STATE OF NEW JERSEY,

Appellant/Cross-Appellee,

VS.

JAMES COMER,

Appellee/Cross-Appellant.

SUPREME COURT OF NEW JERSEY
Docket No. 077318

Criminal Action

On Grant of Direct Certification From:

Superior Court of New Jersey,
Law Division, Essex County

Honorable Thomas R. Vena, J.S.C

Docket No. Below A-4854-14

SUPPLEMENTAL BRIEF OF APPELLEE/CROSS-APPELLANT JAMES COMER

Lawrence S. Lustberg
Avram D. Frey
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

Alexander Shalom
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714

Counsel for Appellee/Cross-Appellant James Comer

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF PROCEDURAL AND FACTUAL HISTORY 4

ARGUMENT 11

I. COMER'S SENTENCE IS CONSTITUTIONALLY INDISTINGUISHABLE FROM A SENTENCE OF LIFE WITHOUT PAROLE 11

II. LIFE WITHOUT PAROLE, INCLUDING *DE FACTO* LIFE WITHOUT PAROLE, IS UNCONSTITUTIONAL FOR ALL JUVENILES, REGARDLESS OF THE OFFENSE 17

A. The New Jersey Constitution Provides for Greater Protections Than Does the Federal Constitution, Including That It Bars Life Without Parole for Juvenile Offenders 19

B. Juvenile LWOP Is Unconstitutional, under Both the State and Federal Constitutions, Based upon the Requisite Proportionality Analysis 29

1. Objective Indicia Show Opposition to Juvenile LWOP 30

2. The Court's "Own Judgment" Uniformly Rejects LWOP and *De Facto* LWOP for All Juveniles 36

a. Juveniles Are Categorically Less Culpable Than Adults 37

b. Life without Parole Is Harsh Punishment for Juveniles 42

c. Sentencing Juveniles to LWOP Serves No Penological Purpose 43

d. A Case-by-Case Approach Is Insufficient to Protect the Rights of Juveniles 51

e. International Law Rejects LWOP for Juveniles 52

III. *Graham v. Florida* Forbids Life without Parole and *De Facto* Life without Parole for Juveniles Who Neither Kill Nor Intend to Kill 53

Page

IV. Comer's Sentence Was Imposed in Violation of *Miller v. Alabama* and *Montgomery v. Louisiana*....... 59

V. There Are No Procedural, Preclusionary, or Precedential Bars to the Relief Comer Seeks......... 63

CONCLUSION.. 65

APPENDIX

Hayden v. Keller, __*F. Supp*. 3d__, 2015 *WL* 5773634 (E.D.N.C. Sept. 25, 2015)..DSa2

People v. Nieto, __*N.E.*3d__, 2016 *WL* 1165717 (Ill. App. Ct. Mar. 23, 2016)..DSa13

People v. Rainer, __*P.*3d__, 2013 *WL* 1490107 (Col. Ct. App. April 11, 2013)...DSa24

State v. Valencia, __*P.*3d__, 2016 *WL* 1203414 (Ariz. Ct. App. Mar. 28, 2016)...DSa41

State v. Zarate, 2016 *WL* 1079462 (App. Div. Mar. 21, 2016)..................DSa45

Veal v. State, __*S.E.*2d__, 2016 *WL* 1085360 (Ga. Mar. 21, 2016)...........DSa63

TABLE OF AUTHORITIES

Page(s)

Cases

Atkins v. Virginia,
536 *U.S.* 304 (2002) ....*passim*

Bd. of Cty. Comm'rs v. Umbehr,
518 *U.S.* 668 (1996) 14

Bear Cloud v. State,
334 *P.*3d 132 (Wyo. 2014) 12, 16

Bear Cloud v. Wyoming,
133 *S.Ct.* 183 (2012) 15

Bobby v. Bies,
556 *U.S.* 825 (2009) 64

Brown v. State,
10 *N.E.*3d 1 (Ind. 2014) 14, 16

Casiano v. Comm'r of Corr.,
115 *A.*3d 1031 (Conn. 2015) 15

Coker v. Georgia,
433 *U.S.* 584 (1977) 55

Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n,
518 *U.S.* 604 (1996) 14

Davis v. United States,
417 *U.S.* 333 (1974) 64

Dean v. United States,
556 *U.S.* 568 (2009) 54

Diatchenko v. Dist. Att. for Suffolk Dist.,
1 *N.E.*3d 270 (Mass. 2013) 50

Doe v. Poritz,
142 *N.J.* 1 (1995) 24

Enmund v. Florida,
458 *U.S.* 782 (1982) 54, 55

In re Grady,
85 *N.J.* 235 (1981) 22

Graham v. Florida,
560 *U.S.* 48 (2010) ....*passim*

Greiman v. Hodges,
79 *F. Supp.* 3d 933 (S.D. Iowa 2015) 16

Hayden v. Keller,
__*F. Supp*. 3d__, 2015 *WL* 5773634 (E.D.N.C. Sept. 25, 2015) 13, 16

Henry v. State,
175 *So.*3d 675 (Fla. 2015) 13, 16

Johnson v. Texas,
509 *U.S.* 350 (1993) 41

Kennedy v. Louisiana,
554 *U.S.* 407 (2008) 18, 55

McCleskey v. Kemp,
481 *U.S.* 279 (1987) 25

Miller v. Alabama,
132 *S.Ct.* 2455 (2012) ....*passim*

Montgomery v. Louisiana,
136 *S.Ct.* 718 (2016) ....*passim*

Moore v. Biter,
725 *F.*3d 1184 (9th Cir. 2013) 15, 16

New Jersey Coal. Against The War In The Middle East v. J.M.B Realty,
138 *N.J.* 326 (1994) 22

People v. Caballero,
282 *P.*3d 291 (Cal. 2012) 16

People v. Nieto,
__*N.E.*3d__, 2016 *WL* 1165717 (Ill. App. Ct. Mar. 23, 2016) 60

People v. Rainer,
__*P.*3d__, 2013 *WL* 1490107 (Col. Ct. App. April 11, 2013) 12, 16

Planned Parenthood of Cent. New Jersey v. Farmer,
165 *N.J.* 609 (2000) 22

In re Quinlan,
70 *N.J.* 10 (1976) 22

Right to Choose v. Byrne,
91 *N.J.* 287 (1982) 22

Robinson v. Cahill,
62 *N.J.* 473 (1973) 22

Roper v. Simmons,
543 *U.S.* 551 (2005) ....*passim*

Sisler v. Gannett Co., Inc.,
222 *N.J. Super.* 153 (App. Div. 1987) 64

State in re A.C.,
426 *N.J. Super.* 81 (Ch. Div. 2012) 27

State v. Acevedo,
205 *N.J.* 40. (2011) 64

State v. Adams,
194 *N.J.* 186 (2008) 8

State v. Adams,
2006 *WL* 3798760 (App. Div. Dec. 28, 2006) 7

State v. Alston,
88 *N.J.* 211 (1981) 23

State v. Baker,
81 *N.J.* 99 (1979) 21

State v. Chun,
194 *N.J.* 54 (2008) 24

State v. Darby,
200 *N.J. Super.* 327 (App. Div. 1984) 57

State v. Eckel,
185 *N.J.* 523 (2006) 20, 21

State v. Fuentes,
217 *N.J.* 57 (2014) 45

State v. Gerald,
113 *N.J.* 40 (1988) ....*passim*

State v. Gilmore,
103 *N.J.* 508 (1986) 24

State v. Hemple,
120 *N.J.* 182 (1990) 23

State v. Hogan,
144 *N.J.* 216 (1995) 24

State v. Hunt,
91 *N.J.* 338 (1982) 19, 20, 21

State v. Johnson,
193 *N.J.* 528 (2008) 17, 23

State v. Johnson,
68 *N.J.* 349 (1975) 24

State v. Koskovich,
168 *N.J.* 448 (2001) 27, 37

State v. Lyle,
854 *N.W.*2d 378 (Iowa 2014) 47

State v. Maldonado,
137 *N.J.* 536 (1994) 17, 18

State v. Marshall,
130 *N.J.* 109 (1992) 20, 24, 25

State v. Martini,
144 *N.J.* 603 (1996) 20, 25

State v. Muhammad,
182 *N.J.* 551 (2005) 24

State v. Murray,
162 *N.J.* 240 (2000) 63

State v. Natale,
184 *N.J.* 458 (2005) 7, 8

State v. Norman,
151 *N.J.* 5 (1997) 24

State v. Novembrino,
105 *N.J.* 95 (1987) 23

State v. Null,
836 *N.W.*2d 41 (Iowa 2013) 16

State v. Pierce,
136 *N.J.* 184 (1994) 23

State v. Ramseur,
106 *N.J.* 123 (1987) ....*passim*

State v. Riley,
110 *A.*3d 1205 (Conn. 2015) 16, 60

State v. Ronquillo,
361 *P.*3d 779 (Wash. Ct. App. 2015) 16

State v. Schmid,
84 *N.J.* 535 (1980) 22

State v. Shannon,
222 *N.J.* 576 (2015) 23

State v. Stovall,
170 *N.J.* 346 (2002) 15

State v. Valencia,
__*P.*3d__, 2016 *WL* 1203414 (Ariz. Ct. App. Mar. 28,
2016) 60

State v. Williams,
93 *N.J.* 39 (1983) 19

State v. Yarborough,
100 *N.J.* 627 (1985) 7, 31

State v. Yothers,
282 *N.J. Super.* 86 (App. Div. 1995) 56

State v. Zarate,
2016 *WL* 1079462 (App. Div. Mar. 21, 2016) 11, 15

State v. Zuber,
442 *N.J. Super.* 611 (App. Div. 2015) 11, 36, 51

Tennessee v. Garner,
471 *U.S.* 1 (1985) 58

Tison v. Arizona,
481 *U.S.* 137 (1987) 25, 55, 56

United States v. Lopez,
514 *U.S.* 549 (1995) 26

Veal v. State,
__*S.E.*2d__, 2016 *WL* 1085360 (Ga. Mar. 21, 2016) 46

Woodson v. North Carolina,
428 *U.S.* 280 (1976) 55

Statutes

L. 1985, *c.* 478...27

L. 2015, *c.* 89..28

N.J.S.A. 2C:5-2..4

N.J.S.A. 2C:11-3(a)(2)...5

N.J.S.A. 2C:11-3..27

N.J.S.A. 2C:11-3(a)(1)...5

N.J.S.A. 2C:11-3(a)(3)..4, 5

N.J.S.A. 2C:15-1...4

N.J.S.A. 2C:20-3(a)..5

N.J.S.A. 2C:39-4(a)..5

N.J.S.A. 2C:39-5(b)..4

N.J.S.A. 2C:43-7.2(c)..7

N.J.S.A. 2C:44-1b(13)..5, 61

N.J.S.A. 2C:44-5..31

Other Authorities

Alex R. Piquero, *et al.*, *The Criminal Career Paradigm*,
30 CRIME & JUSTICE 359 (2003).............................41, 48

Brief of American Psychological Association *et. al.* As
Amici Curiae in Support of Respondent, *Roper v.*
Simmons, 543 *U.S.* 551 (2005), 2004 *WL* 1636447 49

Connie de la Vega and Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983 (2008) 52

Dana Goldstein, *New Jersey Moves to Keep Kids under 15 from Adult Court*, THE MARSHALL PROJECT (June 25 2015), *available at* https://www.themarshallproject.org/2015/06/25/new-jersey-moves-to-keep-kids-under-15-from-adult-court#.V4IkkfSnb 28

Donald R. Lynam, *et al.*, *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. ABNORMAL PSYCHOL. 155 (2007) 48

Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35 (2010) 39

Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY (Kevin M. Beaver, *et al.*, eds. 2015) 49

John F. Edens, *et al.*, *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 BEHAV. SCI. & L. 53 (2001) 49

John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUSTICE 1 (2001).........48, 49

John H. Laub, *Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process*, 63 AM. SOCIOL. R. 225 (1998) 47

Kathryn Monahan, *et al.*, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUSTICE 577 (2015) 38

Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking,* 28 DEV. REV. 78 (2008) 38, 39, 40

Laurence Steinberg, *et al.*, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model,* 44 DEV. PSYCHOL. 1764 (2008) 38

Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability*, 14 NEUROSCIENCE 513 (2013) 39, 42

Maynard L. Erickson, *Delinquency in a Birth Cohort: A New Direction in Criminological Research*, 64 J. CRIM. L. & CRIMINOLOGY 362 (1973)....................................41

Megan C. Kurlycheck, *et al.*, *Long-Term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Felony Study*, 50 CRIMINOLOGY 71 (2012) 41

New Jersey Juvenile Detention Alternatives Initiative (JDAI), 2011 Annual Data Report (Feb. 2012), *available at* http://www.nj.gov/oag/jjc/pdf/JDAI-2011-Report-Annual.pdf 27

Rolf Loeber, *et al.*, *The Prediction of Violence and Homicide in Young Men*, 73 J. CONSULTING AND CLINICAL PSYCHOL. 1074 (2005) 48

The Sentencing Project, *Juvenile Life Without Parole: An Overview* (2016), *available at* www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf 31, 32

Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. R. 674 (1993) 40, 41, 48

Zoe Schein, *New Jersey Bill to Reform Youth Transfer, Waiver and Confinement Policies*, NAT'L JUVENILE JUSTICE NETWORK (Sept. 15 2015), *available at http://www.njjn.org/article/new-jersey-bill-to-reform-youth-transfer-waiver-and-confinement-policies* 28

Rules

R. 1:13-5...11

R. 2:12-2(a)..10

R. 3:21-10(b)...63

Constitutional Provisions

N.J. Const., art. I, para. 12..........................1, 17, 19

U.S. Const., amend VIII..................................*passim*

PRELIMINARY STATEMENT

Defendant James Comer’s sentence assures that he will die in prison, without the opportunity to seek release, for offenses that he committed as a juvenile. For the reasons set forth below, and based upon a series of recent decisions of the United States Supreme Court, this sentence violates both the Eighth Amendment to the United States Constitution, and Article 1, paragraph 12 of the New Jersey Constitution.

Specifically, the Court’s decisions in *Roper v. Simmons*, 543 *U.S.* 551 (2005), *Graham v. Florida*, 560 *U.S.* 48 (2010), *Miller v. Alabama*, 132 *S.Ct.* 2455 (2012), and *Montgomery v. Louisiana*, 136 *S.Ct.* 718 (2016), engender a sea change in the law of juvenile sentencing, categorically barring three classes of punishment for juveniles: the death penalty, *Roper*, 543 *U.S.* 551, life without parole (“LWOP”) for nonhomicide offenders, *Graham*, 560 *U.S.* 48, and LWOP for homicide offenders “whose crimes reflect transient immaturity [and not] . . . irreparable corruption.” *Montgomery*, 136 *S.Ct.* at 734 (discussing *Miller*, 132 *S.Ct.* 2455, and holding it retroactive). These holdings, anchored in medical and social science, all derive from the recognition that the adolescent brain is physiologically underdeveloped, rendering juveniles different from adults in three critical respects: they are less mature and more reckless in their decision-making; they have less control over their

environments and are more susceptible to peer pressure; and their identities are "more transitory, less fixed," making it less likely that their behavior reflects deep-seated character traits. *Roper*, 543 *U.S.* 569-570; *accord Graham*, 560 *U.S.* at 68. Accordingly, the Court has held, the purposes of criminal sentencing — retribution, deterrence, incapacitation, and rehabilitation — apply with far less force in the cases of juveniles. *Graham*, 560 *U.S.* at 71-74. Application of these purposes led the Court in *Graham* to conclude that juveniles who neither kill nor intend to kill have a "twice diminished moral culpability" such that LWOP is never permissible. *Id.* at 69. But even for juvenile homicide offenders, only the incapacitation rationale can ever justify LWOP, *Miller*, 132 *S.Ct.* at 2469; *Montgomery*, 136 *S.Ct.* at 735. And because this rationale "requires a sentencer to make a judgment that the juvenile is incorrigible," a predictive capacity that evades "even [] expert psychologists" *id.* at 73, the Constitution permits it only for "the rarest of juvenile [homicide] offenders," *Montgomery*, 136 *S.Ct.* at 734.

These principles prohibit the sentence imposed here. The Supreme Court's juvenile sentencing jurisprudence applies to Comer because his sentence is functionally and constitutionally indistinguishable from LWOP. The same jurisprudence leads inexorably to the conclusion that LWOP and its functional

equivalent are unconstitutional for juveniles in all circumstances. That is particularly so under the New Jersey Constitution, which has historically provided broader protection to juveniles and criminal defendants. Further, *Graham* categorically bars LWOP for a subset of juvenile homicide offenders who, like Comer, neither killed nor intended to kill. Finally, in Comer's case, the sentence was imposed in violation of *Miller* and *Montgomery* because Comer was sentenced to *de facto* LWOP without consideration of the mitigating characteristics of youth, or a determination that he is, in fact, incorrigible.

