ALBERS SUPREME COURT

Walt BLACK, APPELLANT,	)	
v.	)	ALB-20-01
State of ALBERS, APPELLEE.	)	

OPINION

Before Tinsely, Beauford, Matthews, O'Brien, Coffrin, J.J.

O'Brien, J.

Appellant Walt Black was convicted on charges of possession, distribution, and trafficking of marijuana and felony murder of a law enforcement officer. Two issues are before this Court. First, Black appeals his conviction for possession, distribution, and trafficking, arguing that the Orange County Superior Court erred in refusing to grant his motion to suppress evidence obtained during a search of his property via aerial surveillance with a drone. Second, Black appeals his sentence for felony murder, arguing that the superior court sentencing judge erred in refusing to grant his motion to set aside his sentence of sixty years without parole. For the reasons discussed below, this Court holds that the superior court properly denied both Black's motion to suppress and his motion to set aside his sentence, and that the appeals court properly affirmed the judgment of the superior court. Therefore, we AFFIRM Appellant's conviction and sentence.

Facts and Proceedings Below

Prior to his arrest, Walt Black, a fifteen-year-old with type 1 diabetes, lived with his brother[1] in a single-family home in the town of Weathersfield, Albers. Black and his brother were both members of the Cove Cohort, a notorious area gang known for their violent crimes, drug dealing, and illegal gambling activities. As part of his gang responsibilities, Black regularly grew, packed, and distributed marijuana from his older brother's home. Black's brother also owned an unregistered revolver, which he usually left in plain view on the kitchen countertop.

On the morning of August 15, 2015, the Weathersfield Police Department ("WPD") received an anonymous tip that someone was growing marijuana plants in the Black home's quarter-acre back yard. WPD officers went to Black's address, but were unable to observe the contents of the back yard from street level because of a ten-foot high outer fence and a fourteen-foot-high row of Emerald Arborvitae trees just around the outside of the fence, both of which entirely surrounded the back yard. The officers returned to the station.

Later that day, without obtaining a warrant, three WPD officers deployed one of the WPD's Unmanned Aerial Vehicles—a "DJI Inspire 1" Quadcopter ("Quadcopter")— from an empty parking lot two blocks away from Black's home.[2] The Quadcopter was equipped with a Zenmuse X3 camera ("X3 Camera"), capable of recording continuous 360-degree 1080p video at a tilt of up to 125 degrees. The Quadcopter was labeled "Property of WPD" in half-inch high letters, which the Government concedes were not readable from more than five-to-ten feet away. The X3 Camera on the Quadcopter did not have zoom capability. The same model Quadcopter

[1] Appellant's brother, a legal adult, is Appellant's legal guardian.
[2] The Quadcopter was one of three drones that the WPD owned as part of its recent "Bumblebee Flyby" program, meant to assist officers in the discovery and eradication of marijuana plantations.

with the same camera and same features was available to the general public at the time.[3] In addition to its recording capabilities, the X3 Camera also transmitted live video stream to a laptop connected to the Quadcopter's remote control. Notably, the Quadcopter could only fly so long as it remained within an unobstructed line of site of its remote control and could only fly for up to eighteen minutes before its battery was depleted.

The Quadcopter approached Black's property from an altitude of 150 feet and began to hover for several minutes over Black's back yard as officers used the Quadcopter's camera to surveil the property with the adjustable camera. Neither Black nor any other persons were present in the backyard at the time.

After several minutes of electronic surveillance of the back yard, officers identified a large garden of various plants nestled between the fence and a large oak tree. At 150 feet above the ground, at least half of the garden was obscured by the oak tree's foliage, prompting the officers to gradually lower the Quadcopter to an altitude of thirty feet above the yard to get a better view of the garden. From that height and angle, the officers were able to positively identify several marijuana plants growing towards the back corner of the garden.[4] After identifying the plants, the officers flew the Quadcopter back to the parking lot, and returned to the police station. The total surveillance lasted approximately eight minutes.

