APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 64

Supreme Court Case No. 22SC738
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA2033

Petitioner:

Wayne Tc Sellers IV,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
September 30, 2024

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 Petitioner Wayne Tc Sellers IV asks us to consider whether a life without the possibility of parole ("LWOP") sentence for felony murder is categorically unconstitutional or, alternatively, grossly disproportionate to the offense of felony murder following the General Assembly's 2021 reclassification of that offense.[1]

¶2 Based on objective indicia of societal standards and evolving standards of decency as expressed in legislative action and state practice, as well as the exercise of our independent judgment, we now conclude that an LWOP sentence for felony murder for an adult offender is not categorically unconstitutional.

¶3 We further conclude that, even assuming without deciding that felony murder is not per se grave or serious, Sellers's offense here was, in fact, grave and serious. Thus, his LWOP sentence, although severe, does not run afoul of the Eighth Amendment or article II, section 20 of the Colorado Constitution and therefore was not grossly disproportionate.

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[1] Specifically, we granted certiorari to review the following issues:

1. Whether a life without the possibility of parole sentence for felony murder is categorically unconstitutional following the Colorado General Assembly's reclassification of that offense.
2. Whether a life without the possibility of parole sentence is grossly disproportionate to the offense of felony murder following the Colorado General Assembly's reclassification of that offense.

¶4 Accordingly, we affirm the judgment of the division below, albeit partially on different grounds.

I. Facts and Procedural History

¶5 In October 2018, Sellers and several friends planned to rob alleged drug dealers at gunpoint. One member of Sellers's group arranged to buy acid from O.T., and the two ultimately arranged a meeting. At the appointed time and place, the two met briefly, and O.T. showed the member of Sellers's group the acid. That member then ran off, and four men, including Sellers, approached O.T. One of the men flashed a gun and grabbed O.T.'s acid and backpack.

¶6 Sellers and his friends planned to do the same thing to K.H., who was at a different location. Sellers and his friends drove to that location, but this interaction tragically played out differently. Sellers and one of his friends ultimately fired their weapons at K.H., and Sellers's friend killed K.H. during the gunfire. After K.H. was shot, Sellers and his group left the scene. Sellers was later arrested.

¶7 Sellers was subsequently charged with first degree felony murder, aggravated robbery, two counts of conspiracy to commit aggravated robbery, three counts of attempted aggravated robbery, menacing, and six crime of violence counts. The case proceeded to trial in the El Paso County District Court.

¶8 A jury ultimately convicted Sellers on all counts, except for one of the conspiracy to commit aggravated robbery counts, menacing, and one crime of violence count, which were dismissed. The trial court sentenced Sellers to a composite term of LWOP for the felony murder plus thirty-two years confinement and five years parole for the aggravated robbery conviction.

¶9 Sellers appealed, arguing, among other things, that under the Eighth Amendment to the United States Constitution, an LWOP sentence for felony murder is categorically unconstitutional. *People v. Sellers*, 2022 COA 102, ¶¶ 33, 46, 521 P.3d 1066, 1075, 1077. Alternatively, he contended that the division should remand his case for a proportionality review of his LWOP sentence. *Id.* at ¶¶ 33, 55, 521 P.3d at 1075, 1078.

¶10 In a unanimous, published opinion, the division affirmed Sellers's conviction and sentence. *Id.* at ¶ 68, 521 P.3d at 1080. (The division remanded the case to the trial court with instructions to impose concurrent sentences for Sellers's other convictions, a matter that is not before us. *Id.*) Specifically, the division concluded that Sellers's categorical challenge to the constitutionality of his LWOP sentence was not applicable in this case and that his sentence was constitutionally proportional. *Id.* at ¶ 43, 521 P.3d at 1076.

¶11 In support of these conclusions, the division noted that at the time Sellers committed the crimes at issue, felony murder was a class 1 felony that carried a minimum sentence of LWOP. *Id.* at ¶ 44, 521 P.3d at 1077 (citing §§ 18-3-102(1)(b) and 18-1.3-401(1)(a), C.R.S. (2018)). Although the division acknowledged that in 2021, the General Assembly had reclassified felony murder as a class 2 felony with a maximum sentence of forty-eight years, the division pointed out that the General Assembly also provided that its reclassification applied only to offenses committed on or after September 15, 2021, the date the reclassification took effect. *Id.* at ¶ 45, 521 P.3d at 1077 (citing §§ 18-3-103, 18-1.3-401(1)(a)(V)(A.1), 18-1.3-401(8)(a)(I), C.R.S. (2021)).

¶12 Based largely on this change in the law, Sellers argued that an LWOP sentence for felony murder is categorically unconstitutional. *Id.* at ¶ 46, 521 P.3d at 1077. The division disagreed, however, because Sellers cited no case—and the division was aware of none—that had extended the categorical approach to cases not involving the death penalty or juvenile offenders. *Id.* at ¶ 54, 521 P.3d at 1078. Indeed, the division observed that the Supreme Court had upheld LWOP sentences for adult offenders even in nonhomicide cases. *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

¶13 Having so concluded, the division went on to consider, and reject, Sellers's alternative request to remand the case for an abbreviated proportionality review. *Id.* at ¶ 55, 521 P.3d at 1078. Instead, the division conducted the review itself and determined that felony murder is a per se grave or serious offense (because it necessarily involves a violent predicate felony resulting in the death of a person) and that, therefore, Sellers's LWOP sentence was not grossly disproportionate, despite the subsequent legislative amendments. *Id.* at ¶¶ 55, 65–67, 521 P.3d at 1078–80.

¶14 Sellers then petitioned for a writ of certiorari in this court, and we granted his petition.

II. Analysis

¶15 We begin by setting forth the applicable standard of review and the basic tenets of the Eighth Amendment and article II, section 20 of the Colorado Constitution. We then discuss the pertinent case law addressing categorically unconstitutional sentences, and, applying that law to the facts before us, we conclude that LWOP sentences for felony murder for adult offenders are not categorically unconstitutional.

Finally, we conduct an abbreviated proportionality review of Sellers's LWOP sentence for felony murder, and we conclude that, on the facts presented, the sentence was not grossly disproportionate to the offense.

A. Standard of Review and the Eighth Amendment

¶16 We review de novo the constitutionality of statutes. *People in Int. of T.B.*, 2021 CO 59, ¶ 25, 489 P.3d 752, 760. We likewise review de novo whether a sentence is grossly disproportionate to the offense, in violation of the Eighth Amendment and article II, section 20 of the Colorado Constitution. *Wells-Yates v. People*, 2019 CO 90M, ¶ 35, 454 P.3d 191, 204.

¶17 The Eighth Amendment and article II, section 20 of the Colorado Constitution are identical and provide, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII; Colo. Const. art. II, § 20. To decide whether a punishment is cruel and unusual, "courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). This prohibition "guarantees individuals the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). This right stems from the concept that punishment for a crime should be proportionate to both the offender and the offense. *Miller*, 567 U.S. at 469.

¶18 Supreme Court case law addressing the proportionality of sentences falls within two general categories: (1) cases in which the Court implements the

proportionality standard through categorical restrictions and (2) cases in which the Court considers all of the circumstances of the case to determine whether the length of a term-of-years sentence is unconstitutionally excessive or grossly disproportionate to the offender or the offense. *Graham*, 560 U.S. at 59. Sellers argues that we should vacate his LWOP sentence under both or either of these categories and remand his case for resentencing. We consider his contentions in turn.

