No. _____

In the Supreme Court of the United States

TYSHON BOOKER, PETITIONER

vs.

STATE OF TENNESSEE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE COURT OF CRIMINAL APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A:

State v. Tyshon Booker, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367 (Tenn. Crim. App. Apr. 8, 2020)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 24, 2019 Session

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal from the Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-CCA-R3-CD

During a botched robbery, sixteen-year-old Tyshon Booker, the Defendant-Appellant, shot and killed the victim, G'Metrick Caldwell. Following extensive hearings in juvenile court, the Defendant was transferred to criminal court to be tried as an adult.[1] At trial, the Defendant admitted that he shot the victim several times in the back while seated in the backseat of the victim's car; however, he claimed self-defense. A Knox County jury convicted the Defendant of two counts of first-degree felony murder and two counts of especially aggravated robbery, for which he received an effective sentence of life imprisonment. In this appeal as of right, the Defendant raises the following issues for our review: (1) whether the process of transferring a juvenile to criminal court after a finding of three statutory factors by the juvenile court judge violates the Defendant's rights under Apprendi v. New Jersey, 530 U.S. 466 (2000); (2) whether the State's suppression of alleged eyewitness identifications prior to the juvenile transfer hearing constitutes a Brady violation, requiring remand for a new juvenile transfer hearing; (3) whether the juvenile court erred in transferring the Defendant to criminal court given defense expert testimony that the Defendant suffered from post-traumatic stress disorder (PTSD) and was amenable to treatment; (4) whether the trial court erred in finding that the Defendant was engaged in unlawful activity at the time of the offense and in instructing the jury that the Defendant had a duty to retreat before engaging in self-defense; (5) whether an improper argument by the State in closing arguments constitutes prosecutorial misconduct requiring a new trial; (6) whether evidence of juror misconduct warrants a new trial and whether the trial court erred in refusing to subpoena an additional juror; and

[1] On February 19, 2016, the juvenile court severed the Defendant's case from co defendant Bradley Robinson for purposes of the transfer hearing. While the record contains lengthy discussions regarding the codefendant, including his statement implicating the Defendant in this crime, the codefendant did not testify at the Defendant's trial. The disposition of the codefendant's case is not reflected in the record.

(7) whether a sentence of life imprisonment for a Tennessee juvenile violates the United States and Tennessee Constitutions.[2] Discerning no reversible error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TIMOTHY L. EASTER, JJ., joined.

Mark E. Stevens, District Public Defender, and Jonathan Harwell (at trial and on appeal) and Chloe Akers (at trial), Assistant Public Defenders, for the Defendant-Appellant, Tyshon Booker.

Herbert H. Slatery III, Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Charme Allen, District Attorney General; and Takisha M. Fitzgerald and Phillip Morton, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Juvenile Court Proceedings

Two days after the offense, November 17, 2015, the Knox County Juvenile Court ordered the Defendant's "fingerprint card" to be released to the Knoxville Police Department (KPD) for use in the investigation of the victim's death. On the same day, the juvenile court signed an order for attachment after finding probable cause that the Defendant committed the delinquent and unruly offense of first-degree murder. On November 18, 2015, a juvenile court magistrate signed an attachment for the Defendant. On November 23, 2015, a probable cause hearing was conducted in Knox County Juvenile Court. Based on the testimony of Detective Clayton Madison of the KPD Violent Crimes Unit, the juvenile court determined there was probable cause as to the Defendant and the co defendant. On November 19, 2015, the State filed a motion to transfer the Defendant to Knox County Criminal Court to be tried as an adult. The Defendant filed a motion in opposition to this motion on January 4, 2016, arguing that "[t]ransfer would expose him, upon conviction, to an automatic life sentence of at least fifty-one years[,]" which he asserted was unconstitutional.

The Defendant's transfer hearing occurred on February 26, 2016, and June 9-10, 2016. Linda M. Hatch testified that she lived next door to the Defendant and that he went to school with her daughters. Sometime prior to the offense, Hatch picked up the

[2] We have reordered the Defendant's issues for clarity.

Defendant as he was "walking up the road and needed a ride." From that point on, the Defendant came over to her house "almost daily." She called the Defendant "son" and treated him like "one of [her] kids." She was aware that the Defendant had a Facebook account. At some point during "the week of November the 6th," Hatch observed the Defendant in possession of his brother's pistol, and she admonished him. Although the Defendant returned his brother's gun, the Defendant had another gun, a nine millimeter, "[w]ithin days." Hatch observed the Defendant shooting the gun on her back porch "several times," and she believed the Defendant had only a few bullets left. Prior to the offense, Hatch had set up a camera on her kitchen table to record the Defendant and his friends because she had become suspicious that they were stealing money from her daughter. The camera captured the Defendant with a nine millimeter gun as well as codefendant Robinson, whom Hatch knew as "Savvy," with a .32 caliber gun. The State played the video recording for the juvenile court, which was admitted as an exhibit to the hearing.

On the day of the offense, the Defendant texted Hatch at 3 p.m., and again at 6:11 p.m., stating, "Hey, please come get me right now from where you dropped us off." She understood this to be the place where she dropped off the Defendant and the codefendant the previous Friday. By the time Hatch responded to the Defendant, he was no longer at the location. The next morning, the Defendant came to her house "very upset, very nervous." Hatch said the Defendant wanted to talk to her, and she asked, "Ty, what's wrong?" The Defendant replied, "Mom, I f----- up[,]" and "Mom, I killed a man." The Defendant told Hatch he "shot him with that gun." "[The Defendant] said that [the codefendant] had it planned to rob this guy, and he didn't even know him. And he said that it just went wrong." The Defendant also told her that they were going to get him for "overkill," and he "shot him a lot." The Defendant said, "when the [victim] was fighting to try to get away from [the codefendant]," [the codefendant] told him to shoot, and he "just kept shooting." The Defendant told Hatch that he shot the victim four or five times, and he saw the victim "laying there dead." The Defendant also told her that he threw the gun away.

Hatch testified that the Defendant came back to her house the following morning, and he "wasn't so upset." She said the Defendant told her, "They don't even have the right descriptions. They have no clue it was us." She said the Defendant was "back to kind of being his cool, sweet, charming self."

On cross-examination, Hatch testified that the first time she met the Defendant, he was walking down the street with a ripped trash bag, and she stopped and asked him if he needed a ride. She said the Defendant was upset because he had just gotten in a fight with his mother, and she had told him to get out of the car. Hatch told the Defendant that he could text her anytime, and she would give him a ride or bring him food. She primarily

communicated with the Defendant through Facebook Messenger because he could use it through Wi-Fi. She described the Defendant as "very intelligent and so, so sweet," and she said that the Defendant wanted to be a rapper. She described her love for the Defendant as that of a mother to a child. She lectured the Defendant "many a times" on staying away from "doing drugs or robbing people or being involved in any of that behavior[.]" Hatch testified that "it all went downhill" when the Defendant started hanging out with the codefendant, who was on the run for a violation of probation. Hatch also described the day that the Defendant was arrested in her home. After the police arrested the Defendant and left Hatch's house, she left to pick up the codefendant and informed the police, who showed up to arrest him. A few days later, Hatch went to the police station to give her statement.

A series of Facebook messages between the Defendant and Hatch were also admitted into evidence. Several of these messages included references to the Defendant selling drugs, but Hatch testified that she was trying to figure out what the Defendant had so she could tell her husband. She said that she did not report this to the police. Hatch also sent the Defendant pictures of marijuana and wrote "Yummy" under one of the pictures. In another set of messages, the Defendant wrote, "I need some weed[,]" to which Hatch responded, "You want to go in half?" She explained that she was asking this on behalf of the codefendant. She also messaged the Defendant, "Flower man just called taking orders[,]" which she explained was the man down the street asking if anyone wanted to buy marijuana. In another message, Hatch sent the Defendant a link to a picture of breasts, which she said was in reference to an exotic cake that she made. She denied a sexual relationship with the Defendant. Hatch admitted taking several "sexy pictures" of the Defendant but explained that the Defendant asked her to take those pictures. Hatch testified that she did not get paid for her testimony.

KPD Officer James Wilson testified that he was working patrol on the day of the offense when he received a call of a shooting on Linden Avenue. Upon arrival, he observed the victim, "laying partially in the car and partially out of the car." Officer Wilson noticed that the victim had been shot and called for medical attention. Officer Wilson then secured the area where he observed shell casings and canvassed the neighborhood. The State introduced several photographs of the victim's car, one of which depicted a handgun in the driver's side floorboard.

Timothy Schade, a KPD crime scene technician and certified latent print examiner, testified that he also responded to the shooting call and took several photographs of the crime scene, most of which showed cartridge casings. Schade also recovered four casings from inside the car and one from outside, and he processed several items from inside the car for fingerprints. The victim's car was towed to the KPD's Forensic Unit garage, and Schade processed the car for fingerprints with magnetic

powder. One set of prints matched Kevaugh "Lil Kill" Henry, but the other seven sets did not appear in the Automated Fingerprint Identification System (AFIS). Schade eventually fingerprinted the Defendant, and he was able to match the Defendant's prints to six identifications "on or around the passenger side door" of the victim's car. He found "three finger or palm prints on the exterior of the car that matched [the Defendant]" and one from the interior of the car near the armrest matching the Defendant. He also found five sets of prints matching the codefendant that were located on or around the exterior door on the front passenger side of the victim's car.

On cross-examination, Schade explained that the first casing was recovered on the street outside the rear passenger side of the car. The second casing was recovered from "the little section on the passenger side rear door that you would use to grab the door to shut it." The third casing was found in the floorboard of the front passenger seat. The fourth casing was recovered from the floorboard of the front driver's seat, and the fifth was recovered from the floor of the rear driver's side. A sixth shell casing was never recovered.

Schade further explained that people do not always leave fingerprints behind when they touch a surface. He matched prints taken from a Powerade bottle recovered from the victim's car to the victim, but he was unable to match the prints recovered from a Coke bottle or the gun to anyone. Schade testified that there are variables that determine why one fingerprint might be lighter and another might be darker. He said that he "couldn't scientifically say whether a print was left today or yesterday or last week." On redirect examination, Schade testified that Kevaughn "Lil Kill" Henry's prints were lighter than the other prints on the car.

Dr. Phillip Axtell, a licensed psychologist, testified that he received a court order to evaluate the Defendant. He was told not to ask the Defendant about his arrest or the events on the day of the crime, which limited his evaluation to treatment recommendations. He conducted a psychosocial evaluation of the Defendant based on a sixty to ninety-minute clinical interview. He recommended "[t]reatment and counseling, primarily to deal with stress, benefit from counseling or therapy to help [the Defendant] cope with memories from previous traumatic events, individual and/or group therapy, therapy to give him extra coping skills." He said these services could be provided "in a detention facility, in-patient, or as an outpatient basis." He said that PTSD was a possible diagnosis, and his report was admitted as an exhibit to the hearing.

Justin Campbell, the Court Division Coordinator for first-time offenders in juvenile court, supervised the Defendant for offenses including disorderly conduct, false report, curfew violation, and an active runaway petition. Although the Defendant was

"very well[-]mannered and respectful," he did not follow through on his probation requirements.

Dr. Keith Cruise, an Associate Professor of Psychology at Fordham University, evaluated the Defendant regarding his "current mental health functioning," "exposure to traumatic events and possible current traumatic stress reactions," and "possible rehabilitation." Dr. Cruise conducted evaluations of the Defendant in January and May 2016. As part of his first evaluation, Dr. Cruise met with the Defendant at the detention center for six hours. He described this as a "structured interview" in which he reviewed mental health symptoms. He also interviewed members of the Defendant's family. He conducted the second evaluation to "provide additional information about possible rehabilitation services and an update to any opinions from [his] initial report." Dr. Cruise also reviewed the Defendant's Department of Children's Services (DCS) school records, his arrest report, his juvenile social file, the petition from this case, Dr. Axtell's report, and a letter from Natchez Trace. Dr. Cruise described significant events from the Defendant's life, including the loss of his father before he was born, growing up in what he called a "war zone," witnessing family violence, being shot at, and experiencing the deaths of his aunt and his grandfather.

Dr. Cruise diagnosed the Defendant with three disorders: PTSD, Moderate Cannabis Use Disorder, and Conduct Disorder. He described the death of the Defendant's grandfather as the "turning point" for his PTSD. Dr. Cruise opined that an adult correctional facility would be "ill-equipped" to respond to the Defendant's mental health needs. The Defendant was accepted into Natchez Trace youth facility, which Dr. Cruise stated would have appropriate treatment options for the Defendant. Dr. Cruise believed that the Defendant was amenable to treatment, and he noted that the Defendant was willing to participate in trauma-based treatment.

On cross-examination, Dr. Cruise acknowledged the Defendant's school suspensions beginning in 2011 through 2015, noting that the Defendant's school suspensions decreased after his grandfather's death. Dr. Cruise also noted that the Defendant was a member of "The Chain Gang," which he concluded was not a real gang. Dr. Cruise stated that he did not look at the Defendant's Facebook page as part of his evaluation, and he opined that the Defendant was truthful throughout his interviews.

In determining whether to transfer the Defendant to criminal court, the juvenile court considered the factors as outlined in Tennessee Code Annotated section 37-1-134(a)(4). In regard to part (A), whether there was probable cause to believe that the child committed the delinquent act as alleged, the juvenile court reasoned, in pertinent part, as follows:

I've heard a lot of people in my lifetime try to define what reasonable grounds means. I've heard it called probable cause. I've heard it called a balancing test. I heard [defense counsel]--I listened very carefully to her--refer to it as a preponderance of the evidence. We know that it does not approach the level of moral certainty. It doesn't get there.

I tend to try to break things down simply. What it means to me is [] it reasonable for me to believe based on the evidence that I heard that [the Defendant] was there and took the victim's life. Is it reasonable for me to believe that.

I don't have to be certain. I don't have to be sure. I don't have to ultimately know the answer, but is it reasonable to believe. And in examining whether it's reasonable for me to believe I must look at possibilities.

I think the fingerprints through all that confusion and all of the testimony and all of the slides and the breakdown--all the fingerprints really tell us is that at some point at sometime he was at or in that car. We know that. No doubt.

Then we look at the testimony of Ms. Hatch. And for the record, I find parts of her testimony despicable. That's the nicest thing I can say about my feelings about her relationship with this young man. Despicable.

I believe in my heart Ms. Hatch is one of the reasons that we're sitting here today. I believe he was allowed to be at Ms. Hatch's when he didn't need to be there. I believe he was into bad things with Ms. Hatch. I believe he and the other young men were in an enterprise with Ms. Hatch and were running wild.

I was offended, disturbed, creeped out by Ms. Hatch. But I also believe he told her, "Mama, I 'effed' up. I killed a man." I believe he said that. I believe she heard that. Despite the improper nature of their relationship, despite the obvious enterprise that they were in, despite the fact she creeps me out, I believe that this young man told her that. I believe those were his fingerprints on the car that day. From those two things I find reasonable grounds to believe that he committed the delinquent act.

The juvenile court observed that part (B) of the statute was not in dispute in the Defendant's case and stated that there was "reasonable grounds to believe that [the Defendant] is not committable to an institution for the developmentally disable or mentally ill." Regarding part (C), whether there was probable cause to believe that the interests of the community required that the child be put under legal restraint or discipline, the juvenile court stated that it agreed with both mental health experts "completely" and that it "[did not] doubt for a minute that the adverse childhood experiences [the Defendant] suffered could have led to [PTSD]." The juvenile court also agreed that the Defendant suffered from Cannabis Use Disorder and Conduct Disorder.

The juvenile court then engaged in an extensive analysis of each of the six factors under section 37-1-134(b), and concluded, in pertinent part, as follows:

> The extent and nature of the child's prior delinquency records. They don't tell us a whole lot here. There's not a whole lot of history here from delinquency.
>
> If I looked at the ACS records, if I listened to the reports and the information that the psychologists had been given -- although I have to weigh their opinion by what they've not been told -- I think they were both at a very unfair disadvantage. They were not allowed to question the child about the acts or the things that lead up to the acts, because the defense was attempting to put on a defense to the reasonable grounds to believe that it happened. So they're not going to let their experts ask questions about the facts leading up to that day. And I think that made it tougher for them to do their job.
>
> But I think the extent and nature of the child's prior delinquency records is not of great importance here, because he just had his first brush with the court system and wasn't – I don't think there's a lot there that's going to change and help me make my decision one way or the other as to whether the interests of the community require that the child be put under legal restraint and discipline.
>
> "The nature of past treatment efforts and the nature of the child's response thereto." Well, there hasn't been much – hasn't been any, and what little he was tried to be given here he didn't play. He was off running wild at Ms. Hatch's and smoking dope and selling dope and playing on the

Internet and shooting guns off the back porch of the house with her watching.

. . . .

"Whether the offense was against a person or property with greater weight in favor of the transfer given to an offense against a person." This was murder. A person died, and his life meant something. And what the statute is talking about here is when you hurt someone or you take someone's life, there's a greater weight in favor of transfer. Not much any defense team can do with that except point out that's pretty much the case in all murders.

I think the important question here --now, let me talk about (6) first before I get to (5), which I think may be the more important factor in this case. "Would the child's conduct be a criminal gang offense."

. . . .

I don't know if five people in a "Chain Gang" makes it a gang or not, but I'm not too worried about it one way or the other in this case. It's a factor, and it's an important factor in Knoxville, particularly with the level of organization we seem to have out there. I can't tell in this particular case whether it makes a whole lot of difference or not.

I think what's more important is the people that were there that day acted in concert. I don't have any idea if they're officially in a gang. I don't have any idea where to draw that line; if five people make a gang, if it takes 20. No one has ever told me. But there's certainly some argument each way on factor number (6) whether this was a gang offense. And I can understand the defense's position that it was just a group of kids hanging out together. I don't know where you draw that line.

But again, I think the possible rehabilitation of the child is what this case comes down to in my mind. And the General hinted at it in her argument twice, that he's 17 years and three months old. He has 21 months left. What's available out there to rehabilitate someone to make them a productive citizen that I would feel safe about putting out in the community? What's available out there to do that in 21 months? Because if I keep him here when he's 19, he walks. He does whatever he wants to. So 21 months? How can I take a person whose conscience has been so

killed that the taking of a human life has so little value, how can he be rehabilitated in 21 months with the time I got left?

Based on the testimony I've heard, I must conclude that he can't. The decision will be to transfer him and try him as an adult.

Accordingly, on June 10, 2016, the juvenile court entered an order for the Defendant to be transferred to criminal court to be tried as an adult.

Criminal Court Proceedings

On July 27, 2016, a Knox County grand jury indicted the Defendant for two counts of first-degree felony murder (counts 1 and 2) and two counts of especially aggravated robbery (counts 3 and 4). On September 23, 2016, the Defendant filed a motion to dismiss counts 1 and 2 of the indictment, arguing that, if the Defendant was convicted on these counts, he would face an automatic life sentence of at least fifty-one years. The Defendant argued, "Such an automatic sentence, imposed without consideration of [the Defendant's] unique characteristics or the general nature of juvenile development, and without regard to whether he himself intended to kill, would be unconstitutional."

Trial. On January 22, 2018, the Defendant's eight-day jury trial began. Phyllis Caldwell, the victim's mother, testified that she last saw her son alive on Sunday, November 15, 2015, when he left for work. She communicated regularly with her son by his cell phone, which was 865-216-[xxxx]. She continued to text the victim, but he stopped responding. She informed the police that the victim had an Apple cell phone, but she never saw that phone again. She continued to pay the victim's phone bill for several months after his death to assist the police investigation. Michael Mays, an employee of Knox County Emergency Communications District, explained that two 911 calls were made on the day of the offense, a recording of which was admitted into evidence and played for the jury. A computer aided dispatch (CAD) report, which generates all activity pertaining to 911 calls, was also admitted into evidence. The first call from Alneshia Allison was received at 5:23 p.m. She reported that someone had been shot and was hanging out of his car. Allison testified at trial and confirmed the substance of the 911 call. The second call was received from Ralph Hunter, who also testified at trial. On the day of the offense, Hunter was sitting on his front porch on Linden Avenue and heard gunshots. When he looked up the street, he saw "two young men running from a maroon car that was parked on the opposite side of the street." Hunter initially heard two gunshots and then "a few more" soon thereafter. On cross-examination, Hunter

explained that he heard a total of six or seven gunshots with only "a matter of seconds" between the first two shots and the second four shots.

Sergio Rosles lived on Linden Avenue and had two dogs. He also had several video cameras set up around the outside of his house. Rosles testified that on the day of the offense he "suddenly heard about three gunshots." He looked outside his front window and saw "two or three" people running on the right side of a car. Rosles later reviewed the video surveillance from his home camera system and provided it to the police. The State introduced this video into evidence and played it for the jury. The parties agreed that, although the time stamps on Rosles's videos were not accurate, they were useful for computing the correct times for when events occurred. Rosles explained that, at an hour, seven minutes, and seventeen seconds into the video, the video shows a red car and "two people running to the yellow house." He stated that the police arrived five to ten minutes later.

The video also shows four camera angles around Rosles's house. One of the camera angles shows Rosles's front porch, and his dog can be seen sitting on the porch. Three of the cameras show the streets around Rosles's house. At 6:52:26, a car can be seen pulling over and stopping on Linden Avenue near Rosles's house. At 6:54:00, Rosles's dog jumps. The parties agreed that this was the moment that the first shots were fired. People can be seen running from the car, but they are unidentifiable. A police cruiser, which was later determined to be KPD Officer Jimmy Wilson's vehicle, arrives on the scene at 7:00:06.

KPD Officer Jimmy Wilson, the first officer to arrive at the scene on Linden Avenue, testified that he was less than half a mile from the crime scene when he received the shots fired call. He then activated his emergency recording equipment and responded to the scene. Officer Wilson explained that his police cruiser was in "full record mode" with both audio and video at that time. The video reflects that he received the call at 5:24 p.m. Upon arrival, Officer Wilson secured the scene and determined that the victim did not have a pulse. He observed shell casings inside the victim's car as well as a firearm laying inside the car. He never saw or heard a cell phone from inside the car while he was at the crime scene. He explained that the victim "had his feet and from about his hips down to his feet inside the car," and "his shoulders and his head [were] resting on the ground outside the car as if he was in the driver's seat and had just simply fallen out on his body facing westbound." Officer Wilson also assisted in canvassing the neighborhood for information and searching for the suspects with his K-9 partner. The State introduced the full cruiser recording, which shows Officer Wilson arriving at the victim's car at 17:25:30 or 5:25:30 p.m. The parties agreed that Officer Wilson's cruiser video had an accurate time stamp. The State also introduced screen shots showing when Officer Wilson activated his camera into full record mode and when he left the crime scene.

KPD Sergeant Jeremy Maupin assisted at the crime scene and spoke to witnesses in the area, one of whom heard gunshots and the other who saw the suspects fleeing from the victim's car. He also observed a surveillance video from the Thumbs Up Market, which showed two individuals in dark clothing running westbound through the alley, but he was not able to recover this footage.

Timothy Schade, an expert in the field of a latent fingerprint examination, described the different processes for obtaining latent prints and the variables involved with leaving a fingerprint behind. Schade also responded to the scene on Linden Avenue and took hundreds of photographs of the crime scene and the evidence collected. The first set of photographs depicted the victim's car at the crime scene. Several of the exhibits showed cartridge casings, a gun on the front driver's side floorboard, a t-shirt and a glove on the front passenger's side floorboard, a Coca-Cola bottle, a Powerade bottle, and a phone charger. Schade did not recover a cell phone from the car. A set of photographs showing the evidence after Schade collected the items from the victim's car, a set of photographs showing the victim's car after it was taken to KPD's garage, and a set of photographs showing the fingerprints left on the victim's car were also admitted into evidence. Schade recovered five spent shell casings from the crime scene. He also recovered a plastic container holding several pills. Schade explained that he used magnetic powder to recover fingerprints from the victim's car.

Schade went to the Defendant's house and took pictures which showed rounds of ammunition recovered from a headboard in the front bedroom of the Defendant's house and two cell phone covers. Schade also took pictures of the items taken from the codefendant after he was arrested, which included a backpack, a gun, cartridges, and a cell phone. Schade also went to the Medical Examiner's office, fingerprinted the victim, performed a gunshot residue kit on the victim, and collected all the evidence from the victim, which included the following: clothing, six spent rounds collected from his body, a package of Swisher Sweet Cigarillos, a baggie of marijuana, and $835 in cash. Four spent cartridge casings, a nine millimeter, two Lugers, and an FC nine millimeter, were also admitted into evidence. The gun that was recovered from the victim's car, a SCCY nine millimeter was also admitted into evidence, and Schade noted that he took buccal swabs from the Defendant and the codefendant.

Schade recovered three sets of prints from the outside of the victim's car which belonged to Kevaughn "Lil Kill" Henry, the codefendant, and the Defendant. He specifically compared the fingerprints of J'Andre Hunt to the latent prints from the items recovered from the scene, which were not a match. Schade fingerprinted the Defendant following his arrest, and these print cards were entered into evidence. Schade matched the Defendant's fingerprints to the following areas of the victim's car: "above the wheel

well on the passenger side and behind the rear door going towards the back of the car[,]" the passenger side armrest on the interior side of the door, and the exterior side of the rear passenger door. Schade confirmed that these prints belonged to the Defendant.

On cross-examination, Schade testified that, when he arrived on the scene, the front doors of the victim's car were open, and the rear doors were closed. Schade did not move the gun found in the front driver's side floorboard before photographing it, but he could not say whether someone else had moved it. The gun had nine rounds in the magazine and one in the chamber, and there were no usable prints obtained from the gun. Schade could not opine when each set of fingerprints was left on the victim's car. He focused mainly on taking prints from the passenger side of the car. He did not dust the driver's side of the car for fingerprints, and he did not test any of the items found in the trunk of the victim's car.

KPD Officer Edward Johnson, another latent print examiner, testified that he verified Schade's fingerprint examinations and reached the same result. Officer Johnson also personally collected the fingerprints of J'Andre Hunt and determined that they did not match any of the latent prints taken from the victim's car.

J'Andre Hunt testified that he met the victim through Kevaughn "Lil Kill" Henry, one of his older friends whom he knew as "Kill." Hunt did not know the Defendant at the time, and he did not recognize the Defendant at trial. He also did not know the codefendant. Hunt denied being in the victim's car on the day of the offense, and he testified that he did not shoot the victim or try to rob him. He confirmed that he went to the police station on the night of the offense and provided them with a statement, fingerprints, and a buccal swab. On cross-examination, he agreed that he had been in the victim's car several different times, and he acknowledged that he told the police during his interview that they would find his fingerprints in the victim's car. Hunt stated that the victim would come over to his house twice a week, and they would "chill in the driveway" and smoke weed. He was not aware that the victim was selling pills or drugs, and he communicated with the victim primarily through Facebook.

Alex Brodhag, an expert in firearm identification and examination with the Tennessee Bureau of Investigation (TBI), performed a "muzzle to gun and distance determination" on a jacket worn by the victim to determine the distance from the muzzle of the gun when it was fired to the victim's clothing. Brodhag was only able to determine that there was gun powder residue in five out of eight holes in the victim's jacket. The presence of gunpowder indicated that the gun was shot within six feet of the victim, and his report reflecting such was admitted into evidence. On cross-examination, Brodhag could not explain why some of the holes did not have gunpowder residue around them. He agreed one explanation was that the gunpowder residue could have fallen off prior to

it being tested. He also stated that, without the suspect firearm, he could not determine the distance from which the shots were fired at the victim.

KPD crime technician Stephanie Housewright went to the home of Linda Hatch on November 20, 2015, and took several photographs, which were entered into evidence. The photographs showed the back of the house, the back porch, and two nine millimeter shell casings, which she collected as evidence.

Kim Lowe, a forensic biologist for the TBI, testified that she created DNA profiles for the victim, the Defendant, and the codefendant, and her report was admitted as an exhibit. She matched the t-shirt and the glove found in the victim's car to the codefendant. The Powerade bottle contained only the DNA of the victim and an unknown female. The victim's jacket tested positive for the DNA of the victim, but the results as to the major contributor were inconclusive. Agent Lowe also tested the swabs from the rear and front passenger headrests, which were inconclusive. On cross-examination, Agent Lowe confirmed that none of the items that she tested were positive for the Defendant's DNA. She also established that the victim's jacket was transported multiple times from the inception of the case based on the chain of custody records.

Linda Hatch provided testimony at trial which was consistent with her testimony from the juvenile transfer hearing. Additionally, Hatch testified that when the Defendant came to her house the morning after the offense, the following occurred:

> And when I had my children to leave the room, he had his head bowed in his hands and he was crying a little bit. And I said "Ty, honey, what's wrong?" And he said, "momma, I f--ked up." And I said, "what? Baby, what? What, Ty fly, what's wrong?" And he was trying to talk. And I said "it's okay. Is it you and mom? Is it you and your mom? Is it you and your brother?" "No, momma. I've f--ked my life up." And I said "what have you done, Ty? What did you do?" And he said "momma, I killed a man." And I said "what, Ty? What? No you didn't." And he said "yes, I did, momma. We killed him." And I said "you killed who?"
>
> And I thought my mind was totally in denial because my Ty wouldn't do that. And he said "momma, momma, I shot a man and I killed him and I didn't mean to. And I'm sorry.". . . And I said "what do you mean you killed someone, Ty?" And he said, "momma, it went so wrong. We were just supposed to meet the man, get some weed, take his money. We wasn't supposed to hurt him. Savvy said we would just take his drugs and money."

. . .

> And I said "let's slow down and go back." "Ty, did you take that gun and shoot--did you kill somebody with that gun?" He said, "yeah." "But I didn't mean to, mom." He said, "Savvy called the boy up and set it up. Said he would meet us and we would just get it, you know, get his money. Get the weed. And we would go. But it went bad." And I said, "like what happened? What happened, Ty? What happened?" And he said when he got there it happened so fast, momma. It happened so fast. He said he pulled up. We got--we was just going to, you know, get in and he said Savvy grabbed him and was going to hold him and I was just going to grab, you know, was going to grab the money, grab the weed, and we were gonna go. And he fought and he broke loose. Savvy couldn't hold him. And momma, Savvy said shoot him. Shoot him, Ty. And Ty said, "I pulled the trigger and when I pulled it, I couldn't stop. It just kept shooting. And when I stopped--when I let go--when I realized what was going, I had emptied all the bullets." And I said "how do you know you killed him? You could have wounded him. You could have scared him. That don't mean [sic] you killed him, Ty." And he said, "momma, he was dead. That n---er, we left him dangling dead and we took off running. He was dead."