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[3] At the time of these events, the consumer retail cost of a Quadcopter drone with the same specifications as the WPD Quadcopter was approximately $2899. Ashley Smith, DJI Inspire 1 Price, Drones Etc (May 5, 2015), http://www.dronesetc.com/blogs/news/23901697-dji-inspire-1-price. Consumers could purchase other drones, however, for much less.

[4] At a hearing on Black's motion to suppress, the Government conceded that police were unable to identify the contents of Black's garden until the drone descended to an altitude of thirty feet. Further, both parties conceded that the Quadcopter's flight surveillance occurred directly over Black's curtilage, and that the flight complied with Federal Aviation Administration UAV Guidelines at all times during the operation.

Although the Quadcopter did not generate a substantial amount of noise, wind, or dust during the surveillance, several nearby residents described the hovering drone's presence as "unnerving." One adjacent neighbor spotted the Quadcopter while sunbathing and stated that she felt compelled to run inside for fear that the Quadcopter's operator was "spying" on her. Another adjacent neighbor and her children spotted the Quadcopter while playing on their back yard swing set and ran into their home "because we didn't want anyone recording us."

Contemporaneous local news reports indicated that recreational drone flights were not a routine phenomenon in the town of Weathersfield or Orange County generally. Several members of Weathersfield's Town Council quoted in these reports noted, however, that the town had "some problems with teenagers flying recreational drones too close to residential properties." Moreover, some reports indicated that drone flights were becoming more frequent in other parts of the country. For example, the trial court noted that in January 2016 over 181,000 private hobbyists in the United States had registered their drones with the Federal Aviation Administration ("FAA").[5] Nonetheless, the court concluded that drone flights in public areas, though rising, were still far from routine across the United States. Indeed, between November 2014 and August 2015, the FAA recorded only 764 drone sightings—an average of roughly seventy-six per month—by pilots, citizens, and law enforcement across the entire United States.[6]

Later that day, a WPD officer who viewed the Quadcopter camera's live footage during the Quadcopter surveillance of Black's property obtained a warrant to search Black's home and property. In his affidavit in support of the warrant, the officer relied exclusively on what he

[5] Jonathan Vanian, Here's How Many People Have Registered Their Drones, Fortune (Jan. 6, 2016), https://fortune.com/2016/01/06/federal-drone-registration-system/
[6] UAS Sightings Report, FAA.gov, https://www.faa.gov/uas/resources/public_records/uas_sightings_report/ (last visited January 7, 2020).

reportedly saw during the Quadcopter surveillance of garden in Black's back yard. WPD officers arrived at Black's home, knocked on the door, and announced their presence. When they received no answer and no one came to the door, they opened the door, which was unlocked, and entered. Black was in the kitchen, packaging drugs. He was wearing headphones which were playing extremely loud music, and did not hear the officers knock or enter. Black was startled as he saw the officers enter the kitchen. He maintains that he was "scared and didn't want to go to jail," and that "without thinking," he grabbed his brother's gun from the countertop and fired at the police officers. Black fatally shot one police officer, rookie Frankie Schrader, before the other officers subdued him. Officers placed Black under arrest and searched and secured the home and back yard. During that search, officers seized the marijuana plants in defendant's back yard, along with multiple packages of marijuana in the home. No one else was home during the execution of the warrant. Black's brother has not been located.

Black was charged with the possession, manufacturing, and trafficking of marijuana, as well as felony murder of a law enforcement officer. The ADA assigned to Black's case asked the juvenile court to waive jurisdiction. Although Black had no juvenile record, based on the seriousness of crimes, in particular the murder and trafficking charges, the court agreed, and transferred the case to the Orange County Superior Court on September 15, 2015. On October 6, 2015, Black filed a pre-trial motion to suppress the marijuana plants found in Black's back yard and the marijuana found in his home. Although he concedes that WPD officers lawfully executed the warrant, he contends that the warrantless Quadcopter surveillance, which formed the basis for obtaining the warrant to search his home and property, violated his Fourth Amendment rights. On November 12, 2015, Orange County Superior Court Judge Fring denied Black's

motion to suppress, holding that the Quadcopter surveillance was not a search subject to the Fourth Amendment's warrant requirement.

