be harmless." *Duclos v. State*, 2017 OK CR 8, ¶ 11, 400 P.3d 781, 784 (citing *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Evidence of Appellant's guilt was overwhelming. He received the minimum punishment. Any failure to preserve evidence, which has not been found or even claimed to be material or exculpatory, is harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Accordingly, this claim of prosecutorial misconduct is denied.

¶56 Appellant further finds prosecutorial misconduct in two comments prosecutors made to the media approximately three (3) months before trial. Defense counsel brought the comments to the attention of the trial court as a violation of the Rules of Professional Responsibility. Now on appeal, his only cited authority are the Rules of Professional Responsibility and attorney discipline cases.

[14] ¶57 In *Harvell v. State*, 1987 OK CR 177, ¶ 10, 742 P.2d 1138, 1140, this Court said, "disciplinary rules merely establish standards which, if violated, subject an attorney to discipline. They do not establish the parameters of the constitutional right to a fair trial." This Court determined that "[w]hat is important is the effect which may ensue and whether the comment and the attendant adverse pretrial publicity had a prejudicial effect on prospective jurors." *Id.*

[15] ¶58 Appellant does not make a claim of prejudicial pre-trial publicity. The record reflects jurors were thoroughly screened for media exposure and for pre-determined opinions as to Appellant's guilt. Appellant has made no attempt to show that the jurors who sat on his case were prejudiced by the media or any pre-trial statements made by prosecutors. Any misconduct in the prosecutor's comments did not deny Appellant a fair trial.

¶59 Appellant next claims the State directed psychologist Dr. Shawn Roberson to evaluate him for a possible insanity defense without notice to defense counsel. Defense counsel raised this claim many times throughout the trial proceedings. The State consistently maintained that it had the consent of Appellant's prior attorney for Roberson to interview Appellant. In fact, at two (2) of the pre-trial hearings where the issue was *705 raised, defense counsel actually seemed unsure about a lack of notice, stating more than once that he "could be wrong about the [alleged lack of notice/consent]" and that Dr. Roberson met with the defendant "without, I think, proper notice to our office."

[16] ¶60 If, in fact, the State did not have approval for any interview, Appellant has failed to show any prejudice. An insanity defense was not pursued and Dr. Roberson did not testify at trial. The defense ultimately provided their expert's raw data to Dr. Roberson. Appellant fails to show how his trial would have been impacted if it had been established that the State had not given the defense notice of Dr. Roberson's interview with Appellant.

[17] [18] [19] [20] [21] ¶61 Finally, Appellant complains about two (2) comments made during the State's opening statement, and numerous statements made during the State's closing arguments. We have thoroughly reviewed all of the alleged misconduct. Certain comments were met with contemporaneous objections. In those instances where the objections were sustained, any error was cured. *Young v. State*, 2000 OK CR 17, ¶ 50, 12 P.3d 20, 37-38. Other objections were overruled by the trial court, and our review is therefore for an abuse of discretion. Certain other comments were not met with any objection. In those instances our review is for plain error. *Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211. Under the plain error test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *See Duclos*, 2017 OK CR 8, ¶ 5, 400 P.3d at 783. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

¶62 The challenged comments made in opening statement were well within the scope of opening statement. *See Howell v. State*, 2006 OK CR 28, ¶ 7, 138 P.3d 549, 556 ("[t]he purpose of opening statement is to tell the jury of the evidence the attorneys expect to present during trial. Its scope is determined at the discretion of the trial court.").

[22] [23] [24] ¶63 Regarding closing argument, this Court has long allowed counsel for the parties a wide range of discussion and illustration. *Sanders v. State*, 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. Counsel enjoy a right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it. *Id.* We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights. *Id.* It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *Tafolla*, 2019 OK CR 15, ¶ 28, 446 P.3d at 1260.

[25] ¶64 Reviewing the challenged comments made in closing argument for plain error and otherwise, we find the prosecutor's conduct was not so improper or prejudicial so as to have infected the trial so that it was rendered fundamentally unfair. While some comments were objectionable, the trial court's rulings helped to ensure the prosecutor's conduct did not determine the outcome of the trial. *See Pack v. State*, 1991 OK CR 109, ¶ 17, 819 P.2d 280, 284 (citing 20 O.S. § 3001.1.) No relief is warranted and this proposition is denied.

