DATE FILED
December 16, 2024
CASE NUMBER: 2023SC381

ADVANCE SHEET HEADNOTE
December 16, 2024

2024 CO 75

No. 23SC381, *McDonald v. People*—Cruel and Unusual Punishment in General—Proportionality— Proportionality review—Habitual offenders and career criminals—In General; Retroactive or Prospective Operation—Post-Conviction Relief—Sentence and Punishment.

The supreme court holds that *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191, didn't announce new substantive rules of constitutional law. Although some of *Wells-Yates*'s holdings announced new rules, those rules are procedural. Accordingly, none of *Wells-Yates*'s holdings apply retroactively to cases, like the defendant's, on collateral review. The supreme court therefore affirms the judgment of the court of appeals.

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

2024 CO 75

Supreme Court Case No. 23SC381
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 21CA750

Petitioner:

Rodney Dewayne McDonald,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
December 16, 2024

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

JUSTICE HOOD delivered the Opinion of the Court.

¶1 Rodney Dewayne McDonald asks this court to apply the holdings we announced in *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191, retroactively to his case, which is more than twenty-five years old. Doing so would allow for a second, more in-depth proportionality review of his sentence. We conclude, however, that *Wells-Yates* didn't announce new substantive rules of constitutional law, and so *Wells-Yates*'s holdings don't apply retroactively to cases, like McDonald's, on collateral review.

I. Facts and Procedural History

¶2 In 1996, a jury convicted McDonald of attempted first degree murder, second degree assault, possession of a weapon by a previous offender, and two habitual criminal counts. The habitual criminal counts were triggered by the attempted first degree murder conviction and based on two prior felony convictions: a 1995 conviction for possession of a schedule II controlled substance (a class 4 felony) and a 1994 conviction for conspiracy to commit menacing (a class 6 felony). The court sentenced McDonald to seventy-two years in prison. The judgment of conviction became final in 1999.

¶3 McDonald sought a proportionality review of his sentence in 2007. The district court concluded that McDonald's sentence wasn't grossly

disproportionate to the crime for which he was convicted, and a division of the court of appeals affirmed. *People v. McDonald*, No. 07CA491 (Jan. 22, 2009).

¶4 Over a decade later, we announced our opinion in *Wells-Yates*, which altered the proportionality-review process in Colorado. McDonald moved for a second proportionality review, asserting that his sentence was illegal and was obtained in violation of his constitutional rights under the new rules announced in *Wells-Yates*. *See* Crim. P. 35(a), (c)(2)(I). The district court denied McDonald's motion, concluding that under Crim. P. 35(c)(3)(VI)(b), he wasn't entitled to a second review because he hadn't "demonstrated the rules announced in *Wells-Yates* have been 'applied retroactively by the United States Supreme Court or Colorado [a]ppellate [c]ourts.'" (Quoting Crim. P. 35(c)(3)(VI)(b).)

¶5 On appeal, a division of the court of appeals held that, "to the extent *Wells-Yates* announced new constitutional rules, those rules are procedural and don't apply retroactively"; thus, "the district court properly denied McDonald's motion." *People v. McDonald*, 2023 COA 23, ¶ 2, 531 P.3d 420, 422. We granted McDonald's petition for certiorari review of the division's opinion.[1]

[1] We granted certiorari to review the following issue:

1. Whether *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191, announced a new, substantive rule of constitutional law that applies retroactively.

II. Analysis

¶6 We begin with the applicable standard of review. We then describe Colorado's habitual criminal sentencing scheme and the Eighth Amendment's inherent requirement that punishment be proportionate to the crime. After providing *Wells-Yates*'s holdings, we consider whether they announced new substantive rules of constitutional law that should be applied retroactively to McDonald's case.

A. Standard of Review

¶7 Whether *Wells-Yates* announced new substantive rules of constitutional law that apply retroactively to cases on collateral review is a question of law that we review de novo. *See People v. Cooper*, 2023 COA 113, ¶ 7, 544 P.3d 679, 681.

B. Constitutionality of Habitual Criminal Sentencing

¶8 The legislature defines crimes and their accompanying punishments. *See, e.g.*, *People v. Bott*, 2020 CO 86, ¶ 8, 477 P.3d 137, 139. We generally defer to legislative policy choices regarding sentencing. *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion).