Following the denial of his motion to suppress, Black entered a conditional plea of nolo contendere on all charges, reserving his right to appeal the superior court's denial of his motion to suppress. The case proceeded to sentencing.

At Black's sentencing hearing in January 2016, pursuant to the Albers sentencing statute,[7] the defense submitted evidence of mitigating circumstances and the prosecution submitted evidence of aggravating circumstances regarding Black's character and crimes. Albers Code Ann. § 921.1404(2)(a)-(j) (see Appendix). Specifically, the defense presented mitigating evidence relating to Black's youth and childhood, including his parent's violent and acrimonious divorce when Black was ten years old, which resulted in both parents losing custody of Black and his being sent to live with his adult brother. Prior to that divorce, Black had suffered regular physical abuse from his parents, who were both alcoholics. Additionally, Black suffers from type 1 diabetes and is below age developmentally and emotionally disturbed. Finally, the defense presented a psychologist's finding that Black is anti-social but capable of rehabilitation. The prosecution presented evidence of aggravating circumstances, all of which are enumerated in the sentencing statute. Albers Code Ann. § 921.1404(3)(a)-(h) (see Appendix). Specifically, the prosecution presented evidence that the "defendant knowingly created a great risk of death to more than one person," "the murder was especially heinous, atrocious, or cruel," that the murder "was committed for the purpose of avoiding or preventing a lawful arrest," that there was a probability that the defendant would "commit criminal acts of violence that would constitute a

[7] Albers has a discretionary sentencing scheme; there are no circumstances under which a judge is required to impose a life-without-parole sentence.

continuing threat to society," and that victim was an officer killed while performing her official duty. Albers Code Ann. § 921.1404(2)(b), (d)-(e), (g)-(h) (see Appendix).

The defense also introduced evidence regarding Black's life expectancy, which the prosecution did not challenge. Based on the data that was current as of 2015, a white male (Black's race) born in the United States in 2000[8] had a life expectancy of 74.7 years.[9] At the time, men with type 1 diabetes lost approximately eleven years of life expectancy.[10] Thus, Black's remaining life expectancy at the time of sentencing, when he was fifteen years old, was about 48 remaining years. Black's defense attorney sought a sentence of twenty-five years, while the prosecution sought a sentence of life without parole.

In a ten-page memorandum, dated February 8, 2016, Judge Fring did not make an explicit finding as to whether defendant's crimes reflected permanent incorrigibility or instead, transient immaturity. He did, however state that he "carefully considered" all evidence presented at the sentencing hearing, including "all mitigating factors relating to the distinct features of defendant's youth, especially his difficult childhood." He found that "ultimately the crime was too severe, the need to protect the public from potential future harm too paramount, and the need for just punishment too incontrovertible" to grant the defense's request of twenty-five years. Judge Fring then sentenced Black to sixty years in Albers state prison for the homicide conviction, without the possibility of parole, and an additional ten years for his trafficking

[8] Black's birthday is March 22, 2000.
[9] Elizabeth Arias, United States Life Tables, 2011, 64 Nat'l Vital Stat. Rep. 1, 45 (Sept. 22, 2015), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_07-508.pdf.
[10] Man-Yee Mallory Leung, et al., Life Years Lost and Lifetime Health Care Expenditures Associated with Diabetes in the US, National Health Interview Survey, 1997–2000, 38 Diabetes Care 460, 464 (2015); Dennis Thompson, Type 1 Diabetes Linked to Lower life Expectancy, Web MD (Jan. 6, 2015), https://www.webmd.com/diabetes/news/20150106/type 1-diabetes-linked-to-lower-life-expectancy-in-study#1.

conviction, also without the possibility of parole, to run consecutively with his homicide sentence. Subsequently, Black filed a motion to set aside his sentence for the homicide conviction, which the superior court denied.

Black timely appealed his conviction for possession, distribution, and trafficking of marijuana, arguing that the Orange County Superior Court erred in refusing to grant his motion to suppress evidence obtained during a search of his property via aerial surveillance with a drone. Black also timely appealed his sentence for felony murder, arguing that Judge Fring erred in refusing to grant his motion to set aside his sentence of sixty years without parole. The Albers Appeals Court affirmed the judgment of the superior court. Black now appeals to this Court.