[26] ¶65 In Proposition V, Appellant contends his due process rights were violated by the trial court sustaining the State's objection to the first stage testimony of Dr. Mazur-Mosiewicz on the grounds that the doctor's testimony was not relevant. Appellant asserts the trial court's ruling denied him the fundamental right to present a complete defense as the doctor's testimony was relevant to the voluntariness of his statement to police, his state of mind during the crime, his intellectual functioning as it related to malice aforethought, and to rebut the State's theory that he was responsible for some of the stabbings. On appeal, we review decisions on the admission of evidence for an abuse of discretion. *Pullen v. State*, 2016 OK CR 18, ¶ 4, 387 P.3d 922, 925. An abuse of discretion is a conclusion or judgment that is clearly against the logic and effect of the facts presented. *Id.*

*706 ¶66 The record indicates that in a bench conference, defense counsel explained that he wanted the doctor to describe her testing, the results of her testing, and her conclusions as an expert in neuropsychology. Defense counsel argued that the doctor would testify that Appellant, "suffers from very specific cognitive limitations" and those limitations should be considered by the jury in the context of whether Appellant's decisions "were fully formed, intentional decisions or whether they were done through the filter of limited cognitive ability."

¶67 The prosecutor responded that in the doctor's report, which had been provided to the court, the doctor never rendered an opinion regarding whether or not Appellant was able to form the necessary intent to kill or whether his confession was voluntary. Defense counsel did not rebut this statement but insisted he just wanted "to present the tests that she ran, the results of those tests, her conclusions as a result of those tests, and then leave it for argument."

¶68 After reviewing the doctor's report, the judge noted that she was concerned by one of the last sentences in the report which read, "[t]he lack of medical records related to Mr. Bever's full medical and developmental history make it difficult to delineate whether his neurocognitive and motor deficits are congenital in nature, represent a decline in function as a result of the reported abuse, or both." Defense counsel did not disagree with the judge but added, "all we know is that he has deficits" and that the jury should be allowed to hear that. The judge reiterated her position that the doctor's explanations did not show that because of these deficits, Appellant committed the charged crimes. The judge ultimately decided that the doctor's testimony was not relevant first stage testimony, as it would not assist the jury in determining guilt or innocence. However, the testimony was found relevant for the punishment stage.

¶69 The defense did not raise a defense based on insanity, mental retardation/intellectual disability, or intoxication. Defense counsel did not make an offer of proof regarding the doctor's testimony. Based on defense counsel's failure to rebut, and his actual acquiescence in the prosecutor's argument that the doctor never rendered an opinion regarding whether or not Appellant was able to form the necessary intent to kill or whether his confession was voluntary, the trial court properly excluded the doctor's testimony in the first stage as it was not relevant to a determination of guilt or innocence. In the absence of any conclusion or testimony that because of any "deficits", mental or otherwise, Appellant either committed or did not commit the charged crimes, merely putting the doctor's tests and results before the jury was not relevant evidence.

[27] [28] ¶70 Excluding the doctor's testimony in the first stage did not deny Appellant the opportunity to present a complete defense. In *Rojem v. State*, 2009 OK CR 15, ¶ 9, 207 P.3d 385, 390 (citing *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)), this Court acknowledged that every criminal defendant has a Sixth Amendment right to present a defense. "[T]he Constitution permits judges 'to exclude evidence that is "repetitive ..., only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." ' " *Holmes*, 547 U.S. at 326-327, 126 S.Ct. 1727.

¶71 No assertions were made before the trial court that the doctor could testify to any reasonable degree of medical certainty that Appellant would not have been able to form the intent of malice aforethought. Defense counsel's attempts to have the doctor testify in first stage to general deficiencies Appellant may have had and then argue that there was no proof that he either killed or had the requisite malice to kill was properly thwarted by the trial court. Excluding the doctor's testimony from the first stage did not deny Appellant the ability to present a complete defense.

¶72 Having thoroughly reviewed Appellant's arguments, we find the trial court did not abuse its discretion in excluding the doctor's first stage testimony and the court's ruling did not deny Appellant his Sixth Amendment rights to present a complete defense. This proposition is denied.