¶9 In Colorado, the legislature has created a statutory scheme that punishes recidivist offenders more harshly than first-time offenders. *See* § 18-1.3-801, C.R.S. (2024) ("habitual criminal statute"); *see also People v. Watkins*, 684 P.2d 234, 238 n.7 (Colo. 1984). Under Colorado's habitual criminal statute, courts must sentence

defendants from three times the presumptive maximum sentence to a term of life imprisonment, depending on the number and nature of the prior convictions ("predicate offenses") and the current ones ("triggering offenses"). § 18-1.3-801.

¶10 The legislature's authority to impose this sentencing scheme is circumscribed by the Eighth Amendment, which prohibits the state from imposing "cruel and unusual punishments." U.S. Const. amend. VIII; *accord* Colo. Const. art. II, § 20.[2] This prohibition "'flows from the basic "precept of justice that punishment for crime should be graduated and proportioned"' to both the offender and the offense." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). And although "[t]he concept of proportionality is central to the Eighth Amendment," *id.* (alteration in original) (quoting *Graham v. Florida*, 560 U.S. 48, 59 (2010)), it is a narrow principle that "forbids only extreme sentences that are 'grossly disproportionate' to the crime," *Ewing*, 538 U.S. at 23 (quoting *Harmelin v. Michigan,* 501 U.S. 957, 1001 (1991)

[2] Because McDonald didn't raise to the trial court his argument that the Colorado Constitution provides broader protection than its federal counterpart, it's not properly before us, and we decline to address it. *See Martinez v. People*, 244 P.3d 135, 140 (Colo. 2010) (vacating the portion of an opinion that reached the merits of an unpreserved constitutional claim because, "[t]o preserve a Colorado Constitutional argument for appeal, . . . a defendant must make an objection sufficiently specific to call the attention of the trial court to the potential Colorado Constitutional error").

(Kennedy, J., concurring in part and concurring in the judgment)). *See Rutter v. People*, 2015 CO 71, ¶ 15, 363 P.3d 183, 188.

¶11 Because habitual criminal sentencing greatly increases the length of a defendant's sentence and strips the sentencing court of any discretionary authority, "'the Habitual Criminal Act create[s] a unique possibility' that a defendant will receive a sentence that 'is not proportionate to the crime for which [he] has been convicted.'" *Wells-Yates*, ¶ 20, 454 P.3d at 200–01 (alterations in original) (quoting *Alvarez v. People*, 797 P.2d 37, 40 (Colo. 1990), *abrogated on other grounds by Melton v. People*, 2019 CO 89, 451 P.3d 415). Accordingly, "a defendant is entitled, upon request, to [a] . . . proportionality review of a sentence under [Colorado's] habitual criminal statute." *People v. Deroulet*, 48 P.3d 520, 522 (Colo. 2002), *abrogated on other grounds by Wells-Yates*.

¶12 A proportionality review in Colorado is divided into two stages. In the first stage, known as an abbreviated proportionality review, courts consider the gravity or seriousness of the offense in relation to the harshness of the penalty. *See Wells-Yates*, ¶¶ 10–11, 454 P.3d at 197–98; *see also Solem v. Helm*, 463 U.S. 277, 292 (1983). In conducting an abbreviated proportionality review, courts consider whether, in combination, the triggering and predicate offenses "are so lacking in gravity or seriousness so as to suggest that the sentence is constitutionally disproportionate to the crime," considering "the defendant's eligibility for parole." *Rutter*, ¶ 18,

363 P.3d at 188 (quoting *Close v. People*, 48 P.3d 528, 537 (Colo. 2002), *abrogated on other grounds by Wells-Yates*). To determine the gravity or seriousness of an offense, courts may consider a number of factors, including but not limited to (1) "the harm caused or threatened to the victim or society"; (2) whether the offense involved violence or the threat of violence; (3) "[t]he absolute magnitude of the crime"; (4) whether the offense is the lesser included or greater offense; (5) whether the offense was an attempted or a completed crime; (6) whether the defendant was an accessory, complicitor, or principal; and (7) the defendant's culpability and motive. *Solem*, 463 U.S. at 292–94; *see also Wells-Yates*, ¶ 12, 454 P.3d at 198.

¶13 In Colorado, we have further truncated the abbreviated proportionality review for offenses deemed to be inherently, or per se, grave or serious. *People v. Gaskins*, 825 P.2d 30, 37 (Colo. 1992), *abrogated on other grounds by Wells-Yates*; *see also Rutter*, ¶ 19, 363 P.3d at 188; *Close*, 48 P.3d at 538; *Deroulet*, 48 P.3d at 524. Before *Wells-Yates*, these offenses were

- aggravated robbery,
- robbery,
- burglary,
- attempted burglary,
- conspiracy to commit burglary,
- felony menacing,
- accessory to first degree murder, and

- all narcotics-related offenses.