B. Categorical Unconstitutionality

¶19 Sellers first contends that an LWOP sentence for felony murder is categorically unconstitutional in light of the General Assembly's 2021 reclassification of felony murder from a class 1 felony with a mandatory LWOP sentence to a class 2 felony with a maximum sentence of forty-eight years. In Sellers's view, the General Assembly's reclassification of felony murder as a class 2 felony shows that standards of decency have evolved in Colorado to the extent that its citizens will no longer tolerate punishing felony murder offenders with the most severe sentence available under state law. We are unpersuaded.

¶20 In determining whether a sentence is categorically unconstitutional, the Supreme Court has first considered "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 563). In this regard, the Court has observed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* at 62 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)). The Court has, however, recognized

measures of consensus beyond just legislation. *Id.* For example, the Court has noted that actual sentencing practices are also important in the Court's inquiry into consensus. *Id.*

¶21 After considering objective indicia of societal standards, the Court has next exercised its independent judgment to decide whether the punishment at issue violates the Eighth Amendment. *Id.* at 61. In making this determination, the Court has observed that it is to be guided by the standards set forth in controlling precedents and also by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. *Id.* This exercise of the Court's independent judgment requires consideration of the culpability of criminal defendants in light of their crimes and characteristics, as well as the severity of the punishment at issue. *Id.* at 67.

¶22 Prior to *Graham*, the Supreme Court limited its application of the categorical approach to cases involving the death penalty. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (concluding that the Eighth Amendment precludes the imposition of the death penalty for the rape of a child when the crime did not result, and was not intended to result, in the death of the victim); *Roper*, 543 U.S. at 578 (concluding that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty for offenders who were under the age of eighteen when they committed their crimes); *Atkins*, 536 U.S. at 321 (prohibiting the imposition of the death penalty for defendants with significant intellectual disabilities).

¶23 In *Graham*, 560 U.S. at 82, the Court considered for the first time whether the categorical approach prohibits an LWOP sentence for a juvenile

defendant who did not commit homicide. The Court concluded that it does. *Id.*

¶24 The Court, however, revisited this question two years later in *Miller*, 567 U.S. at 479. Again considering whether the Eighth Amendment prohibits the imposition of a mandatory LWOP sentence for a juvenile offender, the Court this time held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* In so concluding, the Court distinguished *Roper* and *Graham* on the ground that, in the case before it, the Court was not categorically barring a penalty for either a class of offenses or a type of crime. *Id.* at 483. Rather, the Court's ruling "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.*

¶25 Like the division below, we are unaware of any court that has applied the categorical approach to cases not involving either the death penalty or juvenile offenders, and Sellers cites none. *See Sellers*, ¶ 54, 521 P.3d at 1078.

¶26 Nor have we found a national consensus that a mandatory sentence of LWOP for felony murder for an adult offender is categorically impermissible. To the contrary, courts in a number of our sister states have upheld LWOP sentences for felony murder for adult offenders. *See, e.g.*, *Sosebee v. State*, 893 S.E.2d 653, 659–60 (Ga. 2023) (concluding that a recidivist offender's LWOP sentence for felony murder arising from a fatal car accident that occurred while the offender was attempting to flee from a police stop was not grossly disproportionate to his offenses under the Eighth Amendment); *Harte v. State*, 373 P.3d 98, 101–

02 (Nev. 2016) (concluding that an LWOP sentence for felony murder, which was within the statutory limits, was not so grossly disproportionate to the crime as to constitute cruel and unusual punishment).

¶27 To the extent that Sellers cites to decisions that have imposed sentences for felony murder that were less severe than an LWOP sentence, we note that those cases appear to have arisen in states in which the applicable statutes did not allow for the imposition of an LWOP sentence for felony murder. *See, e.g.*, *Todd v. State*, 917 P.2d 674, 679–81 (Alaska 1996) (noting that the maximum sentence for felony murder under the applicable state statute was ninety-nine years, and concluding that consecutive sentences for felony murder and the predicate felony of first degree robbery do not violate double jeopardy); *State v. Reardon*, 486 A.2d 112, 120–21 (Me. 1984) (noting that the maximum sentence for felony murder was twenty years under the applicable state statute, and concluding that a fourteen-year sentence for felony murder was not disproportionate or cruel and unusual). These cases do not support Sellers's assertion that many state courts have concluded that an LWOP sentence for felony murder is categorically unconstitutional. The cases simply do not address that issue. Nor have we seen other cases or authorities supporting Sellers's assertion or indicating that a national consensus has arisen (either in case law or state statutes) against the imposition of LWOP sentences in felony murder cases involving adult offenders.

¶28 For these reasons, we cannot say that the objective indicia of society's standards preclude LWOP sentences in cases like this one.

¶29 Nor does the exercise of our independent judgment lead us to conclude that LWOP sentences for

felony murder for adult offenders are categorically unconstitutional. As noted above, the Supreme Court's case law instructs that we must exercise our independent judgment to decide whether, in light of controlling precedent and our understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, an LWOP sentence for felony murder violates the Eighth Amendment. *Graham*, 560 U.S. at 61. As part of this analysis, we must consider, among other things, "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 67. In particular, the Court has indicated that, in conducting our analysis, we must assess the four recognized goals of penal sanctions, namely, retribution, deterrence, incapacitation, and rehabilitation. *Id.* at 71. We therefore proceed to that analysis.

¶30 Retribution refers to "[p]unishment imposed for a serious offense." *Retribution*, Black's Law Dictionary (12th ed. 2024). Retribution is, of course, a legitimate reason to punish, but the criminal sentence must be directly related to the offender's personal culpability. *Graham*, 560 U.S. at 71.

¶31 Deterrence has been defined as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment." *Deterrence*, Black's Law Dictionary (12th ed. 2024). Deterrence is premised on the idea that a person will take a possible punishment into consideration when making decisions about whether to engage in certain behaviors. *Graham*, 560 U.S. at 72.

¶32 Incapacitation is "[t]he action of disabling or depriving of legal capacity." *Incapacitation*, Black's Law Dictionary (12th ed. 2024). Placing an offender in prison incapacitates that offender so that the offender

cannot commit further crimes (other than in prison itself) or endanger public safety. *Graham*, 560 U.S. at 72.

¶33 Finally, rehabilitation has been defined as "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes." *Rehabilitation*, Black's Law Dictionary (12th ed. 2024). Rehabilitation is "a penological goal that forms the basis of parole systems." *Graham*, 560 U.S. at 73.

¶34 As Sellers asserts, one can reasonably argue that his LWOP sentence did not serve all four of these goals. Specifically, although an LWOP sentence for committing a felony that resulted in another's death might well serve the purposes of retribution, deterrence, and incapacitation, it arguably does not serve the goal of rehabilitation because a person who receives an LWOP sentence is given no opportunity to rehabilitate themselves and reenter the community.

¶35 We cannot say, however, that the fact that an LWOP sentence for felony murder might not satisfy one (or even more than one) of the above-described penological goals necessarily overrides the lack of a national consensus discussed above. *Cf. Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment) (noting that "the Eighth Amendment does not mandate adoption of any one penological theory" and that federal and state courts "have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation"). Specifically, absent a consensus among states that an LWOP sentence for felony murder for an adult offender is always inappropriate, we perceive no basis for overriding the law in effect at the time Sellers committed the offenses that

mandated an LWOP sentence for felony murder or the clear legislative declaration applying the reclassification of LWOP only to offenses committed after September 15, 2021.