*707 ¶73 In Proposition VI, Appellant contends he was denied a fair trial by the admission of "needlessly cumulative" photographs. Specifically, he complains about three (3) sets of photos. Appellant raised contemporaneous objections in each instance and those objections were overruled by the trial court. Therefore, our review on appeal is for an abuse of discretion. *Bench v. State*, 2018 OK CR 31, ¶ 59, 431 P.3d 929, 952. Unless a clear abuse of discretion is shown, reversal will not be warranted. *Id.*

[29] [30] [31] ¶74 Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect. *Id.* at ¶ 61, 431 P.3d at 952. Relevant evidence is defined as "evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable

or less probable than it would be without the evidence." 12 O.S.2011, § 2401. When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. *Bench*, 2018 OK CR 31, ¶ 62, 431 P.3d at 952. Where there is duplication in images, the Appellant has the burden to show that the repetition in images was needless or inflammatory. *Id.*

[32] ¶75 We have thoroughly reviewed the challenged photographs, State's Exhibits 120(A) and 128, 68 and 189, and 157, 158 and 174. Each of the photographs is relevant in showing a different aspect of the crime scene. *See Hogan v. State*, 2006 OK CR 19, ¶ 31, 139 P.3d 907, 921. Any duplication in the photographs is minor and not sufficient to qualify as "needless repetition" which can inflame the jury and result in error. *See President v. State*, 1979 OK CR 114, ¶¶ 9-17, 602 P.2d 222, 225-226. The trial court did not abuse its discretion in admitting the challenged photographs. This proposition is denied.

[33] ¶76 In his final proposition of error, Appellant contends the trial court abused its discretion in denying his requested instruction on duress. The trial court's decision regarding jury instructions is reviewed for an abuse of discretion. *Soriano v. State*, 2011 OK CR 9, ¶ 10, 248 P.3d 381, 387.

¶77 In denying the requested instruction, the trial court relied on *Long v. State*, 2003 OK CR 14, 74 P.3d 105. *Long* states that "duress is not a defense to the intentional taking of an innocent life by a threatened person." 2003 OK CR 14, ¶ 12, 74 P.3d at 108. Appellant now seeks to distinguish *Long* from his case and argues that *Long* misinterpreted 21 O.S. § 156, regarding the defense of duress, and improperly placed limits on the defense.

[34] [35] ¶78 Appellant's case offers no reason to reconsider *Long*. Appellant has failed to offer any evidence that would have supported a jury instruction on duress. Even assuming *arguendo*, Appellant was acting under duress, he had ample opportunity to extricate himself from the scene prior to actually killing anyone. "[A] person who fails to avail himself of an opportunity to escape a situation of duress is not entitled to claim the defense." *Hawkins v. State*, 2002 OK CR 12, ¶ 30, 46 P.3d 139, 146. Further, Appellant offers no authority for his argument that juveniles should be treated differently than adults regarding the assertion of a defense of duress. Based upon the foregoing, the trial court did not abuse its discretion in denying the requested instruction. This proposition is denied.

¶79 Accordingly, this appeal is denied.

DECISION

¶80 The **JUDGMENT and SENTENCE is AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

LEWIS, P.J.: CONCUR IN PART/DISSENT IN PART

KUEHN, V.P.J.: CONCUR IN PART/DISSENT IN PART

HUDSON, J.: SPECIALLY CONCURRING

ROWLAND, J.: CONCUR

HUDSON, J., SPECIALLY CONCUR

*708 ¶1 I concur in today's decision. I write separately to address the views expressed in both dissents. Contrary to my colleagues' assertions, "the Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes." *Detwiler v. State*, 2019 OK CR 20, ¶ 6, 449 P.3d 873, 875; *see also Martinez v. State*, 2019 OK CR 7, ¶ 6, 442 P.3d 154, 156. Interpreting the decisions in *Miller v. Alabama*,[1] *Graham v. Florida*[2] and *Roper v. Simmons*[3] using the "punishment-specific" approach championed by the dissent yields the ridiculous consequence of enabling a juvenile offender to in essence circumvent punishment for a crime by committing multiple crimes. *See Martinez*, 2019 OK CR 7, ¶ 1, 442 P.3d at 157 (Hudson, J., Specially Concur). Oklahoma "is not required to guarantee eventual freedom to a juvenile offender." *Id.*, 2019 OK CR 7, ¶ 8, 442 P.3d at 157 (citing *Graham*, 560 U.S. at 74, 130 S.Ct. 2011). That Bever has subjected himself to a severe penalty "is simply because he committed a great many [ ] offenses." *O'Neil v. Vermont*, 144 U.S. 323, 331, 12 S.Ct. 693, 36 L.Ed. 450 (1892). This case wholly exemplifies the soundness of this Court's analysis and reasoning in *Martinez* and *Detwiller*.