Gaskins, 825 P.2d at 37; *Deroulet*, 48 P.3d at 524; *Close*, 48 P.3d at 538. For these inherently serious crimes, courts don't need to "make an individualized determination of the gravity or seriousness of the offense" because it is presumed, and so courts may proceed directly to scrutinizing the harshness of the penalty. *Rutter*, ¶ 19, 363 P.3d at 188.

¶14 If this abbreviated review gives rise to an inference of gross disproportionality, then a court should proceed to the second stage, known as an extended proportionality review. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment); *Rutter*, ¶ 15, 363 P.3d at 188. During an extended proportionality review, courts should conduct both (1) an intrajurisdictional comparison of the sentences imposed on other criminals for different crimes and (2) an interjurisdictional comparison of sentences imposed for the same crime. *Solem*, 463 U.S. at 292; *see also Rutter*, ¶ 18, 363 P.3d at 188. Even then, "in most instances the General Assembly's determinations regarding the sentencing of habitual criminals will result in constitutionally proportionate sentences." *Wells-Yates*, ¶ 21, 454 P.3d at 201 (quoting *Deroulet*, 48 P.3d at 526).

C. *Wells-Yates*'s Holding

¶15 This court announced its opinion in *Wells-Yates* in 2019. We repeatedly observed that we were merely clarifying existing law and "correct[ing] a few

misstatements" in the caselaw. *Wells-Yates*, ¶ 3, 454 P.3d at 196; *see also id.* at ¶¶ 2 n.2, 17, 25, 37, 46 n.16, 454 P.3d at 195 n.2, 199, 202, 204, 206 n.16. We held that

> (1) during an abbreviated proportionality review of a habitual criminal sentence, the court must consider each triggering offense and the predicate offenses together and determine whether, in combination, they are so lacking in gravity or seriousness as to raise an inference that the sentence imposed on the triggering offense is grossly disproportionate;
>
> (2) in determining the gravity or seriousness of the triggering offense and the predicate offenses, the court should consider any relevant legislative amendments enacted after the dates of those offenses, even if the amendments do not apply retroactively;
>
> (3) not all narcotic offenses are per se grave or serious; and
>
> (4) the narcotic offenses of possession and possession with intent [to distribute] are not per se grave or serious.

Id. at ¶ 2, 454 P.3d at 195 (footnote omitted).

D. Retroactivity of a New Rule of Constitutional Law Announced by the Court

¶16 When a court announces a new rule of constitutional law, defendants whose cases are not yet final (through direct appeal) may receive the benefit of the new rule. *Teague v. Lane*, 489 U.S. 288, 300, 304–05 (1989). But defendants seeking collateral review of their cases after their convictions are final generally aren't entitled to retroactive application of the new rule unless the rule is (1) substantive

(rather than procedural) or (2) a "watershed" rule of criminal procedure.[3] *Id.* at 308–11; *Montgomery v. Louisiana*, 577 U.S. 190, 200–01 (2016); *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004); *see also Edwards v. People*, 129 P.3d 977, 978 (Colo. 2006). Thus, a court analyzing whether a rule applies retroactively must determine (1) whether the conviction is final; (2) whether the rule is new; and (3) if the rule is new, whether the rule meets the exceptions to non-retroactivity. *Beard v. Banks,* 542 U.S. 406, 411 (2004); *People v. Johnson*, 142 P.3d 722, 725 (Colo. 2006).

¶17 We consider each of these questions in turn.

1. Was the Conviction Final?

¶18 "A conviction becomes final when the judgment of conviction is rendered [by the sentencing court], the availability of [direct] appeal exhausted, and time for discretionary [certiorari] review has elapsed." *Zoske v. People*, 625 P.2d 1024, 1025 (Colo. 1981).

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[3] The United States Supreme Court has abolished the watershed rule exception because "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts." *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021). The prosecution asks us to follow suit. But the watershed rule exception isn't implicated by the facts of this case, so we don't address it.

¶19 There is no dispute that McDonald's convictions became final in 1999, twenty years before we announced *Wells-Yates*. So, we consider whether the rules announced in *Wells-Yates* apply retroactively to cases on collateral review.