¶36 We are not persuaded otherwise by Sellers's request that, notwithstanding the above-described case law construing the Eighth Amendment, we should interpret the Colorado Constitution to render an LWOP sentence for felony murder committed prior to September 15, 2021 categorically improper. To be sure, "we are free to construe the Colorado Constitution to afford greater protections than those recognized by the United States Constitution." *Millis v. Bd. of Cnty. Comm'rs*, 626 P.2d 652, 657 (Colo. 1981). To date, however, we have not interpreted article II, section 20 of our constitution to provide greater protection than the Eighth Amendment. Nor have we interpreted article II, section 20 to conclude that an adult's LWOP sentence for felony murder is categorically unconstitutional. And considering the unambiguous statutory language mandating an LWOP sentence for felony murder committed before September 15, 2021, we are not persuaded that we should do so now.

¶37 Accordingly, we conclude that under the Eighth Amendment and article II, section 20 of the Colorado Constitution, Sellers's LWOP sentence for felony murder is not categorically unconstitutional, and we proceed to consider whether that sentence is nonetheless grossly disproportionate to the offense in this case.

C. Gross Disproportionality

¶38 Sellers argues that his LWOP sentence is grossly disproportionate to the offense of felony murder, especially in light of the General Assembly's 2021

reclassification of felony murder. Again, we are unpersuaded.

¶39 "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)); *accord Rutter v. People*, 2015 CO 71, ¶ 15, 363 P.3d 183, 188.

¶40 "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). Thus, we have said, "[I]n conducting proportionality reviews in noncapital cases, courts will rarely conclude that a defendant's sentence is grossly disproportionate." *Rutter*, ¶ 16, 363 P.3d at 188.

¶41 In general, the fixing of prison sentences for specific crimes is properly within the legislature's province and not that of the courts. *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, it is well settled that the legislature may properly define criminal punishments without providing the court with any sentencing discretion. *Id.* at 1006. Reviewing courts should thus grant "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem*, 463 U.S. at 290.

¶42 As noted above, when the General Assembly reclassified felony murder, it expressly stated that its

reclassification applies only to offenses committed after September 15, 2021, the date the reclassification became effective. This was nearly three years after the events in October 2018 that led to Sellers's felony murder conviction. "It is well established in Colorado that when the General Assembly indicates in an effective date clause that a statute shall apply prospectively, courts are bound by that language." *People v. Summers*, 208 P.3d 251, 257 (Colo. 2009). Accordingly, on its face, the legislative reclassification does not invalidate Sellers's LWOP sentence for felony murder.

¶43 Nonetheless, we must still examine whether Sellers's sentence was constitutionally disproportionate. *See Wells-Yates*, ¶ 48, 454 P.3d at 206 ("Whether statutory revisions apply retroactively 'is a separate and distinct question from whether a defendant's sentence is constitutionally proportionate.'") (quoting *Rutter*, ¶ 35, 363 P.3d at 191) (Gabriel, J., dissenting)); *see also Rutter*, ¶ 2, 363 P.3d at 185 (noting that even though "the legislature can change the classification of crimes, courts determine whether offenses are grave or serious for purposes of proportionality review").

¶44 In *Solem*, 463 U.S. at 290–92, the Supreme Court adopted a test to determine whether a sentence is proportionate to the crime for which the defendant was convicted. Although the Court described the test as having three steps, *id.*, we have construed it as having two, with the first step being comprised of two parts, *Wells-Yates*, ¶ 7 & n.4, 454 P.3d at 196–97 & n.4. First, the trial court should consider (a) the gravity or seriousness of the offense along with (b) the harshness of the penalty. *Id.* at ¶ 7, 454 P.3d at 197. Second, the court may compare the defendant's sentence to sentences for other crimes in the same

jurisdiction and to sentences for the same crime committed in other jurisdictions. *Id.* We refer to the first step as an "abbreviated proportionality review" and to the second step as an "extended proportionality review." *Id.* at ¶ 10, 454 P.3d at 197.

¶45 When defendants challenge their sentences on proportionality grounds, reviewing courts in Colorado must complete an abbreviated proportionality review. *Id.* at ¶ 15, 454 P.3d at 198–99. Courts should conduct an extended proportionality review only when the abbreviated proportionality review gives rise to an inference of gross disproportionality. *Id.*

¶46 We have acknowledged that the first part of the abbreviated proportionality review—the determination of the gravity or seriousness of the offense—is "somewhat imprecise." *Id.* at ¶ 12, 454 P.3d at 198 (quoting *People v. Gaskins*, 825 P.2d 30, 36 (Colo. 1992)). Nonetheless, we have considered several factors in conducting this review, including (1) the harm caused or threatened to the victim or society; (2) the magnitude of the crime; (3) whether the crime is a lesser-included or the greater-inclusive offense; (4) whether the crime involved an attempt to commit an act or a completed act; and (5) whether the defendant was a principal in or accessory to the crime. *Id.* We have also weighed factors relevant to the defendant's culpability, such as motive and whether the defendant's acts were negligent, reckless, knowing, intentional, or malicious. *Id.*

¶47 Pertinent here, we further examined in *Wells-Yates*, ¶¶ 40–53, 454 P.3d at 204–07, whether, in the course of conducting an abbreviated proportionality review, a court should consider statutory amendments enacted after the triggering offenses. On this point, we concluded that when determining the

gravity or seriousness of an offense during an abbreviated proportionality review, "the trial court should consider relevant legislative amendments enacted after the date of the offense, even if the amendments do not apply retroactively." *Id.* at ¶ 45, 454 P.3d at 206. This is because such legislative enactments might inform our evaluation of the gravity or seriousness of the offense. *Id.* at ¶ 52, 454 P.3d at 207.

¶48 Lastly, we have identified certain crimes as per se grave or serious. *Id.* at ¶ 13, 454 P.3d at 198. For example, we have concluded that per se grave or serious crimes include aggravated robbery, robbery, burglary, accessory to first degree murder, and certain narcotics-related crimes. *Id.* at ¶¶ 13, 64–66, 454 P.3d at 198, 209. When a crime is per se grave or serious, a sentencing court may skip the determination regarding the gravity or seriousness of the offense and proceed directly to assess the harshness of the penalty. *Id.* at ¶ 13, 454 P.3d at 198.

¶49 Here, we begin by noting that we have never determined whether felony murder is a per se grave or serious offense. Unlike the division below, however, we perceive no need to decide whether it is because even assuming without deciding that it is not per se grave or serious, the application of the above-described factors to this case establish that Sellers's offense was, in fact, grave and serious.

¶50 In this case, the victim died in the course of an aggravated robbery that Sellers helped plan and carry out. Moreover, although Sellers did not personally kill the victim, he fired his weapon at the victim and was an active and willing participant in the events resulting in the victim's death. Considering all of these factors, and taking into account the legislative reclassification that was enacted several years after Sellers

committed the crimes at issue, we conclude that Sellers's offense was, in fact, grave and serious.