To be clear, the relief Comer seeks here is not immediate release for himself or any other juvenile offender; the law does not forbid incarcerating juveniles for their natural lives, so long as the decision to do so is made subsequent to initial sentencing, when the juvenile has matured and his adult conduct can be reliably assessed to determine whether he is incorrigible or not. In other words, what Comer challenges here is not *whether* but *when* New Jersey may determine that either he or anyone else should spend life in prison for juvenile offenses. Because the decision in Comer's case was made at the time of his sentencing, when his offense most likely reflected the shortcomings of adolescence, his sentence is unconstitutional. As a result, the decision below vacating Comer's sentence should be upheld, but modified to bar LWOP for all juveniles.

STATEMENT OF PROCEDURAL AND FACTUAL HISTORY[1]

Comer and two accomplices, Ibn Adams and Dexter Harrison, committed four armed robberies between the evening of April 17 and the early morning of April 18. Pa83.[2] During the second robbery, as the victim, George Paul, was trying to escape, Adams fired a single, fatal shot into Paul's back. Da3. Immediately before the shot was fired, Adams was rifling through Paul's pockets while Comer stood still, his hands empty. Da4. Moments later, Harrison asked Adams why he had shot Paul. Da6. Adams replied, "f*ck them, he didn't have no money." Da6. Comer, born January 10, 1983, was 17 years and three months old at the time. Pa83.

Comer was arrested and charged as an adult with (1) second-degree conspiracy to commit armed robbery, *N.J.S.A.* 2C:5-2; (2) first-degree felony murder, *N.J.S.A.* 2C:11-3(a)(3); (3) four counts of first-degree robbery, *N.J.S.A.* 2C:15-1; (4) six counts of third-degree unlawful possession of a handgun, *N.J.S.A.* 2C:39-5(b); (5) four counts of possession of a weapon for an

---

[1] For the convenience of the Court, this brief combines its recitation of the facts and the procedural history, as those matters are here inextricably intertwined.

[2] Comer uses the abbreviations "Pb" and "Pa" to refer to the State's Brief and Appendix filed in the Appellate Division. Similarly, Comer references his own Brief and Appendix, filed below, as "Db" and "Da," respectively.

unlawful purpose, *N.J.S.A.* 2C:39-4(a); and (6) third-degree theft, *N.J.S.A.* 2C:20-3(a).[3] Pa83.

At Comer's trial, the State introduced no evidence that Comer intended to shoot Paul or was even aware that Adams might shoot Paul or anyone else. Rather, the State argued that Adams acted alone, spontaneously shooting the victim. Da11. The State thus relied on a theory of felony murder in prosecuting Comer for homicide. Da9. On December 19, 2003, after a two-week jury trial, Comer was found guilty on all counts. Pa83.

At sentencing, defense counsel presented no testimony or other evidence but argued that Comer's sentences on his felony murder and first-degree robbery convictions should be run concurrently. Da28. Defense counsel's primary argument was that consecutive terms would yield an unfair disparity between Comer's sentence and that of co-defendant Dexter Harrison, who accepted a plea. Da20-22, 27 ("[I]t's that disparity, I guess, that's kind of at the base of everything, just doesn't seem appropriate."). Counsel also argued for application of mitigating factor 13, *N.J.S.A.* 2C:44-1b(13) ("The conduct of a youthful defendant was substantially influenced by another

[3] Adams was charged with first-degree murder, *N.J.S.A.* 2C:11-3(a)(3), but was convicted only of first-degree felony-murder. *N.J.S.A.* 2C:11–3(a)(1)-(2). Adams's aggregate sentence was 67 years imprisonment with 61.45 years to be served without parole. Pa28. Comer's third accomplice, Harrison, pleaded guilty to robbery and aggravated manslaughter and received "twenty years with seventeen years to be served without parole." *Id.* at 26.

person more mature than defendant”), urging that Harrison, who was older than Comer and Adams, “concocted this scheme and had these two minions working for him.” Da22. Counsel also noted more than once that Comer was 17 at the time of the offense, Da24, 26, 29, and that with concurrent sentencing, he could be released in his 50’s and have a chance at a life after prison, Da25. Additionally, counsel noted that, according to the presentence report, Comer used alcohol and marijuana habitually. Da28; *see also* Da73. Finally, counsel stated that all complaints against Comer in juvenile court — which were for minor infractions such as receipt of stolen property and possession of burglar tools — had been dismissed, and that Comer therefore had no criminal record. Da23.

Nonetheless, in sentencing Comer, the trial court stated:

> I’m [] unpersuaded by anything that has been presented to me to indicate that any consideration be given to you in imposing anything less than the presumptive term. Nothing in your background mitigates the crimes for which you stand before me convicted.
>
> [Da48].

The court then sentenced Comer to 75 years imprisonment, of which 68 years and three months were to be served without eligibility for parole.[4] Pa83. That sentence consisted of a 30-

[4] Defendant received credit for the 1,410 days that he had spent in custody prior to sentencing. Da58.

year term for the felony-murder count, without parole eligibility, and 15 years for each of the three counts of first-degree robbery, 85% of which were to be served without eligibility for parole pursuant to the No Early Release Act ("NERA"), *N.J.S.A.* 2C:43-7.2. Pa83-84. Each of these four sentences was to run consecutively. Pa83-84. In addition, Comer was sentenced to four years for each of five weapons charges and four years for the automotive theft charge, each to run concurrently with all other counts of the indictment. Pa83-84.

Comer filed a timely appeal, specifically challenging his sentence on the grounds that the Court erred by (1) giving no weight to mitigating factor thirteen, that he was a youthful defendant under the influence of a more mature person; (2) imposing consecutive rather than concurrent sentences under *State v. Yarborough*, 100 *N.J.* 627 (1985); (3) imposing sentences above the presumptive sentences, in violation of *State v. Natale*, 184 *N.J.* 458 (2005); and (4) disregarding the discrepancy between Comer's sentence and those of his co-defendants. Pa28. Comer's conviction and sentence were affirmed. *State v. Adams*, 2006 *WL* 3798760, at *6 (App. Div. Dec. 28, 2006), *available at* Pa29. The New Jersey Supreme Court

granted certification[5] but affirmed Comer's conviction and sentence. *State v. Adams*, 194 *N.J.* 186, 190 (2008).

On July 9, 2008, Comer filed a *pro se* petition for post-conviction relief ("PCR"), alleging with respect to his sentence that it was excessive because, "[the] [s]entencing judge abused his discretion when he sentenced Comer to consecutive sentences for a single conspiracy."[6] Da76. Counsel for Comer thereafter filed briefs, alleging additional grounds for relief.[7] Pa58. Comer's PCR claims were denied on September 22, 2009. Pa31-55. Comer appealed from that decision and, on October 23, 2012, the Appellate Division reversed and remanded for an evidentiary

---

[5] Certification was granted to consider (1) whether the trial court should have excluded certain eye-witness identifications; (2) whether the trial court erred in failing to instruct the jury on how to consider Harrison's guilty plea; and (3) whether the trial court violated the rule that sentences above the presumptive term based solely on judicial findings of aggravating factors other than prior criminal conviction violated the Sixth Amendment. The Court held (1) that the record was insufficient for reevaluation of the standard on out-of-court identifications; (2) the trial court did not commit plain error by failing to give a cautionary charge on the use of Harrison's testimony; and (3) Comer's sentence did not require remand in light of the Court's decision in *Natale*, 184 *N.J.* 458. *Adams*, 194 *N.J.* at 191.

[6] Comer also alleged that his trial counsel was ineffective for failing to call certain witnesses, for not filing a motion to suppress certain evidence, and for not objecting to introduction of certain evidence by co-defendant's counsel. Comer also alleged abuse of discretion by the trial court in failing to rule on a motion to dismiss the indictment. Da76.

[7] These included claims of juror impropriety, and ineffective assistance of trial counsel for failure to insure an impartial jury and failure to pursue exculpatory evidence. Da76.

hearing. Pa57-60. That hearing was held on October 11, 2013, after which the trial court again denied Comer relief, in an opinion rendered on November 6, 2013. Pa60-61. Comer appealed, but on December 30, 2015, the Appellate Division affirmed. DSa1.[8]

Meanwhile, on May 23, 2013, Comer filed a *pro se* Motion seeking to correct his sentence; he also sought assigned Counsel, Pa65-78; later, he withdrew this motion without prejudice so that he could re-file with the assistance of counsel. Pa80. On June 13, 2014, undersigned Counsel filed the present action on Comer's behalf. Pa84. Oral argument was heard in the trial court on May 8, 2015. Pa82. On May 11, 2015, the court below ruled by memorandum opinion. Pa82-97.

Specifically, the court held that Comer had been sentenced to *de facto* life without parole. Pa85. The court further held that *Miller* applies retroactively under New Jersey law,[9] Pa96, and that Comer was sentenced in violation of *Miller* because the sentencing court did not consider the mitigating factors of youth. Pa96. The court rejected, however, Comer's arguments that *Roper*, *Graham*, and *Miller* require a categorical bar against sentencing juveniles to life without parole, Pa90-91, and that

---

[8] Comer refers to the appendix to this brief using "DSa."

[9] That *Miller* must be retroactively applied was definitively determined by the United States Supreme Court in *Montgomery*, 136 *S.Ct.* 718, decided after the trial court's ruling.

Graham more specifically prohibits life without parole for juveniles who neither kill nor intend to kill, Pa91-92.

The Appellate Division granted the State's motion for leave to appeal on June 29, 2015, Da79, and Comer's motion for leave to cross-appeal on July 6, 2015. Da80. Briefing on the appeal and cross-appeal were completed by January 27, 2016; submissions under *R.* 2:6-11(d) addressing the United States Supreme Court's decision in *Montgomery*, 136 *S.Ct.* 718, holding *Miller* fully retroactive, were completed by February 11, 2016.

On March 4, 2016, Comer sought direct certification under *R.* 2:12-2(a). This Court granted that application on March 29, 2016, to answer the question, "[d]oes defendant's aggregate sentence, imposed for a homicide offense among other charges, violate the proscriptions of *Miller v. Alabama*, 132 *S.Ct.* 2455 (2012) and other authority regarding sentences of juvenile offenders?" Comer here answers that question in the affirmative, arguing that LWOP is unconstitutional for all juveniles, for the sub-group of juveniles who neither killed nor intended to kill, and because his particular sentence, which is functionally equivalent to LWOP, was imposed without consideration of the mitigating factors of youth, and without a determination that he is incorrigible.

ARGUMENT

I. COMER'S SENTENCE IS CONSTITUTIONALLY INDISTINGUISHABLE FROM A SENTENCE OF LIFE WITHOUT PAROLE.

Comer was sentenced to *de facto* life without parole for offenses committed as a juvenile. Born on January 10, 1983, Comer was 17 years and three months old at the time he committed the offenses at issue on April 17 and 18 of 2000. Pa83. He was sentenced to a term of 75 years, during which he is ineligible for parole for 68 years and three months. Pa83. Comer's first date of parole eligibility will thus fall in the vicinity of July 2068, when he will be over 85 years old. But Comer will by then likely have been dead for several years. According to life expectancy tables published in the National Vital Statistics Reports ("NVSR") appended to *R.* 1:13-5, Comer's life expectancy is, at most, 80 — five years short of his first opportunity for release.[10] In keeping with this fact, the trial court below

[10] This figure is derived based upon the method for determining life expectancy utilized by the Appellate Division in *State v. Zuber*, 442 *N.J. Super.* 611, 627-30 (App. Div. 2015), and *State v. Zarate*, 2016 *WL* 1079462, at *11-12 (App. Div. Mar. 21, 2016), *available at* DSa45. Comer does not concede that this method is correct. *Zuber* and *Zarate* use life expectancy tables from the time of the defendant's challenge, not the time of sentencing, and furthermore decline to account for differences in life expectancy based on race and gender. *See Zuber*, 442 *N.J. Super.* at 627-30; *Zarate*, 2016 *WL* 1079462, at *11-12, DSa54. While not relevant here, this method can result in calculations of life expectancy that are significantly longer than would be the case using more accurate data. *See, e.g.*, *Zuber*, 442 *N.J. Super.* at 631-32 (accounting for Zuber's race, as a black man, yields life expectancy 10-11 years below the court's race-neutral figure).

found, Pa85, and the State has never contested, that Comer's sentence is the functional equivalent of LWOP.

It follows that Comer's sentence of *de facto* LWOP is governed by the principles of *Montgomery*, *Miller*, and *Graham*, as the trial court below correctly held. Pa85. These principles, are discussed in detail below. *See* Part II.B.2 *infra*. In sum, juvenile sentencing must, as a matter of constitutional law, account for the fact that that juveniles are inherently different from and less culpable then adults: because their brains are physiologically less developed, juveniles are more impulsive and more susceptible to peer pressure, and their behavior is less indicative of permanent character traits, meaning they are more capable of reform. *See Roper*, 543 *U.S.* at 569-70. Accordingly, they ought not be sentenced, *ab initio*, to life in prison, regardless of whether such a sentence is denominated life without parole, or a term of years that amounts to the same thing. *See*, *e.g.*, *Bear Cloud v. State*, 334 *P.*3d 132, 141-42 (Wyo. 2014) ("The juvenile who will likely die in prison is entitled to the Eighth Amendment's presumption 'that children . . . have diminished culpability and greater prospects for reform.'"); *People v. Rainer*, __*P.*3d__, 2013 *WL* 1490107, at *14 (Col. Ct. App. April 11, 2013) ("[*Graham*'s] holding and reasoning should apply to [any] sentence that . . . fails to recognize that '[j]uveniles are more capable of change than are

adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults.'").

The Court's opinions from *Roper* to *Montgomery* also focus upon the harshness of the juvenile sentence, *see*, *e.g.*, *Graham*, 560 *U.S.* at 70. But whether a defendant is sentenced to formal or *de facto* LWOP, the harshness of the sentence is the same: either sentence "means denial of hope; . . . that good behavior and character improvement are immaterial," *Graham*, 560 *U.S.* at 70, and "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society," *id.* at 79. *See Hayden v. Keller*, __*F. Supp*. 3d__, 2015 *WL* 5773634, at *15 (E.D.N.C. Sept. 25, 2015) ("[By imposing a *de facto* LWOP sentence on a juvenile] the State [] denie[s] that offender the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation[.]'"); *Henry v. State*, 175 *So.*3d 675, 679-80 (Fla. 2015) (vacating juvenile sentence of 90 years without parole because, "*Graham* is implicated when a juvenile nonhomicide offender's sentence does not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'").

Nor do the accepted rationales for sentencing, also critical to the Court's analysis, *see Graham*, 560 *U.S.* at 70-74, permit of a distinction between formal and *de facto* life without

parole for juveniles. That is, the relative strength or weakness of these rationales — retribution, deterrence, incapacitation, and rehabilitation — has no relation to a sentence's formal label, but instead turns on its functional effect. *See Graham*, 560 *U.S.* at 70-74. *See*, *e.g.*, *Brown v. State*, 10 *N.E.*3d 1, 8 (Ind. 2014) ("Similar to a life without parole sentence, Brown's 150 year sentence ''forswears altogether the rehabilitative ideal.''").

Indeed, to interpret the Supreme Court's holdings as applicable only to sentences formally designated "life without parole," would elevate form over substance in a way that both the United States Supreme Court and this Court have always rejected. *See, e.g., Bd. of Cty. Comm'rs v. Umbehr*, 518 *U.S.* 668, 679 (1996) ("Determining constitutional claims on the basis of [] formal distinctions, which can be manipulated largely at the will of the government . . . , is an enterprise that we have consistently eschewed.") (citing, *e.g.*, *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n,* 518 *U.S.* 604, 622 (1996) (opinion of Breyer, J.) ("[T]he government 'cannot foreclose the exercise of rights by mere labels'"); *Escobedo v. Illinois,* 378 *U.S.* 478, 486 (1964) (declining to "exalt form over substance" in determining the temporal scope of Sixth Amendment protections); *Crowell v. Benson,* 285 *U.S*. 22, 53 (1932) ("Regard must be had . . . in . . . cases where

constitutional limits are invoked, not to mere matters of form but to the substance of what is required"); *Chicago, B. & Q.R. Co. v. Chicago,* 166 *U.S.* 226, 235 (1897) ("In determining what is due process of law regard must be had to substance, not to form.")); *State v. Stovall*, 170 *N.J.* 346, 363 (2002) (refusing to "elevate form over function" in "reasonable suspicion" analysis); *accord Casiano*, 115 *A.*3d at 1044 ("We agree, however, with those courts that have concluded that the Supreme Court's focus in *Graham* and *Miller* 'was not on the label of a 'life sentence'' but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life."); *Moore v. Biter*, 725 *F.*3d 1184, 1192 (9th Cir. 2013) ("*Graham*'s focus was not on the label of a 'life sentence' — but rather on the difference between life in prison with, or without, possibility of parole.").