LEWIS, PRESIDING JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

¶1 I concur in affirming Appellant's convictions but would modify his sentences to comply with *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The Supreme Court in *Miller* did not prohibit a state court or jury from *ever* imposing life without parole on a juvenile homicide offender, but it did hold that a lifetime in prison is disproportionate for all but the rarest juveniles, whose crimes show their permanent incorrigibility or irreparable corruption. *See Montgomery v. Louisiana*, —— U.S. ——, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016). Appellant's jury unanimously concluded that he is neither permanently incorrigible nor irreparably corrupt, and sentenced him to five terms of life imprisonment rather than life without parole.

¶2 The trial court's subsequent order that those terms, as well as the sentence of twenty-eight years for assault and battery with intent to kill, be served consecutively effectively "mandated that [this] juvenile die in prison" even if the jury "thought that his youth and its attendant characteristics, along with the nature of his crime," made a punishment with some possibility of eventual release more appropriate. *Miller*, 567 U.S. at 465, 132 S.Ct. 2455. This is the same situation that confronted the Supreme Court in *Miller*, and the same rule applies. Bever's mandatory punishment[1] of life imprisonment without parole violates the Eighth Amendment.

¶3 The majority avoids the constitutional tension between the jury's *Miller* findings and the trial court's life-without-parole order with its *crime*-specific, "no volume discount" theory of punishment,[2] according to which *Miller*, *Graham v. Florida*,[3] and logically even *Roper v. Simmons*,[4] can only limit the State's penalty options when sentencing a juvenile for a single crime. I read those *709 decisions as *punishment*-specific: Regardless of the crime(s) of conviction, the State may *not* ordinarily inflict certain penalties on juveniles—the death penalty in *Roper*, perpetual imprisonment in *Graham* and *Miller*—because their lesser culpability, incomplete psychosocial development, and greater capacity for change than adults render those punishments cruel and unusual.

¶4 Appellant must serve thirty-eight years, three months of his *first* life sentence before he is even eligible to seek parole onto the next one, and so on. 21 O.S.Supp.2015, § 13.1(1); *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-83 (reckoning that a life sentence is equivalent to forty-five years for parole eligibility under the 85% Rule). He thus faces over 215 years in prison without any meaningful opportunity for release. I would either modify the judgment to concurrent sentences, or grant Bever a parole hearing to promptly consider his release from confinement after thirty-eight years, three months from the date of sentencing, and every three years thereafter. *See* 57 O.S.Supp.2018, § 332.7(E)(1)(granting reconsideration at three year intervals).

¶5 I am authorized to state that Vice Presiding Judge Kuehn joins in this separate writing.

KUEHN, V.P.J., CONCURRING IN PART/DISSENTING IN PART:

¶1 This is an unusually disturbing case involving extreme violence and juvenile appellants. The judgment of the trial court is correct and Appellant's conviction must stand, but I dissent to this Court's affirmation of Appellant's consecutive sentences. Imposing five consecutive sentences on a homicide offender without the requisite finding required to sentence a juvenile to life without parole is error.

¶2 Appellant received five life sentences and one sentence of twenty-eight years, which the trial court ordered to run consecutively. I believe that consecutive sentences imposed on a juvenile defendant functionally serves as a sentence of life without parole. *Martinez v. State*, 2019 OK CR 7 ¶ 3, 442 P.3d 154, 157 (Lewis, P.J., dissenting). The Pardon and Parole Board measures a life sentence at forty-five years. Because Appellant's sentences are 85% crimes, he would be required to serve 215.05 years before he can be considered for parole. These consecutive sentences guarantee he has no reasonable opportunity for parole and amount to a sentence of life without parole. *See Budder v. Addison*, 851 F.3d 1047, 1055-56 (10th Cir. 2017) (explaining that "a sentencing court need not use that specific [life without parole] label" for a sentence to fit within that classification); *see also Graham v. Florida*, 560 U.S. 48, 57, 70, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (explaining that Graham's life sentence would functionally serve life without parole).