¶51 Turning, then, to the harshness of the penalty, we must consider whether a sentence is parole eligible because parole can reduce the length of confinement, thereby rendering the penalty less harsh. *Id.* at ¶ 14, 454 P.3d at 198. In addition, we must consider the offense at issue, as well as the underlying offenses, to determine whether, in combination, they so lack in gravity and seriousness as to suggest that the sentence is "unconstitutionally disproportionate to the crime, taking into account the defendant's eligibility for parole." *Id.* at ¶ 23, 454 P.3d at 201.

¶52 Here, Sellers's LWOP sentence renders him ineligible for parole and thus ensures that he will spend the rest of his life in prison. We recognize, as we must, that such a sentence is the harshest sentence that Colorado law currently authorizes. § 18-1.3-401(1)(a)(V)(F), C.R.S. (2024). Nonetheless, the Supreme Court has concluded that sentencing certain defendants who have committed felonies to LWOP does not necessarily run afoul of the Eighth Amendment. *See Harmelin*, 501 U.S. at 994–96 (concluding that an LWOP sentence for possessing a large amount of cocaine was not cruel and unusual).

¶53 In light of this case law, and considering the above-described facts and circumstances of this case, we cannot say that Sellers's LWOP sentence is one of the rare cases requiring us to conclude that the sentence is unconstitutional or grossly disproportionate to the crime that he committed. *See Rutter*, ¶¶ 16, 25, 363 P.3d at 188–89 (noting that courts in non-homicide cases will rarely find a defendant's sentence to be grossly disproportionate, and concluding, on the facts presented, that the defendant's ninety-six year drug

sentence was not grossly disproportionate to his crime). Nor, for the reasons set forth above, do we perceive a basis to afford Sellers greater protection under the Colorado Constitution on the question of gross disproportionality than is afforded under the Eighth Amendment.

¶54 In light of this determination, we need not proceed to an extended proportionality review.

III. Conclusion

¶55 For the foregoing reasons, we conclude that an LWOP sentence for felony murder for an adult offender is not categorically unconstitutional, nor was that sentence grossly disproportionate on the facts of this case.

¶56 Accordingly, we conclude that Sellers's LWOP sentence for felony murder was constitutional, and we affirm the judgment of the division below, albeit partially on different grounds.

APPENDIX B

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521 P.3d 1066

2022 COA 102

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

WAYNE TC SELLERS IV,
Defendant-Appellant.

Court of Appeals No. 19CA2033

Colorado Court of Appeals Division I.

Announced September 8, 2022

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Opinion by JUDGE TOW

¶ 1 Defendant, Wayne Tc Sellers IV, and several companions robbed two drug dealers at gunpoint. One of Sellers's companions shot and killed the second victim. A jury convicted Sellers of five charges related to the victim who was killed: felony murder, three counts of attempted aggravated robbery, and conspiracy to commit aggravated robbery. The jury also convicted Sellers of aggravated robbery related to the other victim.

¶ 2 Sellers appeals his conviction and also challenges his sentence. We affirm his conviction and his sentence for felony murder but vacate his consecutive sentence for aggravated robbery. In addressing the challenges to his sentence, we address three issues of first impression: (1) we reject his categorical attack on his sentence to life without the possibility of parole for felony murder; (2) we conclude that felony murder is a per se grave or serious offense for purposes of an abbreviated proportionality review; and (3) we hold that where the trial court does not specify whether a defendant's contemporaneously announced sentences are to be concurrent with or consecutive to one another, they are presumed to run concurrently.

I. Sellers's Attacks on His Conviction

¶ 3 Sellers raises two challenges to his conviction. He argues that the trial court erred by denying his motion to suppress statements he made to a detective. And he contends that the prosecutor engaged in misconduct warranting reversal. We address, and reject, each contention.

A. Motion to Suppress

¶ 4 According to the testimony at the motions hearing, El Paso County Detective Jason Darbyshire, who had located Sellers in Holyoke, Colorado, arrested Sellers with the assistance of local law enforcement officers. Before Sellers was taken to the Phillips County Sheriff's Office, Darbyshire told him,

> You are under arrest currently for an active warrant for first degree murder. Okay. Uh, basically, what I want to tell you is I would like to give you an opportunity to get your version of events out there; speak with you; see what went down. Okay? Obviously, I've got a

> lot of information 'cause that's why I'm here talking to you. But, it's up to you, if you don't want to talk to me then, then that's your right to. But if you do want to speak then we can go back to their police station we can have a chat and maybe iron a couple of things out.

Darbyshire asked Sellers what he wanted to do, and Sellers replied, "[U]h, which would be better?" Darbyshire responded,

> Well, I mean, it's totally up to you man. Okay. You are under arrest either way. Okay. So there's a lot of. Before we can talk about the specifics of the case there's a lot of administrative parts and stuff that we've got to cover and a lot of legal stuff that you need to be aware of. Okay? So, do you think that is something you would like to do is make a statement in reference to this case? Or, is that not something you would like to do?

¶ 5 Sellers answered, "It is." Darbyshire then explained to him that he would be transported to the Phillips County Sheriff's Office to "hopefully get some things squared out."

¶ 6 At the sheriff's office, Darbyshire read Sellers his *Miranda* rights, *see Miranda v. Arizona*, 384 U.S. 436 (1966).[1] After reading Sellers his rights, Darbyshire

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[1] The *Miranda* advisement was as follows:

> There are certain constitutional rights that are afforded to you. You've probably heard it a million times in television, movies, whatever, but I'm going to explain those to you now. Okay. Just so we're on the same page. You do have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the

asked him, "[D]o you understand those rights as I've explained them to you?" Sellers said, "Yes." Darbyshire then confirmed that Sellers still wished to speak with him. Sellers, again, said yes.

¶ 7 The questioning, which was video-recorded, took place shortly after midnight and lasted ninety minutes. Sellers gave his version of the events, answered Darbyshire's questions, and even drew pictures to help illustrate certain scenes from the robberies.

¶ 8 Before trial, Sellers moved to suppress the initial audio-recorded police stop and the video-recorded interview at the sheriff's office. The trial court denied the motion as to both recordings. At trial, only the video-recorded interview was admitted.

1. Standard of Review

¶ 9 When reviewing a suppression order, we defer to the trial court's factual findings if they are supported by competent evidence in the record. *Verigan v. People*, 2018 CO 53, ¶ 18, 420 P.3d 247. However, "[w]hen the interrogation is audio or video-recorded, and there are no disputed facts outside the recording pertinent to the suppression issue, we are in the same position as the trial court in determining whether the statements should or should not be suppressed under the totality of the circumstances." *People v. Ramadon*, 2013 CO 68, ¶ 21, 314 P.3d 836. In that case, we

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> right to hire an attorney and have him or her present during any questioning if you wish. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning if you decide to do that route. You can decide at any time not to make any statements or answer any questions.

review de novo the legal effect of those facts. *People v. Liggett*, 2014 CO 72, ¶ 19, 334 P.3d 231.

2. Analysis

¶ 10 We disagree with Sellers's contention that his waiver of his *Miranda* rights was not voluntary, intelligent, and knowing.