Thus, both the United States Supreme Court and the lower courts of this State have held these precedents applicable to terms of years that amount to LWOP, just as surely as to formal sentences of life without parole. *See Bear Cloud v. Wyoming,* 133 *S.Ct.* 183, 183–84 (2012) (vacating and remanding for resentencing in accordance with *Miller* in the case of a juvenile defendant sentenced to consecutive terms of life *with* parole for murder and 20-25 years for aggravated burglary); *Zarate*, 2016 *WL*

1079462, at *11, DSa54 (finding *Miller* applicable to *de facto* LWOP because "[t]he United States Supreme Court's case law . . . focuses upon whether a juvenile offender will have a 'meaningful' opportunity for a future life outside of prison walls."). Indeed, the majority of state and federal courts to have reached the issue are in agreement that, "*Graham*'s analysis does not focus on the precise sentence meted out. Instead . . . it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime.'" *People v. Caballero*, 282 *P.*3d 291, 298 (Cal. 2012); *accord Moore*, 725 *F.*3d at 1191-92; *Greiman v. Hodges*, 79 *F. Supp.* 3d 933 (S.D. Iowa 2015); *Hayden*, 2015 *WL* 5773634, at *8; *Henry*, 175 *So.*3d 675; *State v. Riley*, 110 *A.*3d 1205, 1213-14 (Conn. 2015); *State v. Ronquillo*, 361 *P.*3d 779 (Wash. Ct. App. 2015); *Bear Cloud*, 334 *P.*3d at 141-42; *Brown*, 10 *N.E.*3d at 8; *Null*, 836 *N.W.*2d 41; *Rainer*, 2013 *WL* 1490107.

In sum, this Court should, as one jurisdiction has held, "focus on the forest — the aggregate sentence — rather than the trees — consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Brown*, 10 *N.E.*3d at 8. *Graham*, *Miller*, and *Montgomery* must, then, be applied in Comer's case.

II. LIFE WITHOUT PAROLE, INCLUDING *DE FACTO* LIFE WITHOUT PAROLE, IS UNCONSTITUTIONAL FOR ALL JUVENILES, REGARDLESS OF THE OFFENSE.

Both the United States and the New Jersey Constitutions mandate proportional sentencing under their respective Cruel and Unusual Punishment Clauses. *U.S. Const.* amend VIII; *N.J. Const.* art. I, para. 12; *see Graham*, 560 *U.S.* at 59 ("The concept of proportionality is central to the Eighth Amendment."); *accord State v. Maldonado*, 137 *N.J.* 536, 556 (1994). New Jersey and federal law employ the same test for proportionality, *see State v. Ramseur*, 106 *N.J.* 123, 169 (1987),[11] but this Court should conduct a distinct State proportionality analysis, *id.* at 169 ("[T]his Court recognizes its freedom — indeed its duty — to undertake a separate analysis under the cruel and unusual punishment clause of the New Jersey Constitution."). This is especially so because Article I, paragraph 12 of the State Constitution "affords greater protections . . . than does the

[11] New Jersey articulates the proportionality test under its State Constitution as requiring consideration of three factors, *see Johnson*, 166 *N.J.* at 548; the United States Supreme Court has been less clear with regard to the number of factors in the federal test, *see generally*, *Graham*, 48 *U.S.* 560 (outlining test as a two-step inquiry, but considering multiple factors in each step). Ultimately, however, the tests entail assessment of identical considerations: contemporary standards of decency as manifested through objective metrics; proportionality as measured subjectively by the courts upon consideration of science and social science; and reflection on the purposes of punishment in the particular context. *See Graham*, 560 *U.S.* at 62-82; *Maldonado*, 137 *N.J.* at 556-61.

[E]ighth [A]mendment of the federal constitution." *State v. Gerald*, 113 *N.J.* 40, 76 (1988).

In particular, the standard for determining whether the Constitution categorically prohibits a particular punishment is multi-faceted.[12] First, the Court must consider "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Graham*, 560 *U.S.* at 61 (quoting *Roper*, 543 *U.S.* at 572); *accord Maldonado*, 137 *N.J.* at 557-58. Then, the Court applies its "own judgment," *Kennedy v. Louisiana*, 554 *U.S.* 407, 434 (2008), considering the culpability of the class of offenders at issue, *Graham*, 560 *U.S.* at 67-68; *Roper*, 543 *U.S.* at 569; *Maldonado*, 137 *N.J.* at 558-59, the severity of the punishment, *Graham*, 560 *U.S.* at 69-70; *Gerald*, 113 *N.J.* at 89, whether penological justifications support the punishment, *id.* at 71; *Ramseur*, 106 *N.J.* at 178-80, whether a categorical bar is necessary as opposed to a case-by-case approach, *Graham*, 560 *U.S.* at 74, and whether there is consensus in international law on the question, *id.* at 80; *Roper*, 543 *U.S.* at 578.

[12] Proportionality has two distinct doctrinal strains, each with a separate legal standard: an individual sentencing strain, which addresses the constitutionality of a particular defendant's sentence, and a categorical strain, by which the constitutionality of a particular punishment for a class of offenders is ascertained. *Graham*, 560 *U.S.* 48, 59-61. This brief addresses the second, categorical strain.

Proportionality review is not a balancing test. Instead, "[i]f the punishment fails any one of [these] tests, it is invalid." *Gerald*, 113 *N.J.* at 78 (citing *Coker v. Georgia*, 433 *U.S.* 584, 592 (1977)). Here, the appropriate analysis requires that the Court categorically prohibit juvenile LWOP and *de facto* LWOP in all cases.

A. The New Jersey Constitution Provides for Greater Protections Than Does the Federal Constitution, Including That It Bars Life Without Parole for Juvenile Offenders.

First and foremost, Comer's sentence is, as a categorical matter, unconstitutional under New Jersey's Cruel and Unusual Punishment Clause, *N.J. Const.*, art. I, para. 12. To be sure, the United States Supreme Court in *Miller* stopped short of holding that juveniles may never be sentenced to life without parole under the Federal Constitution (even in homicide cases), although it also did not hold to the contrary. *Miller*, 132 *S.Ct.* at 2469 ("Because [our] holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles[.]"). However, applying the criteria established by this Court for when it will diverge from the Federal Constitution, *see State v. Hunt*, 91 *N.J.* 338, 363-68 (1982) (Handler, J., concurring); *State v. Williams*, 93 *N.J.* 39 (1983) (adopting Justice Handler's

concurring opinion in majority holding), makes clear that, even assuming that the United States Supreme Court allowed for the possibility of life without parole sentences for juveniles, this Court should not.[13]

Here, regardless of how the Federal Constitution is eventually construed by the United States Supreme Court, a categorical ban on LWOP for all juveniles is required by the New Jersey Constitution. This is so first because New Jersey has a

---

[13] *Hunt* requires that, in deciding whether or not the New Jersey Constitution should be interpreted differently than the Federal, the Court consider: (1) textual differences in constitutional language; (2) respective drafting histories; (3) State law predating a Supreme Court opinion; (4) differences in federal and State structures; (5) subjective matters of particular State or local interest; (6) State history or traditions; and (7) societal beliefs or attitudes particular to the State. *Hunt*, 91 *N.J.* at 363-68. However, these factors are "illustrative, rather than exhaustive," *id.* at 368, and this Court has made clear that it may diverge from the Federal Constitution where, as here, some but not all of the factors counsel such divergence. *See, e.g., State v. Eckel*, 185 *N.J.* 523, 538 (2006) ("Although [the relevant text of the New Jersey Constitution] is almost identical to the text of the Fourth Amendment to the Federal Constitution, we have not hesitated in the past to afford our citizens greater protection against unreasonable searches and seizures under Article I, Paragraph 7 than would be the case under its federal counterpart."). In interpreting the State Cruel and Unusual Punishment Clause more broadly than the Eighth Amendment, this Court has several times relied on a single *Hunt* factor. *See*, *e.g.*, *Gerald*, 113 *N.J.* at 76 (basing decision on factor (5), the particular State interest in criminal punishment); *Ramseur*, 106 *N.J.* at 167 (same); *State v. Martini*, 144 *N.J.* 603, 612-13 (1996) (basing decision on factor (4), and describing the unique role of the judiciary with regard to determining the constitutionality of capital punishment); *State v. Marshall*, 130 *N.J.* 109, 209 (1992) (invoking factors (6) and (7), based upon New Jersey's long history and deeply-held beliefs in opposition to the "terrible realities" of racism).

rich history and tradition of interpreting its own Constitution to provide greater protection for individual liberties; second, because criminal law in general and the treatment of juveniles in particular are matters of special State interest and concern; and third, because New Jersey has particularly protective beliefs and attitudes concerning juveniles in the criminal justice system. These are each addressed briefly below.

First, New Jersey has a lengthy and significant history of providing broader protection for individual liberties under its own Constitution than exist under the Federal one. *See Hunt*, 91 *N.J.* at 366-67 (Handler, J., concurring) (noting "A state's history and traditions may [] provide a basis for the independent application of its constitution" and citing, by way of example, "New Jersey's strong tradition of protecting individual and associational rights"). That is, as this Court has held, the Federal Constitution "establish[es] not the ceiling but only 'the floor of minimum constitutional protections[,]'" *Eckel*, 185 *N.J.* at 538, and upholds the State Constitution as "a second line of defense for those rights protected by the federal Constitution and [] an independent source of supplemental rights unrecognized by federal law," *Hunt*, 91 *N.J.* 338, 346 (1982); *see also State v. Baker*, 81 *N.J.* 99, 112, n.8 (1979) ("'[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal

Constitution. State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [United States] Supreme Court's interpretation of federal law.'").

Thus, in diverse areas, New Jersey's courts have routinely invoked the State Constitution where federal law has been insufficiently protective of the rights of its citizens. *See, e.g.*, *Planned Parenthood of Cent. New Jersey v. Farmer*, 165 *N.J.* 609 (2000) (striking down Parental Notification for Abortion statute under State equal protection principles where similar regulations were upheld under federal Constitution); *New Jersey Coal. Against The War In The Middle East v. J.M.B. Realty*, 138 *N.J.* 326 (1994) (State constitutional free speech protections broader than the First Amendment); *Right to Choose v. Byrne*, 91 *N.J.* 287 (1982) (State Constitution safeguards greater individual rights to health and privacy); *In re Grady*, 85 *N.J.* 235, 249 (1981) (recognizing greater right to privacy under the State Constitution); *State v. Schmid*, 84 *N.J.* 535, 560 (1980) (recognizing a greater right of free speech on private university campus); *In re Quinlan*, 70 *N.J.* 10 (1976) (finding a right of choice to terminate life support systems as aspect of right of privacy, which does not exist in the federal system); *Robinson v. Cahill*, 62 *N.J.* 473, 482 (1973) (finding a right to

education under the State Constitution, which the United States Supreme Court has explicitly denied).

This Court has been especially disposed to go further than the Federal Constitution with regard to the rights of criminal defendants. For example, the State Constitution is more protective with regard to rights against unreasonable search and seizure. *See*, *e.g.*, *State v. Shannon*, 222 *N.J.* 576, 592 (2015) (refusing to adopt federal good faith exception to the exclusionary rule because it "has been explicitly, and consistently, rejected" under State Constitution); *State v. Johnson*, 193 *N.J.* 528, 543 (2008) ("[B]y allowing a defendant broader standing to challenge evidence derived from unreasonable searches and seizures under our State Constitution, we increase the privacy rights of all New Jersey's citizens[.]"); *State v. Pierce*, 136 *N.J.* 184, 208-13 (1994) (pat-down search permissible under the Fourth Amendment violated the State Constitution); *State v. Hempele*, 120 *N.J.* 182, 196-97 (1990) (State Constitution prohibits warrantless searches of garbage bags left on curb for collection, notwithstanding permissibility under the Fourth Amendment); *State v. Novembrino*, 105 *N.J.* 95 (1987) (refusing to adopt good faith exception to exclusionary rule as the United States Supreme Court had done); *State v. Alston*, 88 *N.J.* 211 (1981) (recognizing greater standing to challenge validity of car search under the State

Constitution); *State v. Johnson*, 68 *N.J.* 349, 353 (1975) (requiring a higher standard for waiver of right to withhold consent to a search). It has been more protective of the right to counsel. *See*, *e.g.*, *State v. Norman*, 151 *N.J.* 5, 25 (1997) (finding greater State constitutional protection for criminal defendants from attorney conflicts of interest). It has more zealously safeguarded the right not to incriminate oneself. *See, e.g., State v. Muhammad*, 182 *N.J.* 551, 568-69 (2005) (State privilege against self-incrimination stronger than that provided by the Fifth Amendment). It has far greater protections with regard to the right to indictment by grand jury. *See generally State v. Hogan*, 144 *N.J.* 216, 231 (1995). And it has, within the criminal process, more jealously guarded defendants' rights to privacy, *see, e.g., Doe v. Poritz*, 142 *N.J.* 1, 104 (1995) (State constitution more protective of convicted sex offenders' reputation), and to the equal protection of the laws. *See State v. Chun*, 194 *N.J.* 54 (2008) (State equal protection rights frequently broader because "this Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution."); *State v. Marshall*, 130 *N.J.* 109, 208-10 (1992) (State Constitution provides greater equal protection rights to criminal defendants facing the death penalty); *State v. Gilmore*, 103 *N.J.* 508, 522-23 (1986) (State Constitution imposes greater

restriction than the federal Equal Protection Clause on using peremptory challenges to dismiss potential jurors for race-based reasons).

Particularly relevant here are New Jersey's decisions interpreting the State Cruel and Unusual Punishment Clause, which often arose in the context of this State's unique and more protective death penalty jurisprudence. *See Ramseur*, 106 *N.J.* at 190 ("Our State Constitution provides an additional and, where appropriate, more expansive source of protections against the arbitrary and nonindividualized imposition of the death penalty."); *Gerald*, 113 *N.J.* at 75-76 (rejecting *Tison v. Arizona*, 481 *U.S.* 137 (1987), and requiring evidence of intent to kill for imposition of death sentence); *State v. Martini*, 144 *N.J.* 603, 618 (1996) (departing from federal precedent to hold that State Constitution prohibits individuals sentenced to death from waiving the right to post-conviction relief and gives counsel standing to challenge waiver); *Marshall*, 130 *N.J.* at 207-209 (repudiating *McCleskey v. Kemp*, 481 *U.S.* 279 (1987), and holding that, in New Jersey, a defendant complaining of racial disparities in capital sentences "surely has a right to raise a structural challenge to the constitutional fairness of the New Jersey Capital Punishment Act"). These cases not only shed light on New Jersey's historically distinct interpretation of its Cruel and Unusual Punishment Clause, which is at issue here;

they are also particularly pertinent to this analysis based upon the Supreme Court's decisions in *Graham* and *Miller*, which make clear that juvenile LWOP is "akin to the death penalty" and must be "treated . . . similarly." *Miller*, 132 *S. Ct.* at 2466; *accord Graham*, 560 *U.S.* at 69-70.

Decision under the State Constitution is also especially appropriate because this case bears upon matters of particular State interest and local concern, *Hunt*, 91 *N.J.* at 363-68 (Handler, J., concurring) ("When particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law."). Of course, criminal justice is, as both the United States and the Supreme Court have recognized, just such a matter of State interest. *See United States v. Lopez*, 514 *U.S.* 549, 561 n.3 (1995) ("States possess primary authority for defining and enforcing the criminal law."); *Gerald*, 113 *N.J.* at 76 ("Resort to a state-constitutional analysis is especially appropriate" in criminal justice matters because they are "of particular state interest or local concern and do[] not require a uniform national policy.'"). And as noted, above, this Court has frequently recognized the importance of this interest in departing from Federal constitutional standards in matters of criminal justice.