The Defendant also told Hatch that he threw the gun away and took off running after he shot the victim. He said his brother bought him a clip of hollow point bullets, and that he "blew [the victim's] chest out[.]" Hatch saw the Defendant the following day and described his demeanor as "very proud, happy, almost very swag cool" that morning. The Defendant told Hatch that the news had the wrong description of the suspects. He also told Hatch that he had shot the victim in the back.

The next day, the Defendant was arrested at Hatch's home, and shortly thereafter, the codefendant was arrested. Hatch subsequently provided the police with the video of the Defendant, the codefendant, and another friend, "Ears Tate," walking around her house, which was entered into evidence. The video showed Ears Tate with the Defendant's gun "stuck down his pants." Ears Tate pointed the gun at the codefendant and said "boom, boom, boom, boom," and the Defendant said, "give me back my gun."

Hatch also provided the State with copies of Facebook messages between her and the Defendant, which were admitted as an exhibit. Hatch could not recall when she gave these messages to the State. The Defendant's name on Facebook was "Ty Hellabands Booker." In these messages, Hatch and the Defendant talked about tattoos, the Defendant's gun, and drugs. The parties stipulated that "Hatch first provided the State of

Tennessee with a set of Facebook messages previously introduced into this record at trial in August of 2017."

On cross-examination, Hatch testified that she thought of the Defendant as one of her children. She asked the Defendant what kind of drugs he had so that she could tell her husband what the Defendant was bringing into her home. Hatch denied asking the Defendant if he wanted to "go in half" on buying "weed[,]" but explained that her niece had sent these messages from her phone. Hatch also sent the Defendant pictures of marijuana and told him that the "flower man" was "taking orders." She explained that this referred to one of the Defendant's friends selling marijuana. Hatch also sent the Defendant a link to an image of a woman's breasts, which she explained was to get the Defendant's opinion on a cake that she was making. Hatch also took what she described as "sexy" photographs of the Defendant and sent them to him. Hatch said she never smoked weed with the Defendant and that her relationship with the Defendant was "absolutely not" sexual.

A custodian of records for Sprint, Tom Koch, testified and authenticated four call detail records associated with the victim's phone number, (865) 216-[xxxx], which were denoted in central standard time. The first three calls were made to the same number, (865) 227-[xxxx], later determined to belong to the Defendant's girlfriend, Jada Mostella. These calls occurred at the following times: (1) 16:03:33 and ended at 16:04:04; (2)16:10:32 and ended at 16:11:04; and (3) 16:18:08 and ended at 16:18:45. The fourth call was made to (865) 577-[xxxx], later determined to belong to the Defendant's friend, Shanterra Washington, and occurred at 16:18:57 and ended at 16:19:58. There were no further outbound calls made from this number. Koch agreed that the "non-entries" would indicate that the phone was off or outside the range of cell service. Jada Mostella testified and confirmed her phone number, as reflected in the first three calls on the victim's cell phone. At the time of the offense, Mostella was dating the Defendant. She also knew the codefendant, but she did not know the victim, Kevaughn "Lil Kill" Henry or J'Andre Hunt. Shanterra Washington testified and confirmed her home phone number, as reflected in the fourth call on the victim's cell phone. She said the Defendant was her best friend and that she knew the codefendant. She did not know the victim or Kevaughn "Lil Kill" Henry, and that she was familiar with J'Andre Hunt.

Kevaughn "Lil Kill" Henry testified that he knew the Defendant and the victim, and that he had been in the victim's car prior to his death. Henry had viewed the Defendant's Snapchat account in the summer of 2015, and observed the Defendant shooting a gun that "looked like a 9 mm[,]" from someone's back porch. Henry believed that the codefendant was with the Defendant in the video. Henry explained that Snapchat videos disappear within 24 hours after being uploaded, and he did not save this video. He said he informed the State of the video "somewhere pretty early in [the Defendant's]

case." Henry also provided a statement to the police after the victim was killed. Henry testified that he was good friends with the victim, and that he was not involved in the victim's death. On cross-examination, Henry agreed that his fingerprints were found on the victim's car and that he was initially a suspect.

Tiffany Springer lived in South Knoxville with Linda and Heath Hatch and her little brother. She met the Defendant at school and described him as an older brother. She testified that he came to her house every day after he met Linda Hatch. Springer also knew the codefendant and Ears Tate, and she acknowledged that they referred to themselves as the "Chain Gang." Prior to the offense, Springer observed the Defendant and the codefendant in possession of a gun, but she never saw them shoot a gun. On the morning after the offense, the Defendant came to Springer's home to speak to Hatch. Springer overheard the Defendant say, "'I f'ed up my life.'" She also heard him say, "'I didn't know what to do, I panicked so I just--I kept going. I kept pulling it.'" Springer stated that when the Defendant came back to her house the next morning, he "wasn't acting the same as he did on Monday." On cross-examination, Springer stated that she had discussed the Defendant's arrest and the events surrounding it many times with her mother. Springer saw the Defendant smoking marijuana, but she never saw her mother smoking with the Defendant. Springer had a Facebook account in November 2015, but she never communicated with the Defendant via Facebook Messenger. She was aware that her mother communicated with the Defendant through Facebook Messenger, but she never used Hatch's Facebook Messenger to communicate with the Defendant about drugs.

Heath Hatch, Linda Hatch's husband, was a maintenance technician and worked a 6:00 a.m. to 4:00 p.m. shift. He saw the Defendant and the codefendant in his home multiple times, and he observed the Defendant with a "black 9 mm." The Defendant told Heath that the gun was not working properly, and Heath inspected the gun and tried to disable it, but he was unable to do so. Heath never saw the Defendant fire the gun, but he did observe several shell casings in his backyard. Heath testified on cross-examination that he was not aware of his wife smoking marijuana with the Defendant.

Detective Thomas Thurman with the KPD Violent Crimes Unit responded to the scene of the offense the following morning and identified two public information press releases regarding the crime and the suspects, which were admitted as exhibits. Detective Thurman also participated in the interviews of J'Andre Hunt and Kevaughn "Lil Kill" Henry. Detective Thurman received information regarding the Facebook accounts of the Defendant and the codefendant, and he used their fingerprints to apply for arrest warrants. Although Detective Thurman executed a search warrant of the Defendant's residence, it did not produce anything of value to the investigation. Detective Thurman also interviewed Hatch, retrieved a video from her laptop, and unsuccessfully attempted

to locate the victim's cell phone. Detective Thurman also confirmed that the murder weapon was never recovered. In regard to Hatch, Detective Thurman said that she told him to "write [her] check bigger," during an interview, that he told her they were "working on getting [her] processed" as an informant, and that she was never officially an informant. Hatch also wanted KPD to pay her for her son's basketball that was destroyed when the police arrested the Defendant.

Christine Fitzgerald, the Employee Benefits and Risk Management Director for the City of Knoxville, testified that Detective Thurman filed a claim for damaged property belonging to Linda Hatch, which was approved for $30. Hatch signed a release of claims liability. KPD Sergeant Andrew Boatman testified that Hatch had not acted as a controlled informant for the KPD in the past or at the time of the Defendant's trial. Neither Heath Hatch nor Springer served as confidential informants for the KPD. On cross-examination, Sergeant Boatman testified that the KPD does not keep records of every person who "raises the possibility of acting as a confidential informant with anyone in the police department." Sergeant Boatman was also qualified as an expert in narcotics distribution and investigation, and he testified that the victim had "Roxicodone 30s" in his car on the night that he was killed. He stated that it was possible, based on the items recovered from the victim and his car, that the victim was engaged in the "distribution or possession with the intent to distribute controlled substances."

Patricia Resig, an expert in the field of firearms, examined the following from the crime scene: a nine millimeter Luger caliber bullet recovered from the victim's right shoulder; a fired nine millimeter caliber bullet recovered from the victim's right chest wall; a fired nine millimeter caliber bullet recovered from the victim's right chest cavity; a fired nine millimeter caliber bullet recovered from the victim's left chest wall; a fired nine millimeter caliber bullet recovered from the victim's stomach; and a fired nine millimeter caliber bullet recovered from the left sleeve of the victim's jacket. The bullet recovered from the victim's right chest cavity was a hollow point bullet, indicating that it was Federal ammunition, and the other bullets were consistent with Winchester ammunition. Resig determined that the six bullets "display[ed] consistent class characteristics," and that there was "[s]ome agreement of the individual characteristics [which] could have been fired through the same unknown barrel."

In regard to the five shell casings recovered from the crime scene, Resig determined that there was "a lack of sufficient matching individual characteristics[,]" but opined that "all the casings could have been fired in the same unknown gun." Four of the casings recovered from the crime scene were nine millimeter Luger caliber Winchester cartridge casings, and one was a nine millimeter Luger caliber Federal cartridge case. Resig also examined the cartridges recovered from Hatch's back porch, and she determined that both were nine millimeter Luger caliber Federal cartridge cases.

She determined that these two cartridge cases and one cartridge case recovered from the crime scene were fired from the same unknown firearm. She determined that the other four cartridge casings recovered from the scene could have been fired from the same firearm. Resig also examined the nine millimeter SCCY semi-automatic handgun recovered from the victim's car, and she determined that none of the cartridge casings recovered from the crime scene were fired from that gun. Lastly, Resig examined a .32 caliber handgun which was previously identified and introduced as the gun that was confiscated from the codefendant when he was arrested. She testified that this gun would not fire nine millimeter ammunition; therefore, it did not fire any of the casings recovered from the crime scene or from Hatch's back porch. Resig's report of her findings was admitted as an exhibit at trial.

The parties entered a stipulation and agreed that "[i]n June [] 2015 Tyshon Booker and [the codefendant] were observed in each other's company."

Dr. Darinka Mileusnic-Polchan, the Chief Medical Examiner for Knox County, testified as an expert in forensic pathology. Dr. Mileusnic-Polchan performed the autopsy on the victim and confirmed that he had four gunshot wounds to the back of his body. She also found "a lot of money" on the victim's body. Dr. Mileusnic-Polchan examined the jacket that the victim was wearing, and she testified that there were several holes in the jacket that matched up to the victim's gunshot wounds. She used a mannequin to demonstrate the trajectory of the bullets. The toxicology report revealed that the victim had a marijuana metabolite in his system when he died. The victim's manner of death was homicide, and his cause of death was multiple gunshot wounds.

The Defendant testified that he was in the victim's car on November 15, 2015, along with the codefendant. However, the Defendant said that he did not intend to rob the victim. The Defendant insisted that he shot the victim because he thought the victim was going to shoot him or the codefendant. The Defendant described his background at trial. He grew up with his mother and four brothers. His father was killed two weeks before he was born. He described his relationship with his mother as "rocky," and he stated that he would get kicked out of the house when he argued with his mother. The Defendant had a close relationship with his grandfather, who was stabbed to death. The Defendant grew up in East Knoxville, but his family moved to South Knoxville prior to the offense. The Defendant attended South Doyle High School, went to school "from time to time," and regularly smoked marijuana with his friends.

The Defendant met Linda Hatch on July 29, 2015, after his mother kicked him out of the car and Hatch offered him a ride. He got in Hatch's car, and she told him that she was his neighbor and her daughter was always talking about him. The Defendant stated that he and Hatch smoked marijuana while he was in her car. After that, the Defendant

began going to Hatch's house daily. He spent the night at Hatch's house, and she gave him tattoos and bought him things. They smoked marijuana and drank alcohol together. The Defendant communicated with Hatch through Facebook Messenger, and he described several of the messages sent between them. He did not communicate with her daughter, Springer, through Hatch's Facebook account. The Defendant sold crack cocaine, and Hatch helped him find buyers. The Defendant also described two sexual encounters that he had with Hatch. The Defendant testified that he had a nine millimeter gun in November 2015, and that he shot it at Hatch's house. He said the codefendant also had a gun, but it did not function correctly.

The Defendant described the events leading up to the death of the victim as follows. The codefendant showed the Defendant a Snapchat video from the victim inviting him to smoke marijuana, and the victim eventually picked them up in his car. The codefendant sat in the front-passenger seat, and the Defendant sat in the back-passenger seat. The Defendant stated that he had never seen the victim or his car prior to the day of the offense. The Defendant could not recall when the victim picked them up, and he did not know how long they were in the victim's car. He said his gun was hidden under his shirt on his right hip, so the victim would not have known that he had a gun. The victim asked them if they knew where to buy marijuana, and he offered them Oxycodone pills. They each took two pills, and the victim drove them to a different house and gave the codefendant money to buy marijuana. The Defendant and the victim waited in the car and listened to music while the codefendant went inside to get the marijuana. The victim then drove to a gas station and bought cigars to smoke the marijuana.

The Defendant stated that he planned to meet his girlfriend, Jada Mostella, later that day, and he used the victim's cell phone to call her. He also planned to stop by his grandfather's house on Linden Avenue, and he asked the victim to take him there. The Defendant, the victim, and the codefendant rode around in the victim's car "smoking and listening to music[,]" and the Defendant tried to call Mostella again. He also tried to call his friend, Shanterra Washington. The Defendant stated that he was trying to call again when they pulled up to his grandfather's house on Linden, and he saw the victim reach over to the codefendant's pockets. The Defendant had the victim's phone in his right hand when the codefendant and the victim began to fight. The codefendant said, "F—k," and hit the victim. The codefendant told the Defendant that the victim had a gun, and they continued to wrestle for the gun. The Defendant said the victim was holding the codefendant with his right arm while "bobbing and weaving," and the codefendant was swinging at the victim. "[The victim] started mushing [the codefendant] while reaching underneath his seat." The Defendant said he "felt the need to help [the codefendant]," and the codefendant "put [his] hands up like [he] was gonna swing on [the victim]." The victim said, "So you all are going to gang me[,]" and reached for his gun. Asked if there

was anything preventing the Defendant from getting out of the car at that point, the Defendant replied, "Yeah, my friend that's preventing--I'm not about to leave [the codefendant], we came here together, we're gonna leave together." The Defendant pulled out his gun as he saw the victim turn towards him with a gun. The Defendant said he was scared, and he thought the victim was going to shoot him or the codefendant, so he shot the victim. The Defendant said the victim "didn't stop" so the Defendant shot him several more times. Eventually, the victim "stopped coming for [them][,]" dropped his gun, opened his door, and fell out. The Defendant and the codefendant then got out of the car and ran. As the Defendant was running, he threw away the gun and the victim's cell phone. He had not realized he still had possession of the victim's phone until he was running from the car. When he was unable to reach Hatch, he called his mother to get a ride home. The next morning, the Defendant went to Hatch's house and told her that he shot someone. He denied telling her that he had tried to rob the victim, and he insisted that he told her the same thing that he was telling the jury.

On cross-examination, the Defendant agreed that it "made sense" that fingerprints belonging to him and the codefendant were found on the victim's car. The Defendant also stated that he did not know Kevaughn "Lil Kill" Henry and that neither Kevaughn "Lil Kill" Henry nor J'Andre Hunt were in the victim's car with them on the day of the offense. The Defendant had the gun in his right hand and the victim's cell phone in his pocket when he got out of the car. The Defendant was unaware that the victim had cash in his right pocket, and he did not see where the victim had the pills. The State introduced one of the Defendant's Facebook posts, which said, "I been thru it all…robbed n---as, got robbed, shot at, shot back, couple n---az got whacxed [sic]. I done been thru it all." The Defendant explained that these were rap lyrics, and the defense played the song for the jury. On redirect examination, the Defendant stated that he never intended to steal the victim's cell phone, and that he did not know he had it until after the fight.

Following submission of the above proof, the jury found the Defendant guilty as charged, and upon merging count two into count one, the trial court imposed a sentence of life imprisonment. On March 16, 2018, the trial court conducted a sentencing hearing during which several of the victim's family members gave statements about the impact of the victim's death on their lives. A psychological evaluation and follow-up examination conducted by Dr. Keith Cruise was also admitted as an exhibit to the hearing. Following merger of counts three and four, the trial court imposed a twenty-year sentence to be served concurrently to count one, for an effective sentence of life imprisonment.

On May 29, 2018, the Defendant filed a "Motion for Evidentiary Hearing and New Trial Based on the Jury's Misconduct and Exposure to Extraneous Information." In an accompanying affidavit, defense counsel averred that, following the verdict, the Knox County Public Defender's Office sent letters to the petit jury asking to discuss certain

aspects of the Defendant's case. Defense counsel subsequently spoke to juror Lambert, who told them that the jury looked up information regarding the number of years the Defendant would serve for a life sentence in Tennessee during deliberations. Following this discussion, defense counsel attempted to contact the other jurors. Investigator Gerald Witt of the Knox County Public Defender's Office also provided an affidavit stating that he contacted juror Lambert, and she told him that the jurors looked up "terminology" relevant to the Defendant's case and shared that information with the entire jury. The State subsequently filed a "Motion to Prohibit Inquiry into Validity of Verdict." At a hearing held on June 1, 2018, the trial court agreed to subpoena juror Lambert to testify at the Defendant's motion for new trial regarding potential juror misconduct during deliberations.

On June 12, 2018, the Defendant filed a "Motion to Subpoena Additional Juror to Testify at Evidentiary Hearing on Jury Misconduct." Defense counsel asserted that they had received information from a second juror, who stated that "several jurors had been using Google to look up terms during deliberations." Investigator Witt provided another affidavit stating that this juror told him that jurors had looked up the "Webster meaning" of certain words that it was unclear about. At a June 22, 2018 hearing, the Defendant argued that it was necessary for the court to subpoena a second juror to testify as well, but the trial court denied the Defendant's request.

On July 2, 2018, the trial court conducted a hearing on the Defendant's motion for new trial. Juror Lambert testified that she was one of twelve jurors who heard and decided the Defendant's case. Lambert testified that the jury looked up the definition of terms on the internet during deliberations. She testified, in relevant part, as follows:

> The only thing that we looked up was the life sentence and how many years it involved, whether it was a 20[-]year sentence or--but we figured out--found out in the State of Tennessee it's 51 years automatic.
>
> . . .
>
> As far--and then the only other thing was-- that we looked up was terminology and it's been so long that I honestly could not tell you what the exact words were, but it was just a definition. I do know that. It was a definition and it had to--it was a medical word was one of them.
>
> . . .

> I don't recall what the word was, but it was a medical word that someone didn't understand, so we just Googled the word to find out what the definition was.

Juror Lambert explained that this occurred in the jury room and that "somebody got on their phone and looked this up[.]" Although only one person used his or her phone to look up this information, all of the jurors heard it. She could not recall the medical term that the jury looked up, but she stated, "It was a term that had come up in trial." Lambert asserted that the jury did not look up anything concerning the Defendant or the facts surrounding his case. She said both terms were looked up during the jury's deliberations, but she believed that the jury followed the trial court's instructions during deliberations and in rendering its verdict. The Defendant argued for the need to subpoena the second juror to determine what other possible terms the jury looked up during deliberations, which was denied by the trial court.

The trial court denied the Defendant's motion for new trial by written order on July 24, 2018. On August 8, 2018, the Defendant filed a timely notice of appeal, and this case is now properly before this court for our review.

ANALYSIS

I. Apprendi Violation. As an issue of first impression in Tennessee,[3] the Defendant contends that the juvenile transfer hearing process as outlined in Tenn. Code Ann. § 37-1-134(a)(4), violates the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. 2348. This concept applies to any fact that will "expose the defendant to a greater punishment than that authorized by the jury's verdict." Id. at 494, 120 S.Ct. 2348; see also Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 253, (2004) (clarifying that for purposes of Apprendi, the "statutory maximum" is the maximum term of imprisonment a court may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"). The Defendant argues, based

[3] But see Brandon Mobley v. State, No. E2010-00379-CCA-R3-PC, 2011 WL 3652535, at *19 (Tenn. Crim. App. Aug. 18, 2011), aff'd in part, rev'd in part, 397 S.W.3d 70 (Tenn. 2013) (concluding that counsel was not ineffective in failing to challenge juvenile transfer hearing based on Apprendi)(citing Gonzales v. Tafoya, 515 F.3d 1097, 1110-13 (10th Cir. 2008)).

on the principles espoused in Apprendi, that the findings of the juvenile court judge at the transfer hearing exposed him to "the possibility of vastly increased punishment, from incarceration until age nineteen to life imprisonment." As such, the Defendant insists this is a "straightforward" violation of his Sixth Amendment right to a jury trial and the Fourteenth Amendment due process requirement of proof beyond a reasonable doubt. In response, the State contends that Tennessee's juvenile transfer procedure does not violate Apprendi. The State relies on the historic role of Tennessee juvenile courts and the majority view of other jurisdictions that have rejected Apprendi's application to juvenile transfer proceedings. Based on the following reasoning and analysis, we agree with the State, and conclude that the Tennessee juvenile hearing transfer statute does not fall within the scope of Apprendi.

We review issues of constitutional law de novo with no presumption of correctness attaching to the legal conclusions reached by the courts below. State v. Davis, 266 S.W.3d 896, 901 (Tenn. 2008); State v. Burns, 205 S.W.3d 412, 414 (Tenn. 2006). "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." See In re Gault, 387 U.S. 1, 14 (1967) (applying various due process rights to juvenile proceedings including notice of charges, right to counsel, right of confrontation and cross-examination, and privilege against self-incrimination); In re Winship, 397 U.S. 358 (1970) (proof-beyond-reasonable-doubt standard applies to delinquency proceedings); Kent v. United States, 383 U.S. 541, 562 (1966)(holding that the [adjudication] "hearing must measure up to the essentials of due process and fair treatment"); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy protection applies to delinquency proceedings); but see McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion holding that a trial by jury is not constitutionally required for juvenile court adjudications).

Juvenile courts in Tennessee have exclusive original jurisdiction over children alleged to be delinquent. Tenn. Code Ann. § 37-1-103(a)(1) (2011); State v. Hale, 833 S.W.2d 65, 66 (Tenn. 1992). A juvenile court may transfer a child to be dealt with as an adult in the criminal court of competent jurisdiction after a petition has been filed alleging delinquency based on conduct that is designated a crime and before hearing the petition on the merits. Tenn. Code Ann. §37-1-134(a) (2014). The disposition of the child *shall* be as if the child were an adult if the child is sixteen years old or more at the time of the alleged conduct and the charged offense is, inter alia, first degree murder. Id. (emphasis added). At the time of the instant offense, in determining whether to transfer the child to criminal court, the juvenile court was required to find "reasonable grounds to believe" that (A) the "child committed the delinquent act as alleged;" (B) the "child is not committable to an institution for the developmentally disabled or mentally ill;" and (C) the "interests of the community require that the child be put under legal restraint or discipline." Id., §37-1-134(a)(1), (4)(A)-(C). Additionally, in determining whether to

treat a juvenile as an adult as outlined in section (a)(1), the court must also consider, among other matters, the following:

> (1) The extent and nature of the child's prior delinquency records;
>
> (2) The nature of past treatment efforts and the nature of the child's response thereto;
>
> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (4) Whether the offense was committed in an aggressive and premeditated manner;
>
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
>
> (6) Whether the child's conduct would be a criminal gang offense...if committed by an adult.

Id., 37-1-134(b). Hearings pursuant to this part *shall be conducted by the court without a jury*, in an informal but orderly manner, separate from other proceedings not included in § 37-1-103, and pursuant to Rule 27 of the Tennessee Rules of Juvenile Procedure. Tenn. Code Ann. § 37-1-124 (a) (emphasis added). A transfer to criminal court pursuant to this section "terminates the jurisdiction of the juvenile court over the child with respect to the delinquent acts alleged." Tenn. Code Ann. § 37-1-134(c). Moreover, regardless of the seriousness of the offense, any child shall be released from a juvenile court's jurisdiction upon the child's nineteenth birthday. Tenn. Code Ann. § 37-5-103 (4)(A)(b)-(c), (B)-(D)(2011).

In Burns, 205 S.W.3d at 417, the Tennessee Supreme Court cited favorably the reasoning of McKeiver and concluded that article I, section 8 of the Tennessee Constitution does not provide a juvenile defendant with a jury trial upon appeal of a determination by juvenile court to transfer jurisdiction to criminal court. In Burns, the Tennessee Supreme Court characterized the juvenile court system as follows:

> "[T]he system for dealing with juvenile offenders *as juveniles* is separate and distinct from the criminal justice system. On those occasions when a

> juvenile is transferred to criminal court to be tried *as an adult,* he or she is afforded the full panoply of constitutional rights accorded to criminal defendants, including jury trials. Defendant in this case is not, however, being tried as an adult. He is being tried within the context of a system that was designed to avoid much of the trauma and stigma of a criminal trial. We agree with the United States Supreme Court that "one cannot say that in our legal system the jury is a *necessary* component of accurate factfinding." A jury's "necessity" is further attenuated in the context of juvenile delinquency proceedings, which are aimed not at punishing the youthful offender, but at rehabilitating him. We are also persuaded that the McKeiver decision is correct in its concern for the juvenile court's "ability to function in a unique manner" in the absence of a jury. Finally, we agree with Justice Blackmun's observation that, "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it."

Burns, 205 S.W.3d at 417 (emphasis in original) (internal citations omitted). Finally, we are mindful that juvenile proceedings are not "criminal prosecutions." Id. at 418 (citing Childress v. State, 133 Tenn. 121, 179 S.W. 643, 644 (1915) (recognizing that "proceedings before a juvenile court do not amount to a trial of the child for any criminal offense" and that "the proceedings in a juvenile court are entirely distinct from proceedings in the courts ordained to try persons for crime")); see also Breed v. Jones, 421 U.S. at 535 (recognizing that juvenile transfer statutes represent an attempt to impart to the juvenile-court system the flexibility needed to deal with youthful offenders who cannot benefit from the specialized guidance and treatment contemplated by the system).

In Apprendi v. New Jersey, the adult defendant fired several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood. 530 U.S. at 469-71. The defendant was subsequently arrested, admitted that he was the shooter, and upon further questioning, admitted that "even though he did not know the occupants of the house personally, 'because they are black in color he [did] not want them in the neighborhood.'" Id. Although he was later indicted on multiple counts, none of the counts referred to the hate crime statute, and none alleged that the defendant acted with a racially biased purpose. Id. The parties entered into a plea agreement, and the State reserved the right to request the court to impose a higher "enhanced" sentence on the ground that the shooting offense was committed with a biased purpose, as described in the hate crime statute. The defendant, correspondingly, reserved the right to challenge the hate crime sentence enhancement on the ground that it violated the United States Constitution. Id. The trial court accepted the plea agreement.

Following an evidentiary hearing on the issue of the defendant's "purpose" for the shooting, the trial court enhanced the defendant's sentence based on the hate crime statute upon finding "that the crime was motivated by racial bias" and that the defendant's actions were taken "with a purpose to intimidate" as provided by the statute. The defendant appealed, arguing, *inter alia,* that the Due Process Clause of the United States Constitution required that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt. Id. The United States Supreme Court agreed and reasoned due process of law guaranteed "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," which entitled a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Id. (internal citations omitted). Under Apprendi, "Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime," Apprendi v. New Jersey, 530 U.S. at 483, n. 10, and "must be found by a jury, not a judge[.]" Cunningham v. California, 549 U.S. 270, 281 (2007); see also Gall v. United States, 552 U.S. 38, 51 (2007); Alleyne v. United States, 570 U.S. 99 (2013); and Jones v. United States, 574 U.S. 948 (2014).

The Defendant argues in effect that the findings of the juvenile court pursuant to the juvenile transfer statute, are equivalent to the sentencing enhancement that was struck down as unconstitutional in Apprendi. We respectfully disagree. State and federal courts across the nation facing challenges to juvenile transfer laws have repeatedly refused to apply the Apprendi rule to waiver hearings on the following grounds: (1) waiver hearings only determine a jurisdictional matter; (2) waiver hearings do not adjudicate guilt or culpability; (3) the unique nature of the juvenile-justice system warrants different constitutional requirements; (4) and the history of juvenile transfer shows judicial fact-finding is constitutional. See MARK KIMBRELL, IT TAKES A VILLAGE TO WAIVE A CHILD ... OR AT LEAST A JURY: APPLYING APPRENDI TO JUVENILE WAIVER HEARINGS IN OREGON, 52 Willamette L. Rev. 61, 91-92 (2015); but see Commonwealth v. Quincy Q, 434 Mass. 859, 864, 753 N.E.2d 781, 789 (2001), overruled on other grounds by Com. v. King, 445 Mass. 217, 834 N.E.2d 1175 (2005). Upon our review, we now join the majority and decline to apply Apprendi to the Tennessee juvenile transfer process.[4]

[4] United States v. Miguel, 338 F.3d 995, 1004 (9th Cir. 2003) (Apprendi inapplicable because it does not create a per se increase of a defendant's punishment; rather, it establishes jurisdiction only); Gonzales v. Tafoya, 515 F.3d 1097, 1110-1116 (10th Cir. 2008) (comprehensive review of other jurisdictions' analyses of Apprendi's applicability to juvenile court transfer proceedings and noting that "forty-five states and the District of Columbia have enacted statutes allowing judges to transfer juveniles to adult court after making specified findings" and that "amenability and commitment findings have not traditionally been made by juries"); Morales v. United States, No. 09 CIV 5080 LAP, 2010 WL 3431650, at *9 (S.D.N.Y. Aug. 31, 2010); Parks v. Sec'y, DOC, No. 311-CV-1213-J-39, 2014 WL 6610750, at *7 (M.D. Fla. Nov. 21, 2014) (holding, "with the twin considerations of historical practice and respect for

As an initial matter, we conclude that Tennessee juvenile transfer hearings are dispositional, rather than adjudicatory. As noted in our principle authority, juvenile proceedings are not criminal prosecutions, and transfer determinations do not determine guilt or innocence. The transfer statute and the resulting findings of the juvenile court function only to determine the most appropriate forum to address the conduct for which the juvenile defendant is charged. We additionally conclude that even if Apprendi applied to the juvenile hearing transfer process, there can be no violation of the Defendant's Sixth Amendment right to a jury trial in this case. There is no question that the juvenile transfer statute exposed the Defendant to greater punishment. The Defendant's focus here however is misplaced because the statutory maximum sentence for purposes of Apprendi is not release upon the Defendant's nineteenth birthday as argued by the Defendant. The Apprendi rule applies only to statutes that enhance sentences beyond the prescribed statutory range for a given offense. See id. at 494 n.19 (majority opinion); In re M.I., 989 N.E.2d 173, 191-92 (2013). In this case, the Defendant was convicted by a jury of first-degree felony murder, which, for juvenile offenders, is statutorily punishable by a maximum sentence of life without parole, see Charles Everett Lowe-Kelley v. State, No. M2015-00138-CCA-R3-PC, 2016 WL 742180, at *9 (Tenn. Crim. App. Feb. 24, 2016) (noting that "Miller did not hold that a juvenile can never be sentenced to life without the possibility of parole" before upholding the juvenile defendant's consecutive life sentences as constitutional), perm. app. denied (Tenn. June 23, 2016)). Even applying the substance over form test to our analysis, as argued by the Defendant, we are not convinced Apprendi was intended to be so broadly

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state sovereignty, Apprendi and its progeny have not been extended by the United States Supreme Court to apply to a prosecutor's pre-trial jurisdictional charging decision"); State v. Andrews, 329 S.W.3d 369, 372-75 (Mo. 2010), as modified on denial of reh'g (Jan. 25, 2011) (juvenile certification as an adult did not equate to sentence enhancement but instead determined jurisdiction); Kirkland v. State, 67 So. 3d 1147, 1149-50 (Fla. Dist. Ct. App. 2011)(explaining that the 6th Amendment right to a jury trial does not attach "to every state-law 'entitlement' to predicate findings," "Apprendi and subsequent cases are based on the 'historic jury function of deciding whether the State has proved each element of the offense beyond a reasonable doubt," and that, so far, "the Court has not extended the Apprendi and Blakely [v. Washington, 542 U.S. 296 (2004)] line of decisions beyond the offense-specific context that supplied the historic grounding for the decisions"); State v. Rudy B., 149 N.M. 22, 243 P.3d 726 (2010) (Apprendi does not apply to the evidentiary hearing to determine whether a juvenile adjudicate as a youthful offender should be sentenced as a juvenile or as an adult); State v. Read, 397 N.J. Super. 598, 610, 938 A.2d 953, 960 (App. Div. 2008) (recognizing that transferring a juvenile to criminal court "substantially increases his sentencing exposure," but nonetheless holding that "the requirement of jury fact-finding based on proof beyond a reasonable doubt does not apply to a pretrial determination such as whether to waive a complaint against a juvenile to adult court."); Perkins v. Commonwealth, 511 S.W.3d 380, 388 (Ky. Ct. App. 2016) (citing Caldwell v. Commonwealth, 133 S.W.3d 445, 452-53 (Ky. 2004) (employing a rational basis test to determine that the classification of juveniles does not violate the state or federal equal protection clauses);Villalon v. State, 956 N.E.2d 697, 702 (Ind. Ct. App. 2011).

construed. Accordingly, under these circumstances, the Defendant has failed to establish a violation of his Sixth Amendment right to a jury, and he is not entitled to relief.