¶ 11 "A waiver of *Miranda* rights is involuntary 'only if coercive governmental conduct—whether physical or psychological—played a significant role in inducing the defendant to make the confession or statement.'" *People v. Jiminez*, 863 P.2d 981, 984 (Colo. 1993) (quoting *People v. May*, 859 P.2d 879, 883 (Colo. 1993)). We look to the totality of the circumstances to determine whether an interrogation was coercive and consider the following nonexclusive factors:

- whether the defendant was in custody;
- whether the defendant was free to leave;
- whether the defendant was aware of the situation;
- whether the police read *Miranda* rights to the defendant;
- whether the defendant understood and waived *Miranda* rights;
- whether the defendant had an opportunity to confer with counsel or anyone else prior to or during the interrogation;
- whether the statement was made during the interrogation or volunteered later;
- whether the police threatened the defendant or promised anything expressly or impliedly;
- the method of the interrogation;

- the defendant's mental and physical condition just prior to the interrogation;
- the length of the interrogation;
- the location of the interrogation; and
- the physical conditions of the location where the interrogation occurred.

People v. Zadran, 2013 CO 69M, ¶ 11, 314 P.3d 830.

¶ 12 We disagree with Sellers that his waiver was invalid because he was encouraged to speak before being read his *Miranda* rights. Rather, Darbyshire told Sellers twice that he was giving him the option to tell his version of the events. Darbyshire also said, "[I]f you don't want to talk to me then, then that's your right to" and "it's totally up to you man." Moreover, Darbyshire needed to know where to take Sellers: if Sellers wished to talk, he would be taken to the sheriff's office for questioning; if not, he would be taken to the jail for booking. None of these statements encouraged Sellers to speak; they merely gave Sellers the option to do so.

¶ 13 We further disagree with Sellers that the following statements made by Darbyshire were improper promises that induced him to speak:

- "I kinda just want to give you a chance to explain what happened and how all that went down just so I have a clear picture of how everything transpired."
- "Here's the deal, I know you don't know me, but I mean this isn't an act. I'm a [sic] shoot straight with you and if stuff is not good news, I'll tell you it's not good news."

- "I'm going to make sure that you get a fair shake as well."

These statements are not promises and were not coercive. *See id.* at ¶ 19 (concluding that the statement made by an officer that "it would be in [the defendant's] best interest" to speak was not coercive).

¶ 14 And we disagree with Sellers that his experience in the army, where soldiers are expected to answer questions in a command-heavy environment, influenced him to waive his *Miranda* rights.[2] First, we note that there is no evidence that Darbyshire was aware of Sellers's military background or attempted in any way to take advantage of it. *See People v. Cisneros*, 2014 COA 49, ¶ 84, 356 P.3d 877 ("[A] defendant's weakened mental condition, in the absence of deliberate exploitation and intimidation by law enforcement officers, is insufficient to render the defendant's statements involuntary."). In any event, the trial court noted that Sellers was only in the military for two years. And he was discharged for underage drinking after being pulled over for driving under the influence. Based on these facts, the trial court concluded, with record support, that Sellers's military background and experience did not impact the voluntariness of his waiver.

¶ 15 Lastly, we disagree with Sellers's emphasis that his age—twenty years old—contributed to him believing he had no choice but to speak with Darbyshire. *See People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001) (holding that age is another factor for courts to consider in analyzing whether a *Miranda* waiver is valid); *Fare v.*

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[2] At the motions hearing, Sellers provided expert testimony explaining the impact his military service had on his ability to consent for an interview.

Michael C., 442 U.S. 707, 726–28 (1979) (noting that even juveniles can validly waive their *Miranda* rights).

¶ 16 Under the totality of the circumstances, Darbyshire's behavior did not overbear Sellers's will and, therefore, we conclude that Sellers's waiver and his subsequent statements were voluntary. *See Zadran*, ¶ 10.

¶ 17 Next, we disagree with Sellers that his waiver was not knowing and intelligent because he was intoxicated and not properly advised of his *Miranda* rights.

¶ 18 A waiver must be made with full awareness regarding the nature of the rights being abandoned and the consequences of abandoning them. *See Jiminez*, 863 P.2d at 984. "[I]ntoxication only invalidates an otherwise valid *Miranda* waiver if the court finds by a preponderance of the evidence that the defendant was so intoxicated as to be incapable of understanding the nature of his or her rights and the ramifications of waiving them." *People v. Bryant*, 2018 COA 53, ¶ 38, 428 P.3d 669. Sellers self-reported that he used marijuana two hours before the interrogation and cocaine nearly five hours before the interrogation. However, Sellers was not so intoxicated that he did not understand his rights and the consequences of waiving them. *See id.* Rather, as is clear from the video recording, Sellers was coherent, alert, and responsive during the interrogation.

¶ 19 We also disagree with Sellers that the *Miranda* advisement was insufficient because Darbyshire emphasized the word "hire," did not say that an appointed attorney would be free, did not pause to ask

Sellers if he understood each sentence, and read the advisement quickly and in a casual tone.

¶ 20 When officers inform suspects of their rights, the rights need not be rigidly expressed exactly as described in *Miranda*. *Duckworth v. Eagan*, 492 U.S. 195, 202 (1989). Rather, the warning needs to reasonably convey to the suspect their rights as required by *Miranda*. *Id.* at 203; *see Sanchez v. People*, 2014 CO 56, ¶¶ 16–17, 329 P.3d 253 (noting that *Miranda* advisements do not need to include terms like "free of charge"). When Darbyshire told Sellers that if he could not "afford to hire an attorney, one [would] be appointed to represent [him] before any questioning," he clearly communicated that an appointed attorney is free.[3] Further, Darbyshire also emphasized that Sellers could "decide at any time not to make any statements or answer any questions." Finally, we are aware of no Colorado case law—and Sellers points us to none—requiring an officer to pause after each advisement to ask whether the suspect understood it. Thus, we conclude that Darbyshire reasonably conveyed Sellers's rights to him.

¶ 21 In sum, Sellers voluntarily, intelligently, and knowingly waived his rights. And his statements during the interrogation were voluntary. Thus, the trial court did not err by denying the motion to suppress.

B. Prosecutorial Misconduct

¶ 22 We also disagree with Sellers that the prosecutor committed misconduct in opening statement and closing statement by improperly (1) expressing a personal

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[3] Contrary to Sellers's argument, Darbyshire's vocal emphasis on the word "hire" actually drew a clear distinction between Sellers's right to hire an attorney and, if he could not afford one, his right to have an attorney appointed to represent him.

opinion about Sellers's guilt, and (2) vouching for the credibility of witnesses.

1. Standard of Review

¶ 23 We determine whether a prosecutor's conduct was improper based on the totality of the circumstances. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). In doing so, we evaluate claims of improper argument in the context of the argument as a whole and in light of the evidence before the jury. *People v. Conyac*, 2014 COA 8M, ¶ 132, 361 P.3d 1005.

2. Analysis

¶ 24 We disagree with Sellers that the prosecutor expressed her personal opinion about his guilt during opening and closing statements by repeating that he "knew what he was doing." In the prosecutor's opening statement, she used this phrase to preview the evidence that she planned to introduce at trial and drew a reasonable inference from that evidence—that Sellers was a knowing participant in the offenses. *See People v. Samson*, 2012 COA 167, ¶ 31, 302 P.3d 311 (Prosecutors may "employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance."). Similarly, during her closing argument the prosecutor used this same phrase to summarize the evidence presented and to draw the same reasonable inference from that evidence. *See id.* ("Prosecutors may comment on the evidence admitted at trial and the reasonable inferences that can be drawn therefrom."). Contrary to Sellers's argument, nothing in the prosecutor's theme in any way expressed the prosecutor's personal beliefs.