Finally, New Jersey has long manifested particularly protective beliefs and attitudes with regard to juvenile justice. For example, the State legislature outlawed the death penalty for juveniles under age 18 fully two decades before the Supreme Court did so. *See L.* 1985, *c.* 478 (amending *N.J.S.A.* 2C:11-3 to prohibit the death penalty for juveniles); *see also State v. Koskovich*, 168 *N.J.* 448, 554 (2001) (Zazzali, J., concurring) (noting that the prohibition "expressed a generalization" that juveniles are less mature than adults). Likewise, New Jersey has led a national effort to reduce the number of juveniles held in secure detention. *See* New Jersey Juvenile Detention Alternatives Initiative (JDAI), 2011 Annual Data Report (Feb. 2012)[14] at ii (noting that New Jersey was the "only state to be designated a national model for detention reform" for juveniles); *see also State in re A.C.*, 426 *N.J. Super.* 81, 95 (Ch. Div. 2012) (discussing New Jersey's participation in JDAI). And just recently, New Jersey passed sweeping juvenile justice reform: in a number of amendments to the criminal code, the State has raised the minimum age for waivers to adult court from 14 to 15; removed less serious offenses from the list of offenses permitting waiver; established a presumption that waived juveniles will be

---

[14] *Available at* http://www.nj.gov/oag/jjc/pdf/JDAI-2011-Report-Annual.pdf.

incarcerated with juveniles until age 21; provided a right to counsel and increased due process protections prior to transfer of juveniles from detention centers to adult prisons; prohibited punitive solitary confinement of juveniles; and required data collection and transparency with regard to incidents of State waiver and solitary confinement of juveniles. *See L.* 2015, *c.* 89; *see also* Zoe Schein, *New Jersey Bill to Reform Youth Transfer, Waiver and Confinement Policies*, NAT'L JUVENILE JUSTICE NETWORK (Sept. 15 2015).[15] The State's political branches, representatives of the beliefs and attitudes of the State populace, have thus shown exceptional sensitivity to the fact that adult punishment is often inappropriate in the case of juveniles. Indeed, New Jersey's new minimum age for waiver to adult court, 15, is the highest in the nation. *See* Dana Goldstein, *New Jersey Moves to Keep Kids under 15 from Adult Court*, THE MARSHALL PROJECT (June 25 2015).[16]

For these reasons, while *Miller* and *Montgomery* stop short, at least at this point, of requiring a broad categorical prohibition of LWOP for all juveniles under the Eighth Amendment, their holdings by no means prevent this Court from

---

[15] *Available at http://www.njjn.org/article/new-jersey-bill-to-reform-youth-transfer-waiver-and-confinement-policies*.

[16] *Available at* https://www.themarshallproject.org/2015/06/25/new-jersey-moves-to-keep-kids-under-15-from-adult-court#.V4IkkfSnb.

doing so under its own Constitution. Instead, this Court should hold that, given New Jersey's unique history, tradition, beliefs, and attitudes regarding juveniles in the criminal system all support extension of United States Supreme Court law to recognize a broad categorical ban on LWOP for juveniles under the New Jersey Constitution.

B. Juvenile LWOP Is Unconstitutional, under Both the State and Federal Constitutions, Based upon the Requisite Proportionality Analysis.

The principles undergirding the Supreme Court decisions in *Roper*, *Graham*, *Miller*, and *Montgomery* render any sentence of life without parole unconstitutional for all juveniles, including in homicide cases, like this one. The reasons for such a categorical bar flow from the analysis set forth in those cases, including both that objective indicia of society's values reveal fundamental opposition to LWOP for juveniles, and that the United States Supreme Court's "own judgment," *Graham*, 560 *U.S.* at 61, supports a categorical bar because: (1) juveniles have diminished culpability; (2) LWOP is, accordingly, an inappropriately severe penalty for juveniles, (3) which lacks a penological justification in the case of juveniles; (4) a case-by-case approach is insufficient to protect the rights of juveniles; and (5) international law resoundingly condemns sentencing juveniles to LWOP. Where analysis under New Jersey

law provides distinct support under these factors, it is incorporated below.

1. Objective Indicia Show Opposition to Juvenile LWOP.

Analysis of objective indicia often begins by counting the jurisdictions authorizing the sentencing practice in question. *See Graham*, 569 *U.S.* at 62; *Atkins v. Virginia*, 536 *U.S.* 304, 312 (2002). But this assessment is less helpful in the juvenile context because punishment of juveniles as adults depends upon two different sets of laws in each jurisdiction: the law of waiver or transfer of juveniles to adult court on the one hand, and the law of adult sentencing on the other. *Miller*, 132 *S.Ct.* at 2472-73; *Graham*, 560 *U.S.* at 66. Counting states where transfer and sentencing laws combine to authorize a particular penalty for juveniles thus "*tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*" *Graham*, 560 *U.S.* at 66 (emphasis in original). Accordingly, *Graham* outlawed LWOP sentences for juveniles convicted of nonhomicide offenses "even though 39 jurisdictions permitted that sentence." *Miller*, 132 *S.Ct.* at 2471; *see Graham*, 560 *U.S.* at 62.[17] Comer, of course, here

[17] Counting the number of states that authorize a given sentence becomes particularly problematic where *de facto* LWOP is at issue, since such sentences often incorporate, as in this case, still another source of law: that which determines consecutive

respectfully submits that, as a matter of New Jersey law, the holding should be extended to all juvenile sentences, including sentences for homicide.

Nonetheless, "the direction of change" among the States, which is more significant than gross numbers, *Roper*, 543 *U.S.* at 567, shows increasing opposition to LWOP for juveniles. In the four years since the decision in *Miller*, 11 states have abolished juvenile LWOP for all offenses, *see* Da157; *see also* www.fairsentencingofyouth.org (noting recent legislative bans in Utah and South Dakota), and 23 States have changed their laws regarding juveniles convicted of homicide, making parole available after between 15 and 40 years, *see* The Sentencing Project, *Juvenile Life Without Parole: An Overview*, at 2 (2016).[18]

Also probative in the case of juveniles are "actual sentencing practices." *Graham*, 560 *U.S.* at 62. At present, 17 States have no individuals serving LWOP for offenses committed as juveniles, including New Jersey, discussed further below, and four States – Pennsylvania, Michigan, Louisiana, and California – account for approximately half of all juvenile LWOP sentences

---

versus concurrent sentencing. *See N.J.S.A.* 2C:44-5; *Yarborough*, 100 *N.J.* at 644-45.

[18] *Available at* www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf

nationwide. *See* The Sentencing Project, *Juvenile Life Without Parole*, at 2.

Moreover, *Graham* instructs that, in determining whether objective indicia of society's values demonstrate a consensus against juvenile LWOP sentences, courts should estimate the ratio of individuals serving LWOP for offenses committed as juveniles against the approximate "base number" of juvenile convictions for the same offenses, *i.e.*, the number of cases in which LWOP might potentially have been imposed. 560 *U.S.* at 65-66. The lower the percentage of those juveniles who receive LWOP sentences, the weaker the consensus that would render this a proportional sentence. *Graham* underscores that in constructing this ratio, courts must keep in mind that the present number of inmates sentenced to LWOP as juveniles actually reflects "many years" of sentencing practice, since "a juvenile sentenced to life without parole is likely to live in prison for decades." *Id.* at 65. So in selecting the base number of cases in which LWOP might have been imposed, courts should look at conviction data stretching back decades. In making the ultimate calculation, *Graham* also makes clear that exact, statistical precision is unnecessary, and that courts

should instead look to whether, as a general matter, there is indication of consensus based upon the available data.[19]

Nationwide, there are an estimated 2,570 individuals serving sentences of life without parole for offenses committed as juveniles.[20] Da158; accord *Miller*, 132 *S.Ct.* at 2477

---

[19] For example, *Graham* found objective indicia of societal opposition to LWOP for juveniles in nonhomicide cases on the basis of an imprecise comparison: first, it identified the total number of relevant inmates nationwide, 123. *Graham*, 560 *U.S.* at 65. Then, it compared this number against the number of juvenile convictions in 2007 for aggravated assault (57,600), forcible rape (3,580), robbery (34,500), burglary (81,900), drug offenses (195,700), and arson (7,200). *Id.* Notably, the Court looked to 2007 because it was "the most recent year for which statistics [were] available." *Id.* The Court also acknowledged that "it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences." *Id.* As a result, the Court's "base number" was in fact a collection of numbers for only one year having no precise correlation with the 123 individuals who actually received the challenged sentence. Nonetheless, the Court concluded that even this high level of imprecision was sufficient to show that "in proportion to opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual." *Id.* at 66.

[20] This number is imprecise for two reasons. First, of the 2,570 inmates serving LWOP for juvenile offenses, approximately 2,000 received mandatory sentences under applicable statutes. *See Miller*, 132 *S.Ct.* at 2477 (Roberts, J., dissenting). As noted above, the Supreme Court is clear that statutes authorizing and mandating juvenile LWOP are not reliable indicia of societal values because such laws represent the overlap of disparate sentencing and waiver codes. *Id.* at 2472; *Graham*, 560 *U.S.* at 66. So, ideally, a determination of societal values would look to instances in which the challenged sentence was deliberately imposed, *i.e.*, as a matter of discretion. But of the 2,000 juveniles who received mandatory LWOP, it is unknowable how many would have received the same sentence as a discretionary matter. Accordingly, while 2,570 is used here for purpose of argument,

(Roberts, J., dissenting) ("The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18.").

To determine the frequency of the sentence, this number must be measured against the number of cases in which LWOP might potentially have been imposed on a juvenile. From 1985 to 2013, the most recent year for which data is available, approximately 47,800 homicides were committed by juveniles.[21] Da159-60. Dividing the number of discretionary LWOP sentences for juveniles convicted of homicides, 2,570, by the number of juvenile homicides over the approximately overlapping period,

---

this number is doubtless too high, inflating society's apparent willingness to impose LWOP sentences upon juveniles.

Second, the 2,570 number represents formal but not *de facto* LWOP sentences. The number of juveniles serving *de facto* LWOP nationwide is unknown. But the unavailability of this data does not diminish the argument here. LWOP and *de facto* LWOP are constitutionally indistinguishable, so objective indicia of society's opposition to juvenile LWOP must be understood to signal the same opposition to juvenile *de facto* LWOP.

[21] The base number 47,800 is likely too low for several reasons. Most generally, it refers only to homicide offenses. While LWOP is impermissible for nonhomicide offenses post-*Graham*, some of the juveniles currently serving LWOP sentences may reflect pre-*Graham* practices that have yet to be corrected. Additionally, the 47,800 number is too low because the most accurate data would go further in both directions, including homicides committed both since 2013, and before 1985. Nonetheless, the 47,800 figure will suffice to make the point that imposition of LWOP on juveniles is an incredible rarity. The most accurate base number - something well above 47,800 - would further shrink society's apparent willingness to impose juvenile LWOP.

47,800, yields a percentage of 5.37%, or roughly one out of 19 cases. This number shows a clear moral consensus against juvenile LWOP.

In New Jersey, the evidence is even stronger. As noted by the trial court below, the number of individuals expressly sentenced to LWOP for offenses committed as juveniles in New Jersey is *zero*. This is powerful proof that New Jersey does not believe in imposing LWOP sentences on juveniles and thus has a "significantly different attitude . . . from that prevailing nationwide." *Ramseur*, 106 *N.J.* at 169. Furthermore, *de facto* LWOP is also rarely imposed on New Jersey's youth. Because New Jersey tabulates neither the number of juvenile *de facto* LWOP sentences nor the cases in which such a sentence might have been imposed, this calculation is necessarily inexact, but available data nevertheless shows that they are a statistical rarity.

Specifically, there are 17 individuals in New Jersey sentenced to 45 years or more who were 19 or younger at sentencing; this permits of at least an inference that, as an upper limit, there are 17 individuals in the State who might have received sentences of juvenile LWOP.[22] Da161-63. To approximate the number of cases in which *de facto* LWOP might have been imposed on a juvenile, Comer here uses the number of

[22] The number 17 is likely too high because some of the individuals sentenced at 18 and 19 may not have been juveniles at the time of their offenses.

juveniles convicted of homicide offenses from 1990[23] to November 2015: 488.[24] Da164-91. These numbers yield a percentage of 3.48%, meaning that only one out of every 29 cases in which juveniles who could have been sentenced to LWOP in fact resulted in such sentences. Though likely overstating the percentage of juveniles sentenced to *de facto* LWOP, even this number suggests that such a sentence is rarely imposed in New Jersey. In sum, then, at the national level and even more so in New Jersey, juveniles are sentenced to LWOP with an infrequency that shows objective opposition to the practice.

2. The Court's "Own Judgment" Uniformly Rejects LWOP and *De Facto* LWOP for All Juveniles.

Supreme Court precedent also dictates a finding that LWOP and *de facto* LWOP are disproportionate sentences for all juveniles under each of the factors that make up the Court's "own judgment." New Jersey law both incorporates these principles and provides additional bases for a categorical bar.

---

[23] 1990 is the earliest year for which data are available on the New Jersey Attorney General's website. Da165.

[24] The number 488 is likely too low (and the corresponding percentage of juvenile offenders sentenced to LWOP too high) because (1) it does not include data from before 1990, and (2) it refers only to homicide offenses when, in fact, some of those sentenced to *de facto* LWOP as juveniles in New Jersey may have been sentenced to consecutive terms in nonhomicide cases. *See*, *e.g.*, *Zuber*, 442 *N.J. Super.* at 614 (defendant sentenced to 110 years, 55 without parole eligibility, for juvenile nonhomicide offenses).

a. Juveniles Are Categorically Less Culpable Than Adults.

As noted above, the Supreme Court recognizes "[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Roper*, 543 *U.S.* at 569; *accord Miller*, 132 *S.Ct.* at 2464. In reaching this conclusion, the Court in *Roper*, *Graham*, and *Miller*, relied on an overwhelming consensus in the fields of psychology and neuroscience, as well as "what 'any parent knows.'" *Miller*, 132 *S.Ct.* at 2464 (quoting *Roper*, 543 *U.S.* at 569).[25]

First, juveniles are categorically less mature and more irresponsible relative to adults, "qualities that often result in impetuous and ill-considered actions and decisions." *Roper*, 543 *U.S.* at 569 (internal citation omitted); *accord Miller*, 132 *S.Ct.* at 2464; *Graham*, 560 *U.S.* at 69-70. New Jersey courts have long recognized this fact as relevant to proportional sentencing of juveniles. *See Koskovich*, 168 *N.J.* at 554 (Zazzali, J., concurring) ("For what we find offensive about the execution of minors is not merely that they are 'young,'

[25] The Court has noted that the relevant science and social science are still developing, providing new and increasing support for the diminished culpability of juveniles. *See Miller*, 132 *S.Ct.* at 2465 n.5 ("science and social science . . . have become even stronger"); *Graham*; 560 *U.S.* at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

chronologically-speaking, but also that they tend to be immature. This Court has explained that '[i]n determining a defendant's 'relative' youth, a jury must look beyond chronological age to considerations of defendant's overall maturity.'") (quoting *State v. Bey*, 129 *N.J.* 557, 612 (1992)).

Scientific research provides two bases for this immaturity. One is the "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty," making thrill-seeking behavior irresistible to young people. Laurence Steinberg, *et al.*, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model,* 44 DEV. PSYCHOL. 1764, 1764 (2008); Kathryn Monahan, *et al.*, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUSTICE 577, 586 (2015) ("[G]reater neural activity during adolescence" has been observed in "numerous fMRI [functional magnetic resonance imaging] studies."). Second is the incomplete development of the juvenile brain's frontal lobes, resulting in poor impulse control and an inability to foresee consequences. *Miller*, 132 *S.Ct.* at 2465 n.5 ("'It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance'"); *accord* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-*

Taking, 28 DEV. REV. 78, 83 (2008).[26] These characteristics — heightened thrill-seeking with poor impulse control — combine catastrophically, helping to explain why, as the Supreme Court recognizes, "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 *U.S.* at 569.

Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 *U.S.* at 569; *accord Miller*, 132 *S.Ct.* at 2464; *Graham*, 560 *U.S.* at 69-70. Adolescence is a time of great insecurity, in which juveniles seek conformity to avoid ostracism and maintain esteem relative to their peers. Steinberg, *Social Neuroscience*, 28 DEV. REV. at 92. This is problematic because, within the context of adolescent peer groups, "risky experimentation is part of identity formation for many teens" such that "much adolescent criminality is . . . not indicative of bad character or criminal predisposition." Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 64 (2010); *accord Miller*, 132 *S.Ct.* at 2465 n.5 ("'Numerous studies post-*Graham* indicate that exposure to deviant peers leads to

[26] This, too, is evident from "structural imaging studies." Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability*, 14 NEUROSCIENCE 513, 516 (2013).

increased deviant behavior and is a consistent predictor of adolescent delinquency'"). Indeed, it has been empirically demonstrated that, "rates of illegal behavior soar so high during adolescence that participation in delinquency appears to be a normal part of teen life." Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. R. 674, 675 (1993).

Moreover, juveniles "have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings," *Miller*, 132 *S.Ct.* at 2464 (quoting *Roper*, 543 *U.S.* at 570), all of which means that juveniles generally cannot escape exposure, and pressure, from peers for whom deviant behavior is unexceptional. *Roper* recognized that, for this reason, adolescents "have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper*, 543 *U.S.* at 570.

Third, youth is an era marked by transitory, developing identity, meaning that "'[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.'" *Roper*, 543 *U.S.* at 570; *accord Miller*, 132 *S.Ct.* at 2464. Research suggests that identity formation is incomplete until the late teens or early twenties. Steinberg, *Social Neuroscience*, 28 DEV. REV. at 94. This diminishes culpability because it means that the actions of

juveniles cannot with certainty be attributed to their characters; instead, juvenile behavior more often reflects "the impetuousness and recklessness that may dominate in younger years." *Johnson v. Texas*, 509 *U.S.* 350, 367 (1993).