II. Juvenile Transfer Hearing. Although the Defendant concedes that "there was sufficient evidence to find probable cause that [he] had committed a crime," he contends that the juvenile court erred in transferring his case to criminal court. Noting that the juvenile court "correctly" narrowed the issue at the hearing to "the possible rehabilitation of the child," he argues that there was no evidence supporting the juvenile court's "untutored intuition as to the futility of treatment," especially in light of the defense expert's opinion to the contrary. The State argues, and we agree, that there were reasonable grounds to believe that the Defendant committed a juvenile act for which he could be tried as an adult. Accordingly, the juvenile court properly transferred the Defendant to criminal court to be tried as an adult.

This court reviews a juvenile court's findings in determining whether reasonable grounds exist to establish the criteria in Tenn. Code Ann. § 37-1-134 (a) for an abuse of discretion. State v. Kayln Marie Polochak, No. M2013-02712-CCA-R3-CD, 2015 WL 226566, at *38 (Tenn. Crim. App. Jan. 16, 2015) (citations omitted). In making the determination of whether a juvenile court properly transferred a case, this Court has held:

> The court is only required to find that there are "reasonable grounds" upon which to base a finding that a juvenile is not amenable to rehabilitation. The juvenile court, in its role of Parens patriae, is placed in a unique position with regard to the persons appearing before it. The juvenile judge is experienced in the evaluation of youthful offenders and is given a wide range of discretion in attempting to establish the most beneficial course of action in rehabilitating those offenders. In making a decision whether a juvenile is amenable to treatment or rehabilitation, the juvenile judge may consider many factors including testimony by expert witnesses, the type of facilities available, length of stay in these facilities, the seriousness of the alleged crime, and the attitude and demeanor of the juvenile.

State v. Strickland, 532 S.W.2d at 920; State v. Layne, 546 S.W.2d 220, 224 (Tenn. Crim. App. 1976); State v. Christopher Bell, No. W2014-00504-CCA-R3-CD, 2015 WL 1000172, at *4 (Tenn. Crim. App. Mar. 4, 2015). "The court can in good faith rely on all or none of these factors as long as there are reasonable grounds supporting the decision." Christopher Bell, 2015 WL 1000172, at *4. "This court has also stated that a defendant's conduct surrounding the offenses and the serious nature of the offenses impact that

defendant's amenability for rehabilitation." Id. (citing State v. Robert William Holmes, No. 01C01-9303-CC-00090, 1994 WL 421306, at *3 (Tenn. Crim. App. Aug. 11, 1994).

The Defendant takes issue with the juvenile court's finding that he could not be properly rehabilitated by the time he turned nineteen and was released from juvenile custody. The Defendant focuses solely on his expert witness's testimony, and he asserts, "the State's evaluating expert did not offer any testimony that would have supported the Juvenile Court's conclusion that treatment would be inadequate." Although the Defendant argues that the juvenile court limited its decision to (b)(5) based on the juvenile court's comment that it was the "more important factor in this case," we disagree. The record shows that the juvenile court conducted a thorough transfer hearing that spanned three days. Not only did the juvenile court order a psychological evaluation of the Defendant, which was performed by Dr. Axtell, the court also heard extensive testimony from the Defendant's independent expert, Dr. Cruise. The juvenile court also heard testimony from the Defendant's supervisor for the first offender program, who testified that the Defendant did not follow through on his probation requirements. The juvenile court considered Dr. Cruise's testimony and agreed with both mental health experts "completely." However, when the juvenile court considered Tenn. Code Ann. § 37-1-134(b)(5), the Defendant's potential for rehabilitation, the juvenile court struggled with the amount of time left to rehabilitate the Defendant based on his age. After weighing the amount of time before it lost jurisdiction over the Defendant based on his age against the seriousness of the crime and the safety of the community, the juvenile court determined that the Defendant should be transferred to criminal court to be tried as an adult. Because the record shows the juvenile court had "reasonable grounds" to believe that the Defendant committed first degree felony murder and that the interests of the community required that the Defendant be put under legal restraint, the Defendant is not entitled to relief.

III. Brady Violation in Juvenile Court. The Defendant contends the State withheld "evidence that the shooting was perpetrated by two individuals who were not [the Defendant]" until "well after" the Defendant's juvenile transfer hearing. He asserts that this information was material to his transfer hearing and, by not providing the information, the State violated his right to a "fair transfer hearing." He argues that the "relevant inquiry" is not whether this information was provided by or useful at his trial in criminal court, but "whether the information would have been useful at the transfer hearing." He asserts that such information was both relevant and material because: (1) "the State's inculpatory evidence consisted merely of fingerprint evidence and of Linda Hatch's testimony[,]" and (2) "the decision to transfer was explicitly predicated on the Juvenile Court's confidence that [the Defendant] was indeed guilty of murder as alleged by the State." The Defendant maintains that Brady applies to juvenile transfer hearings

and that the juvenile court ordered the State to turn over exculpatory material to the Defendant. The Defendant states that the Brady information was material because (1) it was third party culprit evidence, and (2) it could have been used to "cast doubt over the competence and thoroughness of the investigators."

In response, the State contends that Brady does not apply to juvenile transfer hearings. Alternatively, the State argues that even if Brady does apply to juvenile transfer hearings, the Defendant has failed to establish the materiality of the proof at issue. The State argues that the evidence presented at the juvenile transfer hearing was "more than enough to at least establish probable cause" and that the alleged Brady material would have been "frail disputing proof." The State also asserts that the Defendant had the "purported Brady proof" by the time of his trial in criminal court but that he was "no longer interested in this proof" at that time and instead he testified that he shot the victim in self-defense.

Throughout the contentious proceedings and the numerous filings of the parties in this case, the juvenile court repeatedly stressed its concern to avoid "trial by ambush" and compared the transfer hearing to a "probable cause hearing on steroids[.]" In its December 10, 2015 order, the juvenile court ordered the State to "provide the defense with copies of discovery that the State intend[ed] to use at the transfer hearing, as well as exculpatory discovery as defined under Brady, at least two (2) weeks prior to the transfer hearing." At the same time, the Defendant filed a motion to dismiss based on a violation of Brady, arguing that the State failed to turn over information pertaining to Kevaughn "Lil Kill" Henry, whose fingerprints were also found on the victim's car and who provided a recorded interview to police. The juvenile court determined that there had not been a Brady violation; however, it again ordered the State to "give [the Defendant] anything [it had] with regard to Mr. Henry." Following transfer to criminal court to be tried as an adult, on November 23, 2016, the Defendant filed yet another motion to dismiss the indictment based on a Brady violation, arguing that "the State suppressed material exculpatory evidence . . . that an eyewitness identified two other people as the perpetrators--from the defense at the transfer hearing in Juvenile Court[.]" The trial court held a hearing on the Defendant's motion on February 10, 2017.

Clayton Madison, a detective in the KPD Violent Crimes Unit, testified that around 11:30 p.m. on the night of the offense, the victim's brother received a call from someone named "Junkyard," who told him that he saw J'Andre Hunt and Jaquez Hunt running from the victim's car at the time of the offense. The victim's brother notified KPD of this information the same night and sent them an email with two photographs showing Kevaughn "Lil Kill" Henry, J'Andre Hunt, and Jaquez Hunt. The photographs were admitted into evidence at the hearing. Within two days of the offense, Detective Madison conducted recorded interviews of J'Andre Hunt, Kevaughn "Lil Kill" Henry,

and the codefendant, all of which were admitted into evidence. Kevaughn "Lil Kill" Henry denied involvement in the offense and explained that his fingerprints were on the victim's car because the victim had picked him up from a restaurant a day or two before the offense. J'Andre Hunt denied involvement in the offense and claimed he was at home watching football at the time, which was later confirmed by his mother. J'Andre Hunt further advised that his cousin, Jaquez Hunt, was at work at the time of the offense, which was later confirmed by independent investigation. Detective Mason also confirmed that there were no identifiable fingerprints of J'Andre Hunt and Jaquez Hunt at the crime scene. Detective Madison attempted to speak to "Junkyard," but he refused to provide his real name and denied making any statements to the victim's brother. Finally, the codefendant confirmed that he was in the victim's car when the Defendant robbed the victim of his watch and phone and that the Defendant shot the victim in the process.

Detective Madison was pressed by defense counsel regarding when he provided the information confirming the identity of J'Andre Hunt and Jaquez Hunt as well as the photograph of them with Kevaughn "Lil Kill" Henry, but he could not recall the exact date. He "assume[d]" that the State had this information prior to the Defendant's transfer hearing. The Defendant also introduced as exhibits to the hearing a discovery response filed by the State on September 21, 2016, in criminal court, a subsequent discovery response filed on September 30, 2016, a discovery request filed in juvenile court by the Defendant on November 23, 2015; an order from the juvenile court on December 10, 2015, requiring that Brady information be turned over prior to the transfer hearing; and a set of emails sent between the prosecutor and defense counsel on September 27, 2016.

Defense counsel explained to the trial court that the Brady violation concerned information that was not provided prior to the June 10, 2016 juvenile transfer hearing, which deprived the Defendant of a fair transfer hearing. On September 21, 2016, she was notified that the State had an "eyewitness who put two other people at the scene" and that they had interviewed J'Andre Hunt. Upon further requesting the information via email, she received it on September 30, 2016, four months after the transfer hearing. Defense counsel stressed that the juvenile court had previously ordered the State to provide the defense "anything you got with regard to Mr. Henry." The defense vigorously argued that the photograph showing Kevaughn "Lil Kill" Henry with J'Andre and Jaquez Hunt was Brady material and that the State violated the juvenile court order by failing to produce it before the transfer hearing.

In response, the State advised the trial court that they had provided the defense with Kevaughn "Lil Kill" Henry's statement. She further explained that she did not consider the statement of J'Andre Hunt to be exculpatory because he denied fleeing from the scene and investigation subsequently confirmed that he had an alibi. Additionally, given the other evidence of the Defendant and the co defendant's guilt, she did not

believe information pertaining to J'Andre Hunt was exculpatory. She also insisted that prior to the transfer hearing she was unaware whether there was a true eyewitness to the "suspects fleeing the scene" information or whether this was an investigative technique employed by the officers. Upon later speaking with Officer Madison, she provided the information in discovery to the defense concerning "Junkyard's" statements and then categorized it as Brady material.

Although the trial court agreed that the information qualified as Brady material, it denied the Defendant's motion to dismiss the indictment reasoning as follows:

> The question before this Court is, one, has there been a Brady violation? And typically, folks, we're always considering whether or not there's been a Brady violation after a trial has occurred and whether or not that impacted a defendant's right to a fair trial. That's the standard. Just because the State may or may not have turned over some piece of information which may or may not have been exculpatory does not automatically, if that fact is proven, equate to having a new trial.
>
> I think it is significant that [the Juvenile Court] was not required to find proof beyond a reasonable doubt. As the fact finder in Juvenile Court, he was required to find probable cause. He had to find the other criteria, as required by the statute, but he was required to find probable cause. So the question becomes, does the fact that the Defense did not have the information that they now have in preparation of their defense for [the Defendant] before the trier of fact in this court, the jury, does that equal and equate to their right to have this case dismissed at this juncture and sent back to Juvenile Court? This Court finds that it does not.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and the "Law of the Land" Clause of Article I, section 8 of the Tennessee Constitution afford all criminal defendants the right to a fair trial. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." Evidence that is "favorable to an accused" includes both "evidence deemed to be exculpatory in nature and evidence that could be used to impeach the state's witnesses." Johnson v. State, 38 S.W.3d 52, 55-56 (Tenn. 2001). Favorable evidence has also been defined as "evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." Id. at 56-57

(quoting Commonwealth v. Ellison, 376 Mass. 1, 379 N.E.2d 560, 571 (1978)). This also includes "favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim." Johnson v. State, 38 S.W.3d at 56 (citing State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. June 30, 1992.)). In Gumm v. Mitchell, 775 F.3d 345, 364 (6th Cir. 2014), the United States Court of Appeals for the Sixth Circuit held,

> Prosecutors are not necessarily required to disclose every stray lead and anonymous tip, but they must disclose the existence of "legitimate suspect[s]," D'Ambrosio v. Bagley, 527 F.3d 489, 499 (6th Cir. 2008). "Withholding knowledge of a second suspect conflicts with the Supreme Court's directive that 'the criminal trial, as distinct from the prosecutor's private deliberations, [be preserved] as the chosen forum for ascertaining the truth about criminal accusations.'" United States v. Jernigan, 492 F.3d 1050, 1056-57 (9th Cir.2007) (en banc) (quoting Kyles v. Whitley, 514 U.S.419, 439 (1995)).

Rule 206 of the Rules of Juvenile Practice and Procedure governs discovery issues in juvenile court and provides, in pertinent part, that "[e]ach juvenile court shall ensure that the parties in delinquent and unruly proceedings have access to any discovery materials consistent with Rule 16 of the Rules of Criminal Procedure." Tenn. R. Juv. Prac. & Proc. 206(a). However, a "juvenile court transfer hearing 'is the exact counterpart of the General Sessions preliminary hearing to the extent of the issue of probable cause.'" State v. Dennis Joe Hensley, No. E2005-01444-CCA-R3-CD, 2006 WL 2252736, at *8 (Tenn. Crim. App. Aug. 7, 2006) (citing State v. Womack, 591 S.W.2d 437, 443 (Tenn. Ct. App. 1979)). "[T]here is no provision for discovery, as such, as a part of a pre-trial 'probable cause hearing,'" and "the reception of evidence at such a hearing should properly be confined to issues before the court at the time." Womack, 591 S.W.2d at 443. The Advisory Commission Comment to Rule 206 provides, in pertinent part, as follows:

> [D]iscovery rules do not apply to preliminary examinations and hearings. Therefore, this rule would not apply to any probable cause hearing in juvenile court with the caveat that this rule is not the exclusive procedure for obtaining discovery. Please note that some discovery may be critical in a transfer hearing. The Court should use its discretion in granting access to information necessary to defend or prosecute a transfer case. *The state must disclose any exculpatory evidence to the child's attorney per Brady v. Maryland*, 373 U.S. 83 (1963).

Tenn. R. Juv. Prac. & Proc. Rule 206 Advisory Comm'n Cmt. Rule 206 (emphasis added). Accordingly, it is within the discretion of the juvenile court to grant access to information necessary to defend or prosecute a transfer case, and obviously, the State must disclose any exculpatory evidence to the child's attorney per Brady. This is consistent with our principle holdings above, concluding that a juvenile transfer hearing is a critical stage in the proceedings which "must measure up to the essentials of due process and fair treatment." Kent v. United States, 383 U.S. at 560-62; see also State v. Iacona, 2001-Ohio-1292, 93 Ohio St. 3d 83, 92, 752 N.E.2d 937, 947 (Ohio 2001) (holding that the State is under a constitutional duty to "disclose to a juvenile respondent all evidence in the state's possession favorable to the juvenile respondent and material either to guilt or punishment that is known at the time of a mandatory bindover hearing. . . and that may become known to the prosecuting attorney after the bindover"). Accordingly, we conclude that the Defendant was indeed entitled to Brady material at the transfer hearing.

We must now determine if the evidence that was not disclosed at the transfer hearing constitutes Brady material and the effect, if any, the nondisclosure had on the determination of the juvenile court to transfer the Defendant to be tried as an adult. Evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433 (citation omitted); State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995). As the United States Supreme Court explained,

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). The burden of proving a Brady violation rests with the defendant, and the violation must be proved by a preponderance of the evidence. Edgin, 902 S.W.2d at 389 (citing State v. Spurlock, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993)). In order to establish a Brady violation, the defendant must show the existence of four elements: (1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not); (2) that the State withheld the information; (3) that the withheld information was favorable; and (4) that the withheld information was material. Johnson v. State, 38 S.W.3d at 56.

The record clearly establishes that the Defendant requested the State to disclose Brady material in juvenile court prior to the transfer hearing, which was supported by the order of the juvenile court. Emails exchanged between defense counsel and the State establish that the Defendant did not know about two other potential suspects interviewed by the police or that they had photographs of these same individuals with Kevaughn "Lil Kill" Henry until September 27, 2016, well after the Defendant's transfer to criminal court. Detective Madison confirmed that he received this information from the victim's brother on the night of the offense. Although Detective Madison could not recall when he provided this information to the State, the evidence was in the possession of the police prior to the transfer hearing, and they failed to provide it to the defense. See State v. Jackson, 444 S.W.3d 554, 594 (Tenn. 2014) (citing Kyles 514 U.S. at 439; Johnson, 38 S.W.3d at 56). Nevertheless, we conclude that the information concerning the other potential suspects was neither favorable nor material to the Defendant's transfer hearing. Detective Madison testified that he interviewed J'Andre Hunt and Jaquez Hunt, both of whom were quickly eliminated as suspects based on their alibis and other information discovered by the police. These individuals did not appear to be legitimate suspects, but rather, stray leads that were dismissed early in the case. See Bagley, 527 F.3d at 499. Additionally, at the Defendant's transfer hearing there was testimony that the Defendant had confessed to Hatch that he shot the victim in the back as a result of a robbery gone "bad." The Defendant's fingerprints were also found in several areas of the exterior and interior of the victim's car, which was consistent with the Defendant's confession to Hatch. This evidence was more than enough to support the juvenile court's finding of probable cause, and we do not believe that the information about two potential suspects that were abandoned very early into the case would have impacted the decision to transfer to criminal court to be tried as an adult. Accordingly, the Defendant is not entitled to relief.

IV. Defendant's Duty to Retreat before Engaging in Self-Defense. The Defendant concedes that he was engaged in unlawful activity at the time of the offense; specifically, the possession of a weapon as a minor. He argues, however, that this offense is "not the kind of illegal activity that is contemplated by the [self-defense] statute." Although he acknowledges that State v. Perrier, 536 S.W.3d 388 (Tenn. 2017), declined to address the necessity of a causal nexus between the unlawful activity and the need to engage in self-defense, he insists that the trial court erred in instructing the jury that he had a duty to retreat because there was not a causal nexus between his status as a minor in possession of a firearm and the need for him to defend himself and codefendant Robinson. Based on the physical fight between the codefendant and the victim, the Defendant argues the jury should have been instructed that he had "no duty to retreat" before using force against the victim. He argues further that the error was not harmless because the State relied heavily on the Defendant's duty to retreat before using force

against the victim in its closing arguments. Lastly, the Defendant argues that allowing the trial court to make the factual finding of whether a defendant was engaged in unlawful activity under a clear and convincing standard, rather than allowing a jury to make this determination under a beyond a reasonable doubt standard, violates his constitutional rights to due process and a jury trial.[5]

In response, the State contends that the plain language of the self-defense statute does not require a causal nexus between a defendant's unlawful activity and his need for self-defense. The State asserts that, even if this Court imposes a causal nexus requirement, the Defendant has not established a nexus here because the Defendant's illegal possession of a firearm was connected to the "use of force," and minors in possession of handguns are similar to felons in possession of handguns. Regardless, the State argues any error in the jury instruction was harmless because the evidence of the Defendant's guilt was overwhelming.

A defendant in a criminal case has a constitutional right to a correct and complete charge of the law. State v. Dorantes, 331 S.W.3d 370, 390 (Tenn. 2011) (citing State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005); State v. Farner, 66 S.W.3d 188, 204 (Tenn. 2001); State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000)). It follows then that trial courts have a duty in criminal cases to instruct the jury on the law applicable to the facts of a case. State v. Clark, 452 S.W.3d 268, 294-95 (Tenn. 2014) (citing State v. Thompson, 285 S.W.3d 840, 842 n.1 (Tenn. 2009); State v. Burns, 6 S.W.3d 453, 464 (Tenn. 1999)). Whether jury instructions are sufficient is a question of law that this court reviews de novo with no presumption of correctness. Clark, 452 S.W.3d at 295 (citing State v. Hawkins, 406 S.W.3d 121, 128 (Tenn. 2013); Nye v. Bayer Cropscience, Inc., 347 S.W.3d 686, 699 (Tenn. 2011)). When reviewing challenged jury instructions, this court must "view the instruction in the context of the charge as a whole" in determining whether prejudicial error has occurred. Id. (citing State v. Rimmer, 250 S.W.3d 12, 31 (Tenn. 2008); State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997)). An instruction is prejudicially erroneous and requires reversal when "the instruction alone infected the entire trial and resulted in a conviction that violates due process," see State v. James, 315 S.W.3d 440, 446 (Tenn. 2010), or "when the judge's charge, taken as a whole, failed to fairly submit the legal issues or misled the jury as to the applicable law," see State v. Majors, 318 S.W.3d 850, 864-65 (Tenn. 2010). Id. "[A] person is entitled to a jury

[5] The Defendant acknowledges that the Tennessee Supreme Court rejected this issue in Perrier, which held that the trial court makes the determination of whether a defendant was engaged in unlawful activity such that the 'no duty to retreat' instruction would not apply. He has preserved this issue in the event of further litigation. As we are bound by Perrier, the Defendant is not entitled to relief as to this issue.

instruction that he or she did not have to retreat from an alleged attack only when the person was not engaged in unlawful activity and was in a place the person had a right to be." Perrier, 536 S.W.3d at 401 (footnote omitted).

> Tennessee's self-defense statute provides as follows:
>
> (b)(1) Notwithstanding §39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force.
>
> (2) Notwithstanding § 39-17-1322, a person who is not engaged in unlawful activity and is in a place where the person has a right to be has no duty to retreat before threatening or using force intended or likely to cause death or serious bodily injury, if:
>
> (A) The person has a reasonable belief that there is an imminent danger of death or serious bodily injury;
>
> (B) The danger creating the belief of imminent death or serious bodily injury is real, or honestly believed to be real at the time; and
>
> (C) The belief of danger is founded upon reasonable grounds.

Tenn. Code Ann. § 39-11-611. The Tennessee Pattern Jury Instructions on self-defense provide, in relevant part, as follows:

> Included in the defendant's plea of not guilty is *[his][her]* plea of self-defense.
>
> If a defendant was in a place where he or she had a right to be, he or she would have a right to *[threaten][use]* force against the *[deceased][alleged victim]* when and to the degree the defendant reasonably believed the force was immediately necessary to protect against the alleged victim's *[use][attempted use]* of unlawful force. **[Remove this bracketed language if the trial court finds the defendant was engaged in unlawful activity after a hearing. See Comment Two**: The defendant would also have no duty to retreat before *[threatening][using]* force.**]**

> [If a defendant was in a place where he or she had a right to be, he or she would also have a right to *[threaten][use]* force intended or likely to cause *[death][serious bodily injury]* if the defendant had a reasonable belief that there was an imminent danger of death or serious bodily injury, the danger creating the belief of imminent death or serious bodily injury was real, or honestly believed to be real at the time, and the belief of danger was founded upon reasonable grounds. **[Remove this bracketed language if the trial court finds the defendant was engaged in unlawful activity after a hearing. See Comment Two**: The defendant would also have no duty to retreat before *[threatening][using]* force likely to cause *[death][serious bodily injury]***]**.]

7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 40.06(b) (emphasis in original).

The trial court in the Defendant's case removed the bracketed language from the Tennessee Pattern Jury Instruction after finding that the Defendant was engaged in unlawful activity to wit: minor in possession of a firearm, see Tenn. Code Ann. § 39-17-1319, and, therefore, had a duty to retreat. It provided the following instruction to the jury:

> Included in the defendant's plea of not guilty is his plea of self-defense.
>
> The defendant would have a right to threaten or use force against the deceased when and to the degree the defendant reasonably believed the force was immediately necessary to protect against the alleged victim's use or attempted use of unlawful force.
>
> The defendant would also have a right to threaten or use force intended or likely to cause death or serious bodily injury if the defendant had a reasonable belief that there was an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury was real or honestly believed to be real at the time, and the belief of danger was founded upon reasonable grounds.
>
> The law of self-defense requires that the defendant must have employed all means reasonably in his power, consistent with his own safety, to avoid danger and avert the necessity of taking another's life. This requirement includes the duty to retreat if, and to the extent, that it can be done in safety.

The statute at issue here, Tenn. Code Ann. Section 39-11-611(b), does not define "unlawful activity" and is therefore not unambiguous. Additionally, while the Perrier court declined to address the causal nexus issue, in answering the question of whether the "unlawful activity" language modifies the entirety of the claim of self-defense or only applies to the no-duty-to-retreat qualification, it "examin[ed] the history and language of the statute because the statutory language is *not clear and unambiguous*." Perrier, 536 S.W.3d at 398 (emphasis added). In doing so, the Court observed that "[t]he abandonment of the duty to retreat was '[t]he primary distinction' between the common law and the statutory law of self-defense." Id. at 399 (citing 11 DAVID L. RAYBIN, TENNESSEE PRACTICE: CRIMINAL PRACTICE AND PROCEDURE, § 28:36 Self-defense (Dec. 2016 Update)). Based on State v. Renner, 912 S.W.2d 701, 704, (Tenn. 1995), the Perrier court determined that the phrase, "is in a place where the person has a right to be," was related to the "true man" doctrine. "The 'true man' doctrine is simply another term for the no-duty-to-retreat rule, and it provides that one does not have to retreat from a threatened attack."

> [T]his doctrine applies only: (1) when the defendant is without fault in provoking the confrontation, and (2) when the defendant is in a place where he has a lawful right to be and is there placed in reasonably apparent danger of imminent bodily harm or death.

Perrier, at 399 (citations omitted). The Defendant argues that the "engaged in unlawful activity" phrase is "an elaboration of the 'without fault in provoking the confrontation' requirement from the true man doctrine." He insists that the "without fault" language does not refer to fault in general, but rather, fault in causing the confrontation at issue. We agree.

At common law, the "true man" doctrine's primary prerequisite was that only "one without fault" is permitted to use deadly force. R. CHRISTOPHER CAMPBELL, UNLAWFUL/CRIMINAL ACTIVITY: THE ILL-DEFINED AND INADEQUATE PROVISION FOR A "STAND YOUR GROUND" DEFENSE, 20 Barry L. Rev. 43, 55 (2014) (citing Beard, 158 U.S. at 561). The common law cases to address the "without fault" requirement acknowledge that "the party in the wrong must do the retreating. Our law is more favorable to the man who is in the right, and places a less burden upon him in homicide cases than upon the man who is in the wrong and *produces* the occasion." Voight v. State, 109 S.W. 268, 270 (Tex. Crim. App. 1908)(emphasis added). Additionally, "[i]t is one of the fundamental principles of the law of homicide, whenever the doctrine of self-defense arises, that the accused himself must always be reasonably *free from fault, in having provoked or brought on the difficulty in which the killing was perpetrated*." Storey v. State, 71 Ala. 329, 336 (1882)(emphasis added).

To interpret the statute without a nexus between the "unlawful activity" and the duty to retreat would lead to absurd results. For example, if a defendant had failed to file her income taxes or failed to timely file her vehicle registration or failed to renew her gun license, then she would be unable to avail herself of Tennessee's self-defense statute. As one court has explained, application of the self-defense statute without a nexus to the conviction offense would nullify virtually every claim of self-defense. See Mayes v. State, 744 N.E.2d 390, 392 (Ind. 2001) (citing Oregon v. Doris, 51 Or. 136, 94 P. 44, 53 (1908) ("[T]o hold that the mere fact that a person accused of a homicide was armed at the time, and that because of the misdemeanor resulting therefrom [possession of a concealed weapon] he shall be deprived of any right of self-defense, would lead to the absurd and unjust consequence in practically all cases of depriving the accused of any defense...."); South Carolina v. Leaks, 114 S.C. 257, 103 S.E. 549, 551 (1920) (In a prosecution for homicide "[t]he causal connection between the unlawful act of gambling and the encounter arising during the progress of the game between the participants is too remote to destroy the right of self-defense."); West Virginia v. Foley, 128 W.Va. 166, 35 S.E.2d 854, 861 (1945) ("Whether [defendant] had a license to carry a pistol on the occasion he was armed is not relevant in the least to the common law right to arm for self-defense.")). Accordingly, we conclude that a causal nexus between a defendant's unlawful activity and his or her need to engage in self-defense is necessary before the trial court can instruct the jury that the defendant had a duty to retreat.