¶ 25 Nor did the prosecutor express her personal opinion about Sellers's guilt when, in closing argument, she said that "the defendant[ ] is absolutely guilty of

all the crimes we've charged" him with. "Whether a statement improperly expresses the personal opinion of a prosecutor ... requires a reviewing court to consider the language used, the context in which the statement was made, and any other relevant factors." *Domingo-Gomez v. People*, 125 P.3d 1043, 1051 (Colo. 2005).

¶ 26 The prosecutor was prefacing her argument that the evidence contradicted Sellers's abandonment theory and was emphasizing the lack of evidence to support such a theory. *See People v. Denhartog*, 2019 COA 23, ¶ 55, 452 P.3d 148 (noting that a prosecutor's comments in direct response to defense arguments were not prejudicial misconduct); *cf. People v. Esquivel-Alaniz*, 985 P.2d 22, 23 (Colo. App. 1999) ("[C]omment on the lack of evidence confirming a defendant's theory of the case is permissible ...."). Further, the prosecutor's statement was not preceded by an assertion of personal belief. *See Samson*, ¶¶ 33, 38 (perceiving no prosecutorial misconduct where prosecutor's statements that "[t]he defendant is guilty" and "[h]e did this" were not preceded by a phrase like "I believe"). Indeed, a prosecutor would effectively be prohibited from arguing their case if they could not even express that the admitted evidence was sufficient to convict the defendant. *See People v. Merchant*, 983 P.2d 108, 115 (Colo. App. 1999) (concluding that prosecutor's comment "that the '[defendant's] guilty of the crime of theft,' merely expressed the proposition that the evidence was sufficient to sustain a conviction" and was proper) (alteration in original).

¶ 27 Similarly, when viewed in context, the prosecutor's statement during rebuttal that "[w]e believe we met our burden" was not improper. She made this statement while discussing a question on the jury

verdict form that the jurors would only reach if they first found that the prosecution had met its burden of proving the underlying offenses. The full context of her statement is important:

> If you don't think we've proved beyond a reasonable doubt he's guilty of these crimes, you don't ever have to get to this, but we believe we did. We believe we met our burden. And if you believe likewise, we're gonna ask you to find the easy question, that he also had a deadly weapon.

¶ 28 Although the reference to the prosecution's "belief" was unnecessary and inartful, in context it is clear that the prosecutor was merely asserting that the evidence of Sellers's guilt was sufficient for the jury to reach the question of whether he possessed a deadly weapon. And, significantly, the prosecutor emphasized that it was the jury's job to decide this issue. Thus, we do not consider these statements "to have fallen to the level of improper expressions of the prosecutor's personal opinion." *Domingo-Gomez*, 125 P.3d at 1052.

¶ 29 We also disagree with Sellers that the prosecutor improperly vouched for the credibility of witnesses in her opening statement when she said,

> Now, I'm going to be up front with you. We had to make a deal with witnesses in order to get their truthful testimony. Now, we don't like doing that. And you probably don't like to hear that. But it is literally the only way we get an inside view of what happened that night. And I'm being up front with you so you know that.

¶ 30 In opening statement, a prosecutor is permitted to mention evidence that they believe in good faith

will be admissible. *See People v. Lucero*, 714 P.2d 498, 503 (Colo. App. 1985) (citing 1 ABA, *Standards for Criminal Justice*, Standard 3-5.5 (2d ed. 1982)). The specifics of a plea agreement between the prosecution and a witness—including the requirement that the witness provide "truthful testimony"—is admissible, at least where the prosecutor does not express an opinion that the witness actually told the truth and there is no suggestion that the prosecutor possesses information unavailable to the jury. *People v. Coughlin*, 304 P.3d 575, 582–83 (Colo. App. 2011).

¶ 31 The plea agreement for one of the witnesses, which provides that the witness was agreeing to "testify truthfully," was admitted into evidence. Moreover, nothing in the prosecutor's statement amounted to an expression of the prosecutor's personal opinion that the witness would in fact testify truthfully (as opposed to merely stating that the witness agreed to do so). Nor did the statement suggest that the prosecutor "appeared to possess information unavailable to the jury." *Id.* at 582. Thus, the prosecutor's statement about the plea agreement was proper.

¶ 32 In sum, we discern no prosecutorial misconduct and, thus, no error by the trial court in failing to intervene.[4]

II. Sellers's Attacks on His Sentence

¶ 33 Sellers levies two attacks on his sentence, the second of which has two alternative bases. He

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[4] Sellers contends that even if the purported instances of prosecutorial misconduct addressed in Part I.B of this opinion do not individually rise to reversible error, their cumulative prejudicial effect does. *See Howard-Walker v. People*, 2019 CO 69, ¶¶ 24–25, 443 P.3d 1007. However, because we discern no error at all, there can be no cumulative error.

contends that the imposition of a consecutive sentence for his aggravated robbery conviction constitutes double jeopardy because, although the court did not address whether the sentence would be concurrent or consecutive to the felony murder sentence in its oral remarks, the mittimus later provided that it was consecutive. And he argues that his sentence to life without the possibility of parole for felony murder is categorically or, alternatively, grossly disproportionate. We agree with his first contention but reject both aspects of his second.

A. Consecutive Sentence

¶ 34 We review de novo whether a sentence is illegal. *People v. Chirinos-Raudales*, 2021 COA 37, ¶ 33, 491 P.3d 538 (cert. granted Dec. 20, 2021).

¶ 35 A court may not change a sentence from concurrent to consecutive after a defendant has begun serving it. *People v. Sandoval*, 974 P.2d 1012, 1015 (Colo. App. 1998). "Such an increase in the sentence is impermissible even if the court alters the sentence solely to conform to or clarify its original intent." *Id.* In *Sandoval*, a division of this court held that "where the trial court is advised of a pre-existing Colorado sentence but does not specify whether the new sentence is to be concurrent with or consecutive to the prior sentence, the new sentence will be presumed to run concurrently with the prior sentence." *Id.* However, no published Colorado case addresses whether this presumption of concurrency applies to contemporaneously announced sentences—rather than a pre-existing sentence and a new sentence—when the record is silent as to whether the defendant's sentences are to be concurrent or consecutive. Doing so for the first time, we conclude that it does.

¶ 36 In discussing the presumption of concurrency,[5] the division in *Sandoval* cited cases that applied a presumption of concurrency to sentences announced contemporaneously where the record was similarly silent. *Id.* at 1014–15. For example, the division cited *Borum v. United States*, 409 F.2d 433, 440 (D.C. Cir. 1967), in which the court held that absent a specification of consecutiveness, multiple sentences operate concurrently whether they are pronounced contemporaneously or at different times or pertain to the same or different matters. *Sandoval*, 974 P.2d at 1014–15. And the division noted that "[i]n *Graham v. Cooper*, 874 P.2d 390 (Colo. 1994), the [S]upreme [C]ourt cited federal cases applying the presumption of concurrency [for contemporaneous sentences] but found them inapplicable where the original sentence unambiguously imposed consecutive sentences." *Sandoval*, 974 P.2d at 1014.