That juveniles overwhelmingly age out of criminal behavior has also been amply demonstrated by empirical research which shows that between a quarter and half of all juvenile offenders are "immediate desisters," meaning individuals whose first criminal offense is also their last. *See* Maynard L. Erickson, *Delinquency in a Birth Cohort: A New Direction in Criminological Research*, 64 J. CRIM. L. & CRIMINOLOGY 362, 364 (1973) (citing study finding immediate desistance rate at 46%); *see also* Megan C. Kurlycheck, *et al.*, *Long-Term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Felony Study*, 50 CRIMINOLOGY 71, 98 (2012) (citing two studies finding immediate desistance at between 22-27% and 54-59%, respectively). Indeed, research overwhelmingly shows that criminal careers are short: between five and 15 years, regardless of offense-type. *See* Alex R. Piquero, *et al.*, *The Criminal Career Paradigm*, 30 CRIME & JUSTICE 359, 435 (2003). Thus, the majority of juvenile criminality is limited to adolescence, a fact further reinforced by findings that juvenile desistance from crime by the mid-to-late 20s approaches 85-90%. *See* Moffit, *Adolescence-Limited and*

Life Course-Persistent, 100 PSYCH. R. at 680; Steinberg, *The Influence of Neuroscience*, 14 NEUROSCIENCE at 516.

For these reasons, the Supreme Court has held juvenile offenders "categorically less culpable than the average criminal." *Roper*, 543 *U.S.* at 567. Importantly, none of the relevant science, social science, or related holdings by the Supreme Court are "crime-specific;" *Miller* expressly noted that "[t]hose features [which make juveniles different from adults] are evident in the same way, and to the same degree, when . . . a botched robbery turns into a killing," 132 *S.Ct.* at 2465 — *precisely* what happened here. Culpability is thus, as a matter of constitutional law, diminished in Comer's case, as it is for all juvenile offenses. *Miller*, 132 *S.Ct.* at 2465.

b. Life without Parole Is Harsh Punishment for Juveniles.

Supreme Court precedent also holds that sentencing juveniles to LWOP is extremely severe punishment. In *Graham*, the Supreme Court held that under the Eighth Amendment, juvenile LWOP must be considered the equivalent of execution because both "mean[] denial of hope," 560 *U.S.* at 69-70, and "no chance for fulfillment outside prison walls, no chance for reconciliation with society," *id.* at 79. *Graham* also recognized that LWOP is particularly harsh when imposed upon a juvenile because a younger offender necessarily serves "more years and a greater

percentage of his life in prison than an adult offender." *Id.* at 570; *accord Miller*, 132 *S.Ct.* at 2466. Furthermore, these years are likely to be spent with reduced access to the activities and programs that can give inmates a sense of self-worth or meaning. *See Graham*, 560 *U.S.* at 74 ("[D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services[.]") (internal citation omitted).

In short, the Supreme Court recognizes juvenile LWOP as a uniquely terrible punishment. That is, it means an entire lifetime without hope, prospect for fulfillment, or integration into society, a sentence which, given the high possibility of reform post-adolescence, amounts to tremendous waste. For these reasons, juveniles LWOP is cruel punishment indeed, regardless of the crime committed.

c. Sentencing Juveniles to LWOP Serves No Penological Purpose.

There are four recognized purposes for sentencing: retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 *U.S.* at 71. *Graham* undertook a comprehensive analysis of these purposes in the context of juvenile nonhomicide offenders sentenced to LWOP, concluding that "[none] provides an adequate justification." *Id.* But *Graham*'s holding was predicated on facts about juveniles and LWOP generally; thus

as the Court recognized in *Miller*, "*Graham*'s reasoning implicates *any* life-without-parole sentence imposed on a juvenile." 132 *S.Ct.* at 2465 (emphasis added).

In *Montgomery*, the Court clarified that only the incapacitation rationale could ever justify LWOP in the case of a juvenile homicide offender. 136 *S.Ct.* at 734. But this rationale requires a finding that the juvenile offender is "incorrigible," though the Court, and abundant research, express great skepticism that courts can make this finding reliably. *Graham*, 560 *U.S.* at 72-73. Thus, really, none of the recognized purposes of punishment support juvenile LWOP, even in homicide cases, as is discussed in further detail, below.

Retribution is "the interest in seeing that the offender gets his 'just deserts.'" *Atkins*, 536 *U.S.* at 319. Under a theory of retribution, punishment "must be directly related to the personal culpability of the criminal offender." *Graham*, 560 *U.S.* at 71; *Atkins*, 536 *U.S.* at 319 ("[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender."). But as noted above, the culpability of juveniles, for all offenses, is categorically diminished because of their inherent cognitive limitations. Accordingly, as the Supreme Court has recognized, "'the case for retribution is not as strong with a minor as with an adult.'" *Graham*, 560 *U.S.* at 71.

Deterrence is the idea that the specter of punishment will influence the "cold calculus that precedes the decision" to commit an offense.[27] *Atkins*, 536 *U.S.* at 319. In the context of juvenile offenders, the Supreme Court has shown that the relevant question is whether a given punishment will deter juveniles in particular. *See Graham*, 560 *U.S.* at 72 (considering only whether LWOP was likely to deter juveniles); *Roper*, 543 *U.S.* 571-72 (considering only whether capital punishment was likely to deter juveniles). On this question, the Court has held:

> "[T]he same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." Because juveniles' "lack of maturity and underdeveloped sense of responsibility ... often result in impetuous and ill-considered actions and decisions," they are less likely to take a possible punishment into consideration when making decisions.
>
> [*Id.* at 571-72.]

And for the juveniles sentenced to LWOP, parole ineligibility has the opposite of a deterrent effect because, "[a] young person who knows that he or she has no chance to leave prison

[27] Deterrence, of course, "incorporates two 'interrelated but distinguishable concepts,' the sentence's 'general deterrent effect on the public [and] its personal deterrent effect on the defendant.'" *State v. Fuentes*, 217 *N.J.* 57, 79, (2014) (quoting *State v. Jarbath*, 114 *N.J.* 394, 405 (1989)). But in contemplating extremely long sentences, any specific deterrence benefit is subsumed by the incapacitation rationale, *i.e.*, the goal of deterring the specific individual's future offending is achieved by keeping him incarcerated.

before life's end has little incentive to become a responsible individual." *Graham*, 560 *U.S.* at 79. Thus, sentencing juveniles to LWOP will not deter juvenile crime.

Incapacitation justifies punishment to remove an offender from society for the public's safety; in the case of juveniles sentenced to LWOP, this justification "requires the sentencer to make a judgment that the juvenile is incorrigible." *Id.* at 72-73. *Montgomery* makes clear that, under *Miller*, a factual finding of just such incorrigibility (alternatively denoted "irreparable corruption," *Roper*, 543 *U.S.* at 573; *Miller*, 132 *S.Ct.* at 2469, and "irretrievably depraved character," *Roper*, 543 *U.S.* at 570; *Graham*, 560 *U.S.* at 68) is the only rationale that might justify juvenile LWOP – a sentence of life without even the possibility of ever being released – and that without a finding of incorrigibility, such a sentence is unconstitutional. 136 *S.Ct.* at 735 (States are not "free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."); *Veal v. State*, __*S.E.*2d__, 2016 *WL* 1085360, at *9 (Ga. Mar. 21, 2016) ("Thus, *Montgomery* emphasizes that a life without parole sentence is permitted only in '*exceptional* circumstances,' for 'the *rare* juvenile offender who exhibits such *irretrievable depravity* that rehabilitation is *impossible*'") (emphasis in

original). That is to say, juvenile offenders should not, unless they are demonstrably incorrigible, be sentenced to life without the possibility of release. *State v. Lyle*, 854 *N.W.*2d 378, 400 (Iowa 2014) (holding that, where incorrigibility cannot be demonstrated, and the juvenile offender is therefore capable of reform, "the incapacitation objective can no longer seriously be served, and . . . [juvenile LWOP] becomes 'nothing more than the purposeless and needless imposition of pain and suffering.'").

But the fact that adolescent identities are transient, with most juvenile criminality limited to adolescence, means that no such determination is possible at the time of sentencing. Indeed, the Supreme Court summarized the social science research in *Graham* and held, "'[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 68.

This has been demonstrated in repeated empirical trials. Thus, for example, the factors commonly used to predict criminality — poverty, childhood abuse and neglect, and exposure to violence — are strong predictors of *initial* criminality, but they are very poor predictors of persistence in crime. *See* John H. Laub, *Trajectories of Change in Criminal Offending: Good*

Marriages and the Desistance Process, 63 AM. SOCIOL. R. 225 (1998); Piquero, *et al.*, *Criminal Career Paradigm*, 30 CRIME & JUSTICE at 470-71 ("As many as one-half to two-thirds of [chronic offender] predictions have been shown to be incorrect."). Nor, as empirical studies show, does the seriousness or frequency of juvenile offending provide reliable evidence of which juveniles will remain dangerous. Moffitt, *Adolescence-Limited and Life-Course-Persistent*, 100 PSYCH. R. at 678 ("[M]easures of the frequency or seriousness of adolescent offending will not discriminate very well between life-course-persistent and adolescence-limited delinquents."); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUSTICE 1, 21 (2001) ("[O]ur study found that a host of traditional individual-difference factors were at best weakly predictive of eventual desistance.").

Thus, for example, one longitudinal study of juvenile murder offenders showed that expert predictions that particular juveniles would re-offend were wrong a staggering 87% of the time. Rolf Loeber, *et al.*, *The Prediction of Violence and Homicide in Young Men*, 73 J. CONSULTING AND CLINICAL PSYCHOL. 1074, 1074-75 (2005). Another longitudinal study found that 86% of juveniles who scored in the top 20th percentile on diagnostic tests measuring psychopathy did not display psychopathic tendencies by age 24. *See, e.g.*, Donald R. Lynam, *et al.*,

Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy, 116 J. ABNORMAL PSYCHOL. 155, 160, 162 (2007).[28] These predictive failures make sense in light of what social science research has uncovered about desistance from crime (*i.e.*, "exiting a criminal career"), which "is typically tied to the acquisition of meaningful bonds to conventional adult individuals and institutions, such as work, marriage and family, and community institutions." Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY 391 (Kevin M. Beaver, *et al.*, eds. 2015). Relatedly, desistance is also strongly correlated with "disengagement from [] deviant peers." Laub & Sampson, *Understanding Desistance*, 28 CRIME & JUSTICE at 28. But, of course, no sentencing court can predict which juvenile offenders will, for example, enter into positive, stable relationships, or distance themselves from peer groups. As the Supreme Judicial Court of Massachusetts has

[28] *See also* Brief of American Psychological Association *et. al.* As *Amici Curiae* in Support of Respondent, *Roper v. Simmons*, 543 *U.S.* 551 (2005), 2004 *WL* 1636447, at *44-48 (citing studies showing that even psychopathic tendencies in youth are unreliable indicators of future propensity for criminality); John F. Edens, *et al.*, *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 BEHAV. SCI. & L. 53, 73 (2001) (existing studies "provide little support for the argument that psychopathy during adolescence is a robust predictor of future violence, particularly violence that occurs beyond late adolescence").

expressed it, "Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved." *Diatchenko v. Dist. Att. for Suffolk Dist.*, 1 *N.E.*3d 270, 284 (Mass. 2013).

Finally, as to rehabilitation, sentencing juveniles to LWOP "forswears altogether the rehabilitative ideal." *Graham*, 560 *U.S.* at 74. Sending a juvenile to prison for life, without the possibility of release, sends the message that improvement of his character will serve no purpose — indeed, as noted above, this message is itself a disincentive to rehabilitation. *Id.* at 79. Moreover, as also discussed above, the LWOP designation can be a barrier to rehabilitation because it may foreclose access to valuable programs in prison. *Id.* at 74.

In sum, LWOP and *de facto* LWOP are unjustifiable in the case of juveniles. Because "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense," *id.* at 71, the New Jersey Constitution cannot permit imposition of these sentences, but must allow for the possibility of release at some point.

d. A Case-by-Case Approach Is Insufficient to Protect the Rights of Juveniles.

As part of its proportionality analysis, the Supreme Court asks whether a case-by-case approach would suffice to alleviate constitutional concerns, or whether instead the risk of error is so great as to require categorical protection. *See Graham*, 560 *U.S.* at 74-75; *Roper*, 543 *U.S.* at 572-73; *Atkins*, 536 *U.S.* at 320-21; *Zuber*, 442 *N.J. Super.* at 621 (citing *Graham*). The Court's decision in *Graham* is dispositive: *Graham* held that a case-by-case approach cannot be trusted to protect juveniles against disproportionate sentencing for three reasons. First, as previously discussed, the transience of juvenile identities means that even psychiatric experts are unable to identify incorrigibility. *Graham*, 560 *U.S.* at 73. Accordingly, any faith in the ability of courts to determine incorrigibility at the time of an individual sentencing would be misguided. Second, as *Graham* makes clear, a categorical rule would eliminate the risk that any juvenile would lose his "chance for fulfillment outside prison walls" based on "demonstrate[d] maturity and reform," which chance creates a powerful incentive to rehabilitation for all juvenile offenders. *Id.* at 79.

Third, and finally:

> [T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice

> system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions[.]
>
> [*Id.* at 78.]

The Supreme Court favors categorical bars in circumstances like this, where a class of defendants is inherently compromised in assisting in its own defense. *See*, *e.g.*, *Atkins*, 536 *U.S.* at 320-21.[29] For these reasons, a case-by-case approach cannot adequately protect the rights of juveniles, and a categorical ban against LWOP is necessary.

e. International Law Rejects LWOP for Juveniles.

Proportionality analysis, finally, entails consideration of global practices because "[t]he opinion of the world community . . . does provide respected and significant confirmation for our own conclusions." *Roper*, 543 *U.S.* at 578. In this case, the international law evidence could not be plainer: no other country in the world imposes LWOP on juvenile offenders. *See* Connie de la Vega and Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983,

[29] Comer's case is an unfortunate example: Comer's decision to go to trial resulted in a sentence of *de facto* LWOP, while one co-defendant pleaded guilty and received a sentence which resulted in his parole eligibility after 17 years.

999-1004 (2008). This is stark evidence of a global, moral consensus against sentencing juveniles to LWOP.

For this reason too, proportionality analysis offers convincing reasons for a categorical ban against sentencing juveniles to LWOP. Indeed, any of the above would support such a prohibition; that each and all of them do provides this Court with abundant authority to implement the categorical bar, particularly under New Jersey's more expansive interpretation of its Cruel and Unusual Punishment Clause. As a result, the decision of the trial court, below, should be modified to include a categorical ban on LWOP for juveniles.

III. *Graham v. Florida* Forbids Life without Parole and *De Facto* Life without Parole for Juveniles Who Neither Kill Nor Intend to Kill.

Both the New Jersey and Federal Constitutions also compel a narrower categorical bar against LWOP and *de facto* LWOP under circumstances where juvenile homicide offenders neither kill nor intend to kill. This holding flows directly from two elements of *Graham*: its proportionality analysis, and its equation of juvenile LWOP with the death penalty. And, because the evidence showed that Comer neither killed nor intended to kill, Da3-4, his sentence should be vacated for this reason, as well.

Under traditional proportionality analysis, above, all of the factors supporting a broad ban on LWOP for juveniles necessarily apply to the subset of juveniles who neither kill

nor intend to kill. But *Graham* shows that, for several reasons, LWOP is even less appropriate for juveniles who neither kill nor intend to kill. First, critical to *Graham*'s ultimate holding was the recognition that this sub-group is less culpable because "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* at 69. Second, from this premise, *Graham* held that, because "'[t]he heart of the retribution rationale" is "the personal culpability of the criminal offender,'" *id.* at 71, retribution is "even weaker" where a juvenile did not kill or intend to kill, *id.* Furthermore, the deterrence rationale is also greatly weakened in this context: since homicides in which the juvenile neither kills nor intends to kill are by nature "unintended consequences" of other offenses, *see Dean v. United States*, 556 *U.S.* 568, 575 (2009), there is no "'cold calculus that precedes the decision' of other potential murderers." *Atkins*, 536 *U.S.* at 319; *accord Enmund v. Florida*, 458 *U.S.* 782, 799 (1982) ("'punishment can serve as a deterrent only when murder is the result of [intentional action]'").

Furthermore, *Graham* provides an independent basis for a ban on LWOP for juveniles who neither kill nor intend to kill. By equating juvenile LWOP to capital punishment, *Graham* expressly incorporates the canon of death penalty law into the realm of juvenile LWOP. 560 *U.S.* at 70; *Miller*, 132 *S.Ct.* at 2467.

Indeed, the *Miller* Court explained that *Graham*'s categorical bar "mirrored a proscription first established in the death penalty context — that the punishment cannot be imposed for any nonhomicide crimes," citing the capital punishment law of *Kennedy*, 554 *U.S.* 407, and *Coker*, 433 *U.S.* 584, which bar the death penalty for nonhomicides. *Miller*, 132 *S.Ct.* at 2467. In *Miller*, this incorporation of the capital punishment canon was an express, independent basis for the Court's decision prohibiting mandatory LWOP for juveniles: because the Court had long held that "a statute mandating a death sentence for first-degree murder violated the Eighth Amendment" under *Woodson v. North Carolina*, 428 *U.S.* 280 (1976), so, too, *Miller* held, is individualized sentencing required prior to imposition of juvenile LWOP. *Miller*, 132 *S.Ct.* at 2467.