We must now determine whether there was a causal nexus between the Defendant's unlawful activity and his need to engage in self-defense, and what effect, if any, it had in this case. Arguably, the Defendant's status as a juvenile in possession of a handgun, a violation of Tenn. Code Ann. § 39-17-1319, could be the cause of the confrontation at issue in this case. In other words, but for the Defendant's illegal possession of the handgun as a minor, the victim would still be alive. However, status offenses such as this will rarely qualify as unlawful activity because a person's status alone cannot provoke, cause, or produce a situation. Nevertheless, in our view, the proof here overwhelming established a causal connection between the Defendant's robbery of the victim and the Defendant's perceived need to engage in self-defense. Because the Defendant was engaged in unlawful activity, to wit robbery, at the time of the offense, he had a duty to retreat, and was therefore not entitled to the protection of the Tennessee self-defense statute. Accordingly, the trial court properly instructed the jury, and the Defendant is not entitled to relief.

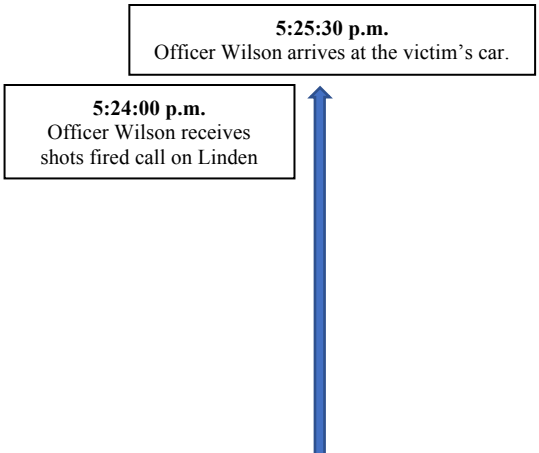
V. Prosecutorial Misconduct Based on False Statements in Closing Argument.

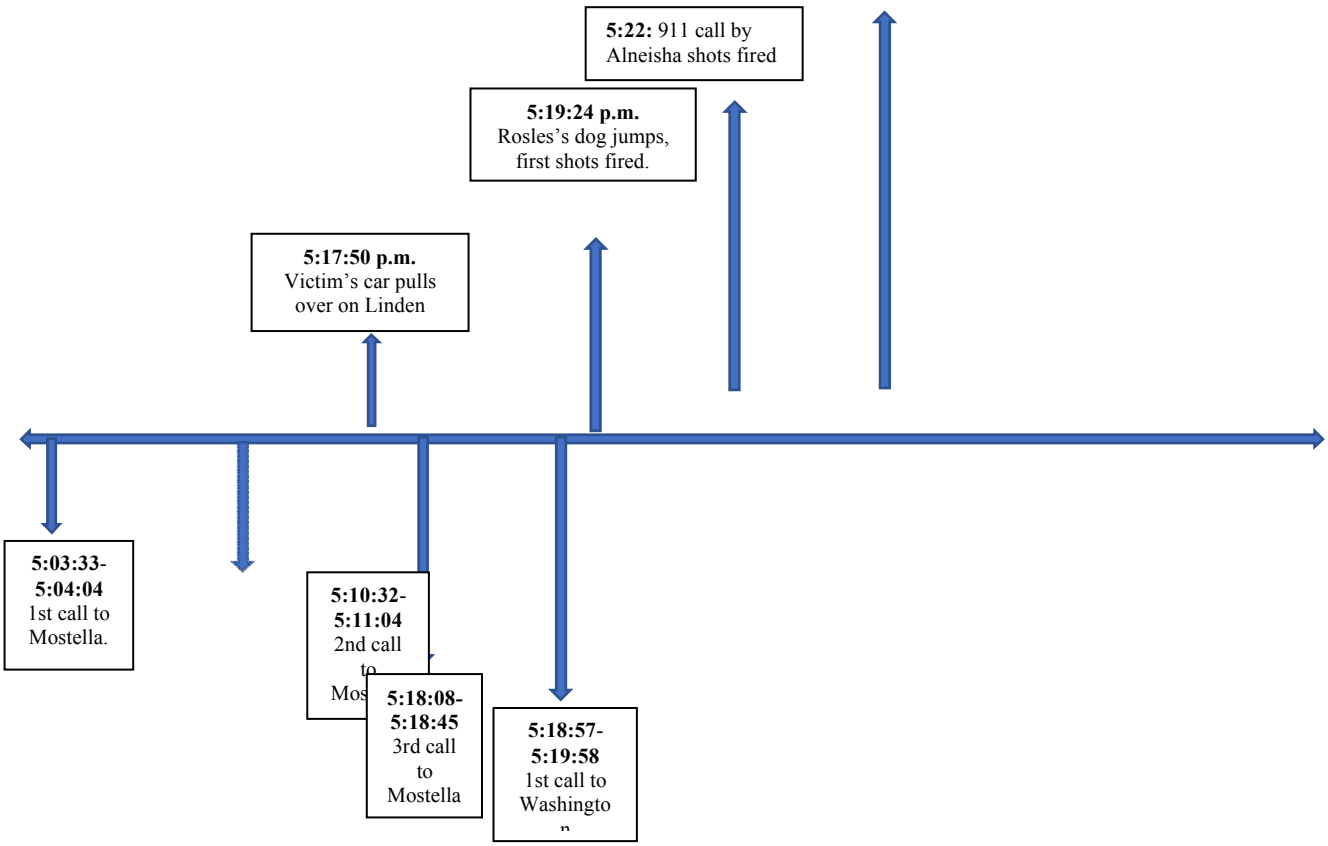
As we will explain in more detail below, the parties in this case relied heavily on the Rosles' video footage, the dashcam footage from the patrol car, and the cell phone

records to establish a timeline for the offense. At the core of the Defendant's claim of prosecutorial misconduct is the State's miscalculation of these times during closing argument. The Defendant specifically argues that the State misstated the evidence regarding the timing of the shooting and the timing of the four phone calls made to the Defendant's girlfriends. In stating these times inaccurately, the State argued the Defendant made two calls on the victim's phone *after* the shooting, which the Defendant argues directly contradicted his testimony and undercut his credibility. The Defendant acknowledges that he failed to object to the State's closing argument and argues for plenary review given the unique circumstances of this case.

In response, the State contends that the Defendant waived this argument and that he is not entitled to plain error relief because defense counsel "made a conscious and considered strategic decision not to object to this argument because he did not believe that he had a good-faith basis for objection and had to 'let it go.'" Additionally, the State asserts that the Defendant should have anticipated the use of the timing because of the lengths the State went to in order to establish it and because the Defendant presented his own theory of the timing during his closing argument. Alternatively, the State argues that, even if this Court was to review this issue under the plain error doctrine, the Defendant would nevertheless not be entitled to relief because "the [D]efendant presents no evidence whatsoever that the State intentionally miscalculated, intentionally misled the jury or the court, or intentionally misstated the evidence." For the reasons that follow, we agree with the State, and conclude that the Defendant is not entitled to relief.

Based on the evidence adduced at trial, we have created the below timeline to illustrate the events on the day of the offense to better understand the position of the parties on this issue.





As previously noted, the Rosles's video did not have accurate time stamps. In an effort to ascertain the timing of events, the parties subtracted the time lapse between the arrival of Officer Wilson as shown on the Rosles's video, 7:00:06, from the dog jump, 6:54:00, which was six minutes and six seconds (6:06). Officer Wilson's arrival on the scene as accurately reflected on his dashcam, 5:25:30, minus the 6:06 time lapse from the Rosles's video, reflects that the dog jumped at 5:19:24. The parties agreed that the first shot occurred when the dog jumped. At closing argument, however, the State deduced that the first shot occurred at "5:18 something[.]" The State specifically argued, and the Defendant now contests, the following excerpts from their closing argument:

> So we say that puts the time of the first shot at 5:18, and here's how we get there. Right there at the bottom you'll see 5:25:30 is when Officer Wilson rolls up to -- to the scene.
>
> And so if you look, and I urge you to do this, look at Mr. Rosles's video and you'll see Officer Wilson show up at 16:07:06. So that's over six minutes after the first shot that Officer Wilson shows up, okay? So if he

> shows up at 5:35 [sic], 5:19 plus a little bit more, 5:18 something is going to be the time that that first shot was made. And that's very important.

The State capitalized further from its timeline and additionally argued the following:

> We say the cell phone records, Mr. Cook [sic] told you a whole lot about, shows that this defendant used that cell phone twice *after* the killing. (emphasis added). And I say that because when you do the extrapolation, if I can call it that, when you match up these videos and go back over six minutes from the time Officer Wilson arrived, that gives you the time – the approximate time, within seconds I suggest to you, of when those first shots were fired Okay? And that rolls it back to 5:18 going on 5:19.
>
> He calls his female friends and that phone was turned on and off again 28 times up through the end of these records through November 30th. And these are the four calls that are pertinent, and if you will see, and remember you've got to add an hour, but those last two outbound calls from that phone were to two different females. One at 5:18, almost 5:19, and one at a minute apart 5:19, almost 5:20.
>
> Now, [the Defendant] would have you believe that he was done using that phone long before this skirmish broke out in the car. Well, think of it this way, if you add back the 97 seconds, before the five -- little over five minutes, six minutes, that's at seven and a half minutes or there abouts, if that -- according to his testimony that phone would have no longer been used by him. And these records show that he is not telling the truth about that.

As an initial matter, the record reflects that the Defendant failed to object during closing argument. Technically, as argued by the State, the failure to make a contemporaneous objection at the time these comments were made resulted in waiver of these issues. See Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(1). It is well-recognized that a defendant's failure to object to a prosecutor's comments during closing argument rarely results in a reversal of the conviction:

> Unobjected to closing arguments warrant reversal only in exceptional circumstances. United States v. Smith, 508 F.3d 861, 864 (8th Cir. 2007). Accordingly, like the United States Court of Appeals for the Eighth Circuit, "[w]e bear in mind that fleeting comments that passed without objection during the rough-and-tumble of closing argument in the

> trial court should not be unduly magnified when the printed transcript is subjected to painstaking review in the reflective quiet of an appellate judge's chambers." United States v. Mullins, 446 F.3d at 758.

State v. Banks, 271 S.W.3d 90, 132, n.30 (Tenn. 2008). We note that "where a prosecuting attorney makes allegedly objectionable remarks during closing argument, but no contemporaneous objection is made, the complaining defendant is not entitled to relief on appeal unless the remarks constitute 'plain error.'" State v. Thomas, 158 S.W.3d 361, 413 (Tenn. 2005) (citing Tenn. R. App. P. 36(b); State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000)); see State v. Pack, 421 S.W.3d 629, 648 (Tenn. Crim. App. 2013) (holding that because the defendant failed to make a contemporaneous objection during closing arguments, he not only had to establish that the comments were improper but also that they constituted plain error); State v. Gann, 251 S.W.3d 446, 458 (Tenn. Crim. App. 2007) (concluding that the defendant's failure to make a contemporaneous objection during the State's closing argument waived plenary review and allowed for consideration under plain error review only). The Defendant relies on State v. Hawkins, 519 S.W.3d 1 (Tenn. 2017), and State v. Zackary James Earl Ponder, No. M2018-00998-CCA-R3-CD, 2019 WL 3944008 (Tenn. Crim. App. Aug. 21, 2019), perm. app. denied (Tenn. Dec. 5, 2019), for the proposition that plenary review is appropriate in this case. However, those cases are readily distinguishable and generally involved the prosecutor's use of information in closing argument that was objected to pre-trial, which sufficiently preserved the issue for appellate review. Accordingly, we review this issue under plain error only.

The plain error doctrine states that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. App. P. 36(b). In order for this court to find plain error,

> "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'"

Smith, 24 S.W.3d at 282 (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "It is the accused's burden to persuade an appellate court that the trial court committed plain error." State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007) (citing U.S. v. Olano, 507 U.S. 725, 734 (1993)). "[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record

that at least one of the factors cannot be established." Smith, 24 S.W.3d at 283.

The Tennessee Supreme Court has consistently held that "'closing argument is a valuable privilege that should not be unduly restricted.'" State v. Reid, 164 S.W.3d 286, 320 (Tenn. 2005) (quoting State v. Bane, 57 S.W.3d 411, 425 (Tenn. 2001)); see State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998). Closing argument gives each party an opportunity to persuade the jury of their theory of the case, see 11 DAVID L. RAYBIN, TENNESSEE PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 29.2, at 97 (2008), and to highlight the strengths and weaknesses in the proof for the jury. Banks, 271 S.W.3d at 130 (citations omitted). "[P]rosecutors, no less than defense counsel, may use colorful and forceful language in their closing arguments, as long as they do not stray from the evidence and the reasonable inferences to be drawn from the evidence or make derogatory remarks or appeal to the jurors' prejudices." Banks, 271 S.W.3d at 131 (internal citations omitted). A prosecutor's comments during closing argument must be "'temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law.'" State v. Johnson, 401 S.W.3d 1, 20 (Tenn. 2013) (quoting State v. Middlebrooks, 995 S.W.2d 550, 557 (Tenn. 1999)).

In order to be entitled to relief on appeal, the defendant must "show that the argument of the prosecutor was so inflammatory or the conduct so improper that it affected the verdict to his detriment." State v. Joseph L. Ware, No. M2018-01326-CCA-R3-CD, 2019 WL 5837927, at *10 (Tenn. Crim. App. Nov. 7, 2019) (citing State v. Farmer, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996)). This court must consider the following factors when determining whether the argument of the prosecutor was so inflammatory or improper to negatively affect the verdict:

> (1) the conduct complained of viewed in the light of the facts and circumstances of the case; (2) the curative measures undertaken by the court and the prosecution; (3) the intent of the prosecutor in making the improper arguments; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength and weakness of the case.

Joseph L. Ware, 2019 WL 5837927, at *10 (citing State v. Chalmers, 28 S.W.3d 913, 917 (Tenn. 2000) (citations omitted)).

We conclude that the Defendant has failed to establish that a substantial right of his was adversely affected. In review of this issue, we recognize that the parties were dealing with "extrapolations" and deductions to discern a timeframe, a process which naturally lends itself to imprecision. Nevertheless, there can be no question that the State

erroneously calculated the time of the first shot as 5:18, rather than 5:19:24. This is significant because it directly contradicted the Defendant's version of events; specifically, his testimony that he used the victim's phone to call his girlfriends before the shooting occurred. Based on the misstatement by the State, it is conceivable that the Defendant was deemed less credible by the jury, and the State argued this exact point in closing. While this misstatement of the evidence was indeed improper, we are not convinced that it impacted the verdict in this case so as to deprive the Defendant of his due process right to a fair trial. Our review of the State's closing argument shows that the prosecutor mentioned the time of the shooting twice, which was fairly isolated compared to the length of the closing argument. When the prosecutor first mentioned how they calculated the first shot, she qualified the estimated time and encouraged the jury to look at the video and make the calculation for themselves. The bulk of the State's closing argument focused not on the time of the first shot but on the proof at trial; namely, the Defendant's confession to Hatch, fingerprint and DNA evidence inside and outside the victim's car, and the multiple gunshot wounds inflicted to the back of the victim. Accordingly, even assuming that this case boiled down to a credibility contest between Hatch and the Defendant, the State's error in misstating the time of the first shot by a minute and twenty-four seconds could not have tipped the credibility scale so much so to have changed the outcome of the trial. Having failed to establish plain error, the Defendant is not entitled to relief.

VI. Juror Misconduct. The Defendant argues that the trial court erred in denying his motion for new trial because the jury received extraneous, prejudicial information when, during deliberations, it looked up the "meaning of a life sentence in Tennessee" and a "medical word." He insists that "the mere fact that the jury sought this information out, in direct contravention of the judge's instructions, is strong evidence that it played some part in the deliberations," and that the State failed to carry its burden of showing that the exposure was harmless. The Defendant additionally argues that the trial court had an obligation to subpoena the second juror and conduct a hearing to ascertain what, if any, additional terms were looked up by the jury during deliberations. The Defendant requests de novo review of this issue and a remand of this case for a new trial or an evidentiary hearing at which the second juror, and possibly other jurors, would be called to testify. In response, the State agrees that the jury was exposed to extraneous information, but it argues that the jury's exposure to extraneous information was harmless. The State argues that the standard of review for the trial court's determination that the jury was not exposed to extraneous, prejudicial information is for an abuse of discretion. It further contends that the trial court did not abuse its discretion in declining to subpoena the second juror to testify at an evidentiary hearing because the Defendant failed to show that her testimony would have been "competent, material, and admissible." We agree with the State.

A defendant's right to a fair trial is guaranteed by the Sixth Amendment to the United States Constitution and by article I, section 9 of the Tennessee Constitution. Additionally, this court has said that every defendant is assured "'a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation.'" State v. Akins, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1995) (quoting Toombs v. State, 270 S.W.2d 649, 650 (Tenn. 1954)). Moreover, "[j]urors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge." State v. Adams, 405 S.W.3d 641, 650 (Tenn. 2013) (citing Caldararo ex rel. Caldararo v. Vanderbilt Univ., 794 S.W.2d 738, 743 (Tenn. Ct. App. 1990)). If the jury has been exposed to extraneous prejudicial information or subjected to an improper outside influence, the validity of the verdict is questionable and a new trial may be warranted. Id. (citing State v. Blackwell, 664 S.W.2d 686, 688 (Tenn. 1984)). Whether the constitutional right to an impartial jury has been violated is a mixed question of law and fact which we review de novo, granting a presumption of correctness only to the trial court's findings of fact. Id. at 656 (citing Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001)).

"A party challenging the validity of a verdict must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence." Adams, 405 S.W.3d at 651 (citing Caldararo, 794 S.W.2d at 740-41). Tennessee Rule of Evidence 606(b) explains what types of evidence may be used to challenge a verdict:

> **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Tenn. R. Evid. 606(b) (emphasis added). In short, Rule 606(b) "bars juror testimony and affidavits concerning jury deliberations but permits testimony and affidavits pertaining to extraneous prejudicial information, outside influence, and agreed quotient verdicts." Akins, 867 S.W.2d at 355 (citing Tenn. R. Evid. 606(b)).

The threshold inquiry is whether or not the information is "extraneous" and, (2) if "extraneous, whether or not said information was prejudicial, and (3) finally, if both extraneous and prejudicial, whether said extraneous prejudicial information had an influence on the jury. Kelli Whiteside v. Michael A. Hedge, No. E2004-02598-COA-R3-CV, 2005 WL 1248975, at *3 (Tenn. Ct. App. May 26, 2005) (citing Patton v. Rose, 892 S.W.2d 410, 414 (Tenn.Ct.App.1994); Cavalier Metal Corp. v. Johnson Metal Controls, 124 S.W.3d 122 (Tenn. Ct. App.2003)). "Extraneous information is information coming from a source outside the jury." State v. Clayton, 131 S.W.3d 475, 480 (Tenn. Crim. App. 2003) (citing State v. Coker, 746 S.W.2d 167, 171 (Tenn. 1987); NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE, § 6.06[4], at 6-51 (4th ed. 2000)). "[E]xtraneous prejudicial information is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case." Adams, 405 S.W.3d at 650 (citing Robinson v. Polk, 438 F.3d 350, 363 (4th Cir.2006); State v. Blackwell, 664 S.W.2d 686, 688-89 (Tenn. 1984); see also 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6075 (2d ed.2012)). "[C]lear and convincing evidence of prejudice is required to meet the standards of Tennessee Rules of Evidence 606(b)." Id.

When it is shown that a juror has been exposed to extraneous prejudicial information or an improper influence, a rebuttable presumption arises and the burden shifts to the State to explain the conduct or demonstrate that it was harmless. State v. Smith, 418 S.W.3d 38, 46 (Tenn. 2013) (citing Adams, 405 S.W.3d at 651; Walsh v. State, 166 S.W.3d 641, 647 (Tenn. 2005)). Because of the potentially prejudicial effect of a juror's receipt of extraneous information, the State bears the burden in criminal cases either to explain the conduct of the juror or the third party or to demonstrate how the conduct was harmless. Id. at 46. Error is harmless when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (quoting State v. Brown, 311 S.W.3d 422, 434 (Tenn. 2010); Neder v. United States, 527 U.S. 1, 15 (1999)).

In State v. Adams, the Tennessee Supreme Court utilized the analysis in Walsh v. State, 166 S.W.3d 641 (Tenn. 2005) as well as "factor tests" employed by several federal circuit courts of appeals to provide the "proper framework for determining the probable, objective effect upon a verdict of a juror's exposure to either extraneous prejudicial information or an improper outside influence." 405 S.W.3d 641, 654 (Tenn. 2013). The Tennessee Supreme Court listed following factors to aid in the determination of whether the State has rebutted the presumption of prejudice:

> (1) the nature and content of the information or influence, including whether the content was cumulative of other evidence adduced at trial; (2)

> the number of jurors exposed to the information or influence; (3) the manner and timing of the exposure to the juror(s); and (4) the weight of the evidence adduced at trial.

Id. "No single factor is dispositive. Instead, trial courts should consider all of the factors in light of the ultimate inquiry—whether there exists a reasonable possibility that the extraneous prejudicial information or improper outside influence altered the verdict." Id. (citing Walsh, 166 S.W.3d at 649).

The State does not dispute that the testimony of juror Lambert established that the jury in the Defendant's case was exposed to extraneous information. Based on the following analysis of the Adams factors, the trial court determined that this extraneous information was harmless:

> When applying these factors to the conduct which occurred in this case this Court finds the same to be harmless and holds that this conduct did not alter the verdict returned by this jury.
>
> The nature and content of the information learned from extraneous sources did not impact the verdict in this case. The extraneous information consisted of learning the definition of certain medical terminology, and the jury's receipt of the definition of a "life sentence" in Tennessee which equals a sentence wherein an offender must serve fifty-one (51) calendar years before becoming eligible for parole. Ms. Lambert was unable to specify what medical terms were "googled", and it would be pure speculation to assume that some unknown medical term adversely affected the verdict. Likewise, this Court has carefully considered whether or not the information about the duration of a life sentence could impact the jury's verdict and finds that within the context of this case, that this information did not impact the verdict. Most significantly, none of the extraneous information imparted was about [the Defendant].
>
> Based upon the testimony received, it does not appear to be in dispute that all twelve (12) jurors learned about the extraneous information. Nor does there appear to be dispute that the information was acquired after deliberations began.
>
> When considering factor four, this Court finds that the evidence of [the Defendant's] guilt is simply overwhelming, to wit: [the Defendant's] finger and palm prints were found upon multiple locations from both within

> and without the car where the homicide occurred; the victim was killed by multiple rounds from a 9 mm handgun where video evidence proved [the Defendant] possessed such a weapon within days preceding the homicide; the DNA of co-defendant (Bradley Robinson) was found on multiple items within the front seat of the vehicle; a 9 mm casing found within the crime scene matched a casing recovered from a location where [the Defendant] fired his 9mm weapon; the cellular phone records from the victim's phone prove the last usage of the phone prior to the victim's death was the placement of calls to individuals connected to [the Defendant]; [the Defendant] testified and admitted to firing the shots that killed [the victim] and to fleeing while in possession of the victim's cell phone after firing the shots; [the Defendant] admitted to Linda Hatch that he shot [the victim] in the course of a robbery that "went bad"; and the victim was shot at least six (6) times with five (5) entry wounds within the victim's back.

Upon our de novo review, State v. Smith, 418 S.W.3d at 48, we agree with the trial court, and conclude that the exposure to the extraneous information in this case was harmless. While it was highly improper for the jury to research this information in violation of the instruction of the trial court, the victim's cause of death was not in dispute, and as such, medical terms did not play a significant role in this case. Similarly, the meaning of a life sentence in Tennessee did not bear on the guilt or innocence of the Defendant. Because this information was not prejudicial, the Defendant is not entitled to a new trial on this issue. As to whether the trial court erred in refusing to subpoena the second juror to testify, we conclude that the trial court properly determined that it was unnecessary to do so. The affidavit of the second juror did not reveal anything that would "add to or supplement" the testimony of juror Lambert. It stated generally that the jury used Google to look up terms and the Webster dictionary definition of certain words. See e.g. State v. Keith Waggoner, No. E2018-01065-CCA-R3-CD, 2019 WL 4635589, at *20 (Tenn. Crim. App. Sept. 24, 2019) (internal citations omitted)(noting that inquiry into juror misconduct is not justified by potentially suspicious circumstances and that something more than unverified conjecture must be shown). Accordingly, we similarly conclude that the trial court did not abuse its discretion in not subpoenaing the second juror, and the Defendant is not entitled to a new evidentiary hearing on this matter.

VII. Constitutionality of Automatic Life Sentence for Juvenile. The Defendant argues that "an automatic sentence of life imprisonment (with release no sooner than fifty-one years) is unconstitutional for a juvenile." He invites this court to extend the United States Supreme Court's reasoning in Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S 460 (2012), to hold that automatic life sentences, even with the possibility of parole, are unconstitutional for juveniles. While we understand the Defendant's argument, we must

reject his invitation as we are bound by court precedent. See State v. Walter Collins, No. W2016-01819-CCA-R3-CD, 2018 WL 1876333, at *20 (Tenn. Crim. App. Apr. 18, 2018), appeal denied (Aug. 8, 2018), cert. denied, 139 S. Ct. 649 (2018) (collection of cases rejecting claim that a juvenile's mandatory life sentence in Tennessee, which requires service of fifty-one years before release, violates Miller and its progeny). Accordingly, the Defendant is not entitled to relief.

CONCLUSION

Based on the above authority and analysis, we affirm the judgments of the trial court.

_____

CAMILLE R. MCMULLEN, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 24, 2019 Session

STATE OF TENNESSEE v. TYSHON BOOKER

Criminal Court for Knox County
No. 108568

No. E2018-01439-CCA-R3-CD

JUDGMENT

Came the Defendant-Appellant, Tyshon Booker, by counsel, and the State, by the Attorney General, and this case was heard on the record on appeal from the Criminal Court for Knox County; and upon consideration thereof, this court is of the opinion that no error exists in the judgments of the trial court.

It is, therefore, ordered and adjudged by this court that the judgments of the trial court are AFFIRMED, and the case is remanded to the Criminal Court for Knox County for execution of the judgments of that court and for collection of costs accrued below.

It appearing that the Defendant-Appellant, Tyshon Booker, is indigent, the costs of the appeal are taxed to the State of Tennessee.

Camille R. McMullen, Judge
Robert L. Holloway, Jr., Judge
Timothy L. Easter, Judge

Appendix B:

September 16, 2020 Order of Tennessee Supreme Court Granting Rule 11 Application in Part

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. TYSHON BOOKER

Criminal Court for Knox County
No. 108568

No. E2018-01439-SC-R11-CD

ORDER

Upon consideration of the application for permission to appeal of Tyshon Booker and the record before us, the application is granted solely as to the issue of whether the sentence of life imprisonment violates the United States or Tennessee Constitutions. In their supplemental briefs, the parties shall also address what sentencing options may be available under Tennessee law if the sentence of life-imprisonment is improper. Additionally, the motions to file amicus briefs by the National Association of Criminal Defense Lawyers, the Tennessee Association of Criminal Defense Lawyers, and the Juvenile Law Center are hereby granted.

The Clerk is directed to place this matter on the docket for oral argument upon the completion of briefing.

PER CURIAM

Appendix C:

State v. Booker, 656 S.W.3d 49 (Tenn. 2022)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
February 24, 2022 Session Heard at Nashville[1]

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-SC-R11-CD

Tyshon Booker challenges the constitutionality of Tennessee's mandatory sentence of life imprisonment when imposed on a juvenile homicide offender. In fulfilling our duty to decide constitutional issues, we hold that an automatic life sentence when imposed on a juvenile homicide offender with no consideration of the juvenile's age or other circumstances violates the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Mr. Booker stands convicted of felony murder and especially aggravated robbery—crimes he committed when he was sixteen years old. For the homicide conviction, the trial court automatically sentenced Mr. Booker under Tennessee Code Annotated section 40-35-501(h)(2) to life in prison, a sixty-year sentence requiring at least fifty-one years of incarceration. But this sentence does not square with the United States Supreme Court's interpretation of the Eighth Amendment. When sentencing a juvenile homicide offender, a court must have discretion to impose a lesser sentence after considering the juvenile's age and other circumstances. Here, the court had no sentencing discretion. In remedying this constitutional violation, we exercise judicial restraint. We need not create a new sentencing scheme or resentence Mr. Booker—his life sentence stands. Rather, we follow the policy embodied in the federal Constitution as explained in *Montgomery v. Louisiana*, 577 U.S. 190 (2016) and grant Mr. Booker an individualized parole hearing where his age and other circumstances will be properly considered. The timing of his parole hearing is based on release eligibility in the unrepealed version of section 40-35-501(h)(1), previously in effect, that provides for a term of sixty years with release eligibility of sixty percent, but not less than twenty-five years of service. Thus, Mr. Booker remains sentenced to sixty years in prison, and after he has served between twenty-five and thirty-six years, he will receive an individualized parole

[1] We first heard oral argument on February 24, 2021. In light of the untimely death of Justice Cornelia A. Clark and by order of this Court filed December 17, 2021, retired Tennessee Supreme Court Justice William C. Koch, Jr. was designated to participate in this appeal. The case was re-argued on February 24, 2022.

hearing where his age and other circumstances will be considered. Our limited ruling, applying only to juvenile homicide offenders, promotes the State's interest in finality and efficient use of resources, protects Mr. Booker's Eighth Amendment rights, and is based on sentencing policy enacted by the General Assembly.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Criminal Appeals Reversed in Part

SHARON G. LEE., J., delivered the opinion of the Court, in which WILLIAM C. KOCH, JR., SP.J., joined. HOLLY KIRBY, J., filed an opinion concurring in the judgment. JEFFREY S. BIVINS, J., filed a dissenting opinion, in which ROGER A. PAGE, C.J., joined.

Eric Lutton, District Public Defender, and Jonathan P. Harwell, Assistant District Public Defender, for the appellant, Tyshon Booker.

Herbert H. Slatery III, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Zachary T. Hinkle, Associate Solicitor General; Mark Alexander Carver, Honors Fellow, Office of the Solicitor General; Charme P. Allen, District Attorney General; and TaKisha M. Fitzgerald and Phillip Morton, Assistant District Attorneys General, for the appellee, State of Tennessee.

Amy R. Mohan and L. Webb Campbell II, Nashville, Tennessee, and Marsha L. Levick, Philadelphia, Pennsylvania, for the Amicus Curiae, Juvenile Law Center.

Charles W. Bone, Nashville, Tennessee, and J. Houston Gordon, Covington, Tennessee, for the Amici Curiae, The Foundation for Justice, Freedom and Mercy, and Cyntoia Brown Long.

Edmund S. Sauer and Richard W.F. Swor, Nashville, Tennessee, for the Amicus Curiae, Raphah Institute.

Gibeault C. Creson, Alexandra Ortiz Hadley, and Robert R. McLeod, Nashville, Tennessee, for the Amicus Curiae, Julie A. Gallagher.