Discussion

1. Motion to Suppress

This Court reviews the denial of a motion to suppress and its legal conclusions de novo. United States v. Scott, 731 F.3d 659, 663 (7th Cir. 2013); see also Smith v. State, 765 Alb. 34, 36 (2015). This Court defers to the trial court's findings of fact unless those findings are clearly erroneous; neither party here disputes the factual findings below. See Scott, 731 F.3d at 663; Smith, 265 Alb. at 36.

The Fourth Amendment protects the right of "[t]he people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. IV.[11] A search occurs under the Fourth Amendment when the government violates a subjective expectation of privacy and society recognizes that expectation as reasonable. Kyllo v. United

[11] The Albers constitution's prohibition on warrantless searches is identical to the Constitution's Fourth Amendment, however, Black has raised no challenges under the Albers constitution.

States, 533 U.S. 27, 32–33 (2001) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

The Supreme Court has held that a property owner's curtilage, like the home itself, is "afforded the most stringent Fourth Amendment Protections." Oliver v. United States, 466 U.S. 170, 180 (1984) (citation omitted) (defining curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life'"). The curtilage is not immune, however, from all police observation. California v. Ciraolo, 476 U.S. 207, 213 (1986) (stating that the Fourth Amendment does not "[r]equire law enforcement officers to shield their eyes when passing by a home on public thoroughfares"). When the government "obtains information by physically intruding" upon a home's curtilage, however, a search has "undoubtedly occurred." Florida v. Jardines, 569 U.S. 1, 5 (2013) (citing United States v. Jones, 565 U.S. 400, 406–07 n.3 (2012)).

Here, the State concedes that the general area that the Quadcopter hovered over and surveilled, including Black's back yard and garden, were within Black's curtilage. Further, the State concedes that Black had a subjective expectation of privacy in the contents of his fenced back yard and garden, and that no exigencies would otherwise permit a warrantless search. Thus, if the Government's flight over the curtilage intruded upon an expectation of privacy that society is prepared to recognize as reasonable, the Quadcopter surveillance was an impermissible warrantless search in violation of the Fourth Amendment. Katz, 389 U.S. at 361 (Harlan, J., concurring). The State concedes that if the Quadcopter surveillance violated the Fourth Amendment, all evidence obtained following that violation, including evidence obtained pursuant to the search warrant obtained using the Quadcopter surveillance, was fruit of the

poisonous tree and must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 488 (1963).

The Supreme Court has not yet addressed whether or when drone surveillance constitutes a search, but the Court has addressed surveillance technologies generally and aerial surveillance specifically. Generally, observations made from a public vantage point, where an officer is entitled to be and from which the activities observed are clearly visible, do not constitute a search. Florida v. Riley, 488 U.S. 445, 450–51 (1989) (plurality opinion); Ciraolo, 476 U.S. at 213–14. Further, the use of limited sense-enhancing technology, like an ordinary camera, does not transform otherwise lawful government surveillance into a search. Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986); United States v. Knotts, 460 U.S. 276, 282 (1983). Following this reasoning, several lower courts have held that using a pole camera to conduct long-term government surveillance of a property does not constitute a search. See, e.g., United States v. Jackson, 213 F.3d 1269, 1280 (10th Cir. 2000), vacated on other grounds, 531 U.S. 1033 (holding that prolonged surveillance of defendants' trailer and curtilage did not constitute a search because the captured views were plainly visible to any member of the public). But see United States v. Vargas, No. CR-13-6025-EFS, 2014 U.S. Dist. LEXIS 184672, at *26 (E.D. Wash. Dec. 14, 2014) (finding pole camera surveillance unreasonable, noting that "[h]idden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement").