The significance of importing the law of capital punishment to the juvenile LWOP context is obvious when one looks to the Supreme Court's, and this Court's, felony murder jurisprudence. In *Enmund*, 458 *U.S.* 782, and *Tison*, 481 *U.S.* 137, the Supreme Court set the parameters for constitutional imposition of the death penalty for those who neither kill nor intend to kill: capital punishment is permissible only if the defendant was a "major" participant in the underlying felony and exhibited "reckless indifference to human life", *Tison*, 481 *U.S.* at 158. And New Jersey's cruel and unusual punishment jurisprudence

places even greater weight on the intent to kill. Breaking with *Tison*, 481 *U.S.* 137, this Court in *Gerald*, 113 *N.J.* at 85, held that the death penalty was forbidden under the State Constitution absent proof of specific intent to kill.[30] *Gerald* held:

> The failure to distinguish, for purpose of punishment, those who intend the death of their victim from those who do not does violence to the basic principle . . . that "the more purposeful the conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."
>
> [*Id.* at 85 (quoting *Tison*, 481 *U.S.* at 156).]

Incorporation of Federal death penalty law thus entails prohibition of LWOP for juveniles who neither kill nor intend to kill unless the State can prove "major participation" in a felony showing "reckless indifference" to life; and under New Jersey law, juvenile LWOP requires proof of specific intent to kill (or at the very least to cause serious bodily injury resulting in death). Neither are present here: Comer was a participant in a robbery that unexpectedly turned fatal when a codefendant spontaneously shot the victim out of frustration

[30] In the wake of *Gerald*, the Constitution was amended to specifically authorize the death penalty in cases of intent to cause serious bodily injury that resulted in death. *State v. Yothers*, 282 *N.J. Super.* 86, 92 (App. Div. 1995). That, of course, is of no moment here, where Comer intended neither death nor serious bodily injury.

that, "he didn't have no money;" Comer, at the time, stood still, his hands empty. Da3-6.[31]

Nonetheless, the court below rejected Comer's claim that *Graham* prohibits LWOP for juveniles who neither kill nor intend to kill. Pa91-92. But it did so without undertaking any proportionality analysis whatsoever; instead, the trial court misinterpreted Comer's claim as suggesting that a broad categorical bar against juvenile LWOP in all cases was necessitated by the holding in *Graham*; to this the Court replied, "*Graham* only created a categorical ban on juvenile life without parole sentences for non-homicide crimes. Since Defendant Comer committed a homicide crime, *Graham*'s ultimate holding has little to no bearing on the analysis of the constitutionality of Defendant Comer's sentence." Pa91. Of course, this was not Comer's argument at all. Rather, Comer focused on *Graham*'s holding that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability," 560 *U.S.* at 69, which holding was not, by its terms, limited to the nonhomicide context.

Likewise, the court below found that Comer's claim was foreclosed by the Supreme Court's resolution of defendant

---

[31] Significantly, Comer's homicide conviction fell under New Jersey's felony murder statute, which does not require proof of intent to kill: "a wholly unintended killing is murder if it results from the commission of the underlying felony." *State v. Darby*, 200 *N.J. Super.* 327, 331 (App. Div. 1984).

Kuntrell Jackson's claim in *Miller*, because Jackson was convicted only of felony murder, and "[The Supreme Court] could have easily disposed of Jackson's petition by articulating that Jackson's sentence was unconstitutional per *Graham*." Pa91. But, there was a question as to the evidence of intent in Jackson's case. *Miller*, 132 *S.Ct.* at 2461 (parties disputed whether Jackson manifested intent to kill based on comments made during robbery). Of course, no such factual conflict is present here, making this case a far more appropriate one for constitutional adjudication. *See, e.g.*, *Tennessee v. Garner*, 471 *U.S.* 1, 22 (1985) (finding that "uncertain state of the record" functioned to "preclude any consideration" of constitutionality of law enforcement policy on use of deadly force).

Furthermore, in *Miller*, the Court vacated Jackson's sentence and remanded with instructions for him to be resentenced after an evidentiary hearing. 132 *S.Ct.* at 2475. Thus, it would have been premature for the Court to find that Jackson could not be resentenced to life without parole. As Justice Breyer explained in his concurrence, "if the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, there will have to be a determination whether Jackson 'kill[ed] or intend[ed] to kill[.]'" *Id.* at 2475 (Breyer, J., concurring) (internal

citation omitted). Contrary to the trial court's decision below then, the Supreme Court's resolution of Jackson's case does not suggest a rejection of the rule Comer seeks.

In sum, the language and reasoning of *Graham* establish that a sentence of life without parole for a juvenile who neither killed nor intended to kill would violate both the United States and the New Jersey Constitutions. For this reason too, the lower court decision should be modified to preclude the imposition of a sentence of life without parole for Comer.

IV. Comer's Sentence Was Imposed in Violation of *Miller v. Alabama* and *Montgomery v. Louisiana*.

Even if this Court is not persuaded that State and federal law bar Comer's sentence of *de facto* life without parole, Comer's sentence must still be vacated, in order to satisfy the dictates of *Miller* and *Montgomery*. As the trial court found, Comer's sentence of *de facto* LWOP was imposed without consideration of the mitigating factors of youth, and without the sentencing court determining that Comer is, in fact, incorrigible.

In *Miller*, the Supreme Court announced that juveniles convicted of homicide offenses cannot be sentenced to LWOP, if at all, without consideration of "chronological age," "immaturity, impetuousity," "failure to appreciate risks and consequences," "family and home environment," "the circumstances

of the homicide offense, including the extent of his participation in the conduct and the way that familial and peer pressures may have affected him," as well as "the possibility of rehabilitation." 132 *S.Ct.* at 2468. The Court directed that these factors be given significant weight, adding, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469; *see Riley*, 110 *A.*3d at 1214 ("[*Miller*] suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender[.]").

And in *Montgomery*, the Court clarified that sentencing courts must consider these factors to determine whether the juvenile's offense reflects "transient immaturity" or "irreparable corruption." 136 *S.Ct.* at 734. Only in the latter case, the Court held, might LWOP ever be imposed on a juvenile under the Eighth Amendment, and thus *Montgomery* requires an express finding of incorrigibility prior to sentencing a juvenile to LWOP or *de facto* LWOP. *Id.*; *see also State v. Valencia,* __*P.*3d__, 2016 *WL* 1203414, at *3 (Ariz. Ct. App. Mar. 28, 2016)("[T]he court can impose a natural-life sentence only if it concludes that the juvenile defendant's crimes reflect permanent incorrigibility."); *People v. Nieto*, __*N.E.*3d__, 2016 *WL* 1165717, at *10 (Ill. App. Ct. Mar. 23, 2016) ("Life in prison without parole is disproportionate unless the juvenile

defendant's crime reflects irreparable corruption.”). *Montgomery* further reinforced that “appropriate occasions” for imposition of juvenile LWOP would be few, noting repeatedly that LWOP is disproportionate “for all but the rarest of children.” 136 *S.Ct.* at 726; *accord id.* at 734.

Comer’s sentence was preceded by neither the process envisioned in *Miller*, nor the finding of incorrigibility mandated in *Montgomery*. At Comer’s sentencing, no evidence of any kind was presented; certainly there was not the showing addressed to Comer’s youth that *Miller* and *Montgomery* mandate; even argument with regard to that issue was superficial and conclusory. Da23-24 (“certainly we can glean from his presentence report he . . . was a juvenile at the time of his arrest[;]” “I’m going to ask the Court to consider the years - how old he was at the time of the offense, that being seventeen years old and a juvenile[;]”). Instead, counsel focused primarily on whether concurrent sentencing was necessary to avoid unfair sentencing disparity relative to co-defendant Harrison. Da20 (“[W]hen I consider the amount of time that Mr. Comer is going to receive . . ., I try to think about the disparity of the acts between Dexter Harrison and James Comer.”). And, while counsel also argued under statutory mitigating factor 13, *N.J.S.A.* 2C:44-1b(13) that “the conduct of a youthful defendant was substantially influenced by another

person more mature than the defendant and the way that familial and peer pressures may have affected him . . . . [a]nd . . . the possibility of rehabilitation," this concerns a very narrow issue associated with youth: the potential influence of older accomplices, and falls markedly short of the depth and breadth of factors required under *Miller*.

Thus, the Court heard neither proof nor argument regarding Comer's physiological incapacity for reasoned judgment or impulse control; it learned nothing about whether Comer's home life was affected by negligence, violence, or dysfunction — factors the *Miller* Court upheld as "'particularly relevant'" *Id.* at 2467. It considered no facts regarding familial pressure, as *Miller* requires, *id.* at 2467, and only conclusory statements regarding peer pressure, Da22 ("Certainly we have the testimony that Mr. Harrison was barking out orders to the two juvenile defendants[,] . . . that Mr. Harrison was the person who, in fact, concocted this scheme and had these two minions working for him."), including nothing about the nature of the relationships between Comer and his co-defendants, about why Comer participated in the offense, or about the extent to which the limitations of youth made Comer susceptible to pressure from his peers. Nor did the sentencing court ever hear whether Comer was capable of assisting his counsel and making mature decisions in his defense. In sum, there was no *Miller* hearing. And

obviously, there was also no determination that Comer's offense reflected incorrigibility, as opposed to the transient immaturity of youth.

It was for this reason that the court below, which had also sentenced Comer, recognized Comer's sentencing as constitutionally inadequate after *Miller*:

> [T]here's no doubt in anybody's mind, including mine 'cause I - I was there and I remember, that - that I did consider on some level Mr. Comer's age at that time in which I sentenced him. But I understand fully your argument is that well that was very much on a different level because we didn't know what we know now or maybe somebody did, but I didn't know what we known now with regard to - to the juvenile mind.
>
> [Pa176].

By ordering re-sentencing in this case, the court below provided the best evidence that the mitigating factors of youth were not properly presented or given the appropriate weight. At the very least, then, a remand is required for this purpose. On this point, the decision of the trial court should be affirmed.

V. There Are No Procedural, Preclusionary, or Precedential Bars to the Relief Comer Seeks.

Finally, Comer's claims in this matter are properly before this Court, and are not procedurally barred, precluded, or adversely determined, as the State has argued. Comer brought this action to correct an "illegal" sentence under *R.* 3:21-10(b), because his sentence of *de facto* LWOP was "not imposed in accordance with law," *State v. Murray*, 162 *N.J.* 240, 246-247

(2000), namely, the Constitutions of the United States and the State of New Jersey. As a result, his challenge "may be entered at any time," and cannot be time-barred. *State v. Acevedo*, 205 *N.J.* 40, 47 n.4. (2011).

Further, Comer's claims are not previously determined because he has never raised them before, as the trial court recognized. On direct appeal, and in a different post-conviction proceeding, Comer challenged his sentence on different grounds, arguing that it was excessive, not "illegal," as he argues here. Even more obviously, the Supreme Court's decisions in *Graham*, *Miller*, and *Montgomery*, were decided after this Court upheld Comer's sentence on direct appeal and after Comer challenged his sentence, on other grounds, in a petition for post-conviction relief. Thus, even if Comer here raised claims that were identical to previous claims, he would not be barred from a decision on the merits because preclusionary doctrines do not apply in the event of a relevant, intervening decision from a higher Court. *See Bobby v. Bies,* 556 *U.S.* 825, 836 (2009) ("[E]ven if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in *Atkins*."); *Davis v. United States*, 417 *U.S.* 333, 342 (1974) ("intervening change in the law" an exception to law of

the case doctrine); *accord Sisler v. Gannett Co., Inc.*, 222 *N.J. Super.* 153, 160 (App. Div. 1987).

Finally, Comer presents issues of first impression to this Court. This Court has yet to determine the reach and application of the United States Supreme Court's jurisprudence from *Roper* to *Montgomery*, so there is no binding authority contrary to Comer's arguments. To the contrary, as Comer has argued throughout, binding and persuasive authority overwhelmingly support his arguments and demand that his sentence be vacated and his case remanded for resentencing.

CONCLUSION

For the foregoing reasons, defendant James Comer respectfully submits that this Court should affirm the judgment vacating his sentence, and remand for re-sentencing to a term less than *de facto* life without parole, after a hearing that comports with the constitutional mandates of *Miller* and *Montgomery*.

Respectfully submitted,

Lawrence S. Lustberg
Avram D. Frey
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

Dated: May 13, 2016

Defendant’s Supplemental Appendix (DSa)

James Comer here attaches the unpublished opinions cited in his Supplemental Brief in accordance with *R.* 1:36-3. Comer is unaware of contrary unpublished opinions within the respective jurisdictions represented in these opinions.

KeyCite Blue Flag – Appeal Notification
Appeal Filed by SHAUN HAYDEN v. PAUL BUTLER, JR., 4th Cir., October 22, 2015

2015 WL 5773634
Only the Westlaw citation is currently available.
United States District Court, E.D. North Carolina, Western Division.

Shaun Antonio HAYDEN, Plaintiff,
v.
Alvin KELLER, et al., Defendants.
No. 5:10–CT–3123–BO.
|
Signed Sept. 25, 2015.

Attorneys and Law Firms

Elizabeth Guild Simpson, Mary Sheehan Pollard, N.C. Prisoner Legal Services, Raleigh, NC, for Plaintiff.

Joseph Finarelli, N.C. Dept. of Justice, Raleigh, NC, for Defendants.

ORDER

TERRENCE W. BOYLE, District Judge.

***1** On July 15, 2010, plaintiff Shaun Antonio Hayden ("Hayden"), proceeding pro se, filed this complaint in this case pursuant to 42 U.S.C. § 1983. Compl., D.E. 1. After denying defendants' motion to dismiss the matter, the court directed that Hayden be represented by North Carolina Prison Legal Services, Inc. ("NCPLS"). *Hayden v. Keller,* No. 10-HC-2272-BO, Orders, D.E. 9 and 25; Notices, D.E. 10-15, 22. NCPLS entered an appearance and, on September 11, 2013, filed an amended complaint on Hayden's behalf pursuant to Section 1983. *Id.; Hayden,* 5:10-CT-3123-BO, Am. Compl., D.E. 10 and Notice of Appearance, D.E. 13. Cross motions for summary judgment are now before the court. Pl.'s Mot. Summ. J., D.E. 30; Defs' Mot. Summ. J., D.E. 36. On July 27, 2015, the court held a hearing on the pending motions. Min., D.E. 49. Thereafter, the motions were supplemented with statistical data and additional briefing. Orders, D.E. 50 and 53; Responses, D.E. 52, 56-57; In this posture, the matter is ripe for determination.

A. Issue

Hayden contends that, as a juvenile offender sentenced to a life sentence with parole, he is owed something that adult offenders are not: a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida,* 560 U.S. 48, 75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Hayden further contends that the North Carolina Post-Release Supervision and Parole Commission ("Parole Commission" or "Commission") and their procedures do not afford him that opportunity. Hayden seeks declaratory and injunctive relief, but no monetary damages.

B. Facts

Hayden is a prisoner in the custody of the North Carolina Department of Public Safety ("NCDPS"). Hayden was born on October 6, 1966. Mem. in Supp. Pl's Mot. Summ. J., D.E. 31, Decl. Hayden ¶ 1; Def's Mot. Summ. J., D.E. 36, Ex. A—Offender Info. He was fifteen years old when he committed the crimes for which he is now imprisoned. *Id.,* ¶¶ 2-3; *Id.,* Ex. B and C—Indictments, Probable Cause Hearing. Although Hayden was to be tried as an adult at the age of sixteen, he did not go to trial, but pled guilty to first degree burglary; assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death; first degree sexual offense; second degree sexual offense; first degree rape; attempted second degree rape; and breaking and entering and larceny. *Id.* ¶ 4; *Id.,* Ex. D.—Judgment and Commitment. The maximum allowable prison term was two life terms plus 160 years. Def's Mot, Ex. C. Hayden was sentenced to a term of his natural life. Pl's Mot. Summ. J., D.E. 31, ¶ 6. He has been in the custody of the NCDPS since March of 1983, and he is now 48 years old.

Hayden became eligible to be considered for parole in 2002, after serving a term of twenty years. N.C. Gen.Stat. § 15A-1371(a1) (1983). The Parole Commission has considered him for parole every year[1] since 2002 under

the normal adult offender parole procedures. Pl's Mot. Summ. J., ¶ 7; D.E. 32, Ex. B, Parole Comm'n Records. Each year parole has been denied at the first level of review. *Id.*, ¶ 8.