Gregory D. Smith, J. David Wicker, and Alexandra T. MacKay, Nashville, Tennessee, for the Amicus Curiae, Tennessee State Conference of the NAACP.

Meri B. Gordon, Rachel H. Berg, Joshua D. Arters, and Samantha M. Flener, Nashville, Tennessee, for the Amici Curiae, Campaign for the Fair Sentencing of Youth and the Children's Defense Fund.

Michael R. Working, David R. Esquivel, Jeff H. Gibson, Sarah Miller, Angela L. Bergman, Bradley A. MacLean, and Jonathan D. Cooper, Nashville, Tennessee, and Lucille A. Jewel and Stephen Ross Johnson, Knoxville, Tennessee, for the Amici Curiae, Tennessee Association of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, Charles Lowe-Kelley, and Amos Brown.

Thomas H. Castelli, Stella Yarbrough, James G. Thomas, and Nathan C. Sanders, Nashville, Tennessee, for the Amicus Curiae, American Civil Liberties Union of Tennessee.

W.J. Michael Cody and William David Irvine Jr., Memphis, Tennessee, for the Amici Curiae, American Baptist College, The American Muslim Advisory Council, The Rt. Rev. John C. Bauerschmidt, Bishop of The Episcopal Diocese of Tennessee, The Rt. Rev. Brian L. Cole, Bishop of the Episcopal Diocese of East Tennessee, The Rt. Rev. Phoebe A. Roaf, Bishop of the Episcopal Diocese of West Tennessee, The Most Reverend J. Mark Spalding, Bishop, Catholic Diocese of Nashville in Tennessee, The Most Reverend Richard F. Stika, Bishop, Catholic Diocese of Knoxville in Tennessee, The Most Reverend David P. Talley, Bishop, Catholic Diocese of Memphis in Tennessee, The Reverend Kevin L. Strickland, Bishop of the Southeastern Synod of the Evangelical Lutheran Church in America, The Black Clergy Collaborative of Memphis, Memphis Interfaith Coalition for Action and Hope, Nashville Organized for Action and Hope, Chattanoogans in Action for Love, Equality, and Benevolence, Interdenominational Ministers Fellowship, Islamic Center of Nashville, CCDA Knoxville, Woodland Presbyterian Church, Knoxville Christian Arts Ministries, Nashville Jewish Social Justice Roundtable, Rabbi Micah Greenstein, Rabbi Jeremy Simons, Rabbi Philip Rice, Ministry Table of West End United Methodist Church, Pastor Anna Lee, Knoxville Underground, Yoke Youth Ministries, Bishop Joseph Warren Walker, Bishop Edward H. Stephens, Jr., Pastor Peris J. Lester, Reverend Dr. Byron C. Moore, MPC, Reverend Dr. J. Lawrence Turner, Minister J.P. Conway, Minister Josh Graves, Professor Lee Camp, Raising a Voice, Reverends Jeannie Hunter and Robert Early, Reverend Mike Wilson, Reverend Mary Louise McCullough, Reverend C. Nolan Huizenga, Reverend Timothy E. Kimbrough, Dave McNeely, Pastor Brad Raby, Pastor Doug Banister, Pastor Russ Ramsey, Pastors Jonathan Nash, Elliott Cherry, and Matt Avery, and Mosaic Church.

OPINION

I.

This case requires us to rule on the constitutionality of the statutory sentencing process for juvenile homicide offenders. History teaches that our constitutional union is preserved best when the three branches of government respect our state and federal constitutions, particularly the proper roles assigned to each branch of government. As

Justice Bivins recently reminded us, the Tennessee Constitution establishes this Court as "the supreme judicial tribunal of the [S]tate." *State v. Lowe*, 552 S.W.3d 842, 856 (Tenn. 2018) (quoting *Barger v. Brock*, 535 S.W.2d 337, 340 (Tenn. 1976)). Accordingly, this Court has the sole authority—and responsibility—to "determine the constitutionality of actions taken by the other two branches of government." *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995) (citing *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 148 (Tenn. 1993)); *see also Jordan v. Knox Cnty.*, 213 S.W.3d 751, 780 (Tenn. 2007) ("When there is a challenge, the judicial branch of government has a duty to determine the substantive constitutionality of statutes, ordinances, and like measures." (citing *City of Memphis v. Shelby Cnty. Election Comm'n*, 146 S.W.3d 531, 536 (Tenn. 2004))); *Huntsman's Lessee v. Randolph*, 6 Tenn. (5 Hayw.) 263, 271 (1818) (recognizing the courts' duty to determine the substantive constitutionality of statutes).

This Court cannot wield its constitutional prerogative in a way that usurps the authority of the other two branches of government. *See* Tenn. Const. art. II, § 2. It is not our prerogative to determine whether a statute is "dictated by a wise or foolish policy." *Cosmopolitan Life Ins. Co. v. Northington*, 300 S.W.2d 911, 918 (Tenn. 1957). We are not "free to write [our] personal opinions on public policy into law." *Jordan*, 213 S.W.3d at 780.

However, if our constitutions are to remain viable and their integrity maintained, we must strike down statutes that violate either the federal or the state constitution.[2] We have the power and duty to declare a statute void when it violates the prohibition against cruel and unusual punishment in article I, section 16 of the Tennessee Constitution. *Brinkley v. State*, 143 S.W. 1120, 1122 (Tenn. 1911). There is no precedent or reasoned principle that prevents us from determining whether a Tennessee statute violates a similar constitutional protection in the Eighth Amendment to the United States Constitution. The fact that the United States Supreme Court has not yet addressed the precise question before us provides

[2] *Hooker v. Haslam*, 393 S.W.3d 156, 165 (Tenn. 2012); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 7 (Tenn. 2000), superseded by constitutional amendment, Tenn. Const. art. I, § 36 (2014); *Biggs v. Beeler*, 173 S.W.2d 946, 948 (Tenn. 1943). The United States Supreme Court has recognized that state courts have jurisdiction to hear federal constitutional claims. Over two hundred years ago, the Court noted:

> [T]he constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342 (1816).

scant justification to shirk our duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

II.

We begin with a review of the facts of this case. On Sunday afternoon, November 15, 2015, sixteen-year-old Tyshon Booker and another juvenile, Bradley Robinson, were riding around in Knoxville with Mr. Robinson's friend, the twenty-six-year-old victim, G'Metrik Caldwell. The victim drove his car, with Mr. Robinson riding in the front passenger seat and Mr. Booker in the rear passenger seat. Late in the afternoon after the victim pulled his car to a curb, Mr. Booker shot him six times in the back, the side of the chest, and right shoulder. Mr. Robinson and Mr. Booker, who had the victim's cell phone, ran from the scene. More than $800 and a baggy containing a green leafy substance were found in the victim's pockets after the shooting. He died from multiple gunshot wounds.

Mr. Booker was charged with murder in a petition filed in Knox County Juvenile Court. Following a hearing, the juvenile court transferred his case to the Knox County Criminal Court.[3] Mr. Booker was later indicted on two counts of first-degree felony murder and two counts of especially aggravated robbery for taking the victim's cell phone.[4]

At trial, a neighbor of Mr. Booker's testified that the morning after the murder, Mr. Booker told her that he and Mr. Robinson had planned to rob the victim but that the victim resisted and Mr. Robinson yelled at Mr. Booker to shoot. The neighbor further stated that Mr. Booker told her once he started shooting, he could not stop until he had fired all the bullets. When Mr. Booker testified at trial, he admitted shooting the victim but claimed he acted in self-defense. Mr. Booker explained that he and Mr. Robinson rode around with the victim in his car and smoked marijuana and took two pills supplied by the victim. According to Mr. Booker's testimony, when the victim pulled his car to the curb to let Mr. Booker out, the victim and Mr. Robinson began fighting. Mr. Booker said he saw the victim reaching down for something in the front floorboard, and Mr. Robinson yelled, "He got a gun, bro." Mr. Booker stated that when he saw the victim holding a gun and starting to turn

[3] Only an adult may be tried for first-degree murder, but the juvenile court was authorized to transfer a juvenile offender to criminal court to be tried as an adult. *See* Tenn. Code Ann. § 37-1-134 (2014 & Supp. 2021).

[4] Mr. Robinson was also charged with murder in a juvenile court petition and transferred to criminal court to be tried as an adult. *See State v. Robinson*, No. E2020-00555-CCA-R3-CD, 2021 WL 1884713, at *6 (Tenn. Crim. App. May 11, 2021), *perm. app. denied* (Tenn. Sept. 22, 2021). Mr. Robinson and Mr. Booker were indicted together on the same charges. *Id.* at *1. Mr. Robinson's case was severed, and a jury convicted him of facilitation of first-degree felony murder and facilitation of especially aggravated robbery. *Id.* at *6. Mr. Robinson's effective sentence was thirty-seven years. *Id.* at *1.

toward him in the back seat, Mr. Booker shot the victim until he stopped moving. Mr. Booker denied he planned to rob the victim, explaining that he borrowed the victim's cell phone to call his girlfriend. Mr. Booker stated that after the shooting, he ran from the scene not realizing he had the victim's phone in his pocket.

The jury convicted Mr. Booker of two counts of first-degree felony murder[5] and two counts of especially aggravated robbery. The trial court merged the two felony murder convictions and, without a hearing, sentenced Mr. Booker to life in prison. This sentence has a sixty-year term with release after fifty-one years if all applicable sentencing credits are earned and retained. *See* Tenn. Code Ann. § 40-35-501(h)(2) (Supp. 2021).[6] The trial court merged the two especially aggravated robbery convictions and, after a hearing, sentenced Mr. Booker to twenty years—less than the maximum punishment—to be served concurrently with his life sentence. The trial court denied Mr. Booker's motion for a new trial.

In the Court of Criminal Appeals, Mr. Booker challenged the constitutionality of Tennessee's automatic life sentence for first-degree murder when imposed on a juvenile.[7] The Court of Criminal Appeals affirmed, acknowledging Mr. Booker's argument but deferring to existing precedent. *State v. Booker*, E2018-01439-CCA-R3-CD, 2020 WL 1697367, at *33 (Tenn. Crim. App. Apr. 8, 2020).

We granted Mr. Booker's application for permission to appeal to address the constitutionality of Tennessee's sentence of life imprisonment when automatically imposed on a juvenile homicide offender. Order, *State v. Booker*, No. E2018-01439-SC-

[5] Felony murder is a form of first-degree murder that does not require premeditation but involves a killing committed during the commission of or attempt to commit a violent felony such as arson, rape, or robbery. Tenn. Code Ann. § 39-13-202(a)(2) (2018 & Supp. 2021). Other forms of first-degree murder are killings that are premeditated and intentional, *id.* § -202(a)(1), result from a bombing, *id.* § -202(a)(3), or occur during the commission of or attempted commission of an act of terrorism, *id.* § -202(a)(4).

[6] Section 40-35-501(h)(2) is the current version of the statute, which was previously numbered as sections 40-35-501(i)(1) and (i)(2)(a), and is substantively identical. Tennessee law mandates a sentence of death, imprisonment for life without possibility of parole, or imprisonment for life for those convicted of felony murder. *See* Tenn. Code Ann. §§ 39-13-202(a)(2) & (c)(1)–(2) (2018 & Supp. 2021). Mr. Booker was not eligible for the death penalty, *see Roper v. Simmons*, 543 U.S. 551, 568 (2005), and the State did not give notice of intent to seek life without parole. *See* Tenn. Code Ann. § 39-13-208(a)–(c) (2018 & Supp. 2021). Thus, Mr. Booker's sentence of life imprisonment was mandatory. *See* Tenn. Code Ann. § 39-13-208(c).

[7] Mr. Booker also asserted other claims, including the prosecution's failure to disclose exculpatory evidence, juror misconduct, improper closing argument and jury instructions, and challenges to the juvenile transfer process.

R11-CD (Tenn. Sept. 16, 2020) (granting application for permission to appeal). Mr. Booker argues that the life sentence of at least fifty-one years and no more than sixty years violates the Eighth Amendment to the United States Constitution and article I, section 16 of the Tennessee Constitution. Mr. Booker's arguments find universal support in the many briefs filed by amici curiae.[8] The State contends that the life sentence, which guarantees release after sixty years, contravenes neither the United States Constitution nor the Tennessee Constitution.

III.

We review questions of constitutional interpretation de novo without presuming the correctness of the lower court's legal conclusions. *State v. Burns*, 205 S.W.3d 412, 414 (Tenn. 2006) (citing *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001)). Ruling on a constitutional challenge to a statute is often an exercise in judicial restraint. We must be careful not to impose our own policy views on the matter or overstep into the General Assembly's realm of making reasoned policy judgments. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 717 (Tenn. 1997). Similarly, when construing statutes, "it is our duty to adopt a construction which will sustain [the] statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993).

The Eighth Amendment and Juvenile Sentencing

Over a century ago, the United States Supreme Court acknowledged that the principle of proportionality is embedded in the Eighth Amendment. The Court said that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910).

The Court's later opinions applying the proportionality principle do not chart a straight course.[9] In 1983, after noting that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law

[8] Briefs were filed as amici curiae by a coalition of religious organizations in Tennessee; the Tennessee State Conference of the NAACP; the Campaign for the Fair Sentencing of Youth and the Children's Defense Fund; the Juvenile Law Center; the Tennessee and National Associations of Criminal Defense Lawyers; Charles Lowe-Kelley; Amos Brown; the ACLU of Tennessee; the Raphah Institute; the Foundation for Justice, Freedom and Mercy; Cyntoia Brown Long; and Julie A. Gallagher.

[9] We have observed that "the precise contours of the federal proportionality guarantee are unclear." *State v. Harris*, 844 S.W.2d 601, 602 (Tenn. 1992) (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991) (Kennedy, J., concurring in part)).

jurisprudence," the Court stated "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 284, 290 (1983). But eight years later, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court's controlling opinion[10] held that the Eighth Amendment contains a "narrow proportionality principle" that "does not require strict proportionality between crime and sentence" but "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 997, 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at 288).

As to juveniles tried as adults, the Court has been clear about the central importance of proportionality when imposing significant criminal punishment. In 1988, the Court held that the Eighth Amendment prohibited executing juveniles who were under the age of sixteen at the time of the offense. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). Three principles formed the cornerstone of the Court's opinion.

The first principle was that the "authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments." *Id.* at 821. The second principle was proportionality. The Court said that the "punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 834 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). The third principle was that "there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults." *Id.* at 823 (emphasis omitted).

Based on these principles, the Court endorsed "the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Id.* at 835. After noting that "[t]he basis for this conclusion is too obvious to require extended explanation," the Court stated that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.*[11]

The *Thompson* Court declined to extend its decision to juvenile offenders older than sixteen years. *Id.* at 838. Yet when revisiting the question in 2005, the Court held that the

[10] The Court issued a divided opinion in *Harmelin* and later characterized Justice Kennedy's separate opinion as the "controlling opinion." *Graham v. Florida*, 560 U.S. 48, 59–60 (2010).

[11] The *Thompson* Court said that juveniles' reduced culpability arose from the fact that (1) juveniles are "less mature and responsible than adults"; (2) juveniles are "more vulnerable, more impulsive, and less self-disciplined than adults"; and (3) adolescents "may have less capacity to control their conduct and to think in long-range terms than adults." *Thompson*, 487 U.S. at 834.

Eighth Amendment prohibited imposing the death penalty on all juvenile offenders. *Roper v. Simmons*, 543 U.S. 551, 574, 578–79 (2005).

The *Roper* Court based its decision on the same principles that animated the *Thompson* Court's decision. First, the Court said that the Eighth Amendment's protection against cruel and unusual punishments "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned.'" *Id.* at 560 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). Second, the Court explained that three differences between juveniles and adults show that "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

The three differences between juveniles and adults identified in *Roper* mirror the reasons identified in *Thompson*. The first difference is that juveniles lack maturity and have "an underdeveloped sense of responsibility." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). The second difference is that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). The third difference is that "the character of a juvenile is not as well formed as that of an adult." *Id.* at 570.

Like the *Thompson* Court, the *Roper* Court addressed the Eighth Amendment issue by adopting a bright-line prophylactic rule based on the age of the juvenile when the crime was committed. Justice O'Connor, writing separately, agreed that "juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and . . . these differences bear on juveniles' comparative moral culpability." *Id.* at 599 (O'Connor, J., dissenting). But she disagreed with creating a bright-line rule because "the class of offenders . . . is too broad and too diverse to warrant categorical prohibition." *Id.* at 601. Justice O'Connor preferred to address proportionality concerns "through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his [or her] susceptibility to outside pressures, his [or her] cognizance of the consequences of his [or her] actions, and so forth." *Id.* at 602–03. Thus, Justice O'Connor favored addressing the Eighth Amendment issue with a procedural remedy.

In 2010, the Court employed another bright-line prophylactic rule, holding that the Eighth Amendment prohibits sentencing a juvenile who has not committed homicide to a life-without-parole sentence. *Graham v. Florida*, 560 U.S. 48, 82 (2010). Reflecting the reasoning in *Thompson* and *Roper*, the *Graham* Court's decision was based on the proportionality principle and the lesser culpability of juveniles. The Court said that "[t]he concept of proportionality is central to the Eighth Amendment." *Id.* at 59. Then, relying on the three differences between juveniles and adults discussed in *Roper*, the Court stated that juveniles are "less deserving of the most severe punishments" because they are less

culpable. *Id.* at 68. Finally, the Court said that "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles." *Id.*

Chief Justice Roberts concurred in the judgment, agreeing that Mr. Graham's life-without-parole sentence violated the Eighth Amendment. Chief Justice Roberts cited the *Roper* Court's conclusion that "juvenile offenders are generally less culpable than adults who commit the same crimes." *Id.* at 86 (Roberts, C.J., concurring in the judgment). And he invoked the narrow proportionality rule applicable to noncapital cases. Noting that "an offender's juvenile status can play a central role in the inquiry," *id.* at 90, the Chief Justice said:

> Terrance Graham committed serious offenses, for which he deserves serious punishment. But he was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive. In my view, Graham's age—together with the nature of his criminal activity and the unusual severity of his sentence—tips the constitutional balance. I thus concur in the Court's judgment that Graham's sentence of life without parole violated the Eighth Amendment.

Id. at 96.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that mandatory life-without-parole sentences for juveniles violated the Eighth Amendment. The Court based its decision on the two essential principles found in *Thompson*, *Roper*, and *Graham* but fashioned a different remedy to address the constitutional violation.

First, after noting that "[t]he concept of proportionality is central to the Eighth Amendment," the Court said that the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions" and that this right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Id.* at 469 (first quoting *Graham*, 560 U.S. at 59; and then quoting *Roper*, 543 U.S. at 560).

Second, the Court said that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. Relying on the "three significant gaps between juveniles and adults" discussed in *Graham*, the Court said that juveniles "are less deserving of the most severe punishments" because they "have diminished culpability and greater prospects for reform." *Id.* (quoting *Graham*, 560 U.S. at 68). The Court added that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472.

But the Court declined to devise another bright-line rule to remedy the Eighth Amendment problem and instead turned its attention to the sentencing process itself. Consistent with Justice O'Connor's dissenting opinion in *Roper* seven years earlier, the Court decided that the proportionality concerns should be addressed by requiring individualized sentencing so that the sentencer could give appropriate weight to the youthfulness of the defendant. *Id.* at 489. The Court held that mandatory life-without-parole sentences for juveniles "contravene[d] *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 474. Thus, the Court found that subjecting juveniles to a mandatory life-without-parole sentence violates the Eighth Amendment because the sentencing authority did not have the opportunity to consider the "mitigating qualities of youth." *Id.* at 476 (quoting *Johnson*, 509 U.S. at 367).

The *Miller* Court emphasized the fundamental importance of individualized sentencing to avoid imposing disproportionate punishment on juveniles facing a state's harshest penalties. Mandatory sentencing laws "remov[e] youth from the balance" and "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 474. Without individualized sentencing for juveniles facing a state's harshest penalties, the sentencing authority "misses too much," and thereby runs "too great a risk of disproportionate punishment." *Id.* at 477, 479.

The Court decided two *Miller*-related cases after 2012. In 2016, the Court held that *Miller* should be applied retroactively because it announced a new substantive rule of constitutional law. *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). The petitioner in *Montgomery* had been automatically sentenced to life without parole for an offense he committed when he was seventeen years old. *Id.* at 194. After the Court decided *Miller*, the petitioner, then sixty-nine years old, sought collateral review of his mandatory sentence. *Id.* at 195. The Court applied *Miller* retroactively and explained that a *Miller* violation did not require resentencing but could be remedied by allowing juvenile homicide offenders to be considered for parole. *Id.* at 206. In 2021, the Court held that neither the Eighth Amendment nor *Miller* requires separate findings or an on-the-record explanation of permanent incorrigibility before imposing a discretionary life-without-parole sentence on a juvenile. *Jones v. Mississippi*, 141 S. Ct. 1307, 1318–19, 1321 (2021).

In neither case did the Court retreat from the essential principles in *Thompson*, *Roper*, *Graham*, and *Miller*. In *Montgomery*, the Court repeated *Miller*'s point that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," a mandatory life-without-parole sentence "poses too great a risk of disproportionate punishment." *Montgomery*, 577 U.S. at 195 (quoting *Miller*, 567 U.S. at 479). In *Jones*, the Court acknowledged that "youth matters in sentencing," and the "key

assumption" in *Miller* is "that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." *Jones*, 141 S. Ct. at 1314, 1318.

The *Miller* Court's decision that the mandatory imposition on a juvenile of a life-without-parole sentence poses too great a risk of disproportionate punishment reflects its concern, at least when a state's severest punishments are involved, that a mandatory sentencing scheme risks erroneously depriving a juvenile's right to receive a proportionate sentence. *Miller*, 567 U.S. at 479. The Court's remedy does not preclude juveniles from being sentenced to life without parole. Rather, the remedy requires a procedural safeguard—individualized sentencing—to minimize the risk of erroneously imposing a disproportionate sentence. *Id.* at 489.

Although this case involves a life sentence, and not death or life without parole, three essential rules can be derived from the *Thompson*, *Roper*, *Graham*, and *Miller* line of cases when considering proportionality. The first principle is that the Eighth Amendment's requirement of proportionality means that punishment has to be graduated and proportioned. The second principle is that steps must be taken to minimize the risk of a disproportionate sentence when juveniles are facing the possible imposition of a state's harshest punishments. The third principle is that these steps, whatever they may be, must allow the sentencer to take the mitigating qualities of youth into account by considering, among other relevant factors, (a) the juvenile's "lack of maturity" and "underdeveloped sense of responsibility," which can lead to "recklessness, impulsivity, and heedless risk-taking"; (b) the juvenile's vulnerability and susceptibility to negative influences and outside pressure, as from family and peers; and (c) the fluidity of the development of the juvenile's character and personal traits. *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569–70).

Tennessee's Automatic Life Sentence

With these principles in mind, we turn to a proportionality analysis. In determining whether Tennessee's automatic life sentence when imposed on juvenile homicide offenders complies with the Eighth Amendment's requirement of proportionality, we consider whether "the punishment for the crime conforms with contemporary standards of decency," "whether the punishment is grossly disproportionate to the offense," and whether the sentence goes beyond what is necessary to accomplish "legitimate penological objectives." *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306 (Tenn. 2005) (citing *Roper*, 543 U.S. at 560–61; *Atkins*, 536 U.S. at 311–12; *Solem*, 463 U.S. at 292).

"Reliable objective evidence of contemporary values" can be provided by a review of "legislation enacted by the country's legislators." *Penry v. Lynaugh*, 492 U.S. 302, 331

(1989) *abrogated by Atkins,* 536 U.S. 304. This is in addition to "[a]ctual sentencing practices" because they are "an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62.

Compared to the other forty-nine states, Tennessee is a clear outlier in its sentencing of juvenile homicide offenders. So much so that Tennessee's life sentence when automatically imposed on a juvenile is the harshest of any sentence in the country. No one, including the dissent, disputes that a juvenile offender serving a life sentence in Tennessee is incarcerated longer than juvenile offenders serving life sentences in other states. For example, had Mr. Booker committed felony murder in nearby Alabama, he would have been eligible for release in fifteen years; twenty years in Virginia; twenty-five years in North Carolina, Kentucky, and Missouri; thirty years in Georgia; and twenty-five to thirty years in Arkansas.[12]

Juvenile homicide offenders with life sentences (and in some states, even life-without-parole sentences) may be eligible for release within twenty-five years or less in twenty-three states (Alabama, California, Florida, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maryland, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming) and the District of Columbia.[13] The release eligibility for a life sentence ranges

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[12] *See* Ala. Code § 15-22-28(e)(2) (West, Westlaw through Act 2022-442 of 2022 Reg. & First Sp. Sess.); Va. Code Ann. § 53.1-165.1(E) (West, Westlaw through 2022 Reg. Sess. and 2022 Sp. Sess. I, cc. 1 to 22); N.C. Gen. Stat. Ann. § 15A-1340.19A to .19C. (West, Westlaw through S.L. 2022-75 of 2022 Reg. Sess.); Ky. Rev. Stat. Ann. § 640.040 (West, Westlaw through 2022 Reg. & Extraordinary Sess.); Mo. Ann. Stat. § 558.047.1(1)–(2) (West, Westlaw through WID 37 of 2022 Second Reg. Sess.); Ga. Code Ann. § 17-10-6.1 (West, Westlaw through 2022 Reg. Sess.); Ark. Code Ann. § 16-93-621(a)(2)(A) (West, Westlaw through 2022 Third Extraordinary Sess.).

[13] *See* Ala. Code § 15-22-28(e)(2) (15 years); Cal. Penal Code § 3051(b)(4) (West, Westlaw current with urgency legislation through Ch. 997 of 2022 Reg. Sess.) (25 years for a life-without-parole sentence); D.C. Code Ann. §§ 24-403(a) (West, Westlaw through June 30, 2022) (15 years), -403.01(c)(2)(B) (no life without parole); Fla. Stat. Ann. § 921.1402(2) (West, Westlaw through July 1, 2022) (25 years for a life sentence); Haw. Rev. Stat. Ann. §§ 706-656(1), -669(1) (West, Westlaw through 2022 Reg. Sess.) (set by parole board, with immediate eligibility and consideration of youth); Idaho Code Ann. § 18-4004 (West, Westlaw through 2022 Second Reg. Sess. & First Extraordinary Sess.) (10 years); 730 Ill. Comp. Stat. Ann. §§ 5/5-4.5-115, 5-4.5-105, 5-8-1 (West, Westlaw through P.A. 102–1102 of 2022 Reg. Sess.) (20 years, with review of *Miller*'s mitigating considerations and discretionary enhancements, not applicable to Mr. Booker's facts, requiring 40 years and up to natural life); Ky. Rev. Stat. Ann. § 640.040(1) (25 years); La. Stat. Ann. § 15:574.4(E) (West, Westlaw through 2022 First Extraordinary & Reg. Sess.) (25 years for all juvenile homicide offenders, with mandatory conditions); Md. Code Ann., Corr. Servs. § 7-301(d) (West, Westlaw through 2022 Reg. Sess.) (25 years for a life sentence); Mo. Ann. Stat. § 558.047(1)(2) (25 years for a life sentence); Nev. Rev. Stat. Ann. § 213.12135 (West, Westlaw through Ch. 2 (End) of 33rd Sp. Sess. 2021) (20 years, but not for multiple victims); *State v. Comer*, 266 A.3d 374, 380–81 (N.J. 2022) (permitting juvenile homicide offenders to petition for a 20-year look-back hearing applying *Miller* factors

from twenty-five to thirty-five years in twelve other states (Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Massachusetts, Minnesota, Montana, New Mexico, Ohio, and Pennsylvania).[14] In sum, compared to Tennessee's fifty-one-year minimum and sixty-year maximum sentence, thirty-six or nearly three-fourths of other states allow juvenile offenders release eligibility in less than thirty-five years. Two states (Oklahoma and Texas) guarantee parole eligibility in thirty-eight and forty years, respectively.[15] The other twelve states besides Tennessee (Alaska, Indiana, Iowa, Kansas, Maine, Michigan, Mississippi, Nebraska, New Hampshire, South Carolina, South Dakota, and Vermont)

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to avoid constitutional infirmity of a mandatory 30-year-minimum sentence under N.J. Stat. Ann. § 2C:11-3(b)(1)); N.Y. Penal Law §§ 70.00(3)(a)(i), -(5) (West, Westlaw through L.2022, chs. 1 to 566) (20 to 25 years; no life without parole); N.C. Gen. Stat. Ann. §15A-1340.19A (25 years for a life sentence, no life without parole for felony murder); N.D. Cent. Code Ann. § 12.1-32-13.1 (West, Westlaw through 2021 Reg. & Sp. Sess.) (20 years for all); Or. Rev. Stat. Ann. § 144.397 (West, Westlaw through 2022 Reg. Sess.) (15 years for life and life without parole); 13 R.I. Gen. Laws Ann. § 13-8-13(e) (West, Westlaw current with effective legislation through Ch. 442 of 2022 Reg. Sess.) (20 years for a life sentence); Utah Code Ann. §§ 76-3-206(2)(a)(ii), (b) (West, Westlaw through 2022 Third Sp. Sess.) (25 years; no life without parole); Va. Code Ann. § 53.1-165.1(E) (20 years for all); Wash. Rev. Code Ann. § 9.94A.730(1) (West, Westlaw through 2022 Reg. Sess.) (20 years for life); W. Va. Code Ann. §§ 61-11-23(a)–(b) (West, Westlaw through 2022 First Sp. Sess., Reg. Sess., Second Sp. Sess., Third Sp. Sess., & Fourth Sp. Sess.) (15 years; no life without parole); Wis. Stat. Ann. § 973.014(1g)(a)(1) (West, Westlaw through 2021 Act 267) (20 years for a life sentence, with discretion); Wyo. Stat. Ann. § 6-10-301(c) (West, Westlaw through 2022 Budget Sess.) (25 years for all except for cases with certain subsequent adult offenses).