Black correctly points out that the Supreme Court has cautioned that the use of sophisticated or novel technology not available to the general public can transform an otherwise lawful surveillance into a search—particularly when the technology reveals information that would not otherwise be available without a physical intrusion. Kyllo, 533 U.S. at 40 (holding

that use of thermal-imaging technology to measure heat emanating from the interior of a home was a search). For example, in Carpenter, the Court held that the defendant had a legitimate expectation of privacy in physical movements captured by historical "Cell-Site Location Information" ("CSLI") data, even though the tracking data—which was collected by a third-party wireless carrier—was imprecise and would have normally been exempted from Fourth Amendment protection under the third-party doctrine. Carpenter v. United States, 183 S. Ct. 2206, 2217 (2018).

Although Carpenter focused on the third-party doctrine and CSLI, Black urges this Court to read the opinion broadly as subjecting to higher scrutiny technologies that have the ability to track a suspect's physical movements or discern their intimate associations of life. See, e.g., United States v. Shipton, No. 0:18-cr-202-PJS-KMM, 2019 WL 5330928, at *12 (D. Minn. Sept. 11, 2019). Carpenter, however, is a narrow decision, properly applicable only to technologies—like historical CSLI—that catalogue a person's long-term location data and are accessible to third-party providers. See 138 S. Ct. at 2220. Although we agree with Black that drones were a fairly novel technology in 2015, they were not unavailable to the public; this is not like the thermal-imaging technology in Kyllo. 533 U.S. at 40. Instead, we agree with the State that Quadcopter surveillance is much more analogous to pole camera surveillance or other camera-produced surveillance, which courts have long found constitutional. See, e.g., Dow, 476 U.S. at 239; Jackson, 213 F.3d at 1276.

We further observe that the Supreme Court has considered two major cases dealing with aerial surveillance, and in each, found that surveillance constitutional. In California v. Ciraolo, this Court held that surveillance of a defendant's curtilage from a fixed-wing aircraft 1000 feet in the air did not constitute a search because the defendant did not have a reasonable expectation

that the contents of his yard would remain private from anyone travelling in the navigable airspace above. 476 U.S. at 213, 215. Three years later, in Florida v. Riley, this Court held that helicopter surveillance of a partially obscured greenhouse in defendant's curtilage from 400 feet likewise did not constitute a search. Riley, 488 U.S. at 450–51.

Black urges this Court to follow those lower courts that evaluate the constitutionality of aerial surveillance by weighing a broad combination of factors from the Riley plurality and Justice O'Connor's Riley concurrence, including the helicopter's compliance with regulations, the helicopter's altitude, the commonality of such flights, the amount of noise that the helicopter created, the helicopter's interference with property, whether the helicopter created a hazard on the surface, and whether the helicopter viewed the intimate details of the home. See, e.g., Pew v. Scopino, 904 F. Supp. 18, 26–28 (D. Me. 1995).

We agree with the State, however, that we should place great weight on the flight's compliance with FAA regulations, as well as whether the drone was flying at an altitude commonly used by the public. See United States v. Boyster, 436 F.3d 986, 992 (8th Cir. 2006). Additionally, we find it relevant the Quadcopter caused virtually no physical intrusion onto Black's property. See, e.g., State v. Davis, 360 P.3d 1161, 1169 (N.M. 2015).

Finally, Black contends that the Supreme Court's more recent decisions in Jardines and Jones suggest that an otherwise lawful surveillance may still give rise to a search if the flight was low enough to constitute a physical trespass upon the curtilage. Jardines, 569 U.S. at 11 (citing Jones, 565 U.S. at 408 n.5). He contends that the Quadcopter's flight was so low as to constitute a trespass on to his curtilage. See United States v. Causby, 328 U.S. 256, 264 (1946). We disagree. The Jardines framework is inapplicable here because Jardines specifically dealt with a

police officer's physical intrusion on the curtilage, whereas the Quadcopter fully remained at least thirty feet above Black's curtilage at all times. See Jardines, 569 U.S. at 5, 8.

We find that the WPD's Quadcopter surveillance was not so novel or intrusive as to constitute a search under the Fourth Amendment. Additionally, it was not the type of aerial surveillance that violates the Fourth Amendment. Finally, the Quadcopter surveillance did not involve a trespass. For these reasons, we AFFIRM the judgment of the superior court denying Black's motion to suppress. Accordingly, Black's conviction on the marijuana-related charges is AFFIRMED.