***2** In North Carolina, the Parole Commission is the independent agency responsible for evaluating offenders for parole release. *See* N.C. Gen.Stat. § 143B-720(a). The Parole Commission consists of four commissioners, assisted by a chief administrator and staff. Mem. in Supp. Pl's Mot. Summ. J., D.E. 32, Dep. Mary Stevens (Agent of Parole Commission), at 20. The Commission employs a staff of thirty-six people including a psychologist, two lead parole case analysts, and sixteen parole case analysts. Dep. Stevens at 8-9. For each case, the assigned analyst researches the record and the inmate file, including using such specific criteria that the Commission has said they want to know about the case, and then prepares a written report and recommendation. *Id.* at 21, 25, 33-34, and 45. Caseloads are high: each parole case analyst is responsible for approximately 4,338 offenders. Dep. Stevens at 28. According to Paul Butler, the Chairman of the Parole Commission, the most important information in the summary includes the following: the official crime version (narrative of events of crime of conviction); prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. Dep. Butler at 51-52. Special weight is given to the "brutality of the crime." *Id.* at 54-55.

As for the commissioners, they work full-time for the Commission. Dep. Stevens at 104. The law requires a majority of commissioners (three out of four) to vote on every case. *Id.* at 86; N.C. Gen.Stat. § 143B-721(d). They vote on in excess of 2,000 cases every month, not including other work the commissioners do. *Id.* at 106. As of September 2014, the Parole Commission had reviewed about 15, 200 parole cases for that year. *Id.*

The parole process is a two step process. Step one, or level one, is referred to as the "review." Dep. Stevens at 20-12. Step two, or level two, is referred to as the "investigation." *Id.* At the "review" stage, the parole case analyst relies on any psychological evaluations contained within the offender's prison file. Dep. Stevens at 63. After writing the summary of the prison file, and making a written recommendation for or against granting parole, the parole case analyst provides the information to a commissioner. *Id.* at 43.

The commissioners make independent electronic votes. Ex. E. Dep. Butler at 50; Ex. D. Dep. Stevens at 104, 107. They do not consult one another in casting their ballots, nor do they cast their ballots in the same room. Ex. E, Dep. Butler at 50-51. On a "fairly typical day," a commissioner casts approximately 91 votes. *Id.* at 25. The commissioners have many other responsibilities including presiding over Post-Release Supervision Revocation hearings, attending training, overseeing office administration, reviewing statistical reports, making field visits to jails and probation offices, approving warrants for arrest, and meeting with members of the public on Tuesdays. *Id.* at 14, 18-19, 23-24, 31, 33; Dep. Stevens at 71. The commissioners vote on felony parole cases five days a week. Dep. Butler at 62.

***3** The Parole Commission does not provide notice to a juvenile offender in advance of his/her parole review; there is no opportunity for a juvenile offender to be heard during the course of his/her parole review; and, the commissioners do not hold an in-person hearing to deliberate together on the question of a juvenile offender's suitability for parole.[2] Dep. Stevens at 43-53. The commissioners are not aware, and do not consider, whether a particular offender was a juvenile at the time of his/her offense. Dep. Stevens at 111.

Testimony states that a commissioner's usual vote is "no" on felony parole at the "review" stage. Dep. Stevens at

98. If the vote is not "no," the commissioner will most likely vote "incomplete," and recommend an "investigation." *Id.* At the "investigation" stage, the parole case analyst notifies the offender, the offender's prison facility, the victim, the prosecuting district attorney, and law enforcement. *Id.* at 45, 48–49. It is normal practice for the commission to order a psychological report to be conducted on the offender at this second level of review. Dep. Butler at 35. All such reports must be completed by the Parole Commission's staff psychologist, Dr. Denis Lewandowski. Dep. Stevens at 18. The probation department is requested to investigate the feasibility of the offender's proposed home plan. *Id.* at 54. If the "investigation" shows that the candidate for parole is promising, the Parole Commission will normally offer a "MAPP contract"—which is a contract between the offender, the prison, and the Parole Commission. Dep. Butler at 36. The contract lets an offender work through different custody levels and "get on work release for one to five years before they are released." Dep. Stevens at 77–79. The MAPP contract is ordinarily a mandatory step toward felony parole. *Id.* at 20–21; Dep. Butler at 60. Hayden has been denied parole at the review stage each year since 2002, thus never reaching the level two investigation.

Reasons for parole denial are considered confidential. Records created, received, and used by the Parole Commission in the performance of its statutory duties are likewise confidential and are not subject to disclosure under the Public Records Law.[3] 1996 Op. Atty Gen'l 36 (April 24, 1996).

The court notes that while the affidavits of the two commissioners before the court state no consideration of age is given in a parole review, there is evidence in the record that at least one case analyst did negatively consider age as a parole factor. The analyst review reads as follows:

> Hayden was 15 years old when he committed these crimes. In 3/07 DOP completed a risk assessment which found Hayden to be an acceptable risk for unsupervised access to the community. **It is important to note that in the risk assessment it was further noted that the young age that Hayden did the crimes and the fact that he has spent much of his developmental life in prison suggests he will always require at least moderate level of supervision since it is unlikely that he has significant coping skills and decision making ability to function well without good guidance.** In 11/10 DOP completed another risk assessment which found him to be an unacceptable risk for unsupervised access to the community. Based on the belief that Hayden would not adhere to the conditions of parole and the risk he poses to public safety, it is recommend that parole/Mapp be denied.

***4** D.E. 32-4 at 7-8.

One additional source of information about some offenders is the commissioners' meetings with the public. Members of the public have the right to visit the Parole Commission on Tuesdays. Dep. Stevens at 71. Availability is on a first-come, first-serve basis, and if a member of the public misses an offender's annual parole review, he or she must try again the following year. *Id.* at 71–72.

Throughout this process, every felony offender—adult or juvenile—is reviewed in the same way. Dep. Stevens at 39.

The Parole Commission gives no consideration to an offender's age at the time of the offense. Dep. Butler at 54.

An expert report to identify the overall differences between paroled and non-paroled prisoners in the North Carolina system also provides relevant information.[4] Ex. F, Expert Report of Bryan Gilbert Davis. The report found that the statistical data shows that older offenders, offenders who have reached 58 to 59 years of age, are more likely to be paroled than younger offenders. *Id.* at 8. However, the length of an offender's incarceration seems to have no impact on whether or not the offender will be paroled. *Id.* at 17-18. Merely being in prison longer is not enough to increase parole likelihood. *Id.* The report found that a vast majority of the paroled offenders to have a low infraction history in prison. *Id.* The report found that "compared against the base case of violent crime, sex offenders are significantly less likely to be paroled." *Id.* "On the other hand, perpetrators of property crimes (which include burglary and arson in this model) are only slightly more likely to be paroled than violent offenders." *Id.* The report also found that those that attempt escape are significantly less likely to be granted parole. *Id.*

Additional statistical data from 2010-2015 shows the following for inmates with no release date or serving a life sentence:

1. In 2015, a total of 531 inmates are eligible for annual parole review. Because 24 of these individuals were assigned to treatment or MAPP programs, only 507 inmates will actually receive an annual parole hearing. So far this year, six of these inmates have received parole (1.2% of those considered). In 2015, 34 juvenile offenders are eligible for parole, and one has received parole.

2. In 2014, a total of 529 inmates were eligible for annual parole review. Because 43 of these individuals were assigned to treatment or MAPP programs, only 486 actually received an annual parole hearing. Nine of these actually received parole (1.9% of those considered). In 2014, 35 juvenile offenders were considered for parole, but none received parole.

3. In 2013, a total of 508 inmates were eligible for annual parole review. Because 63 of these individuals were assigned to treatment or MAPP programs, only 445 actually received an annual parole hearing. Six of these actually received parole (1.4% of those considered). In 2013, 32 juvenile offenders were considered for parole, but none received parole.

***5** 4. In 2012, a total of 490 inmates were eligible for annual parole review. Because 53 of these individuals were assigned to treatment or MAPP programs, only 437 actually received an annual parole hearing. Ten of these actually received parole (2.3% of those considered). In 2012, 29 juvenile offenders were considered for parole, but none received parole.

5. In 2011, a total of 446 inmates were eligible for annual parole review. Because 35 of these individuals were assigned to treatment or MAPP programs, only 411 actually received an annual parole hearing. Eleven of these actually received parole (2.7% of those considered). In 2011, 28 juvenile offenders were considered for parole, but none received parole.

6. In 2010, a total of 421 inmates were eligible for annual parole review. Because 50 of these were assigned to treatment or MAPP programs, only 371 actually received an annual parole hearing. Twenty-two of these actually received parole (5.9% of those considered). In 2010, 32 juvenile offenders were considered for parole, and six received parole.

D.E. 52, Response of Def. Butler to Court Order.

C. Discussion

Summary judgment is appropriate when, after reviewing the record taken as a whole, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the nonmoving party "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (emphasis and quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. *Anderson,* 477 U.S. at 249–50, 106 S.Ct. 2505. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. *Scott v. Harris,* 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

[1] "To state a claim under [section] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *see Philips v. Pitt Cnty. Mem'l Hosp.,* 572 F.3d 176, 180 (4th Cir.2009). Hayden contends he has been denied his constitutional rights to be free from cruel and unusual punishment and to due process pursuant to the Eighth and Fourteenth Amendments of the Federal Constitution. Specifically, he claims these rights have been infringed because defendants have denied him (in the status of a juvenile offender) from receiving a meaningful opportunity to obtain release through parole based on the Supreme Court's holdings in *Graham* and *Miller v. Alabama,* --- U.S. ----, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

***6 [2] [3] [4]** To begin, it is well established that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); cf. *Hawkins v. Freeman,* 195 F.3d 732, 747 (4th Cir.1999) (indicating that there is no fundamental right to parole release). Likewise, in the Fourth Circuit, a State is not constitutionally obligated to provide a parole regime. *Vann v. Angelone,* 73 F.3d 519, 521 (4th Cir.1996). Therefore, offenders' limited right to consideration for parole finds its roots in State law. *See Burnette v. Fahey,* 687 F.3d 171, 181 (4th Cir.2012).

In North Carolina, the Parole Commission has the exclusive discretionary authority to grant or deny parole. *See* N.C. Gen.Stat. § 143B–720 (2014) (authority of Parole Commission), and N.C. Gen.Stat. § 15A–1371(d) (indicating that the Parole Commission "may refuse to release on parole a prisoner it is considering for parole if it believes" the prisoner falls under any of the criteria detailed in the statute); *see also Goble v. Bounds,* 13 N.C.App. 579, 583, 186 S.E.2d 638, 640 ("We conclude that honor grade status, work release privilege, and parole are discretionary acts of grace or clemency extended by the State as a reward for good behavior, conferring no vested rights upon the convicted person."), aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972) (emphasis added). The Fourth Circuit has determined that due process requires only that authorities "furnish to the prisoner a statement of [their] reasons for denial of parole." *Vann,* 73 F.3d at 522 (quoting *Franklin v. Shields,* 569

F.2d 784, 801 (4th Cir.1977)). There is no differentiation between adult and juvenile offenders in North Carolina's parole scheme.

The Supreme Court in *Graham* viewed the question, not as one of due process, but in terms of the constitutional protections found within the Eighth Amendment. They held

> [t]he Eighth Amendment states: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. To determine 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. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Graham, 560 U.S. at 58, 130 S.Ct. 2011. Importantly, *Graham* then found that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82, 130 S.Ct. 2011; *see also Miller,* 132 S.Ct. at 2465 (recognizing "this Court held in *Graham* [ ] that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders"). The Court continued that when a state sentences a juvenile and "imposes a sentence of life it must provide [that child] with some realistic opportunity to obtain release before the end of that term." *Graham,* 560 U.S. at 82, 130 S.Ct. 2011. Therein, the opportunity must be "meaningful" and "based on demonstrated maturity and rehabilitation." *Id.* at 75, 130 S.Ct. 2011.

***7** Thus, the question presented here is whether the parole process in North Carolina provided to a juvenile offender serving a life sentence with parole comports with *Graham.* In this court's review, it is important to start with the Supreme Court's holding that in fact "children are different." *Miller,* 132 S.Ct. at 2470. Juveniles have "lessened culpability" and a "greater capacity for change." *Miller,* 132 S.Ct. at 2460. The Supreme Court has banned life without parole as a punishment for juvenile nonhomicide offenders. *Graham,* 560 U.S. at 48, 130 S.Ct. 2011. Absent some meaningful parole process for nonhomicide juvenile offenders, Hayden argues his life sentence is de facto one of exactly that, life without parole—because he will never be granted the opportunity to obtain release by demonstrating his increased maturity. While "[a] state is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime ... [w]hat a State must do ... is give defendants ... some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 75, 130 S.Ct. 2011.

[5] Clearly *Graham* created a categorical bar or flat ban on imposition of a sentence of life without the possibility of parole on juvenile nonhomicide offenders. *Graham,* 560 U.S. at 48, 130 S.Ct. 2011; *see Johnson v. Ponton,* 780 F.3d 219, 222 (4th Cir.2015) (*Graham* "categorically barred life-without-parole-sentences for juvenile nonhomicide offenders"); *In re Vassell,* 751 F.3d 267, 269–70 (4th Cir.2014) (defendant's petition for habeas relief was untimely because his right to relief first became available after *Graham,* which "prohibited imposing any sentence of life without parole—mandatory or individualized—for juveniles convicted of committing nonhomicide offenses"); *In re Sloan,* 570 Fed.Appx. 338, 339 (4th Cir.2014) (*Graham* held "the Eighth Amendment prohibits a sentence

of life without parole for any juvenile offender [ ] who did not commit homicide"). The Supreme Court in *Miller* further extended the reasoning in *Graham* to *mandatory* sentences of life without parole for juveniles convicted of homicide offenses. *Miller,* 132 S.Ct. at 2467. Under *Miller,* a State may ultimately impose a life without parole sentence against a juvenile convicted of homicide, but only after the sentencer has the opportunity to consider all the mitigating circumstances, including the offender's age and age-related characteristics. *Id.* at 2475. In doing so, the Supreme Court emphasized that, "given all we have said in *Roper* [*v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)], *Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *See id.* at 2469.

[6] In applying these principles set out by the Supreme Court, other courts have held that *Miller* and *Graham* apply to lengthy term-of-years sentences or aggregate sentences. *See Moore v. Biter,* 725 F.3d 1184, 1192 (9th Cir.2013) (a sentence of 254 years is materially indistinguishable from a life sentence without the possibility of parole); *Casiano v. Comm'r of Correction,* 317 Conn. 52, 79, 115 A.3d 1031, 1047 (Conn.2015) ("a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.' "); *Brown v. State,* 10 N.E.3d 1, 7-8 (Ind.2014) (reducing a juvenile's sentence to eighty years after concluding that, while the trial court acted within its discretion when it imposed a sentence of 150 years for murder, such a sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the [juvenile] convict ..."); *Bear Cloud v. State,* 334 P.3d 132, 144 (Wyoming 2014) (an aggregate sentence of just over forty-five years was the de facto equivalent of a life sentence without parole); *State v. Null,* 836 N.W.2d 41, 72 (Iowa 2013) ("*Miller's* principles are fully applicable to a lengthy term-of-years sentence"); *People v. Caballero,* 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291, 296 (Cal.2012) ("sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment"); *but see Bunch v. Smith,* 685 F.3d 546, 552-53 (6th Cir.2012) (even though an aggregate sentence of eighty-nine years may be the functional equivalent of life, *Graham* applied only to sentences of "life," not aggregate sentences that result in a lengthy term of years); *State v. Brown,* 118 So.3d 332, 342 (La.2013) ("nothing in *Graham* addresses a defendant convicted of multiple offenses and given term of year sentences"). Courts have also rejected state "geriatric release provisions" by which a nonhomicide juvenile offender sentenced to life without parole may apply for geriatric release as "inconsistent with the Eighth Amendment." *LeBlanc v. Mathena,* 2015 WL 4042175, at *11-18 (E.D.Va.2015) (quoting and citing *Graham,* 560 U.S. at 76, 130 S.Ct. 2011). Furthermore, courts have determined that *Miller*-type protections, i.e., individualized sentencing evaluations, are constitutionally required in cases where a juvenile is sentenced to either a de facto life sentence, or to a term of years that would effectively deprive him of a meaningful opportunity for release on parole during his lifetime. *Greiman v. Hodges,* 79 F.Supp.3d 933, 938-945 (S.D.Iowa 2015) (defendants denied plaintiff a meaningful opportunity to obtain release by failing to consider plaintiff's youth at the time of the offense and by failing to consider plaintiff's demonstrated growth, maturity, and rehabilitation as part of the parole review process); *State v. Null,* 836 N.W.2d 41, 72-76 (Iowa

2013) (holding that *Miller's* protections are fully applicable to "a lengthy term-of-years sentence" and require judges sentencing juveniles to recognize: (1) that children are constitutionally different than adults and cannot be held to the same standard of culpability in sentencing; (2) that children are more capable of change than adults; and (3) that lengthy prison sentences without the possibility of parole for juveniles are appropriate, "if at all, only in rare or uncommon cases"). Lastly, *Graham* explicitly holds that "[w]hat the State must do is give some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 75, 130 S.Ct. 2011. "It is axiomatic that a juvenile offender could only prove increased maturity and rehabilitation warranting release from custody at some time well after a sentence is imposed." *Greiman,* 79 F.Supp.3d at 943; *see Graham,* 560 U.S. at 79, 130 S.Ct. 2011 (the Eighth Amendment does not permit a State to deny a juvenile offender the chance "to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law").