¶3 Appellant's jury specifically found that he was not irreparably corrupt or permanently incorrigible. In homicide cases, a juvenile may be sentenced to life without parole *only if* a jury finds them "irreparably corrupt and permanently incorrigible." *Stevens v. State*, 2018 OK CR 11, ¶¶ 34-35, 37, 422 P.3d 741, 750; *Miller v. Alabama*, 567 U.S. 460, 477-78, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). Therefore,

Appellant lacks the requisite findings to be sentenced to life without parole.

¶4 I would affirm the sentences of the lower court, but modify the terms to be served concurrently. This modification would, as required by the jury's finding, do nothing more than assure Appellant a reasonable opportunity to come before the Pardon and Parole Board after serving 85% of a life sentence. Neither I nor my dissenting colleague forgive the horrid actions of the Appellant, nor would our reasoning guarantee his release during his lifetime. Appellant's jury specifically did not find the only condition which, as they were instructed, could justify life without parole. Considering a 215 year sentence as not equating to life without parole while ignoring the jury's collective decision and juror affidavits for concurrent sentences during sentencing is, as the special concurrence wants to call it, the only "ridiculous" result here.

¶5 If there were any evidence that the jurors desired consecutive sentencing, I am confident the Majority would point it out as *710 justification for denying relief. But since the jury's legal findings and sentiments go against the result the Majority wants to reach, it simply ignores them. I dissent because the result today is contrary to the jury's wishes.

¶6 I am authorized to state Presiding Judge Lewis joins in this separate writing.

All Citations

467 P.3d 693, 2020 OK CR 13

Footnotes

1 Appellant must serve 85% of his sentence in each count before becoming eligible for consideration for parole. 21 O.S.Supp.2014, § 13.1.

2 However, we take this opportunity to note that under 57 O.S.Supp.2018, § 332.7, referred to as the "Forgotten Man Act", the Legislature has enacted procedures to ensure that inmates, other than those serving a life sentence without parole, shall be eligible for consideration for parole.

1 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

2 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

3 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

1 Though Appellant's jury rejected the *option* of "life without parole" sentences, the trial court's order that all of these sentences be served consecutively produces a mandatory administrative effect rendering Appellant ineligible for release from prison on parole for his natural lifetime, and then some.

2 *See also Martinez v. State*, 2019 OK CR 7, ¶ 6, 442 P.3d 154, 156 (holding "each [consecutive] sentence should be analyzed separately to determine whether it comports with the Eighth Amendment"); *Detwiler v. State*, 2019 OK CR 20, ¶ 6, 449 P.3d 873, 875 (holding Eighth Amendment analysis under *Graham* and *Miller* "focuses on the [consecutive] sentence imposed for each specific crime"), and my dissenting opinions in these cases.

3 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

4 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

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The Honorable Sharon K. Holmes
14th Judicial District
Tulsa County Courthouse
500 S. Denver Ave.
Tulsa, Ok 74103-3832

Dear Judge Holmes,

This letter is submitted jointly by the undersigned individuals, each of whom served as a juror in *State v. Bever*, Tulsa County Case No. CF-2015-3983. We submit this letter with great respect for the Court. It was an honor to serve as a juror in your courtroom. Thank you for your service to our community and state.

As you know, we served as jurors with a sense of great responsibility. To say the least, the trial was demanding for us because of its extraordinary length and content. However, we carefully rendered our verdicts according to the facts, evidence, and the instructions of law we were given.

We concluded in our deliberations that Mr. Bever should be sentenced to life in prison with the possibility of parole because he is not "irreparably corrupt and permanently incorrigible." The verdicts reflect this finding. It is our desire and hope that all six sentences will be concurrent with each other to encourage the possibility of a future life outside of prison for Mr. Bever. Consecutive sentences would be inconsistent with our verdict as it would prevent a meaningful opportunity for parole.

Respectfully,

Elizabeth Woodson, Juror #9
David Dutton, Juror #12
Shannon Kirby, Juror #1
Ashley Conlon, Juror #11
Tammy Manning, Juror #6
Jamie Nix, Juror #8