¶ 37 We see no reason why, where the record is silent, a presumption that the court intended to impose concurrent sentences would not apply when the trial court contemporaneously sentences the defendant on more than one offense. "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *Id.* at 1015. "Adopting a presumption of concurrency comports with 'the general notion of holding the Government to precision

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[5] Although the division used the phrase "presumption of concurrency," *People v. Sandoval*, 974 P.2d 1012, 1015 (Colo. App. 1998), the presumption goes to whether the sentences imposed were to run concurrently. The term is not intended to suggest that there is an evidentiary presumption that must be overcome before a sentencing court may exercise its discretion to impose a consecutive sentence.

before a defendant can be jailed,' and requires that the prosecution and the court affirmatively suggest and impose consecutive sentences if such are intended." *Id.* (quoting *United States v. Wenger*, 457 F.2d 1082, 1084 (2d Cir. 1972)).

¶ 38 As noted, the trial court did not say during the sentencing hearing that the sentence for aggravated robbery would be consecutive to the sentence for felony murder. Of course, the courts need not specifically use the word "consecutive." *See*, *e.g.*, *Graham*, 874 P.2d at 394 (noting that the transcript of the sentencing proceeding unambiguously reflected a consecutive sentence, in part because the court said the aggregate sentences would "total '80 years'"). But we do not view the court's sentencing pronouncement as unambiguously indicating such an intent.

¶ 39 At the sentencing hearing, the trial court merged the five convictions related to the victim who was killed, entering a single conviction for felony murder, and sentenced Sellers to life without the possibility of parole in the custody of the Department of Corrections. Regarding his sentence for the aggravated robbery of the other victim, the trial court said,

> I do find that Count 13, the [aggravated robbery] conviction, is a separate offense. It's further supported by a proven crime of violence sentencing enhancer. The Court finds that the maximum sentence of 32 years in the Department of Corrections, followed by a five-year period of parole, for Count 13 reflects the serious violent nature of the event as the Court heard the evidence and reflects the jury's verdict. It is an aggravated robbery.

¶ 40 Contrary to the People's contention, the trial court's language does not evince an intent to impose a consecutive sentence. Rather, the trial court had just explained that the other convictions merged into the felony murder conviction, and its statements about the aggravated robbery conviction and sentence being for a separate offense explained why that conviction was not merged into the felony murder conviction.

¶ 41 Accordingly, applying the presumption of concurrency, we conclude that the court's oral pronouncement imposed concurrent sentences. Thus, the trial court impermissibly increased Sellers's sentence when, after Sellers had already begun serving his sentence, it issued the mittimus providing that Sellers's aggravated robbery sentence would run consecutively to his felony murder sentence.

B. Eighth Amendment Challenges

¶ 42 Embodied in the Eighth Amendment is the principle that punishment for a crime must be proportionate to the offense. *Graham v. Florida*, 560 U.S. 48, 59 (2010). There are two types of Eighth Amendment challenges to sentences: (1) challenges to the excessiveness of a particular punishment for a particular offender, and (2) categorical challenges to sentences imposed based on the "nature of the offense" or the "characteristics of the offender." *See id.* at 59–61; *see also People in Interest of T.B.*, 2021 CO 59, ¶ 27, 489 P.3d 752.

¶ 43 Sellers contends that a sentence of life without the possibility of parole for felony murder is categorically unconstitutional; in the alternative, he contends that we should remand the case to the trial court to conduct a proportionality review. We disagree that the categorical approach is applicable. And because

the record is sufficient for us to do so, we conduct an abbreviated proportionality review and conclude that Sellers's sentence is proportional. *See People v. Cooper*, 205 P.3d 475, 480 (Colo. App. 2008) ("Only when an extended proportionality review is required must an appellate court remand."), *abrogated on other grounds by Scott v. People*, 2017 CO 16, 390 P.3d 832.

1. The Statutory Amendment

¶ 44 Sellers committed his offense on October 7, 2018. At that time, felony murder was a class 1 felony. § 18-3-102(1)(b), C.R.S. 2018. As such, the minimum sentence was life in prison without the possibility of parole. § 18-1.3-401(1)(a)(V)(A.1), (4)(a), C.R.S. 2018.

¶ 45 In 2021, the General Assembly reclassified felony murder as a class 2 felony. Ch. 58, sec. 2, § 18-3-103, 2021 Colo. Sess. Laws 236. As a result, the maximum length of a sentence for this offense was lowered to forty-eight years. § 18-1.3-401(1)(a)(V)(A.1), (8)(a)(I), C.R.S. 2021. The General Assembly explicitly provided that the reclassification only applies to offenses committed on or after September 15, 2021. Ch. 58, sec. 6, 2021 Colo. Sess. Laws at 238.

2. Categorical Challenge

¶ 46 Sellers contends that a sentence of life without the possibility of parole for felony murder is categorically unconstitutional, in large part because of the subsequent legislative amendments to the classification of and penalty for felony murder. We disagree because the categorical approach is inapplicable.

a. Standard of Review and Applicable Law

¶ 47 We review de novo the constitutionality of statutes. *T.B.*, ¶ 25.

¶ 48 Eighth Amendment challenges to criminal sentences usually involve "comparing the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at 60. However, on a few occasions, the Supreme Court has "used categorical rules to define Eighth Amendment standards." *Id.*

¶ 49 Cases adopting categorical rules under the Eighth Amendment employ a two-part test. *Id.* at 61. First, we look to "'objective indicia of society's standards' ... to determine whether there is a national consensus against the sentencing practice at issue." Id. (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)). Then we "determine in the exercise of [our] own independent judgment whether the punishment in question violates the Constitution." *Id.*

b. Analysis

¶ 50 Until *Graham*, the only cases in which the Supreme Court had used the categorical approach involved a determination that the death penalty was impermissible for certain offenses or certain types of offenders. *Id.* at 60; *see also Coker v. Georgia*, 433 U.S. 584, 593–96 (1977) (defendants convicted of sexual assault where the victim did not die); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982) (defendants convicted of felony murder but who did not actively participate in the use of lethal force); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (defendants who are insane); *Atkins v. Virginia*, 536 U.S. 304, 313–21 (2002) (defendants with cognitive disabilities); *Roper*, 543 U.S. at 568 (juvenile offenders); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (defendants convicted of sexual offense against a child where death neither occurred nor was intended).

¶ 51 In *Graham*, the Supreme Court applied the categorical approach in holding that the Eighth Amendment prohibits the imposition of a life sentence without the possibility of parole on a juvenile offender who did not commit homicide. 560 U.S. at 61–62, 82. Then in *Miller v. Alabama*, 567 U.S. 460, 476 (2012), the Supreme Court held that even for homicide offenses, a juvenile may not be subject to a mandatory sentence of life without the possibility of parole, and that the sentencing authority must take into account the mitigating qualities of "an offender's age and the wealth of characteristics and circumstances attendant to it."

¶ 52 *Graham* categorically prohibited a certain punishment for certain offenses involving juveniles—namely, life without the possibility of parole for nonhomicide offenses. Contrary to Sellers's argument, however, in *Miller*, the Supreme Court explicitly said that its decision "does not categorically bar a penalty for a class of offenders or type of crime." 567 U.S. at 483. Rather, "it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.*[6]

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[6] In the wake of *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court's handling of this qualifying language has been inconsistent. *Compare Montgomery v. Louisiana*, 577 U.S. 190, 201–04 (2016) (treating the rule announced in *Miller* as akin to a "categorical constitutional guarantee[ ]," and thus a substantive rule to be applied retroactively to cases already final), *with Jones v. Mississippi*, 593 U.S. ——, ——, 141 S. Ct. 1307, 1316 (2021) (reiterating the description of *Miller* as noncategorical and noting that "*Montgomery* did not purport to add to *Miller's* requirements"). Thus, it appears that the Supreme Court's characterization of the decision in *Miller* as noncategorical remains accurate.