[14] *See* Ariz. Rev. Stat. Ann. § 13-751(A)(2) (West, Westlaw through legislation effective Sept. 24, 2022 of the Second Reg. Sess.) (25 to 35 years for life); Ark. Code Ann. § 16-93-621(a)(2)(A) (25 to 30 years for all juvenile homicide offenders); Colo. Rev. Stat. Ann. §§ 17-34-102(8)(a)–(b) (West, Westlaw through Second Reg. Sess.) (30 years for juvenile homicide offenders participating in a specialized rehabilitation program); Conn. Gen. Stat. Ann. § 54-125a(f)(1) (West, Westlaw through 2022 Reg. Sess.) (the greater of 12 years or 60% of the sentence for a sentence of 50 years of less; 30 years for a sentence of more than 50 years); Del. Code Ann. tit. 11, § 4204A(d)(2) (West, Westlaw through Ch. 424 of 151st Gen. Assemb. 2021–2022) (30 years for all), *id*. § 4204A(b)(2); Ga. Stat. Ann. § 17-10-6.1 (30 years for a life sentence); Mass. Gen. Laws. Ann. ch. 279 § 24 (West, Westlaw through Ch. 125 of 2022 Second Ann. Sess.) (20 to 30 years for a life sentence); Minn. Stat. Ann. § 244.05(4)(b) (West, Westlaw through 2022 Reg. Sess.) (30 years for life); Mont. Code Ann. § 46-23-201(4) (West, Westlaw through 2021 Sess.) (30 years); N.M. Stat. Ann. § 31-21-10(A) (West, Westlaw through 2022 Second Reg. & Third Sp. Sess.) (30 years for life); Ohio Rev. Code Ann. § 2929.03 (West, Westlaw through File 132 of 134th Gen. Assemb., 2021-2022) (20 to 30 years for life); 18 Pa. Stat. & Cons. Stat. Ann. § 1102.1 (West, Westlaw through 2022 Reg. Sess. Act 97) (25 to 35 years).

[15] *See* Tex. Gov't Code Ann. § 508.145(b) (West, Westlaw through end of 2021 Reg. & Called Sess.) (40 years for a life sentence); *Anderson v. State*, 130 P.3d 273, 282–83 (Okla. Crim. App. 2006) (85% of 45-year presumptive life sentence).

allow a sentencer to use discretion and impose a term of less than fifty years on juvenile homicide offenders.[16]

In short, Tennessee is out of step with the rest of the country in the severity of sentences imposed on juvenile homicide offenders. Automatically imposing a fifty-one-year-minimum life sentence on a juvenile offender without regard to the juvenile's age and attendant circumstances can, for some juveniles, offend contemporary standards of decency.

Next, we consider whether a sixty-year life sentence requiring a minimum of fifty-one years of service when imposed on juvenile offenders is grossly disproportionate to the crime. The answer is—it depends. A fifty-one-year prison sentence will be proportionate for some offenders, but not for others. This is where individualized sentencing matters. Proportionality concerns can be addressed when the sentencer can consider the offender's age and circumstances, the nature of the crime, and the severity of the sentence. *See Graham*, 560 U.S. at 90 (Roberts, C.J., concurring in the judgment). But in juvenile first-degree murder cases, and only in these cases, a sentence is automatically imposed without considering age, the nature of the crime, or any other factors. The mandatory life sentence when imposed on juvenile offenders is one-size-fits-all. Yet juvenile offenders and their crimes are not all the same. Thus, Tennessee's automatic life

[16] *See* Alaska Stat. Ann. §§ 12.55.125(a) (West, Westlaw through Aug. 27, 2022 of 2022 Second Reg. Sess.) (30 to 99 years with aggravating factors, many involving discretion), -(j) (parole eligibility for 99 at 49.5 years), -(m) (discretion if mandatory 99-year sentence for killing during robbery "would be manifestly unjust"), 33.16.090(b) (two-thirds parole eligibility for first-degree murder but subject to other discretion-empowering provisions); Ind. Code Ann. §§ 35-50-2-3; 35-50-6-4(b) (West, Westlaw through 2022 Second Reg. Sess., Second Reg. Tech. Sess., & Second Reg. Sp. Sess.) (discretionary sentencing between 45 and 65 years or life without parole); *State v. Zarate*, 908 N.W.2d 831, 855 (Iowa 2018) (discretionary factors under Iowa Code Ann. § 902.1(2)(b)); Kan. Stat. Ann. §§ 21-6620, -6623 (West, Westlaw through laws enacted during 2022 Reg. Sess. effective on July 1, 2022) (25, 40, or 50 years, with discretion); Me. Rev. Stat. Ann. tit. 17-A, § 1603(1) (West, Westlaw through 2022 Second Reg. Sess.) (at least 25 years, with discretion); *People v. Skinner*, 917 N.W.2d 292, 317 (Mich. 2018) (25 years to life without parole, with discretion under Mich. Comp. Laws Ann. § 769.25(9)); *Chandler v. State*, 242 So. 3d 65, 69–71 (Miss. 2018) (discretion under *Miller*); *State v. Castaneda*, 842 N.W.2d 740, 757–58, 762 (Neb. 2014) (holding that resentencing was required because life sentence with "no meaningful opportunity to obtain release" was imposed before *Miller* and without consideration of factors required by *Miller*); *Petition of State*, 103 A.3d 227, 229, 236 (N.H. 2014) (ordering retroactive resentencing under *Miller* for four juvenile homicide offenders, despite mandatory life without parole required by New Hampshire law); *State v. Lopez*, 261 A.3d 314, 320 (N.H. 2021) (upholding a discretionary 45-year-minimum sentence); *Aiken v. Byars*, 765 S.E.2d 572, 578 (S.C. 2014) (holding that juveniles sentenced to life without parole before *Miller* were entitled to resentencing hearing for consideration of *Miller* factors); *State v. Quevedo*, 947 N.W.2d 402, 411 (S.D. 2020) (upholding discretionary sentence of 90 years, after consideration of *Miller* factors, with eligibility for parole after 45 years); Vt. Stat. Ann. tit. 13, § 2303 (West, Westlaw through Chs. 186 and M-19 of Adjourned Sess. of 2021–2022) (35 years or more, with discretion).

sentence when imposed on juvenile offenders lacks the necessary procedural protection to guard against disproportionate sentencing.

One consistent thread running through the Supreme Court's decisions is that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471 (describing the proposition established by *Roper* and *Graham*). These differences include a child's "lack of maturity and an underdeveloped sense of responsibility," which "often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569 (quoting *Johnson*, 509 U.S. at 367). In addition, a juvenile's brain and character traits are not fully developed, and a juvenile is particularly "susceptible to negative influences and outside pressures." *Id.* These factors bear directly on a juvenile's culpability.

Yet Tennessee statutes that require a juvenile homicide offender to be automatically sentenced to life imprisonment allow for no consideration of the principles stated in these Supreme Court decisions. In Tennessee, there is no sentencing hearing. There is no recognition that juveniles differ from adults. And the sentencer has no discretion to consider or impose a lesser punishment. *See Jones*, 141 S. Ct. at 1321 (noting that in a case involving a juvenile who committed a homicide, a state's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient). Instead, Mr. Booker's life sentence requires service of between fifty-one and sixty years. Even if he earns every available sentencing credit, Mr. Booker will spend more time behind bars than nearly any adult with the same sentence. As the Supreme Court has observed, lengthy sentences inflict more punishment on juvenile offenders than similarly situated adult offenders because juveniles will spend a higher percentage of their natural lives in prison. *See Graham*, 560 U.S. at 70–71; *Miller*, 567 U.S at 477.

Although Mr. Booker had no sentencing hearing for the first-degree murder conviction, he did have a sentencing hearing on the especially aggravated robbery conviction. At that hearing, the trial court was allowed to consider as a mitigating factor whether Mr. Booker lacked substantial judgment in committing the offense because of his youth. Tenn. Code Ann. § 40-35-113(6). The trial court imposed on Mr. Booker not the harshest sentence, but a mid-range sentence of twenty years to be served concurrently with the life sentence for first-degree murder.

Had there been a sentencing hearing for the first-degree murder conviction, the trial court could have considered Mr. Booker's age and circumstances and the nature of his crime. According to evidence presented at his juvenile transfer hearing, proof at trial, and evidence proffered at the hearing on the motion for new trial, Mr. Booker grew up in a poor, unstable, and chaotic environment. Violence was common, and Mr. Booker witnessed shootings and often heard gunfire in his neighborhood. Before Mr. Booker was born, his father was murdered. According to Mr. Booker, he was physically and

emotionally mistreated by his mother. He saw his mother being physically abused. Once when his mother was selling drugs, Mr. Booker and his family were held at gunpoint during a home invasion. Mr. Booker's relationship with his mother was "rocky," and she often "kicked" him out of the house. During these times, he lived with friends and "door to door." In the eighth grade, Mr. Booker started smoking marijuana to cope with his problems. He smoked marijuana with his family, including his mother. When he was thirteen, Mr. Booker became close to his paternal grandfather. But his grandfather was stabbed to death at his home just over a year later. Mr. Booker, who had visited his grandfather shortly before the stabbing, blamed himself for not being there to protect his grandfather. After his grandfather was murdered, Mr. Booker began skipping school, increased his marijuana use, and misbehaved more often. Before his grandfather's murder, Mr. Booker had never been in serious trouble. According to his juvenile record, he was cited for disorderly conduct, making a false report, violating curfew, and being a runaway. None of these matters led to formal charges, and all were diverted through the juvenile court system.

According to psychological expert testimony, Mr. Booker suffered from cannabis use disorder, secondary to post-traumatic stress disorder, and was amenable to treatment. Expert testimony about adolescent brain development showed that the systems that register emotions, arousal, and reward sensitivity do not fully develop until around ages fourteen to sixteen. Yet the parts of the brain that inhibit and regulate those drives do not fully develop until age twenty to twenty-five. Mr. Booker's post-traumatic stress disorder exacerbated this disparity—making the brain's "alarm system" overly sensitive to threats, bypassing adaptive responses like judgment and executive functioning, and hijacking the brain into a state of "fight, flight, or freeze." Thus, a young person like Mr. Booker is more impulsive, a bigger risk-taker, and has poor judgment. In sum, Mr. Booker's background failed to provide him stability and security, which only increased the likelihood that he would make rash, reckless, and impulsive decisions. But these circumstances were not considered at sentencing for the murder conviction.

Finally, we consider whether Tennessee's automatic life sentence is supported by sufficient penological objectives when imposed on a juvenile. *See Miller*, 567 U.S. at 472–74. These objectives are generally considered to be retribution, deterrence, preventing crime through incarceration, and rehabilitation. *Id.* Retribution is tied to an offender's culpability and blameworthiness. Thus, the reason for retribution is reduced with a juvenile compared to an adult because of the juvenile's reduced culpability. *See Miller*, 567 U.S. at 471–72. And deterrence is not effective because "'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Id.* (quoting *Graham*, 560 U.S. at 71). The benefit of preventing crime through incarceration is no justification—since it necessarily implies that the "juvenile offender forever will be a danger to society" because he is incorrigible, and "incorrigibility is inconsistent with youth." *Id.* at 472–73 (quoting *Graham*, 560 U.S. at 72–73). The justification of rehabilitation also fails because

Tennessee's automatic life sentence rejects the notion that a juvenile should have the chance to change and mature. *Id.* at 473. Although a state need not guarantee a juvenile offender eventual freedom, it must not foreclose all genuine hope of a responsible and productive life or reconciliation with the community. *See Graham*, 560 U.S. at 75. This denial renders "an irrevocable judgment about that person's value and place in society." *Id.* at 74. Thus, the life sentence imposed on Mr. Booker is not supported by sufficient penological objectives.

From *Thompson*, *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones*, we know that juveniles are constitutionally different than adults for sentencing purposes; juveniles have lesser culpability and greater amenability to rehabilitation. To be clear, we are not holding that a juvenile may never receive a life sentence in Tennessee. But consistent with Supreme Court precedent, the sentencer must have discretion to impose a lesser punishment and to properly consider an offender's youth and other attendant circumstances. Tennessee's sentencing scheme for juvenile homicide offenders—which automatically imposes the most extreme punishment short of life without parole in the United States—fails to recognize that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. The current automatic sixty-year sentence does not square with the United States Supreme Court's interpretation of the Eighth Amendment.

In sum, Tennessee's automatic life sentence when imposed on juvenile homicide offenders is an outlier when compared with the other forty-nine states, it lacks individualized sentencing which serves as a bulwark against disproportionate punishment, and it goes beyond what is necessary to accomplish legitimate penological objectives. For these reasons, we hold that Tennessee's automatic life sentence with a minimum of fifty-one years when imposed on juveniles violates the Eighth Amendment.

Because we conclude that Tennessee's mandatory fifty-one- to sixty-year sentence violates the Eighth Amendment, we need not consider Mr. Booker's arguments that his sentence is equivalent to life without parole and is thus subject to *Miller*,[17] or that his life sentence violates article I, section 16 of the Tennessee Constitution. Our direct application of Eighth Amendment principles pretermits these issues.

Remedy for Constitutional Violation

We exercise judicial restraint when remedying the unconstitutionality of the current statutory scheme for sentencing juvenile homicide offenders. Rather than creating a new sentencing scheme or resentencing Mr. Booker, we apply the sentencing policy adopted by the General Assembly in its previous enactment of section 40-35-501. In doing so, we make

[17] *See, e.g.*, *State v. Kelliher*, 873 S.E.2d 366 (N.C. 2022).

no policy decisions. Nor do we substitute our judgment for that of the General Assembly. The parties agree that if the mandatory sentence of fifty-one to sixty years in section 40-35-501(h)(2) is unconstitutional, then we should apply the release eligibility provision that the General Assembly previously enacted and never repealed, that was in effect from November 1, 1989, to July 1, 1995, as stated in section 40-35-501(h)(1),[18] which still applies to conduct during that period. Under this unrepealed statute, Mr. Booker remains sentenced to a sixty-year prison term and is eligible for, although not guaranteed, supervised release on parole after serving between twenty-five and thirty-six years. Thus, at the appropriate time, Mr. Booker will receive an individualized parole hearing in which his age, rehabilitation, and other circumstances will be considered. This ruling applies only to juvenile homicide offenders—not to adult offenders.

The dissent claims, without any basis, that by upholding the protections of our United States Constitution, we are making policy. But when the Court does its duty and rules on the constitutionality of a statute, it makes no policy of its own. The Court simply implements the policy embodied in the Constitution itself. Without question, the General Assembly determines policy and enacts laws. This Court's duty is to apply the law and, when necessary, decide whether a law is constitutional. By interpreting state and federal constitutions with reasoned opinions, courts are carrying out the quintessential judicial function to "say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. Because a party may disagree with a court's conclusion about the constitutionality of a statute does not mean that the judiciary has "usurped the legislative prerogative." *State v. Soto-Fong*, 474 P.3d 34, 43 (Ariz. 2020).

The dissent would have us wait until the United States Supreme Court rules on this precise issue. But we will not shirk our duty and ignore an injustice. Our decision today directly affects Mr. Booker and over 100 other juvenile homicide offenders who are or will be incarcerated in Tennessee prisons under an unconstitutional sentencing scheme.[19] For these incarcerated individuals, time matters. The United States Supreme Court may not

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[18] Tennessee Code Annotated section 40-35-501(h)(1) provides:

> Release eligibility for a defendant committing the offense of first degree murder on or after November 1, 1989, but prior to July 1, 1995, who receives a sentence of imprisonment for life occurs after service of sixty percent (60%) of sixty (60) years less sentence credits earned and retained by the defendant, but in no event shall a defendant sentenced to imprisonment for life be eligible for parole until the defendant has served a minimum of twenty-five (25) full calendar years of the sentence . . . .

[19] *See* Anita Wadhwani & Adam Tamburin, *Special Report: In Tennessee, 185 People Are Serving Life for Crimes Committed as Teens*, The Tennessean (Mar. 6, 2019), https://www.tennessean.com/story/news/2019/03/07/juvenile-sentencing-tennessee-cyntoia-brown-clemency-life/2848278002/. Of the 185 juvenile homicide offenders, 120 were sentenced under the current statute that requires incarceration between fifty-one and sixty years. *Id.*

have the chance to rule on this precise issue soon, if ever. And we need not wait because the Supreme Court has given us clear guidance in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones*. Many other state supreme courts have resolved this issue without delay. We must fulfill our duty.

Although the constitutionality of Tennessee's practice of automatically sentencing juvenile homicide offenders to life in prison is an issue of first impression for this Court, the dissent claims the issue is settled law in Tennessee based on several unreported decisions from the Court of Criminal Appeals. Yet, as the dissent should know, this Court is not bound by decisions of the Court of Criminal Appeals. *See*, *e.g.*, *State v. Middlebrooks*, 995 S.W.2d 550, 557 n.7 (Tenn. 1999) (citing *State v. McKay*, 680 S.W.2d 447, 450 (Tenn. 1984)). And none of the intermediate appellate court decisions relied on by the dissent analyzed the constitutional issue, correctly noting that the intermediate appellate court is bound to follow existing precedent. *See State v. Douglas*, W2020-01012-CCA-R3-CD, 2021 WL 4480904, at *25 (Tenn. Crim. App. Sept. 30, 2021) (stating that although the court had "considered the Defendant's policy arguments regarding the particular length of Tennessee's life sentences, as well as the special considerations applicable to juvenile offenders and their potential for rehabilitation," the court was bound "to apply the law as it has been enacted by [the Tennessee] legislature and interpreted by [the Tennessee] courts"); *State v. Fitzpatrick*, M2018-02178-CCA-R3-CD, 2021 WL 3876968, at *8 (Tenn. Crim. App. Aug. 31, 2021) ("The power to break with well-established precedent does not lie with this court, and we are not prepared to expand the parameters of the Eighth Amendment in this regard, notwithstanding the fact that the Defendant's sentence 'may push, and possibly exceed, the bounds of his life expectancy[.]'" (quoting *State v. King*, W2019-01796-CCA-R3-CD, 2020 WL 5352154, at *2 (Tenn. Crim. App. Sept. 4, 2020))); *State v. Polochak*, M2013-02712-CCA-R3-CD, 2015 WL 226566, at *34 (Tenn. Crim. App. Jan. 16, 2015) ("While the next logical step may be to extend protection to [juvenile] sentences [of life with the possibility of parole], that is not the precedent which now exists." (quoting *Perry v. State*, W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *5 (Tenn. Crim. App. Apr. 7, 2014))).

The remedy here—granting a parole hearing rather than resentencing—serves the State's interest in finality and the efficient use of its resources and also protects juvenile homicide offenders' rights under the Eighth Amendment. Applying the previous unrepealed version of section 40-35-501(h)(1) complies with *Montgomery*, which allows states to remedy a *Miller* violation by allowing juvenile homicide offenders to receive an individualized parole hearing rather than be resentenced. *Montgomery*, 577 U.S. at 212 ("Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.").

This decision need not be the end of the discussion about sentencing juvenile homicide offenders. The General Assembly, in its collective wisdom, may decide to

continue to adhere to its previously adopted sentencing scheme as reflected in the unrepealed version of section 40-35-501(h)(1). The General Assembly may also consider enacting legislation for sentencing juvenile homicide offenders that provides for discretionary, individualized sentencing while maintaining the current life sentence, no life sentence, or a less severe sentence that is in line with the other forty-nine states. We trust the General Assembly to make these important policy decisions.

IV.

Mr. Booker committed a serious offense for which he deserves serious punishment. But he was only sixteen years old when he committed the offense. The United States Supreme Court has made clear that under the Eighth Amendment, youth is a factor that must be considered in sentencing. Thus, we hold that Tennessee's mandatory sentence of life in prison when imposed on a juvenile homicide offender with no consideration of the juvenile's age and attendant circumstances violates the Eighth Amendment's prohibition against cruel and unusual punishment. Consistent with the parties' arguments, we remedy this constitutional defect by applying the unrepealed pre-1995 version of section 40-35-501(h)(1). Under this statute, Mr. Booker remains sentenced to a sixty-year term but is eligible for, although not guaranteed, supervised release on parole after serving between twenty-five and thirty-six years. In line with *Montgomery*, Mr. Booker will, at the appropriate time, receive an individualized parole hearing in which his youth and other circumstances will be considered. This ruling applies only to juveniles, not adults, convicted of first-degree murder.

We reverse the judgment of the Court of Criminal Appeals to the extent it upheld the automatic life sentence imposed on Mr. Booker under Tennessee Code Annotated section 40-35-501(h)(2). The Clerk of the Appellate Court shall provide a copy of this opinion to the Tennessee Department of Correction and the Tennessee Board of Parole. Costs of this appeal are taxed to the State of Tennessee.

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SHARON G. LEE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
February 24, 2022 Session Heard at Nashville[1]

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-SC-R11-CD

HOLLY KIRBY, J., concurring in the judgment.

Not so long ago, it was commonplace for states to require juveniles convicted of homicide to serve sentences of over fifty years. Now, that practice has vanished. A review of sentencing statutes enacted by state legislatures and court decisions shows that there is now only one state where juvenile offenders face a mandatory non-aggregated sentence of more than 50 years for first-degree murder with no aggravating factors—Tennessee. In the entirety of the nation, Tennessee stands alone.

This is strong objective evidence that a national consensus has formed *against* juvenile sentencing statutes like Tennessee's. My concurrence in the holding in Justice Lee's plurality opinion is based on this unequivocal objective data. In the absence of solid objective indicia, I would not be able to concur in the plurality's judgment in favor of Mr. Booker.

In this case, the Court granted permission to appeal on the question of whether a mandatory sentence of life imprisonment for juvenile offenders for first-degree murder, with no aggravating factors, under Tennessee Code Annotated sections 39-13-208(c) and 40-35-501(h)(2) violates the provisions in the United States and Tennessee Constitutions forbidding cruel and unusual punishment. In Tennessee, the mandatory sentence of life imprisonment is a term sentence of sixty years, with a minimum service of fifty-one years.

[1] We first heard oral argument on February 24, 2021. In light of the untimely death of Justice Cornelia A. Clark and by order of this Court filed December 17, 2021, retired Tennessee Supreme Court Justice William C. Koch, Jr., was designated to participate in this appeal. The case was re-argued on February 24, 2022.

See Brown v. Jordan, 563 S.W.3d 196, 202 (Tenn. 2018).[2] I concur in the holding in the plurality opinion that Tennessee Code Annotated section 40-35-501(h)(2), when imposed on a juvenile homicide offender, violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution. I also concur in the remedy adopted in the plurality opinion and agree it is limited to offenders who were juveniles at the time of the offense. Accordingly, I concur in the judgment in the plurality opinion. I write separately to explain the importance of objective indicia of national consensus to the Eighth Amendment analysis in this case.

I. EIGHTH AMENDMENT ANALYSIS

The Eighth Amendment "bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). The United States Supreme Court's decision in *Gregg v. Georgia* requires us to consider whether a particular punishment is "disproportionate in relation to the crime for which it is imposed." 428 U.S. 153, 187 (1976). In doing so, *Gregg* described the substantive, but limited, responsibility imposed on the judiciary under the Eighth Amendment:

> Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.
> . . . .
> [W]hile we have an obligation to [e]nsure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

Id. at 174–75. The legislature has the "power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such [a] case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked." *Weems v. United States*, 217 U.S. 349, 378 (1910).

In this case, Mr. Booker was convicted of a most serious offense, first-degree murder. "[W]hen a life has been taken deliberately by the offender," that is considered

[2] Tennessee Code Annotated § 39-13-208(c) provides that, when the State does not seek the death penalty or life without the possibility of parole, a defendant convicted of murder in the first degree "shall be sentenced to imprisonment for life." Tennessee Code Annotated § 40-35-501(h)(2) provides that such a defendant "shall serve one hundred percent (100%) of sixty (60) years less sentence credits earned and retained," but "no sentence reduction credits . . . shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%)." In *Brown*, the Court interpreted these provisions to mean that "[a] defendant convicted of first-degree murder that occurred on or after July 1, 1995, may be released after service of at least fifty-one years if the defendant earns the maximum allowable sentence reduction credits." 563 S.W.3d at 202.

"the most extreme of crimes." *Gregg*, 428 U.S. at 187. The length of Mr. Booker's sentence, in and of itself, is not inherently grossly disproportionate to either the crime or the offender, and does not offend the Eighth Amendment. Indeed, in *Miller v. Alabama*, the U.S. Supreme Court expressly permitted sentencers to impose life-without-parole sentences on juvenile homicide offenders, so long as the sentence was not mandatory, that is, so long as there was discretion to consider the defendant's youth and impose a lesser punishment. *See* 567 U.S. 460, 479–80 (2012). And life without parole is an even more severe sentence than Mr. Booker received.

In this type of Eighth Amendment case, where the punishment is not barbaric and not inherently disproportionate to either the crime or the offender, objective indicia of national consensus is a threshold issue. That is, without objective indicia of national consensus against the punishment contained in the statute at issue, the analysis would go no further. This is explained below.

1. As Applied to Juvenile Offenders

Here, Mr. Booker asserts that Tennessee's mandatory sentence of life imprisonment violates the Eighth Amendment to United States Constitution as applied to juvenile homicide offenders. As to a category of offenders, the Eighth Amendment does not guarantee there will be *no* risk of a disproportionate sentence in a specific case. The question instead is whether Tennessee's statutory framework creates an *unacceptably high* risk of a disproportionate sentence in a given case with a juvenile defendant. *See Jones v. Mississippi*, 141 S. Ct. 1307, 1317 (2021) ("[*Miller*] stated that a mandatory life-without-parole sentence for an offender under 18 'poses too great a risk of disproportionate punishment.'" (quoting *Miller*, 567 U.S. at 479)).

The question of whether the risk of a disproportionate sentence is so high that it offends the Constitution is assessed under the analysis set forth in the United States Supreme Court's Eighth Amendment jurisprudence on juvenile offenders. Justice Lee's plurality opinion describes in detail the Supreme Court's Eighth Amendment cases on juvenile offenders, demonstrating the Court's increasingly firm conviction that children are different when it comes to sentencing. *See Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."). The three general differences between juveniles and adults consistently cited by the Supreme Court are (1) "lack of maturity and an underdeveloped sense of responsibility," (2) "more vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure," and (3) that "the character of a juvenile is not as well formed as that of an adult." *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); *see also Graham v. Florida*, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring in the judgment) ("[J]uvenile offenders are generally less culpable than adults who commit the same crimes.").

In *Miller*, these three significant differences between juveniles and adults were the foundation for the Court's conclusion that "children are constitutionally different from adults for purposes of sentencing" and its holding that mandatory life-without-parole sentences for juveniles violated the Eighth Amendment. 567 U.S. at 471. More recent Eighth Amendment cases on juvenile offenders reaffirm these precepts. *See Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016) ("[C]hildren are constitutionally different from adults for purposes of sentencing." (quoting *Miller*, 567 U.S. at 471)); *see also Jones*, 141 S. Ct. at 1314 ("In a series of Eighth Amendment cases applying the Cruel and Unusual Punishments Clause, this Court has stated that youth matters in sentencing.").

This Supreme Court caselaw suggests that, in a case with a juvenile offender, the risk of a disproportionate sentence is higher than in a similar case with an adult offender. But that proposition does not automatically mean that juvenile defendants must *always* be sentenced under a separate, more lenient sentencing structure than adult offenders, in every case and for every crime. The question is whether, under a particular sentencing framework, the risk of a disproportionate sentence for a juvenile offender is so high that it violates the Eighth Amendment.

2. Objective Indicia

To answer the question of whether the risk of a disproportionate sentence for a juvenile offender under Tennessee sentencing statutes is unconstitutionally high, the Supreme Court's body of Eighth Amendment cases, taken as a whole, requires that we consult objective data. The proportionality assessment under the Eighth Amendment "does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173. The Supreme Court has repeatedly emphasized "the requirement that proportionality review be guided by objective factors." *Ewing v. California*, 538 U.S. 11, 23 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

The Supreme Court has looked to three kinds of objective indicia to determine whether there is a national consensus against a challenged sentencing practice. First is the number of states that have overtly rejected the challenged practice, either through legislative or judicial action. *See Atkins v. Virginia,* 536 U.S 304, 312 (2002) ("We have pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (quotation marks omitted) (citation omitted)); *Roper*, 543 U.S. at 564 ("By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.").

The next type of objective indicia is how frequently the challenged sentencing practice is actually used. *See Atkins*, 536 U.S. at 316 ("[E]ven in those States that allow the execution of [intellectually disabled] offenders, the practice is uncommon."); *Roper*, 543 U.S. at 564 ("[E]ven in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent."); *Graham*, 560 U.S. at 62 ("Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.").

The final type is objective indicia of trends among the states, including the direction and pace of change regarding the challenged sentencing practice. *See, e.g.*, *Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *Roper*, 543 U.S. at 565–66 (discussing both consistency and pace of change compared to *Atkins*); *Graham*, 560 U.S. at 108–09 (Thomas, J., dissenting) (arguing that lack of consistency and direction of change counseled against the majority's decision).

Such objective indicia anchor any assessment of whether a statute violates the Eighth Amendment to data that demonstrates the nation's values and standards. This underpinning ensures principled constitutional analysis that is not premised on the subjective sensibilities of individual judges. *See Gregg*, 428 U.S. at 173.

To be sure, the Supreme Court's analysis in *Miller* relied much less than previous cases on this type of objective data. *See* 567 U.S. at 483 (distinguishing *Miller* "from the typical [case] in which we have tallied legislative enactments"). At the time *Miller* was decided, many states had the type of statute at issue in *Miller*, a mandatory sentence of life without parole for juveniles convicted of homicide. For that reason, the *Miller* majority's finding of an Eighth Amendment violation drew a sharp dissent from the Chief Justice.[3]

[3] Chief Justice Roberts first identified lack of objective indicia of national standards as the reason for his dissent: "The pertinent law here is the Eighth Amendment to the Constitution, which prohibits 'cruel and unusual punishments.' Today, the Court invokes that Amendment to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such. I therefore dissent." *Miller*, 567 U.S. at 493 (Roberts, C.J., dissenting). He then summarized the Court's Eighth Amendment cases on objective indicia:

> When determining whether a punishment is cruel and unusual, this Court typically begins with "objective indicia of society's standards, as expressed in legislative enactments and state practice." We look to these "objective indicia" to ensure that we are not simply following our own subjective values or beliefs. Such tangible evidence of societal standards enables us to determine whether there is a "consensus against" a given sentencing practice. If there is, the punishment may be regarded as "unusual."

Id. at 494 (first quoting *Graham*, 560 U.S. at 61; and then quoting *Gregg*, 428 U.S. at 173).

In a subsequent case, however, the Court's description of past Eighth Amendment caselaw on juvenile offenders reaffirmed its traditional emphasis on objective indicia. In *Jones v. Mississippi*, the Court considered whether *Miller* and *Montgomery* required sentencing authorities to make a separate factual finding that a juvenile offender was permanently incorrigible before sentencing him to life without parole. 141 S. Ct. at 1311. In considering whether permanent incorrigibility would be an eligibility criterion for a sentence, similar to sanity or competence, the *Jones* Court recounted that, "when the Court has established such an eligibility criterion, the Court has considered whether 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' demonstrated a 'national consensus' in favor of the criterion." *Id.* at 1315 (quoting *Graham*, 560 U.S. at 61). Describing *Miller*'s discussion of whether a discretionary sentencing procedure would result in fewer life-without-parole sentences for juveniles, *Jones* commented: "Importantly, . . . the Court [in *Miller*] relied on data, not speculation. The Court pointed to statistics from 15 States that used discretionary sentencing regimes to show that, 'when given the choice, sentencers impose life without parole on children relatively rarely.'" *Id.* at 1318 (quoting *Miller*, 567 U.S. at 483 n.10).[4]

Thus, the body of Supreme Court Eighth Amendment cases counsel us to base any finding of unconstitutionality on solid data illuminating the nation's values and standards on the sentencing framework at issue, "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173. Our review must be "guided by objective factors." *Ewing*, 538 U.S. at 23 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)). This approach provides a limiting principle to ensure that findings of a violation of the Eighth Amendment are reserved for punishments that may fairly be regarded as "unusual." *Miller*, 567 U.S. at 494 (Roberts, C.J., dissenting).