2. Did *Wells-Yates* Announce "New" Rules?

¶20 A rule is "new" if "it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. Put another way, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* If, "at the time the conviction became final, the rule was already 'apparent to all reasonable jurists,'" it isn't new for retroactivity purposes. *Edwards v. Vannoy*, 593 U.S. 255, 265 (2021) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997)). "The starkest example of a decision announcing a new rule is a decision that overrules an earlier case." *Id.*

¶21 The prosecution argues that not all of *Wells-Yates*'s holdings announced new rules, but it concedes that two of them probably did: (1) that not all narcotics-related offenses are per se grave or serious and (2) that in conducting an abbreviated proportionality review, courts should consider relevant legislative amendments enacted after a defendant's offenses, even if those amendments don't apply retroactively. As to the other holdings, the prosecution asserts that the court simply clarified or confirmed existing law. Despite these concessions, we consider each of *Wells-Yates*'s holdings.

¶22 First, *Wells-Yates* held that courts conducting a proportionality review must consider the gravity of each triggering offense along with the gravity of any predicate offenses to determine whether they give rise to an inference of gross disproportionality when compared to the sentence imposed for each triggering offense. ¶¶ 27, 38, 454 P.3d at 202, 204. This holding eliminated confusion stemming from *Rutter*, ¶¶ 24–25, 363 P.3d at 189, which seemed to indicate that the gravity of only the triggering offense mattered for proportionality-review purposes. *See Wells-Yates*, ¶¶ 35, 38, 454 P.3d at 204. *Wells-Yates* also reiterated that it has long been the accepted practice to consider the proportionality of a sentence as to each conviction, not as an aggregate of all the sentences imposed. ¶ 74, 454 P.3d at 210–11; *see also, e.g.*, *Close*, 48 P.3d at 539. Because we simply clarified existing law, this was not new.

¶23 Second, *Wells-Yates* instructed courts to consider subsequent legislative amendments to assist the gravity analysis. Although several divisions of our court of appeals had previously considered post-sentencing legislative reclassification of crimes in conducting an abbreviated proportionality review, we hadn't done so in a supreme court decision before *Wells-Yates*. *See Wells-Yates*, ¶ 44, 454 P.3d at 205 (collecting cases); *see also, e.g.*, *Rutter*, ¶ 23, 363 P.3d at 189. Thus, this holding announced a new rule under this court's precedent.

¶24 Lastly, we consider *Wells-Yates*'s holdings that not all narcotics-related offenses are per se grave or serious and that possession and possession with intent aren't per se grave or serious. In *Wells-Yates*, we noted that we hadn't previously used the term "per se grave or serious" in the proportionality context. ¶ 13 n.6, 454 P.3d at 198 n.6. But the designation of certain crimes as "per se grave or serious," and the use of that designation as a shortcut during an abbreviated proportionality review, had become common practice in the lower courts by the time we announced *Wells-Yates*. *See id.* at ¶ 62, 454 P.3d at 208–09; *see also, e.g.*, *People v. McCulloch*, 198 P.3d 1264, 1268 (Colo. App. 2008). As we explained, however, the designation of all narcotics-related offenses as per se grave or serious derives from numerous misreadings of *Gaskins*, the recognized "genesis" of the designation. *Wells-Yates*, ¶¶ 55–56, 454 P.3d at 207–08.

¶25 By removing those offenses from the list of per se grave or serious crimes and by explaining that the per se designation "must be reserved for those rare crimes which, based on their statutory elements, necessarily involve grave or serious conduct" (meaning, "the crime would be grave or serious in every potential factual scenario"), *Wells-Yates* essentially returned the per se grave or serious designation to the standard provided by *Gaskins*. *Id.* at ¶¶ 63, 69–70, 454 P.3d at 209–10; *see also Gaskins*, 825 P.2d at 36–37. Still, *Wells-Yates* altered the standard for assessing whether crimes should be designated per se grave or

serious and narrowed the "per se" designation for narcotics-related offenses. Thus, these holdings announced "new" rules. *See Edwards*, 593 U.S. at 266 (concluding that the court had announced a new rule when it brought legal interpretation back in line with the original meaning of the Sixth Amendment).

¶26 Even so, as noted above, for these new rules to apply to McDonald retroactively, they must be *substantive*. We turn our attention to that final consideration now.

3. Did *Wells-Yates* Announce Substantive Rules?

¶27 A rule is substantive "if it alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 U.S. at 353. Substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 351–52 (citation omitted); *see also Montgomery*, 577 U.S. at 198. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (quoting *Bousley v. United States,* 523 U.S. 614, 620 (1998)); *accord Montgomery*, 577 U.S. at 208–09.