¶ 53 Significantly, however, in neither case did the Supreme Court hold or even suggest that the categorical approach should be applied to a life-without-parole sentence imposed on an adult in a homicide offense. To the contrary, the Supreme Court noted in *Graham* that "defendants who do not kill, intend to kill, *or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers." 560 U.S. at 69 (emphasis added). And in *Miller*, the Supreme Court noted that "children are constitutionally different from adults for purposes of sentencing." 567 U.S. at 471.

¶ 54 Sellers cites no case—and we are aware of none—extending the categorical approach to cases not involving the death penalty or juvenile offenders. In fact, the Supreme Court has upheld a life-without-parole sentence for an adult offender—even in a nonhomicide case. *Harmelin v. Michigan*, 501 U.S. 957 (1991) (possession of over 650 grams of cocaine). And the Supreme Court in *Miller* unequivocally clarified that it was not overruling *Harmelin*. *Miller*, 567 U.S. at 482. Thus, because neither the Supreme Court nor, apparently, any other appellate court in the nation has applied the categorical analysis to cases not involving either the death penalty or juvenile offenders, we decline to do so.

3. Proportionality of Sellers's Sentence

¶ 55 We also reject Sellers's alternative request to remand for an abbreviated proportionality review. Instead, conducting that review ourselves, we conclude that the sentence is not unconstitutionally disproportionate despite subsequent legislative amendments to the sentencing range for felony murder.

a. Preservation and Standard of Review

¶ 56 To the extent the People contend that Sellers's proportionality challenge was not preserved because he did not request a proportionality review, we need not resolve this issue because, reviewing de novo whether the sentence is grossly disproportionate, *see Wells-Yates v. People*, 2019 CO 90M, ¶ 35, 454 P.3d 191, we perceive no error.

b. Applicable Law

¶ 57 A sentence that is grossly disproportionate to the crime is unconstitutional. *Wells-Yates*, ¶ 5 (citing *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)). While most proportionality challenges occur in habitual criminal cases, the same principles apply in nonhabitual cases. *See People v. Smith*, 848 P.2d 365, 374 (Colo. 1993).

¶ 58 To determine whether a sentence is grossly disproportionate, the court conducts a two-step analysis. *Wells-Yates*, ¶ 10. First, the sentencing court conducts an abbreviated proportionality review. *Id.* at ¶¶ 11–14. And second, if necessary, it conducts an extended proportionality review. *Id.* at ¶ 15. In an abbreviated proportionality review, the court compares the gravity and seriousness of the offense with the harshness of the sentence. *Valenzuela v. People*, 856 P.2d 805, 809 (Colo. 1993) ; *see also Wells-Yates*, ¶¶ 7, 10. This analysis generally requires a consideration of the facts and circumstances underlying the defendant's conviction. *People v. Session*, 2020 COA 158, ¶ 36, 480 P.3d 747.

¶ 59 Certain crimes have been designated per se grave or serious offenses. *Wells-Yates*, ¶ 13. "For these crimes, ... a trial court may skip the first subpart of step one—the determination regarding the gravity or seriousness of the crimes ...." *Id.* A crime should not

be designated per se grave or serious unless, based on the statutory elements and in every potential factual scenario, it involves grave or serious conduct. *Id.* at ¶¶ 63–64 (explaining, for example, that robbery is a per se grave or serious offense).

¶ 60 Even when the offense is per se grave or serious, "it would be improper for a court to skip the second subpart of an abbreviated proportionality review and neglect to consider the harshness of the penalty." *Id.* at ¶ 27. Our determination of the harshness of the penalty takes into account parole eligibility. *Id.* at ¶ 14.

c. Analysis

¶ 61 Sellers argues that the 2021 statutory amendment should be considered when assessing the proportionality of his sentence. True, our supreme court in *Wells-Yates* observed that even statutory amendments that apply only to future offenses should nevertheless be considered "as objective indicia of the evolving standards of decency to determine the gravity or seriousness of the triggering offense." *Wells-Yates*, ¶ 47. But the court also acknowledged that such an amendment is "not determinative." *Id.* at ¶ 50.

¶ 62 Initially, we note that even after the statutory amendment, the legislature has still made clear that it considers felony murder a serious matter. Indeed, the legislature classified felony murder as second degree murder, a class 2 felony. Thus, while the General Assembly has (prospectively) significantly lowered the sentencing range for such acts, the amendment cannot be seen as a signal that the "evolving standards of decency" reflected by the statute no longer consider felony murder to be grave or serious.

¶ 63 No Colorado appellate court has yet addressed whether felony murder is per se grave or serious. We now consider that question and conclude that it is.

¶ 64 A person commits felony murder when,

> [a]cting either alone or with one or more persons, he or she commits or attempts to commit felony arson, robbery, burglary, kidnapping, sexual assault as prohibited by section 18-3-402, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, as those sections existed prior to July 1, 2000, or a class 3 felony for sexual assault on a child as provided in section 18-3-405(2), or the felony crime of escape as provided in section 18-8-208, and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by any participant.

§ 18-3-103(1)(b), C.R.S. 2021.

¶ 65 Felony murder is a per se grave or serious offense because it necessarily involves committing a violent predicate felony that results in the death of a person. Thus, every factual scenario giving rise to a charge of felony murder will be grave or serious. *See Wells-Yates*, ¶¶ 63–64; *People v. Mandez*, 997 P.2d 1254, 1273 (Colo. App. 1999) (agreeing with the trial court that "felony murder is a serious crime"); *Smith*, 848 P.2d at 374 (noting that felony murder is a crime of "the utmost gravity"). Notably, the legislature has also defined it as a per se crime of violence and an extraordinary risk crime. § 18-3-103(4); § 18-1.3-406(2)(a)(II)(B), C.R.S. 2021. At least one division of

this court has considered a crime's classification as a per se crime of violence as support for the conclusion that the crime is also per se grave or serious. *People v. Gee*, 2015 COA 151, ¶ 37, 371 P.3d 714.

¶ 66 In sum, nothing in the statutory reclassification of felony murder suggests that the legislature no longer considers felony murder to be grave or serious.

¶ 67 As to the harshness of the penalty, we conclude that his life sentence is not grossly disproportionate. While we recognize that this life sentence is potentially substantially longer than the maximum forty-eight years a defendant in Sellers's shoes could receive under the amended statute, and that Sellers is not eligible for parole, those differences do not mean that the sentence is grossly disproportionate. *See Mandez*, 997 P.2d at 1273 (concluding that a life sentence without parole for felony murder was not grossly disproportionate). Thus, we conclude that Sellers's sentence is not grossly disproportionate.

III. Disposition

¶ 68 We affirm the convictions and the sentence for felony murder but vacate the consecutive sentence for aggravated robbery and remand to the trial court with instructions to impose a concurrent sentence.

JUDGE DAILEY and JUDGE HAWTHORNE* concur.

* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5 (3), and § 24-51-1105, C.R.S. 2021.