In this case, the elevated risk of a disproportionate sentence for a juvenile convicted of first-degree murder arises because of Tennessee's unique combination: (1) a mandatory sentence, allowing the sentencer no discretion, plus (2) a very lengthy minimum imprisonment of fifty-one years. Consistent with the facts in this case, it is appropriate to focus our review on how many states still subject juvenile offenders convicted of first-degree murder, with *no* aggravating factors, to a *mandatory* non-aggregated sentence of more than 50 years.

[4] *See also Jones*, 141 S. Ct. at 1320 ("*Miller* highlighted 15 existing discretionary state sentencing systems as examples of what was missing in the mandatory Alabama regime before the Court in that case." (citing *Miller*, 567 U.S. at 484 n.10)). Indeed, *Jones* itself used statistics to show that *Miller* and *Montgomery* had in fact accomplished the stated objective of drastically reducing the number of juvenile homicide offenders sentenced to life without parole. *See id.* at 1322 ("Those statistics bear out *Miller*'s prediction: A discretionary sentencing procedure has indeed helped make life-without-parole sentences for offenders under 18 'relatively rar[e].'" (alteration in original) (quoting *Miller*, 567 U.S. at 484 n.10)).

Two objective indicia tell the story best: (1) legislative enactments, i.e., sentencing statutes, and (2) state court decisions holding state sentencing statutes unconstitutional. Taken together, these provide strong objective evidence of the nation's contemporary standards for sentencing juvenile homicide offenders who fit Mr. Booker's circumstances.

Here, those objective indicia demonstrate that now, almost ten years after *Miller*, sentencing statutes like Tennessee's have disappeared. Now, only one state sentences juvenile offenders to a mandatory non-aggregated sentence of more than fifty years for first-degree murder with no aggravating factors—Tennessee.[5] This is compelling data that Tennessee's sentencing framework for juvenile defendants convicted of first-degree murder, with no aggravating factors, stands far apart from the rest of the nation.

Turning to actual sentencing practices, assessing the frequency with which a *mandatory* sentence is imposed reveals little about community standards because by definition there are no other available options. It is instructive to recall, however, that defendants resentenced under the Supreme Court's decisions in *Miller* and *Montgomery* were rarely given sentences of life without parole. *See Jones*, 141 S. Ct at 1322. This shows that, in actual practice, such severe sentences for juveniles convicted of homicide are disfavored.

The direction and pace of change regarding the challenged sentencing practice is also illuminating. Ten years ago, before the U.S. Supreme Court decided *Miller*, twenty-eight states had mandatory life-without-parole statutes applicable to juveniles. *See Miller*, 560 U.S. at 513–14 (Alito, J., dissenting). As *amici* have shown, many states changed their laws in the last decade, post-*Miller*.[6] The consistent direction of the changes, by either legislative enactment or state court decision, has been to either reduce the mandatory sentence applicable to juveniles or insert discretion into sentencing for juveniles.[7] Most

[5] The gap between Tennessee and the rest of the country is substantial. As noted by the plurality opinion, the next longest mandatory sentences, in Oklahoma and Texas, are over ten years shorter than the term set forth in Tennessee Code Annotated § 40-35-501(h)(2). In twelve other states, the maximum mandatory sentence with no discretionary review is between one third to one half less than Tennessee's mandated sentence. In twenty-three other states and the District of Columbia, a juvenile convicted of first-degree murder serves less than half the time as in Tennessee before becoming eligible for some type of individualized consideration. Twelve other states *may* impose a sentence as long as Tennessee's, but their sentencing authorities have discretion to impose a lesser sentence. *See* Plurality Op. nn.12–16.

[6] Asked at oral argument about the startling level of change in state laws through either legislative enactment or court decision, the State observed that many of the changes were prompted by the *Miller* decision. The dissent echoes this observation. The State conceded, however, that the great majority of changes in other states went considerably further than was needed to come into strict compliance with *Miller*'s holding.

[7] The change in national consensus on sentencing juvenile homicide offenders recalls the change that occurred over twenty years ago regarding the execution of intellectually impaired offenders, as recognized by the U.S. Supreme Court in *Atkins*, which held that imposing the death penalty on persons

states went well beyond *Miller*'s explicit requirements. In a relatively short number of years, societal standards on juvenile homicide offenders have consistently moved away from mandatory sentences of over fifty years.

These objective indicia are compelling. Considered as a whole, they do more than demonstrate that Tennessee's sentencing practice is unusual. These objective indicia suggest that every other state in the nation has decided that a *mandatory* sentence of more than fifty years for juveniles convicted of first-degree murder, with no aggravating factors, creates an unacceptable risk of a disproportionate sentence. In other words, there is now a national consensus *against* the type of statute Tennessee has.

3. Proportionality

In our analysis, the seriousness of Mr. Booker's crime must weigh heavily. The Eighth Amendment's proportionality principle does not just implicate the status of the offender and the severity of the punishment; it also addresses the nature of the crime. *See Graham*, 560 U.S. at 86 (Roberts, C.J., concurring in the judgment). Moreover, there are clearly some juvenile offenders from whom society needs and deserves protection for fifty-one years—or even longer.

But there are other juvenile offenders convicted of first-degree murder for whom such a lengthy incarceration is not warranted. A mandatory sentence, coupled with a minimum service in excess of fifty years, presents a serious risk of a disproportionate sentence. Is the risk of a disproportionate sentence so high for juvenile offenders that Tennessee's statutes violate the Eighth Amendment? The objective indicia in this case provide a solid foundation for making that assessment. Considering the qualities of youth the U.S. Supreme Court has recognized, as well as the compelling objective indicia of a national consensus, I agree with the plurality's conclusion that an automatic life sentence with a minimum of fifty-one years, when imposed on juveniles convicted of first-degree murder with no aggravating factors, violates the Eighth Amendment.

The evidence of national consensus in this case provides both the basis of the Eighth Amendment proportionality analysis and its limiting principle. I would not join the plurality's judgment in favor of Mr. Booker in the absence of solid objective indicia of national consensus.

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with intellectual disabilities violated the United States Constitution. 536 U.S. at 314 (commenting that "[m]uch has changed since" the Court issued its decision in *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), holding that executing intellectually disabled people convicted of capital offenses did not contravene the Eighth Amendment). *See Coleman v. State*, 341 S.W.3d 221, 234–35 (Tenn. 2011) (summarizing the changes regarding intellectual disability).

II. REMEDY

Because the unconstitutionally high risk of a disproportionate sentence for juvenile homicide offenders stems from Tennessee's unique combination of (1) a mandatory sentence plus (2) a minimum incarceration period of over fifty years, that risk can be ameliorated by changing either parameter. In other words, the unacceptably high risk of disproportionality can be reduced by either (a) giving sentencing authorities discretion to sentence juveniles convicted of first-degree murder a lesser sentence, or (b) reducing the mandatory sentence applicable to juveniles convicted of first-degree murder to a level that comports with the national standards, as reflected in other states' sentencing statutes.

The remedy adopted in Justice Lee's plurality opinion accomplishes this, and is consistent with the positions of the parties in the event of a finding of unconstitutionality. As described in Justice Lee's plurality opinion, the remedy applies the pre-1995 version of Tennessee Code Annotated § 40-35-501(h) to Mr. Booker, a juvenile offender convicted of first-degree murder with no aggravating factors.[8] Thus, Mr. Booker will remain sentenced to a sixty-year term, but he is eligible for—though not guaranteed—supervised release on parole after serving between twenty-five and thirty-six years. For this reason, I concur in the remedy adopted in Justice Lee's plurality opinion.

This remedy leaves the General Assembly free, in its discretion, to enact a new sentencing statute for juvenile offenders convicted of first-degree murder with no aggravating factors, consistent with the national consensus.

III. REJOINDER

Justice Bivins's well-stated dissent makes a number of important points that warrant this respectful response.

The dissent first says the majority "impermissibly moves the Court into an area reserved to the legislative branch." It does not.

The view expressed in the dissent was rejected by the Founders in the earliest days of our nation. The Federalist Papers explain that, when courts hold statutes unconstitutional, it does not mean the judiciary has assumed superiority over the legislative branch. It means instead that the Constitution is superior to both branches:

[8] This appears consistent with the remedy suggested by the State in the event of a finding of unconstitutionality, to elide the objectionable part of Tennessee Code Annotated § 40-35-501 that requires service of at least fifty-one years in prison, as to juvenile offenders convicted of first-degree murder, and hold that the remainder of the statute is enforceable.

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. . . . [T]he courts were designed to be an intermediate body between the people and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . .
>
> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the Legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

The Federalist No. 78 (Alexander Hamilton). In ruling on the constitutionality of a statute, we do not usurp the job of the legislative branch; we do our own job.

The dissent next notes that the holding in *Miller* dealt only with sentences of life without parole, and admonishes that the majority fails to apply the Supreme Court's holdings "as they are written, not what we wish were true."[9]

And yet the dissent acknowledges that the Supreme Court has never addressed whether a statute such as Tennessee's violates the Eighth Amendment. Respectfully, judicial restraint does not prohibit lower courts from taking up constitutional issues of first impression. It's been an everyday practice since the earliest days of our nation.[10]

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[9] The dissent cites cases such as *Arkansas v. Sullivan*, 532 U.S. 769 (2001). *Sullivan* says only that states are not free to contradict the Court's "controlling precedent" on factual situations where the Court has issued a definitive ruling. *Id*. at 771. Nothing in that opinion, or any other, prohibits states from considering issues of first impression under the federal constitution.

[10] Years before he penned his famous dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan wrote for the United States Supreme Court:

> Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it. . . . If they fail therein . . . the party aggrieved may bring the case from the highest court of the state in which the question could be decided, to this court for final and conclusive determination.

The question of whether Tennessee's mandatory life sentence statute, as applied to juveniles, violates the Eighth Amendment has not yet been presented to the United States Supreme Court. It has been presented to us. We are obliged to answer it as best we can. Our decision is then subject to the High Court's review.

Next, in its analysis, the dissent offers a lengthy discourse on why Tennessee's mandatory life sentence, as applied to juvenile offenders, is not the "functional equivalent" of a life-without-parole sentence. The inclusion of this discussion is a puzzler.

Here's why. In this appeal, Mr. Booker offered two theories for why Tennessee's statute violates the Eighth Amendment. First, Mr. Booker argued that, under the well-established Eighth Amendment analysis in *Roper*, *Graham*, etc., and based on objective indicia of a national consensus, Tennessee's mandatory sentencing statute violates the Eighth Amendment. Second, in the alternative, Mr. Booker contended that Tennessee's mandatory life sentence is the "functional equivalent" of a mandatory sentence of life without parole, which was held unconstitutional in *Miller*.

In both the plurality opinion and this separate opinion, the majority of the Court relies exclusively on the well-established Supreme Court analytical framework to hold that Tennessee's statute violates the Eighth Amendment. That pretermits Mr. Booker's alternative "functional equivalency" argument. There was no reason to even discuss it.

If the majority doesn't even discuss the alternative functional equivalency argument, there's no reason for the dissent to spend pages and pages discrediting it.[11] Meanwhile, however, the dissent fails to refute the reasoning *actually* relied upon by the majority of the Court.

Perhaps most troubling, the dissent virtually ignores the objective indicia of a national consensus against a sentencing statute like Tennessee's. The dissent's only response to it is to shrug—in a footnote—that there is no way to "predict with confidence what the Supreme Court may say" if it were faced with the data Mr. Booker presents.

This is weak tea. The conclusion demonstrated by the objective indicia in this case is irrefutable: Tennessee's mandatory life sentence, as applied to juveniles, renders our State an island in the nation. We must not simply shrug that off.

Robb v. Connolly, 111 U.S. 624, 637 (1884).

[11] The only reason offered by the dissent is that the functional equivalency argument is used in *other* state and federal court opinions. Perhaps they are dissenting from those other opinions. It makes little sense for the dissent to fault the majority for failing to use the functional equivalency reasoning for its holding, and then turn around and criticize that very same reasoning.

IV. CONCLUSION

For these reasons, I concur in the plurality's holding that Tennessee Code Annotated section 40-35-501(h)(2), when imposed on a juvenile homicide offender, violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution. I concur in the remedy adopted by the plurality, to hold that Mr. Booker remains sentenced to sixty years in prison but shall be allowed an individualized parole hearing after he has served between twenty-five and thirty-six years in prison, based on release eligibility in the previous version of Tennessee Code Annotated section 40-35-501(h)(2) in effect from November 1, 1989, to July 1, 1995, as stated in section 40-35-501(h)(1). I concur in the plurality's holding that this ruling applies only to offenders who were juveniles at the time of the offense.

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HOLLY KIRBY, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
February 24, 2022 Session Heard at Nashville

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-SC-R11-CD

JEFFREY S. BIVINS, J., with whom ROGER A. PAGE, C.J., joins, dissenting.

I respectfully dissent from the result reached by a majority of the Court today. Quite frankly, I find the policy adopted as a result of the plurality opinion of Justice Lee and the concurring opinion of Justice Kirby to be sound. However, it is just that. It is a policy decision by which the majority today has pushed aside appropriate confines of judicial restraint and applied an evolving standards of decency/independent judgment analysis that impermissibly moves the Court into an area reserved to the legislative branch under the United States and Tennessee Constitutions.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

On November 15, 2015, then sixteen-year-old Tyshon Booker ("Mr. Booker") shot and killed G'Metrick Caldwell ("the victim") while sitting in the victim's car on a residential street in East Knoxville. Mr. Booker and then seventeen-year-old Bradley Robinson ("Mr. Robinson") left the victim for dead in the vehicle, and Mr. Booker fled with the victim's cellphone, which he eventually discarded. Mr. Booker's finger and palm prints were found at the scene of the shooting along with shell casings from his nine-millimeter handgun.

Two days later, Mr. Booker was charged by petition in the Knox County Juvenile Court related to his involvement in the victim's death. The next day, he was arrested at the home of his neighbor, Linda Hatch ("Ms. Hatch").

[1] This opinion discusses only those facts relevant to the issue granted appeal by this Court. A full recitation of the facts is set out in the Court of Criminal Appeals' opinion. State v. Booker, No. E2018-10439-CCA-R3-CD, 2020 WL 1697367 (Tenn. Crim. App. Apr. 8, 2020), perm. app. granted, (Tenn. Sept. 16, 2020).

A. Juvenile Court

Following Mr. Booker's arrest, the State filed a "Notice and Motion to Transfer," seeking to transfer Mr. Booker to the Knox County Criminal Court to be tried as an adult. During the hearing that followed, the State put on forensic evidence linking Mr. Booker to the victim's vehicle. Additionally, Ms. Hatch testified that, the day after the shooting, Mr. Booker confessed to her that he and Mr. Robinson shot the victim in a failed robbery attempt.

In response, Mr. Booker attacked Ms. Hatch's credibility. He argued that she fabricated part of his confession to protect herself because she maintained an inappropriate relationship with him that included smoking marijuana together, helping him sell crack cocaine, and engaging in sexual activities. Dr. Keith Cruise, clinical psychologist, testified that Mr. Booker suffered from Post-Traumatic Stress Disorder, Moderate Cannabis Use Disorder, and Conduct Disorder stemming from numerous traumatic events he experienced during childhood, including witnessing both the death of a close relative and the shooting of a neighborhood child, as well as experiencing the murder of his paternal grandfather when Mr. Booker was in his early teens. Dr. Cruise explained that Mr. Booker was likely amenable to treatment but that adult correctional facilities were "ill equipped" to help him.

At the close of the hearing, the juvenile court considered the transfer factors required by Tennessee Code Annotated section 37-1-134(b).[2] In its oral ruling, the juvenile court explicitly found: (1) there were reasonable grounds to believe Mr. Booker committed the murder, (2) Mr. Booker was not committable to an institution for the developmentally disabled or mentally ill, (3) his prior delinquency records were "not of great importance here," (4) he received minimal past treatment efforts, (5) the nature of the alleged offense weighed heavily in favor of transfer, (6) any gang affiliation had little impact in the case, and (7) there was little hope of rehabilitating Mr. Booker in the twenty-one months remaining before his nineteenth birthday when he would be released from juvenile state custody. The juvenile court expressed reservations but, ultimately, based on its findings, the judge transferred Mr. Booker to criminal court to be tried as an adult.

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[2] In making the [transfer] determination . . ., the court shall consider, among other matters:

(1) The extent and nature of the child's prior delinquency records;
(2) The nature of past treatment efforts and the nature of the child's response thereto;
(3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
(4) Whether the offense was committed in an aggressive and premeditated manner;
(5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
(6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

Tenn. Code Ann. § 37-1-134(b) (2014) (amended 2022).

B. Criminal Court

A Knox County Grand Jury indicted Mr. Booker on two counts of felony murder and two counts of especially aggravated robbery related to the victim's death. The case proceeded to a jury trial. At trial, the State's evidence was consistent with its presentation at the juvenile transfer hearing, including evidence of Mr. Booker's confession to Ms. Hatch and their improper relationship.

Mr. Booker took the stand and testified at trial that he shot the victim in self-defense. According to Mr. Booker, there was a fight between the victim and Mr. Robinson in the vehicle, during which Mr. Booker believed the victim reached for a gun. Mr. Booker denied telling Ms. Hatch that he and Mr. Robinson planned to rob the victim, but rather stated that the three planned only to drive around and smoke marijuana together.

The jury convicted Mr. Booker as charged on all counts. The felony murder convictions merged, and the trial court imposed the mandatory sentence of life imprisonment.[3] Following a sentencing hearing, the trial court sentenced Mr. Booker to twenty years for the especially aggravated robbery convictions, to be served concurrently with his life sentence.

C. The Appeal

On appeal to the Court of Criminal Appeals, Mr. Booker raised, *inter alia*, constitutional challenges to Tennessee's automatic life sentence for first-degree murder. After briefing and oral argument, the Court of Criminal Appeals found no reversible error and affirmed Mr. Booker's convictions. State v. Booker, No. E2018-01439-CCA-R3-CD, 2020 WL 1697367, at *33 (Tenn. Crim. App. Apr. 8, 2020), perm. app. granted, (Tenn. Sept. 16, 2020). As to Mr. Booker's claim that his mandatory life sentence is unconstitutional under the Eighth Amendment to the United States Constitution and United States Supreme Court precedent, the court stated, "While we understand [Mr. Booker]'s argument, we must reject his invitation as we are bound by court precedent." Id. (citing State v. Collins, No. W2016-01819-CCA-R3-CD, 2018 WL 1876333, at *20 (Tenn. Crim.

[3] Tennessee law mandates a sentence of death, imprisonment for life without possibility of parole, or imprisonment for life for those convicted of felony murder. See Tenn. Code Ann. §§ 39-13-202(a)(2), (c)(1)–(3) (2014) (amended 2018, 2021 & 2022). The State must send notice to the defendant of its intent to seek the death penalty or life without parole. See Tenn. Code Ann. § 39-13-208(a)–(c) (2014) (amended 2021 & 2022). If the State seeks either the death penalty or life without parole, the sentencer has discretion to choose between the alternative sentences during a sentencing hearing. Tenn. Code Ann. § 39-13-204 (2014) (amended 2019, 2021 & 2022). When the State declines to pursue the death penalty or life without parole, the law mandates a sentence of life imprisonment if the defendant is convicted of first-degree murder. See Tenn. Code Ann. § 39-13-208(c) (2014). Mr. Booker was not eligible for the death penalty, see Roper v. Simmons, 543 U.S. 551, 568 (2005), and the record indicates that the State did not give notice of intent to seek life without parole. Therefore, Mr. Booker's sentence of life imprisonment was mandatory.

App. Apr. 18, 2018), perm. app. denied, (Tenn. Aug. 8, 2018), cert. denied, 139 S. Ct. 649 (2018)).

Mr. Booker then appealed to this Court. We granted the application only as to the issue of whether Tennessee's sentence of life imprisonment, as applied to juveniles, violates the United States or Tennessee Constitutions. Order, State v. Booker, No. E2018-01439-SC-R11-CD (Tenn. Sept. 16, 2020) (granting the application for permission to appeal). We also directed the parties to address what sentencing options may be available under Tennessee law if the sentence of life imprisonment is improper. Id. Approximately two months after oral argument in this case, the United States Supreme Court issued its opinion in Jones v. Mississippi, 141 S. Ct. 1307 (2021), which analyzed a related juvenile sentencing issue. We ordered the parties to submit supplemental briefing regarding whether Jones affects the analysis or outcome in this case.[4] Order, State v. Booker, No. E2018-01439-SC-R11-CD (Tenn. June 10, 2021) (directing the parties to submit supplemental briefs).

II. ANALYSIS

The proper analysis for this challenge requires examination of the issue of whether the Eighth Amendment to the United States Constitution, as interpreted in Miller v. Alabama, 567 U.S. 460 (2012), requires this Court to hold that Tennessee's life sentence is unconstitutional as applied to juveniles. The Eighth Amendment, applicable to the States through the Fourteenth Amendment, states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Further, the United States Supreme Court has explained, "The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions[, which] flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" Roper v. Simmons, 543 U.S. 551, 560 (2005) (second alteration in original) (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002); Weems v. United States, 217 U.S. 349, 367 (1910)).

When our Court is asked to interpret the Eighth Amendment, we are bound by the existing interpretations of the United States Supreme Court. West v. Schofield, 519 S.W.3d

[4] Both parties agree that the holding in Jones does not directly control the outcome in Mr. Booker's case. However, each party's supplemental brief argues that Jones ultimately supports that party's position in this case. Mr. Booker argues that his position rests on applying the principles of Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, 567 U.S. 460 (2012), and because Jones explicitly upholds Graham and Miller as good law, Jones supports his position that Tennessee's life sentence is unconstitutional as applied to juveniles. The State maintains that Miller is distinguishable and that Jones implicitly approves of Tennessee's first-degree-murder sentencing scheme in a footnote. See Jones, 141 S. Ct. at 1318 n.5. Further, because Tennessee's sentencing scheme can result in discretion if the State pursues a life-without-parole sentence, the State argues that a life sentence is the lesser, not equal, punishment when compared to a life-without-parole sentence.

550, 566 (Tenn. 2017) (citing James v. City of Boise, 577 U.S. 306, 307 (2016) (per curiam) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 531 (2012) (per curiam) ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.")). We may not "interpret the United States Constitution to provide greater protection than [the United States Supreme Court's] own federal constitutional precedents provide." Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (citing Oregon v. Hass, 420 U.S. 714, 719 (1975)).[5]

A. The Roper/Graham/Miller Trilogy

Over the last twenty years, the United States Supreme Court has held that the Eighth Amendment prohibits certain punishments and requires special procedural protections in the context of juvenile sentencing. See Roper, 543 U.S. at 568; Graham v. Florida, 560 U.S. 48, 74–75 (2010); Miller, 567 U.S. at 465; Montgomery v. Louisiana, 577 U.S. 190, 212 (2016). In Roper, the Court barred the use of the death penalty on any juvenile offender, regardless of the crime of conviction, as cruel and unusual under the Eighth Amendment. Roper, 543 U.S. at 568. First, the Court determined that a national consensus had formed against the juvenile death penalty supported by the understanding that juveniles are "categorically less culpable than the average criminal." Id. at 567 (citing Atkins, 536 U.S. at 316) (summarizing the objective indicia of national consensus against the juvenile death penalty as "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice" (Id. at 552)). The Court also reasoned that the usual penological justifications for the death penalty, such as retribution and deterrence, no longer carried the same weight when considering the harshness of the penalty compared to certain inescapable characteristics of youth, such as immaturity and irresponsibility, vulnerability and susceptibility to negative influences coupled with a lack of control over their environment, and personality traits that are more transient and amenable to rehabilitation. Id. at 569–73. For these reasons, the Court concluded that the death penalty is disproportional when applied to any juvenile offender and violates the Eighth Amendment. Id. at 575.

Five years later, in Graham, the Supreme Court barred the use of life-without-parole sentences for juveniles convicted of nonhomicide crimes. Graham, 560 U.S. at 74. The Supreme Court determined that a national consensus had developed against the use of such a harsh punishment for juvenile nonhomicide offenders and held, in that context, such a sentence violates the Eighth Amendment. Id. at 67, 74. The Graham Court reiterated the same characteristics associated with youth first stated in Roper: "juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable and

[5] In my view, the result reached by the majority today does just that: the majority has interpreted the United States Constitution to provide greater protection than federal constitutional precedents provide.

susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" Id. at 68 (quoting Roper, 543 U.S. at 569–70). In the context of juvenile nonhomicide offenders, these same characteristics led the Supreme Court to conclude that a juvenile's already lowered moral culpability is twice diminished when he or she "did not kill or intend to kill," id. at 69, and, overall, juveniles cannot reliably be classified as incorrigible at the time of conviction, id. at 72–73.

The Graham Court described a life-without-parole sentence as "the second most severe penalty permitted by law," id. at 69 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)), and something akin to the death penalty, which "alters the offender's life by a forfeiture that is irrevocable . . . without giving hope of restoration," id. at 69–70. Therefore, a life-without-parole sentence is disproportional when applied to juvenile nonhomicide offenders given the difficulty of differentiating between a juvenile "whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 68 (quoting Roper, 543 U.S. at 573). Similar to the reasoning in Roper, the Court concluded that deterrence and retribution do not support life-without-parole sentences in the context of juvenile nonhomicide offenders. Id. at 71–72. Further, while incapacitation may justify a lengthy punishment for a serious nonhomicide crime, it does not support life without parole for juvenile nonhomicide offenders because it requires a sentencer to make the decision that a juvenile "forever will be a danger to society" at the outset, id. at 72, even though "incorrigibility is inconsistent with youth," id. at 73 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)). The Supreme Court also explained that such a punishment is inconsistent with rehabilitation as a goal because life without parole "forswears altogether the rehabilitative ideal[ ] [b]y denying the defendant the right to reenter the community" despite a juvenile's capacity for reform. Id. at 73–74. Therefore, a sentence of life without parole is cruel and unusual and violates the Eighth Amendment as applied to a juvenile convicted of a nonhomicide crime. Id. at 74.

Just two years later, the Court decided Miller, which held that life without parole could be imposed on a juvenile convicted of *homicide*, but only under a discretionary sentencing scheme. Miller, 567 U.S. at 465. Two fourteen-year-old offenders, Kuntrell Jackson and Evan Miller, were convicted of capital murder and the only available sentence under the law of their respective states was life without parole. Id. at 465–69; see Ark. Code. Ann. § 5-4-104(b) (1997) (providing that "[a] defendant convicted of capital murder . . . shall be sentenced to death or life imprisonment without parole"); Ala. Code §§ 13A-5-40(a)(9), 13A-6-2(c) (1982) (fixing murder in the course of arson as a capital offense subject to life without parole). Therefore, both Mr. Jackson and Mr. Miller were sentenced under mandatory sentencing schemes, which did not allow for consideration of their youth or an option to impose a lesser punishment than life without parole. Miller, 567 U.S at 465–69. Their cases were consolidated on review.

The Miller Court explained that there may be the type of rare incorrigible youth who commits homicide and deserves a sentence of life without parole. Id. at 479–80. However, given all that Roper and Graham said about youth, the "appropriate occasions for sentencing juveniles [to life without parole] will be uncommon" and require a sentencing scheme that allows for the sentencer to consider the offender's "youth and attendant characteristics." Id. at 479, 483. If the sentencing scheme is mandatory and "mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," the Supreme Court explained, the "scheme poses too great a risk of a disproportionate punishment" and runs afoul of the Eighth Amendment. Id. at 479. Miller relied on the same characteristics of youth announced in Roper and reiterated in Graham, that a juvenile's "transient rashness, proclivity for risk, and inability to assess consequences" leads to diminished criminal culpability and an increased ability to reform and be rehabilitated, and determined that "none of what [its precedents] said about children . . . is crime-specific." Id. at 471–73.

Building on Graham's conclusion that life without parole "alters the offender's life by a forfeiture that is irrevocable," the Miller Court reasoned that individualized sentencing and consideration of "the 'mitigating qualities of youth'" are particularly relevant when considering the constitutionality of a life-without-parole sentence imposed on a juvenile. Id. at 475–76 (first quoting Graham, 560 U.S. at 69; then quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)). Both Roper and Graham, the Supreme Court acknowledged, "teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." Id. at 477. Therefore, mandatory imposition of life without parole, which ignores the very attributes that make children constitutionally different from adults and disregards the offender's potential for rehabilitation, violates the Eighth Amendment. Id. at 479. The Supreme Court clarified that its holding, unlike Graham, did not categorically bar life-without-parole sentences for juvenile homicide offenders. Id. at 479–80. However, after Miller, the Eighth Amendment requires that a sentencer "take into account how children are different, and how those differences counsel against irrevocably sentencing [a juvenile] to a lifetime in prison." Id. at 480.

I do agree with the majority that the Roper/Graham/Miller trilogy[6] centers around one foundational principle: "children are constitutionally different from adults for purposes of sentencing." Id. at 471. In support of this principle, each holding builds off prior precedent to support the conclusion: juvenile offenders generally are less culpable than their adult counterparts and more responsive and amenable to rehabilitation, which makes

[6] Following Miller, the United States Supreme Court held in Montgomery v. Louisiana, 577 U.S. 190, 212 (2016), that Miller established a new rule of constitutional law that applies retroactively on collateral review. The Court also recently clarified that "[i]n light of th[e] explicit language" in Miller and Montgomery, there is no formal factfinding requirement regarding a child's incorrigibility before sentencing a juvenile homicide offender to life without parole, so long as the overall sentencing scheme is discretionary. Jones, 141 S. Ct. at 1311.

them less deserving of the most severe punishments at law. Id. (citing Graham, 560 U.S. at 68); see also Roper, 543 U.S. at 569–71.