2. Motion to Vacate Sentence

Whether a juvenile's discretionary and lengthy term of years without parole sentence violates the Eighth Amendment is a question of law. This Court reviews the lower court's legal conclusions de novo. Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 508 n.27 (1984); see also John J. v. State, 557 Alb. 678, 680 (2010).

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This prohibition is based on the principle that "punishment for crime should be graduated and proportioned to [the] offense." Atkins v. Virginia, 536 U.S. 304, 311 (2002). Determining whether a punishment is cruel and unusual requires "look[ing] 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)). The Supreme Court has issued four opinions that are instrumental in establishing the guidelines and principles for punishing juvenile offenders consistent with the Eighth Amendment's ban on cruel and unusual punishments: Roper v.

Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); and Montgomery v. Louisiana, 136 S. Ct. 723 (2016).

In Roper v. Simmons, seventeen-year-old Simmons was convicted of first-degree murder and sentenced to death. 543 U.S. 551, 556 (2005). After granting certiorari, the Court overturned his sentence and categorically banned the death penalty for individuals who were under the age of eighteen at the time they committed their capital crimes. Id. at 575. The Court determined that the "cruel and unusual punishments" clause's "history, tradition, and precedent," as well as its "purpose and function in the constitutional design," requires courts to refer to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be 'cruel and unusual.'" Id. at 560-61 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)). Furthermore, the Court reasoned that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Id. at 568 (quoting Atkins, 536 U.S. at 319). The Court determined that based on a variety of factors, juveniles are of diminished culpability compared to adults, and that the two justifications for the death penalty, retribution and deterrence, did not apply. Id. at 571-72.

In Graham v. Florida, the Court held that the Eighth Amendment prohibited the imposition of life without parole for juvenile non-homicide offenders, regardless of whether the sentence was mandatory or discretionary; such offenders must receive a "meaningful opportunity to obtain release." 560 U.S. 48, 75 (2010). Based on the rarity of life without parole sentences for juvenile non-homicide offenders, the inadequacy of penological justification for such sentences, the diminished culpability of juvenile offenders, and the severe impact of such sentences on juveniles as compared to adults, the Court held that all juvenile non-homicide offenders must

receive some "meaningful opportunity for release based on demonstrated maturity and rehabilitation," and that it is up to the state to "explore the means and mechanisms for compliance." Id. at 64, 74-75.

Next, in Miller v. Alabama, the Court held that the Eighth Amendment forbids mandatory sentencing schemes that impose life without parole on juvenile homicide offenders. 567 U.S. 460, 465 (2012). In so holding, the Court relied on Roper and Graham, observing that "children are constitutionally different from adults for sentencing purposes" and are thus "less deserving of the most severe punishments." Id. at 471 (quoting Graham, 560 U.S. at 68 (internal quotation marks omitted)). Moreover, the Court reasoned that although Graham dealt with non-homicide offenses, Graham's analysis was not "crime-specific;" instead, the fundamental import of Graham is that "youth matters for the purposes of meting out the law's most serious punishments." Id. at 473, 483. Thus, mandatory schemes that "prevent the sentencer from taking account" of youth and its attendant circumstances before sentencing a juvenile offender to life without parole contravene Graham's central reasoning. Id. at 474. The Court held that Alabama's mandatory sentencing scheme "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,'" and therefore "runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." Id. at 465 (quoting Graham, 560 U.S. at 68).

Finally, most recently, the Court considered whether Miller's ban on mandatory sentences of life without parole for juvenile homicide offenders must be applied retroactively. Montgomery v. Louisiana, 136 S. Ct. 723, 727 (2016). First, the Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." Id. at 729. Second, the Court

held that "Miller announced a substantive rule," which must be applied retroactively, because Miller "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Id. at 732; id. at 734 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)). Thus, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" Id. at 734 (quoting Miller, 567 U.S. at 479).

The Montgomery majority also acknowledged that Miller has a procedural component in addition to its substantive rule; specifically, Miller requires a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors . . . to separate those juveniles who may be sentenced to life without parole from those who may not." Id. at 735 (quoting Miller, 567 U.S. at 465). Combining Miller's procedural component with its substantive rule, Montgomery held that a court may only sentence a juvenile who commits a homicide crime to life without parole if the court determines at that hearing that life without parole is a "proportionate sentence" for the crime; if instead the crime "reflect[s] transient immaturity," "life without parole is an excessive sentence." Id. at 734-35.