¶28 Conversely, a rule is procedural if it "regulate[s] only the *manner of determining* the defendant's culpability." *Summerlin*, 542 U.S. at 353. Such rules

don't "produce a class of persons convicted of conduct the law does not make criminal . . . but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Welch v. United States*, 578 U.S. 120, 129 (2016) (quoting *Summerlin,* 542 U.S. at 352).

¶29 *Wells-Yates* didn't remove any range of conduct or class of individuals from the possibility of habitual criminal sentencing. *Cf. Welch*, 578 U.S. at 129–30 (concluding that the Court announced a substantive rule in *Johnson v. United States*, 576 U.S. 591 (2015), because "*Johnson* changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes'"; meaning, "the same person engaging in the same conduct is no longer subject to the Act" (alteration in original) (quoting *Summerlin*, 542 U.S. at 353)). No one who was sentenced under the habitual criminal statute before *Wells-Yates* was ineligible for such sentencing after *Wells-Yates*. Instead, *Wells-Yates* clarified how a court should evaluate the proportionality of a habitual criminal's sentence.

¶30 After *Wells-Yates*, courts can no longer categorically assume all narcotics-related offenses are grave or serious; instead, courts must now consider the individual facts of narcotics-related predicate and triggering offenses to determine if they are grave or serious in each instance. Narcotics-related offenses may still trigger habitual criminal sentencing, and a court conducting an abbreviated

proportionality review may still conclude that the offenses at issue are sufficiently grave that the harshness of the sentence imposed under the habitual criminal statute isn't grossly disproportionate.

¶31 Similarly, *Wells-Yates*'s instruction for courts to consider post-offense legislative amendments when evaluating the gravity or seriousness of offenses during an abbreviated proportionality review didn't remove any range of conduct or class of offenders from the state's ability to punish under the habitual criminal statute. Nor did it create a significant risk that a class of habitual criminal sentences would be grossly disproportionate. Rather, it simply reminded courts to consider society's evolving views on the gravity or seriousness of certain crimes when conducting an abbreviated proportionality review.

¶32 Thus, *Wells-Yates*'s holdings removing narcotics-related offenses from the per se grave or serious list and instructing courts to consider post-sentencing legislative amendments merely regulated how habitual criminal sentences are to be evaluated during an abbreviated proportionality review. *See Summerlin*, 542 U.S. at 353–55 (concluding that the new rule was procedural because the range of conduct punishable by death was the same before the rule as it was after); *Johnson*, 142 P.3d at 724–25 (same); *cf. Welch*, 578 U.S. at 131 ("A change [that alters the scope of the underlying proscription] will 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make

criminal.'" (quoting *Bousley,* 523 U.S. at 620)). But concluding that a sentence is grossly disproportionate will likely remain the exception rather than the rule. *See generally Wells-Yates*, ¶¶ 23–27, 454 P.3d at 201–02; *see also, e.g.*, *Gaskins*, 825 P.2d at 36–37; *Rutter*, ¶ 15, 363 P.3d at 188. The *Wells-Yates* rules are, therefore, "prototypical procedural rules." *Johnson*, 142 P.3d at 725 (quoting *Summerlin*, 542 U.S. at 353).

¶33 Contrast this conclusion with *Montgomery*, in which the Supreme Court concluded that the rule announced in *Miller* was substantive and applied retroactively to cases on collateral review. *Montgomery*, 577 U.S. at 212. The *Miller* Court held "that mandatory life without parole for those under the age of [eighteen] at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465. In concluding that this new rule was substantive, the *Montgomery* Court noted that "[a]lthough *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the [*Miller*] Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect '"irreparable corruption."'" *Montgomery*, 577 U.S. at 195 (quoting *Miller*, 567 U.S. at 479–80). Thus, *Miller* deprived the state of the power to impose mandatory life without parole sentences for a certain class of offenders. *Id.* at 201, 208–12; *see also Welch*, 578 U.S. at 129–30.

¶34 We conclude that the new rules *Wells-Yates* announced are procedural, not substantive. Accordingly, *Wells-Yates*'s holdings don't apply retroactively to cases on collateral review, and McDonald isn't entitled to a second proportionality review of his habitual criminal sentence.

III. Conclusion

¶35 The judgment of the court of appeals is affirmed.