Additionally, the trilogy recognizes that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Miller, 567 U.S. at 472. Retribution, incapacitation, deterrence, and rehabilitation provide little support for either the death penalty or life-without-parole sentences once a court considers that juveniles, in general, have diminished culpability, are unlikely to contemplate the potential for punishment before acting, and cannot with reliability be classified as incorrigible or irredeemable at such a young age. See id. at 472–73; Graham, 560 U.S. at 71–73; Roper, 543 U.S. at 571. The Supreme Court cemented the interconnectedness of this line of cases in Miller when it stated that "none of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." Miller, 567 U.S. at 473. Therefore, whether the crime of conviction is homicide or something less severe in the eyes of the law, the rationale for limiting the imposition of these harsh sentencing practices remains the same.

These cases and their collective underpinning are compelling. However, in answering the federal constitutional question before the Court today, "our duty to follow binding precedent is fixed upon case-specific holdings rather than general expressions in an opinion that exceed the scope of any particular holding." State v. Slocumb, 827 S.E.2d 148, 153 (S.C. 2019) (citing Vasquez v. Commonwealth, 781 S.E.2d 920, 926 (Va. 2016)). Because Mr. Booker argues that the principles of both Graham and Miller compel this Court to hold that Tennessee's life sentence is unconstitutional as applied to juveniles, the proper analysis narrows the focus to their specific holdings.

B. Graham and Miller

In Graham, the Supreme Court held that "for a juvenile offender who did not commit homicide[,] the Eighth Amendment forbids the sentence of life without parole." Graham, 560 U.S. at 74. The Supreme Court clarified its holding:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life[-]without[-]parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of

> incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id. at 75.

After Graham, a few points are clear: Tennessee is prohibited from sentencing juvenile *nonhomicide* offenders to life without parole; juvenile nonhomicide offenders can remain incarcerated for life so long as they are given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation;" and it is for our State to decide "the means and mechanisms for compliance" with Graham's holding. Id. Less clear from Graham, however, is how to define a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. That question, while an important one, is not determinative for the analysis today because Graham is distinguishable from this case. Simply put, Graham applies to cases in which a juvenile is convicted of a nonhomicide crime and sentenced to life without parole. In this case, Mr. Booker was convicted of homicide and received a life sentence—not a sentence of life without parole.

In Miller, the Supreme Court held that the Eighth Amendment forbids mandatory imposition of a life-without-parole sentence on juveniles convicted of homicide. Miller, 567 U.S. at 479–80; see Montgomery, 577 U.S. at 193 ("In Miller[], the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing."); Jones, 141 S. Ct. at 1311 ("Under Miller[ ], an individual who commits a homicide when he or she is under [eighteen] may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment."). Therefore, Miller does not prohibit life-without-parole sentences, nor does it prohibit all mandatory sentencing schemes in the juvenile context. Miller, 567 U.S. at 480. Miller requires that, before a juvenile homicide offender is sentenced to life without parole, a sentencer must consider the offender's youth and its accompanying characteristics before deciding the juvenile is incorrigible and must spend the rest of his days in prison. Id. at 479–80.

The Supreme Court has clarified that "Miller did not impose a formal factfinding requirement" on the sentencer. Montgomery, 577 U.S. at 211. Rather, it is up to States to determine the mechanisms to comply with Miller's mandate. Id. This means that not only is the sentencer relieved of making a specific finding of incorrigibility, but also he or she is relieved of making *any* specific factual findings on the record. Jones, 141 S. Ct. at 1316, 1320 (stating "Miller did not require the sentencer to make a separate finding of permanent incorrigibility before imposing [life without parole]" and "Miller did not say a word about requiring some kind of particular sentencing explanation with an implicit finding of

permanent incorrigibility, as Montgomery later confirmed"). The discretionary scheme itself is sufficient, the Supreme Court explained, because it "allows the sentencer to consider the [offender's] youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the [offender's] age." Id. at 1318.

After Miller (and Montgomery/Jones), two points are clear: (1) Tennessee can impose a life-without-parole sentence on a juvenile *homicide* offender only if it does so under a discretionary sentencing scheme; and (2) federal constitutional law, based upon Supreme Court precedent, does not require a sentencer to make any specific findings on the record before sentencing a juvenile homicide offender to life without parole, including that the juvenile is incorrigible.[7]

Because Mr. Booker was under the age of eighteen at the time he committed a homicide, and because his life sentence was mandatorily imposed,[8] Miller's holding could be viewed as providing guidance in this case. One, however, cannot ignore an important distinguishing fact: Mr. Booker was sentenced to life imprisonment, not life without parole. Thus, the main issue Mr. Booker asks this Court to contemplate, and what is still left unclear following Miller and its progeny, is: do the Eighth Amendment protections, as interpreted by Miller, apply to sentences that are not life without parole in name but could

[7] Few state courts have interpreted or applied Jones since it was released. Among the courts that have, the above-mentioned rules are clear. See, e.g., Holmes v. State, 859 S.E.2d 475, 480–81 (Ga. 2021); Elliott v. State, No. CR-20-407, 2021 WL 2012632, at *5 (Ark. May 20, 2021); Wynn v. State, No. CR-19-0589, 2021 WL 2177656, at *8–9 (Ala. Crim. App. May 28, 2021); State v. Miller, 861 S.E.2d 373, 380 (S.C. Ct. App. 2021); Harned v. Amsberry, 499 P.3d 825, 833 (Or. Ct. App. 2021). However, Jones has left some state court decisions now in question. See People v. Dorsey, 183 N.E.3d 715, 727 (Ill. 2021) (determining that Illinois Supreme Court precedent, which held the protections of Miller and Montgomery apply equally to mandatory *and* discretionary life-without-parole sentences is "questionable in light of Jones," but that, overall, Jones approves of the state's discretionary sentencing scheme at issue in that case); People v. Ruiz, No. 1-18-2401, 2021 WL 2102850, at *12 (Ill. App. Ct. May 25, 2021) (concluding that the Illinois Supreme Court can require more fact finding procedures under Miller than those stated in Jones); People v. Terry, No. 1-18-2084, 2021 WL 2290798, at *4 (Ill. App. Ct. May 28, 2021) (stating that the impact of Jones is "unclear" on Illinois Supreme Court precedent).

[8] As previously noted, although Tennessee's first-degree murder sentencing scheme *can* result in the sentencer having discretion, *supra* note 3, Mr. Booker's sentence of life imprisonment was imposed mandatorily because he is not eligible for the death penalty and the State did not seek a sentence of life without parole. Had the State sought life without parole, under Tennessee law, a jury would have had discretion to sentence Mr. Booker to either life without parole—if it unanimously determined that the State proved at least one aggravating factor beyond a reasonable doubt—or life imprisonment. See Tenn. Code Ann. § 39-13-207(a)–(c) (2014) (amended 2021 & 2022). In Tennessee, so long as the proper notice is given, it appears that this type of sentencing discretion is what Miller suggests as a constitutionally sufficient procedure for sentencing a juvenile to life without parole. Miller, 567 U.S. at 478–80, 489. However, that is not the scenario presented today because the State did not seek a life-without-parole sentence in this case.

be considered the functional equivalent to a life-without-parole sentence? Stated another way, does Tennessee's life sentence—a sixty-year sentence that requires at least fifty-one years imprisonment before an opportunity for release—offend the Eighth Amendment and principles of Miller when applied to a juvenile convicted of homicide?

C. State and Federal Court Analysis of the Functional Equivalency Issue[9]

Tennessee clearly is not the only state court to contemplate whether Miller applies to lengthy sentences that are not life without parole in name. Because the United States Supreme Court has not answered this question, and it is an issue of first impression for this Court, we consult the decisions of our lower courts, other state courts, and federal courts for guidance. Overall, research shows there is no consensus on this issue.

Tennessee courts consistently have held that Tennessee's life sentence is not unconstitutional under the Eighth Amendment and Miller because it "permits release eligibility after serving fifty-one years." State v. Polochak, No. M2013-02712-CCA-R3-CD, 2015 WL 226566, at *34 (Tenn. Crim. App. Jan. 16, 2015); see also State v. Douglas, No. W2020-01012-CCA-R3-CD, 2021 WL 4480904, at *24–25 (Tenn. Crim. App. Sept. 30, 2021) (listing other Tennessee cases). Additionally, the courts have recognized that "[w]hile the next logical next step may be to extend protection to these types of sentences, that is not the precedent which now exists." Polochak, 2015 WL 226566, at *34 (quoting Perry v. State, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *5 (Tenn. Crim. App. Apr. 7, 2014)); see also State v. Fitzpatrick, No. M2018-02178-CCA-R3-CD, 2021 WL 3876968, at *8 (Tenn. Crim. App. Aug. 31, 2021) ("The power to break with well-established precedent does not lie with this court, and we are not prepared to expand the parameters of the Eighth Amendment in this regard, notwithstanding the fact that the Defendant's sentence 'may push, and possibly exceed, the bounds of his life expectancy[.]'" (alteration in original) (quoting State v. King, No. W2019-01796-CCA-R3-CD, 2020 WL 5352154, at *2 (Tenn. Crim. App. Sept. 4, 2020)).

[9] The concurring opinion professes that our lengthy discussion of the functional equivalency issue is a "puzzler" and "makes little sense" because neither the plurality nor the concurring opinion relies on such an analysis. The answer as to why such a detailed discussion is necessary is two-fold and very simple. First, Mr. Booker raised this issue as a primary argument to support his position. Indeed, Mr. Booker's counsel spent the majority of his time at the first oral argument of this appeal advocating for an application of Miller to this case, while mentioning an evolving standards of decency/independent judgment analysis only in passing during rebuttal. Second, the overwhelming number of other state and federal courts that have invalidated juvenile sentences under the Eighth Amendment in similar cases have done so on the basis of a functional equivalency analysis. Indeed, today this Court becomes the only court in the country to base its holding on "the well-established Supreme Court [Eighth Amendment] analytical framework" in order to find such a statute unconstitutional under the United States Constitution. Of course, this "well-established framework" is an evolving standards of decency/independent judgment analysis. The fact that both the plurality and the concurrence for some reason chose to ignore this important argument is their choice and not binding or limiting upon us.

As for other state courts, some have decided that the protections of Miller apply equally to a juvenile homicide offender sentenced to life without parole and to a lengthy term of years when the lengthy term-of-years sentence is the functional equivalent of life without parole or a de facto life-without-parole sentence.[10] See Casiano v. Comm'r of Corrs., 115 A.3d 1031, 1044 (Conn. 2015) (concluding that Miller applies to a sentence not based on its label but rather because it is lengthy, does not offer parole, and requires the juvenile to actually be imprisoned for the rest of his or her life); State v. Shanahan, 445 P.3d 152, 159 (Idaho 2019) ("Because the Supreme Court has 'counsel[ed] against irrevocably sentencing [juveniles] to a lifetime in prison' without consideration of the Miller factors, we conclude that the rationale[] of Miller . . . also extend[s] to lengthy fixed sentences that are the functional equivalent of a determinate life sentence . . . ." (first and second alteration in original) (citation omitted)); People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016) (per curiam) ("[W]e hold that sentencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the [E]ighth [A]mendment."); State v. Ragland, 836 N.W.2d 107, 121–22 (Iowa 2013) (holding under the Eighth Amendment and Iowa state constitution that "Miller applies to sentences that are the functional equivalent of life without parole"); Carter v. State, 192 A.3d 695, 725 (Md. 2018) ("The initial question is whether a sentence stated as a term of years for a juvenile offender can ever be regarded as a sentence of life without parole for purposes of the Eighth Amendment. It seems a matter of common sense that the answer must be 'yes.'"); State ex rel. Carr v. Wallace, 527 S.W.3d 55, 60 (Mo. 2017) (en banc) ("Miller controls because [the defendant] was sentenced to the harshest penalty other than death available under a mandatory sentencing scheme without the jury having any opportunity to consider the mitigating and attendant circumstances of his youth."); State v. Kelliher, 873 S.E.2d 366, 370 (N.C. 2022) (holding that "any sentence or combination of sentences which, considered together, requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison"); State v. Zuber, 152 A.3d 197, 201 (N.J. 2017) ("We find that the same concerns apply to sentences that are the practical equivalent of life without parole . . . . The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to [the] sentence."); Ira v. Janecka, 419 P.3d 161, 167 (N.M. 2018) ("We conclude that the analysis contained within Roper and its progeny should be applied to a multiple term-of-years sentence."); White v. Premo, 443 P.3d 597, 605 (Or. 2019) ("We know of no state high court that has held that a sentence in excess of [fifty] years for a single homicide provides a juvenile with a meaningful opportunity for release. Given those particular circumstances, we conclude that petitioner's [fifty-four-year-mandatory-minimum] sentence is sufficiently lengthy that a Miller

[10] Curiously, neither Justice Lee's plurality opinion nor Justice Kirby's concurring opinion relies on a conclusion that Tennessee's statute constitutes a de facto sentence of life without parole.

analysis is required." (footnote and citation omitted)); State v. Ramos, 387 P.3d 650, 659 (Wash. 2017) ("We now join the majority of jurisdictions that have considered the question and hold that Miller does apply to juvenile homicide offenders facing de facto life-without-parole sentences.").

However, there is no clear line to determine when a sentence becomes the functional equivalent of life without parole. Compare Carter, 192 A.3d at 727–30, 734 (discussing five benchmarks courts have used to determine when a sentence becomes the functional equivalent to life without parole and concluding that fifty years before parole eligibility is equivalent to life without parole for purposes of the Eighth Amendment); Zuber, 152 A.3d at 212–13 (stating that Miller applies to a minimum sentence of fifty-five years imprisonment); Casiano, 115 A.3d at 1045–47 (stating that a sentence of fifty years imprisonment without parole triggers Miller protections); Reyes, 63 N.E.3d at 888 (concluding that a mandatory minimum sentence of eighty-nine years is a de facto life-without-parole sentence), with Shanahan, 445 P.3d at 160–61 (determining a fixed thirty-five-year sentence without the possibility of parole was not the functional equivalent of life without parole); State v. Diaz, 887 N.W.2d 751, 768 (S.D. 2016) (concluding that forty years in prison before parole eligibility was not a de facto life sentence); People v. Dorsey, 183 N.E.3d 715, 728–29 (Ill. 2021) (determining that a seventy-six-year sentence was not a de facto life-without-parole sentence because good-time credits made release after thirty-eight years a possibility).

Other state courts have reached the opposite conclusion, that Miller's holding is narrower and applies only to sentences that are life without parole in name. See Lucero v. People, 394 P.3d 1128, 1132 (Colo. 2017) ("Graham and Miller apply only where a juvenile is sentenced to the specific sentence of life without the possibility of parole for one offense."); Wilson v. State, 157 N.E.3d 1163, 1176 (Ind. 2020) ("Miller, Graham, and Montgomery expressly indicate their holdings apply only to life-without-parole sentences."); Hobbs v. Turner, 431 S.W.3d 283, 289 (Ark. 2014) ("[The defendant] was not subjected as a juvenile homicide offender to a mandatory life-without-parole sentence; therefore, Miller, is inapplicable."); Lewis v. State, 428 S.W.3d 860, 863–64 (Tex. Crim. App. 2014) (holding that Miller did not apply to single sentence of life imprisonment with the possibility of parole after forty years imposed mandatorily on a juvenile homicide offender).

This debate is further complicated by the fact that the majority of states that have answered the functional equivalency question have done so in the context of an aggregate sentence for multiple crimes, rather than a single term-of-years sentence, as is the factual scenario presented in this case. But see White, 443 P.3d at 603–04 (determining that Miller applies to a determinate 800-month minimum sentence for a single murder); Parker v. State, 119 So.3d 987, 996–99 (Miss. 2013) (concluding that Miller applies to a single sentence for "natural life" that is not eligible for parole but allows for conditional release at age sixty-five); Shanahan, 445 P.3d at 158–61 (acknowledging that Miller can apply to

a single sentence that is the functional equivalent of life without parole but that thirty-five years before parole eligibility was not the functional equivalent of life without parole).

To reinforce the fact that the answer to this particular question remains unclear, federal jurisdictions have come down on both sides of this issue in the habeas corpus context.[11] Compare Starks v. Easterling, 659 Fed. Appx. 277, 280–81 (6th Cir. 2016) ("Because the Supreme Court has not yet explicitly held that the Eighth Amendment extends to juvenile sentences that are the functional equivalent of life, and given the fact that lower courts are divided about the scope of Miller, we hold that the Tennessee courts' decisions were not contrary to, or an unreasonable application of, clearly established federal law . . . ."), cert. denied, (Jan. 17, 2017); Demirdjian v. Gipson, 832 F.3d 1060, 1076–77 (9th Cir. 2016) (upholding the state court's decision that Miller's ban on mandatory life-without-parole sentences did not apply to defendant's fifty-year sentence with parole eligibility at sixty-six years of age); Webster v. Royce, No. 97-cv-2146 (NG), 2021 WL 3709287, at *17 (E.D.N.Y Aug. 20, 2021) (holding that it was not unreasonable for a state court to deny petitioner relief from a sentence of fifty years before parole eligibility because "the Supreme Court has not 'clearly established' that a sentence of [fifty] years to life imposed on a juvenile is the 'functional equivalent' of life without parole"), with McKinley v. Butler, 809 F.3d 908, 911 (7th Cir. 2016) (overturning a state court decision and expressing reservations based on Miller about a 100-year sentence imposed on a juvenile). In short, courts around the country are divided concerning Miller's application to lengthy sentences such as Mr. Booker's.

At this time, given no controlling authority to the contrary, I would conclude that we should remain consistent with Tennessee's lower courts and join the other state courts that have adopted a narrower interpretation of Miller's holding and United States Supreme Court Eighth Amendment precedent. See Slocumb, 827 S.E.2d at 156 ("Rather than predict what the Supreme Court may or may not do, we believe the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court."); Turner, 431 S.W.3d at 289 ("Miller prohibits a sentencing scheme that *mandates* life in prison without the possibility of parole for juveniles homicide offenders. [The defendant] was not subjected . . . to a mandatory life-without-parole sentence; therefore, Miller is inapplicable." (citation omitted)); Wilson, 157 N.E.3d at 1175 ("And determining what sentence constitutes a 'de facto life sentence' would be a task completely unmoored from the language of Miller.").

[11] Under the Antiterrorism and Effective Death Penalty Act, a federal district court may grant relief to a petitioner only if his or her claim was heard on the merits and "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Therefore, the conclusion of the federal court in the habeas corpus context is not necessarily a review of the petitioner's claim on the merits and has different weight or precedential value.

I reach this decision for two reasons. First, Miller's holding expressly applies to life-without-parole sentences, and Tennessee's life sentence is not that.[12] Under Tennessee law, a life sentence guarantees release after sixty years and offers release as early as fifty-one years, if the offender earns good-time credits. Brown v. Jordan, 563 S.W.3d 196, 200 (Tenn. 2018) ("[F]or first-degree murders committed *on or after* July 1, 1995, a defendant must serve one hundred percent of sixty years less any sentence credits received, but the sentence credits cannot operate to reduce the sentence imposed by more than fifteen percent.") (citing Tenn. Code Ann. § 40-35-501(i)). Therefore, not only does life imprisonment under Tennessee law guarantee release at a certain point, the sentencing scheme offers Mr. Booker the opportunity to obtain release nine years early through earning good-time credits. See Tenn. Code Ann. § 40-35-501(h)(1), (i)(1), & (i)(2)(a) (2014) (amended 2020); Tenn. Code Ann. § 41-21-236 (2014). For a juvenile like Mr. Booker, who is sentenced to life imprisonment at the age of sixteen or seventeen, he or she can expect to remain incarcerated until at least age sixty-seven and at most age seventy-seven. While quite lengthy, I cannot say that Tennessee's life sentence, considered under the current Eighth Amendment jurisprudence of the United States Supreme Court, is equivalent to a life-without-parole sentence with no meaningful opportunity to obtain release.[13] See United States v. Mathurin, 868 F.3d 921, 934–36 (11th Cir. 2017) (determining that a sentencing scheme that offered the ability to earn good-time credits and reduce a sentence by seven years gave a juvenile offender "a reason to pursue and exhibit 'maturity and rehabilitation'" and thus served as a "'meaningful opportunity to obtain release' during [the juvenile's] lifetime" (quoting Graham, 560 U.S. at 75)); Dorsey, 183 N.E.3d at 733 (concluding that a sentence did not violate the Eighth Amendment or constitute a de facto life-without-parole sentence because the state's day-for-day sentencing credit provided a defendant with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (quoting Graham, 560 U.S. at 75)).

I do not believe it is wise or appropriate to extend Miller, or other existing Eighth Amendment precedent, by predicting whether the United States Supreme Court would extend its jurisprudence and hold unconstitutional a lengthy term-of-years sentence in this

[12] Indeed, as previously noted, Tennessee law allows juveniles tried as adults to be subject to a sentence of life without parole. There appears to be no issue regarding the constitutionality of the life-without-parole statute.

[13] Both Mr. Booker and the amici curiae parties argue that a person who spends the majority of his or her life incarcerated has a lower overall life expectancy and that there is convincing data that a juvenile incarcerated for fifty-one years or more is likely to die in prison before the opportunity for release. See Brief of Amici Curiae National Association of Criminal Defense Attorneys, Tennessee Association of Criminal Defense Attorneys, Amos Brown, and Charles Lowe-Kelly, State v. Booker, No. E2018-01439-SC-R11-CD, at 23–25 (Tenn. Dec. 2, 2020). While this data may be compelling, evaluation of such research and its impact on whether a particular sentence is appropriate punishment for a crime is a determination best left to the legislature.

context. See, e.g., Wilson, 157 N.E.3d at 1175 ("[D]etermining the reach of the [Eighth Amendment's cruel and unusual punishment] clause is inherently a line drawing exercise best left to the U.S. Supreme Court."). This Court must apply the holdings of the United States Supreme Court as they are written, not what we wish were true about the holding or how far we would like for the holding to extend.[14] See, e.g., Jones, 141 S. Ct. at 1321–22 ("The dissent draws inferences about what, in the dissent's view, Miller and Montgomery 'must have done' in order for the decisions to 'make any sense.' We instead rely on what Miller and Montgomery said . . . ." (citation omitted)).

The United States Supreme Court certainly could choose to extend its aforementioned Eighth Amendment jurisprudence to a lengthy term-of-years sentence. However, unlike the majority, I do not find it appropriate to extend its precedent further than its own language. In no way do I wish to diminish the fact that Mr. Booker's sentence requires over half a century of incarceration before any opportunity for release.[15] However, for constitutional purposes, I cannot ignore that it not only offers the opportunity for release but also guarantees it. Therefore, Miller does not apply.

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[14] Mr. Booker argues, and Justice Kirby's concurring opinion concludes, that a new national consensus has formed since Miller that sentences that require a minimum of fifty years of incarceration or more, when applied to a juvenile, trigger the protections of Graham and Miller. The United States Supreme Court may very well choose to take up this issue and hold in accord. However, the data relied on by the Supreme Court in Roper and Graham to reach the conclusion that a new national consensus had formed with regard to the particular punishment in those cases varies widely. See Roper, 543 U.S. at 564–68 (relying on legislative enactments and infrequent imposition of the juvenile death penalty in a majority of states); Graham, 560 U.S. at 62–67 (relying on actual sentencing practices rather than legislative action or inaction). Perhaps more importantly, the purported national consensus applied in this case in no way developed in an organic manner as was the situation in Roper and Graham. Many of the legislative and judicial decisions relied upon by the concurrence arose simply as responses to Miller. As a result, I do not believe that we can predict with confidence what the Supreme Court may say when viewing the existing data Mr. Booker highlights in his brief. Likewise, given these circumstances, I am not prepared to find that a national consensus exists in this case similar to the ones found in Roper and Graham.

[15] Both the plurality and especially the concurring opinion make much of the fact that Tennessee imposes the harshest sentence in the nation in terms of years of service. Yet, no less than Justice Anthony Kennedy, the author of the majority opinions in Roper, Graham, and Montgomery, and one of the Justices in the majority in Miller, has written very interestingly regarding a state having the most severe punishment for a particular crime. In Harmelin v. Michigan, a case relied upon in the plurality opinion, Justice Kennedy opines as follows:

> [M]arked divergences . . . in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . Thus, the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate. Our Constitution is made for people of fundamentally differing views. . . . Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.

501 U.S. 957, 999–1000 (1991) (Kennedy, J., concurring) (internal quotation marks and citation omitted).

Second, this Court has long recognized that it is the distinct job of the legislature to make policy decisions and to determine the appropriate sentence or punishment for a crime. See State v. Gentry, 538 S.W.3d 413, 420 (Tenn. 2017) (citing State v. Burdin, 924 S.W.2d 82, 87 (Tenn. 1996)); State v. Harris, 844 S.W.2d 601, 602 (Tenn. 1992) (citing Solem v. Helm, 463 U.S. 277, 289–90 (1983)). In the specific context of Miller, the Supreme Court has reiterated that States are not "preclude[d] . . . from imposing additional sentencing limits in cases involving defendants under [eighteen] convicted of murder." Jones, 141 S. Ct. at 1323. In fact, since Miller, a majority of the state legislatures and the District of Columbia have acted to reform their criminal sentencing laws as they relate to juvenile homicide offenders.[16] However, to date, Tennessee's legislature is not among them. Even very recently, the General Assembly has considered bills to reform Tennessee's first-degree-murder sentencing scheme not only for juveniles but also for all adult offenders. See S.B. 1452, 112th Gen. Assem. (2021) (proposing to reduce the minimum amount of time a juvenile convicted of first-degree murder is required to serve before becoming release-eligible from fifty-one years to thirty years); S.B. 0561, 112th Gen. Assem. (2021) (proposing to reduce the portion of a person's sentence for first-degree murder that must be served prior to becoming eligible for parole to sixty percent of sixty years if sentenced to imprisonment for life for an offense committed during certain dates or 100 percent of sixty years if sentenced to imprisonment for life without the possibility of parole). In fact, Senate Bill 0561, which proposed parole eligibility after thirty-six years for offenders convicted of first-degree murder during a certain time and sentenced to life imprisonment, among other provisions, passed with only four dissenting votes in the Senate on April 22, 2021.[17] However, this measure, and similar measures, have stalled at some point in the legislative process. So, while I certainly recognize that Tennessee's life sentence, as applied to juveniles, is lengthy in comparison to other States, upon answering the constitutional question in this case, this Court should defer to the legislative process and the legislature's distinct role in making "broad moral and policy judgments in the first instance [by] enacting [the] sentencing laws." Jones, 141 S. Ct. at 1322; see also State v. Black, 815 S.W.2d 166, 178 (Tenn. 1991) ("Justice Fones, speaking for the Court, stated: 'The validity and humanity of that complaint should be addressed to the Legislature. This Court's authority over punishment for crime ends with the adjudication of constitutionality.'" (quoting State v. Adkins, 725 S.W.2d 660, 664 (Tenn. 1987))). I continue to urge the legislature to take up this important issue.

[16] See Josh Rovner, Juvenile Life Without Parole: An Overview, THE SENTENCING PROJECT, (May 24, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/ (summarizing state legislative action since Miller).

[17] See S.B. 0561, 112th Gen. Assem., Bill History, https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0561&GA=112 (last visited Nov. 16, 2022).

In response to this dissenting opinion, the plurality announces that it "will not shirk [its] duty and ignore an injustice." Respectfully, those of us in dissent are far from shirking our duty and ignoring an injustice. To the contrary, I would submit that the exercise of judicial restraint in the face of bad policy, particularly involving vulnerable juveniles, is perhaps the ultimate exercise of our judicial responsibility. Indeed, the eloquent words of Justice Felix Frankfurter directly address this point: "For the highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law of which we are all guardians—those impersonal convictions that make a society a civilized community, and not the victims of personal rule." Tom C. Clark, Mr. Justice Frankfurter: "A Heritage for All Who Love the Law," 51 A.B.A. J. 330, 332 (1965).

I stress that I do not arrive at my conclusion today without serious concerns and reservations. Although I cannot say that Mr. Booker's sentence is unconstitutional under the Eighth Amendment to the United States Constitution, the words of Justice Brett Kavanaugh in Jones are equally or perhaps even more appropriate in the context of this case:

> To be clear, our ruling on the legal issue presented here should not be construed as agreement or disagreement with the sentence imposed against Jones. As this case again demonstrates, any homicide, and particularly a homicide committed by any individual under [eighteen], is a horrific tragedy for all involved and for all affected. Determining the proper sentence in such a case raises profound questions of morality and social policy. The States, not the federal courts, make those broad moral and policy judgments in the first instance when enacting their sentencing laws. And state sentencing judges and juries then determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender.

Jones, 141 S. Ct. at 1322.

III. CONCLUSION

For these reasons, I am compelled to hold that Tennessee's life sentence, as applied to juveniles, does not violate the Eighth Amendment, as interpreted by the United States Supreme Court in Miller. In reaching this conclusion, I suggest the parallel of Justice Kavanaugh's words in Jones applies here. State courts must not make broad moral and social policy judgments. Our constitution leaves those decisions to the legislative branch. The majority's conclusion today to the contrary impermissibly crosses the parameters imposed on our judiciary by our constitution. While perhaps representing good, sound policy, the majority's conclusion fails to allow this issue to be resolved appropriately "by our Legislature as the representatives of the people." State v. Barber, 753 S.W.2d 659, 670 (Tenn. 1988).

For these reasons, I respectfully dissent.

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JEFFREY S. BIVINS, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
February 24, 2022 Session Heard at Nashville

STATE OF TENNESSEE v. TYSHON BOOKER

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Knox County
No. 108568 G. Scott Green, Judge

No. E2018-01439-SC-R11-CD

JUDGMENT

This cause came on to be heard upon the record on appeal from the Court of Criminal Appeals, the briefs of the parties and amici curiae, and the arguments of counsel. Upon consideration thereof, this Court holds that Tennessee's mandatory sentence of life in prison when imposed on a juvenile homicide offender with no consideration of the juvenile's age or other circumstances violates the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

In accordance with the opinion filed herein, it is, therefore, ordered that the portion of the judgment of the Court of Criminal Appeals upholding the automatic life sentence imposed on Mr. Booker under Tennessee Code Annotated section 40-35-501(h)(2) is reversed. It is ordered that Mr. Booker shall have an individualized parole hearing where his age and other circumstances will be properly considered. The parole hearing will be conducted after Mr. Booker has served between twenty-five and thirty-six years, based on release eligibility in the unrepealed version of section 40-35-501(h)(1), previously in effect, that provides for a term of sixty years with release eligibility of sixty percent, but not less than twenty-five years of service. The judgment of conviction is modified to reflect the parole hearing at the appropriate time under section 40-35-501(h)(1).

The Clerk of the Appellate Court shall provide a copy of this Judgment to the Tennessee Department of Correction and the Tennessee Board of Parole. The costs of this appeal are taxed to the State of Tennessee.