Montgomery left two unanswered questions: (1) whether and to what extent discretionary, as opposed to mandatory, life without parole sentences for juvenile homicide offenders violate the holdings of Miller and Montgomery, and (2) whether a lengthy term of years without parole constitutes a de facto life sentence without parole, such that Graham or Miller and Montgomery apply. This case presents this Court with a combination of these questions: whether a discretionary, lengthy term of years without parole sentence for a juvenile homicide offender violates the Eighth Amendment.

As to the first question, the Fourth Circuit recently held that "Montgomery has now made clear that Miller's rule has applicability beyond those situations in which a juvenile homicide offender received a mandatory life-without-parole sentence." Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018), cert. granted, 139 S. Ct. 1317 (2019).[12] The court held that regardless of whether a sentence is mandatory or discretionary, sentencers violate Miller and Montgomery when they fail to consider whether the defendant qualifies as one of the rare juvenile offenders who may constitutionally be sentenced to life without the possibility of parole because their "crimes reflect permanent incorrigibility." Id. at 267, 274 (quoting Montgomery, 136 S. Ct. at 734). Black urges this Court to follow Malvo, but we find more compelling the reasoning of those courts which have held that "Miller's categorical ban" applies only to "mandatory life-without-parole sentences." Unites States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016).[13]

Even if we agreed with Black that Miller applied to discretionary sentences, the Supreme Court's juvenile sentencing cases would still not apply here because his sentence is a term of years sentence, not a true life sentence. In his sentencing memo, Judge Fring made no finding as to Black's specific life expectancy. Black did put forth evidence at his sentencing hearing, however, regarding the life expectancy for an average American male and for an average

[12] The Supreme Court has now granted certiorari in Malvo, presumably to resolve the split over whether Miller applies to discretionary life without parole sentences. This Court will nonetheless consider the issue here.

[13] Jefferson also argued that his sentence was substantively unreasonable because the district court did not give proper weight to the mitigating factors regarding his youth; the court rejected this argument, finding that "the district court made an individualized sentencing decision that took full account of 'the distinctive attributes of youth,'" which it thoroughly explained. Jefferson, 816 F.3d at 1019. Although Appellant has not thus far made such an argument, this Court notes that it would be a challenging one, as the standard of review for whether a sentence was substantively unreasonable is "a deferential abuse-of-discretion standard." Id.

American with type 1 diabetes. The State did concede at that hearing that a sixty year sentence would, in all likelihood, be longer than Black's life expectancy.

Black contends that because his sentence would keep him in prison beyond his life expectancy, it is a de facto life sentence. Black argues that "the sentencing practice that was the Court's focus in Graham was any sentence that denies a juvenile nonhomicide offender a realistic opportunity to obtain release in his or her lifetime, whether or not that sentence bears the specific label 'life without parole.'" Budder v. Addison, 851 F.3d 1047, 1050, 1057 (10th Cir. 2017); see also People v. Caballero, 282 P.3d 291, 295 (Cal. 2012), superseded in part by statute as recognized in People v. Bell, 208 Cal. Rptr. 3d 102 (Ct. App. 2016); State v. Moore, 76 N.E.3d 1127, 1141 (Ohio 2016).

We disagree. Nothing in Graham "clearly establish[es] that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole." Bunch v. Smith, 685 F.3d 546, 553 (6th Cir. 2012); see also, e.g., State v. Brown, 118 So. 3d 332, 342 (La. 2013); State v. Kasic, 265 P.3d 410, 415 (Ariz. Ct. App. 2011). Because Black's sentence is not a de facto life sentence, the rationales of Graham and Miller cannot apply.

Moreover, even if Miller applied, Judge Fring did not fail to comply with Miller's procedural requirements. Black contends that Montgomery clarifies that Miller requires a sentencing judge to make an explicit finding of whether a juvenile offender is incorrigible prior to sentencing that juvenile to life without parole. See Montgomery, 136 S. Ct. at 735. We note, however, that Montgomery explicitly states that "Miller did not impose a formal fact-finding requirement." Id. Therefore, although Judge Fring did not explicitly make a determination as to whether Black was in fact incorrigible, the sentence did not violate Black's Eighth Amendment

Rights because Judge Fring fully considered all of the relevant, mitigating factors of Black's youth prior to handing out the sentence

Finally, Black contends more generally that his sentence violates the Eighth Amendment under the Supreme Court's juvenile sentencing jurisprudence because his sentence is disproportionate to his culpability, given that juveniles "lack control over their immediate surroundings," and are more likely to be affected by negative influences within their environment. Roper, 543 U.S. at 553. He further argues that his lengthy sentence fails to serve the typical penological goals for punishment in the same way that de jure life sentences do. See Miller, 567 U.S. at 471-72. Again, we disagree. Black received an individualized, proportionate sentence. See Jefferson, 816 F.3d at 1019 (holding that a fifty-year discretionary sentence did not fall under Miller because "the district court made an individualized sentencing decision that took full account of 'the distinctive attributes of youth'"). To the extent that Black is arguing that, as a matter of law, lengthy term of year sentences are generally not proportionate punishments for juvenile offenders, that is a question more appropriate for the legislature than for this Court. Miller, 567 U.S. at 493 (Roberts, J., dissenting). We emphasize that the Cruel and Unusual Punishment Clause "does not contain a 'proportionality principle.'" Ewing v. California, 538 U.S. 11, 32 (2003). A lengthy term of years without parole sentences for juvenile homicide offenders cannot be characterized as unusual if the Court considers the "objective indicia of society's standards;" Black's sentence is hardly an uncommon one. Miller, 567 U.S. at 514 (Alito, J., dissenting).

Because the Supreme Court's holdings in Graham, Miller, or Montgomery do not apply to discretionary term of years sentences, and because the Eighth Amendment generally does not

prohibit a lengthy term of years without parole sentence for a juvenile homicide offender, we AFFIRM Black's sentence.

Conclusion

For the reasons stated in this opinion this Court holds that the Orange County Superior Court properly denied both Appellant Black's motion to suppress and his motion to set aside his sentence, and that the appeals court properly affirmed the judgment of the superior court. Therefore, we AFFIRM Appellant's conviction and sentence.

Dated: November 22, 2019

SUPREME COURT OF THE UNITED STATES

Walt BLACK, Petitioner,	)	
v.	)	ALB-20-01
State of ALBERS, Respondent.	)	

ORDER GRANTING CERTIORARI

This Court grants Walt Black's Petition for Writ of Certiorari to the Supreme Court of the United States. The Court will consider all issues raised in the court below.

Hugo Archilleya, Clerk
January 22, 2020[14]

[14] Competitors may not rely on any decisions issued or articles published subsequent to this date.

Appendix

Albers Code Ann. § 921.1401 (2014).

921.1401 Sentence of life imprisonment for persons who are under the age of 18 years at the time of the offense; sentencing proceedings.—

(1) Upon conviction or adjudication of guilt of murder which was committed by persons who are under the age of 18 at the time of the offense, the court shall conduct a separate sentencing hearing to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence.

(2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:

(a) The nature and circumstances of the offense committed by the defendant.

(b) The effect of the crime on the victim's family and on the community.

(c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.

(d) The defendant's background, including his or her family, home, and community environment.

(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.

(f) The extent of the defendant's participation in the offense.

(g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.

(h) The nature and extent of the defendant's prior criminal history.

(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.

(j) The possibility of rehabilitating the defendant.

(3) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court may consider the following aggravating circumstances:

(a) Whether the defendant was previously convicted of a felony involving the use or threat of violence to the person;

(b) Whether the defendant knowingly created a great risk of death to more than one person;

(c) Whether the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(d) Whether the murder was especially heinous, atrocious, or cruel;

(e) Whether the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

(f) Whether the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

(g) Whether the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

(h) Whether the victim of the murder was a peace officer, or correctional employee of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.