***8** **[7]** The same principles apply here. If a juvenile offender's life sentence, while ostensibly labeled as one "with parole," is the functional equivalent of a life sentence without parole, then the State has denied that offender the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" that the Eighth Amendment demands. *See Greiman,* 79 F.Supp.3d at 944 ("a de facto life without parole sentence ... is prohibited by *Graham* and its progeny"). In the case before this court, it is evident that North Carolina has implemented a parole system which wholly fails to provide Hayden with any "meaningful opportunity" to make his case for parole. The commissioners and their case analysts do not distinguish parole reviews for juvenile offenders from adult offenders, and thus fail to consider "children's diminished culpability and heightened capacity for change" in their parole reviews.[5] *Miller,* 132 S.Ct. at 2469; *see Greiman,* 79 F.Supp.3d at 943.

For each case reviewed, the assigned analyst researches the record and the inmate file and then prepares a written report and recommendation. The most important information found in the summaries has been noted as: the official crime version (narrative of events of crime of conviction; prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. There is no information about one's status as a juvenile offender. There is no specific information about maturity or rehabilitative efforts. There is no special process for one convicted as an adult before the age of 18, and the commissioner are unaware of that status. Absolutely no consideration is to be given for that status by the commissioners.

Furthermore, caseloads are enormous and each parole case analyst is responsible for approximately 4,338 offenders. The sheer volume of work may itself preclude any consideration of the salient and constitutionally required meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Special weight is given to the brutality of the crime. Special weight is not given, much less taken into consideration, of the age at which the crime was committed.

As for the public meeting, without providing notice to the offender, his/her family members, or others who may be able to provide relevant information about the offender's rehabilitation and maturity efforts, the opportunity appears to exist mainly for those on notice. Since 2012, those are the active victims. Such notice is undoubtedly important to victims. Likewise, the failure to provide the same notice to juvenile offenders denies them "a chance to demonstrate maturity and reform." *Graham,* 560 U.S. at 79, 130 S.Ct.

2011.

The data before the court also indicates that juvenile offenders are rarely paroled. Again, "[a] State is not required to guarantee eventual freedom to a juvenile convicted of a nonhomicide crime." *Graham,* 560 U.S. at 75, 130 S.Ct. 2011. Thus, the information from four of the past five years that no juvenile offenders obtained release while adult offenders did obtain parole is relevant only in that it raises questions about the meaningfulness of the process as applied to juvenile offenders. Furthermore, the research regarding North Carolina parolees is that inmates having committed brutal crimes, most specifically sexual crimes, are least likely to be paroled. Hayden was convicted of sexual crimes.

***9** Next without notice of one's status as a juvenile prior to review, the record upon which each commissioner relies is unable to convey or demonstrate maturity or rehabilitation. For example, Hayden has been found guilty of 41 disciplinary infractions throughout his 32 years of incarceration; however, of those infractions he was only convicted of seven infractions since 2000, and one in the last five years. http://webapps6.doc.state.nc.us/opi/viewoffenderinfractions.do?method=view&offenderID=0174678&listpage=1&listurl=pagelistoffendersearchresults&searchLastName=hayden&searchFirstName=shaun&obscure=Y (last viewed Sept. 22, 2015). This information has significantly different meaning depending on the context in which it is viewed. It gives meaningful insight into gaining, or failing to gain, maturity and rehabilitation if the commissioner views it knowing Hayden was sentenced as a juvenile offender. Viewed in the absence of that knowledge, it simply illustrates a high number of disciplinary infractions which are statistically damaging to one's chance for parole.

Finally, regardless of the fact that juvenile offenders will most likely be serving disproportionately longer sentences, the longer sentence does not present an opportunity for parole. What presents the best statistical opportunity for parole is to obtain the age of 58 to 59 having committed a non-sexual crime. Again, this is not the holding in *Graham,* 560 U.S. at 59, 130 S.Ct. 2011 (citing *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)) ("The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' "). The court finds that the North Carolina parole process violates the Eighth Amendment as outlined in *Graham.*

Defendants argue that Hayden faults the parole review process simply because he himself has been unable to obtain parole. It is true that *Greenholtz*—which notably did not address whether Nebraska's parole scheme comported with due process as applied to juvenile offenders—held that "a mere hope" of parole suffices. 442 U.S. at 11, 99 S.Ct. 2100; *see Hawkins,* 195 F.3d at 747. But even *Greenholtz* acknowledged that "due process is flexible and calls for such procedural protections *as the particular situation demands.*" 442 U.S. at 12, 99 S.Ct. 2100 (emphasis added). The Supreme Court has now clarified that juvenile offenders' parole reviews demand more procedural protections. *See Graham,* 560 U.S. at 79, 130 S.Ct. 2011; *Greiman,* 79 F.Supp.3d at 945. Clearly, in North Carolina's parole process there is no advance notice or opportunity for juvenile offenders to be heard on the question of maturity and rehabilitation—either in writing or in person.[6] The offender is an entirely passive participant in North Carolina's parole review process. What Hayden seeks is what he is constitutionally entitled to, "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* North Carolina's parole process fails to meet this constitutional mandate.

D. Conclusion

***10** The court denies defendants' motion for summary judgment [D.E. 36] and grants in part and denies without prejudice in part Hayden's motion for summary judgment [D.E. 30]. Specifically, the court finds that the current North Carolina parole review process for juvenile offenders serving a life sentence violates the Eighth Amendment. Having so held, the court is guided by the mandate of *Graham* which instructs that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." 560 U.S. at 75, 130 S.Ct. 2011. Thus, the court denies without prejudice Hayden's request for the injunctive relief and gives the parties 60 days to present a plan for the means and mechanism for compliance with the mandates of *Graham* to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation to juvenile offenders convicted as adults.

All Citations

--- F.Supp.3d ----, 2015 WL 5773634

Footnotes

1 At the oral argument, counsel for defendants acknowledged that the annual review is not a date certain but generally occurs within a relative time frame of one year after the offender's last review.

2 Since 2012, the only notice given at the review stage is to "any active victim." Prior to 2012, notice was not provided to any party. Dep. Stevens at 50.

3 Plaintiff filed a motion to seal certain documents due to this provision. Defendants do not seek for the information to be sealed and waive the requirement. The motion [D.E. 33] is DENIED.

4 The report sets out its findings in the context of this historical background:

> The parole system in North Carolina has undergone numerous changes since its original inception in 1868. In its earliest form, the governor was empowered with the ability to make decisions regarding reprieves, commutations, and pardons, and this was expanded to include a system of supervised release. The governor or his staff retained this authority until 1955, when North Carolina established the state's earliest Parole Commission, which had exclusive authority to grant, revoke, and terminate parole. For the next 26 years, the Parole Commission had a great deal of discretion in making parole decisions, which sought to emphasize rehabilitation and public safety. However, in the 1980s, concerns about sentence disparities and a growing prison population gave rise to a new set of rules and standards. In 1987, the General Assembly passed the Prison Population Stabilization Act, known as the prison cap, which mandated that the Commission keep the prison population below a legally-determined level. This dramatically changed the parole process in North Carolina for the duration of its tenure, which ended in 1996. During this time, many inmates found guilty of misdemeanors were released categorically, without much consideration to their degree of rehabilitation or to public safety, as a way to prevent prison overcrowding. In 1994, the system changed yet again with the passage of the Structured Sentencing Act, which eliminated the parole system as it had previously existed, and removed the Commission's discretionary role for most crimes committed after October 1, 1994, with the exception being those incarcerated for driving under the influence.
>
> This report aims to analyze the factors that influence the probability of being granted parole by the Commission for a certain class of offenders, namely those with life sentences convicted before 1995. By focusing on this select group of inmates, it is possible to limit the influence of the changing legal environment. First, by choosing only those prisoners who were convicted prior to 1995, we can be sure that the prison population we are analyzing was and is subject to the Parole Commission's discretion. Second, by focusing our analysis on those prisoners with life sentences, invariably guilty of serious felonies, we can be confident that such prisoners would not have been subject to any categorical release programs as a way to address prison overcrowding.

Id. at 2–3.

5 Although Hayden's parole case file explicitly states that he was fifteen when he committed his offense, it is difficult for this court to believe that a parole commissioner can fully take into "consideration [Hayden']s chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences [,]" *Miller,* 132 S.Ct. at 2468, when reading Hayden's case file along with 90 others in a single day. Indeed, if anything, defendants have demonstrated that North Carolina's juvenile offenders face *harsher* treatment during parole reviews because the young age at which the crime is committed may actually be used as a negative factor in parole consideration by the case analyst preparing the report for the voting commissioners. *See LeBlanc,* 2015 WL 4042175, at *14 ("If it can be said that Virginia's sentencing scheme treats children differently than adults, it would be because,

tragically, the scheme treats children *worse.*" (italics in original)); *see also Miller,* 132 S.Ct. at 2464–65 (identifying a number of reasons which "establish that children are constitutionally different from adults for purposes of sentencing").

6 Although the level two investigation does provide offenders with notice and an opportunity to be heard via a psychological report, the infinitesimal percentage of juvenile offenders who make it to this level of review does not constitute the meaningful opportunity described in *Graham,* 560 U.S. at 82, 130 S.Ct. 2011 (the parole review scheme "must provide [the juvenile offender] with some realistic opportunity to obtain release.")

End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.

2016 IL App (1st) 121604

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Appellate Court of Illinois,
First District, Third Division.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,
v.
Michael NIETO, Defendant–Appellant.
No. 1–12–1604.
|
March 23, 2016.

Appeal from the Circuit Court of Cook County. No. 06 CR 4475, Rosemary Grant Higgins, Judge, Presiding.

OPINION

Justice LAVIN delivered the judgment of the court, with opinion:

***1** ¶ 1 Defendant Michael Nieto appeals from the trial court's order summarily dismissing his *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant argues for the first time that his sentence is unconstitutional as applied under the eighth amendment to the United States Constitution (U.S. Const., amend.VIII), and Illinois' proportionate penalties clause (Ill. Const.1970, art. I, § 11). After considering the complex state of case law following *Miller v. Alabama,* 567 U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), including the United States Supreme Court's most recent pronouncement in *Montgomery v. Louisiana,* 577 U.S. ––––, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), we vacate defendant's sentence and remand for resentencing. We affirm the judgment in all other respects.

¶ 2 I. BACKGROUND

¶ 3 A. Trial

¶ 4 The evidence presented at defendant's jury trial generally showed that on July 14, 2005, defendant, age 17, was riding in a black Ford Expedition with three other Latin Kings. While in a residential neighborhood, the young men encountered a red Jeep Cherokee whose occupants, victim Richard Soria and victim Israel Fernandez, allegedly used a sign disrespecting the Latin Kings. The Ford chased the Jeep. Ultimately, defendant, the front-seat passenger, shot at the Jeep, fatally shooting Soria in the head and injuring Fernandez. Defendant subsequently told his brother-in-law that defendant had just "lit up some flakes" and that one victim received a "dome shot." The jury found defendant guilty of the first degree murder of Soria and the aggravated battery with a firearm of Fernandez. Additionally, the jury found that defendant personally discharged a firearm which proximately caused Soria's death.

¶ 5 B. Sentencing

¶ 6 The presentence investigative report (PSI) stated, among other things, that defendant's highest level of education was the eighth grade. He was expelled from his freshman year of high school for fighting. In 2006, defendant failed the GED exam but planned to retake it and earn a business degree. Although defendant was unemployed, he had previously done some remodeling work and sold drugs to support himself.

¶ 7 According to the PSI, defendant stated that his father was in poor health, having been shot and stabbed at various times, and had been incarcerated for defendant's entire life. Defendant also stated that he was primarily raised by his maternal grandmother because his mother was a drug addict. For two years, defendant and his mother lived with her boyfriend. Her boyfriend, however, decided he did not want defendant to live with them. As a result, defendant lived with his paternal grandfather in Texas, where he remained until 2002. At that time, defendant's mother

summoned him back to Chicago due to his grandmother's poor health. Defendant received counseling after his grandmother's death and believed that he could benefit from further counseling but had not requested it because it was "too much trouble." Defendant subsequently lived with friends or on his own. Defendant also reported that his only friend happened to be a gang member with a criminal record. We note that defendant's brother-in-law testified that at the time of the offense, defendant occasionally lived with his family.

***2** ¶ 8 Defendant, who smoked marijuana daily, had committed armed robbery, attempted robbery and possession of cannabis as a minor. Tragically, he had pending charges of involuntary manslaughter and reckless discharge of a firearm for accidentally killing his younger brother, Elias Nieto, on December 24, 2005, after the present offense.

¶ 9 At sentencing, Detective Robert Girardi testified he learned that defendant possessed a gun which jammed and then discharged, accidentally shooting Elias. Defendant held Elias' hand on the way to the hospital and unsuccessfully tried to resuscitate him. Detective Girardi was informed that defendant had asked his mother to come to the police station, but she refused to see him. Following the detective's testimony, the State presented the victim impact statements of Soria's father, sister and brother-in-law. The State argued that defendant deserved the maximum sentence available, while defense counsel argued that even the aggregate minimum sentence of 51 years would ensure that defendant would not be released until he was almost 70 years old.

¶ 10 The trial court stated that it considered all of the evidence, arguments and defendant's offenses. In aggravation, the court found that defendant shouted gang slogans and used a firearm belonging to his gang to fire multiple times at unarmed victims, who were Satan Disciples. Additionally, no serious provocation was involved. Afterward, defendant told fellow gang members that he "lit up some flakes." The court also found that defendant and his companions used police scanners to get information and avoid prosecution. The court further found that not only was defendant's criminal conduct likely to recur, but it did recur, given the shooting of Elias. The court also observed that defendant blamed Elias for defendant's own decision to tell the police that Satan's Disciples shot Elias, which potentially caused the police to pursue rival gang members. Nonetheless, the court recognized defendant's "considerable remorse for his brother's death and regret at what he considered to be an accidental shooting."

¶ 11 With respect to gang activity, the court considered deterrence:

> "I do find that his ongoing criminal activity is an indication to this court that his gang, the Latin Kings, and the Satan Disciples as well, should know that this sentence is necessary to deter others from committing similar crimes. The use of gangs and gang violence for revenge, either on the Satan Disciples' part or on the Latin Kings' as a consequence of this action or Mr. Nieto's action."

The court also rejected defense counsel's suggestion that defendant lacked the opportunity to receive therapy. Instead, the court found the PSI showed he had the opportunity but decided it was too much trouble to take advantage of. The court further stated, "[h]is character and attitude as displayed over the course of his life does not indicate to me significant rehabilitative potential."

***3** ¶ 12 With that said, the court also stated as follows:

> "I have taken into consideration your young age. I have taken into consideration the fact that everybody, no matter what crimes they commit, can do something to change their lives. You will have to do that something, Mr. Nieto, in the Illinois Department of Corrections. But you can do something. Perhaps you can work with the gangs there and somehow rectify the wrongs you did when you committed the murder of Richard Soria, [the aggravated battery with a firearm of] Israel Fernandez, and inadvertently the death of your own brother.

You can change it by pointing out to those people who perhaps will be able to someday walk the streets and advise them and work with the programs in the Illinois Department of Corrections to change their lives. You can be a pivotal person in that change if you are willing to do that. I do believe that there is something good in you. I don't believe that on the streets you are capable of doing that good. I believe that the influence of the gangs and the strength and control they had over you in addition to your character did not permit you the opportunities that you will have in the Illinois Department of Corrections to help change somebody else's life and maybe save a life or two.

> I believe that when you are shaking your head you are doing it in a positive way, and that you can do something positive for your mother, for your brother, and rectify his death and somehow make good on that."

The court sentenced defendant to 35 years in prison for first degree murder, 25 years for the personal discharge of a firearm, and 18 years for aggravated battery with a firearm, all to be served consecutively for a total of 78 years.

¶ 13 Defendant moved for the court to reconsider given that he was only 17 years old on the date of the offense and would be required to serve 75.3 years of his sentence after receiving sentencing credit. Defendant argued that his sentence did not adequately reflect his potential for rehabilitation and restoration to useful citizenship. Furthermore, defendant argued that recent studies showed long prison sentences do not affect deterrence and that the court's statement regarding sending a message to gang members was against the prevailing academic view.

¶ 14 The court denied defendant's motion. Consequently, defendant will not complete his sentence until he is approximately 94 years old.[1]

¶ 15 C. Direct Appeal

¶ 16 We affirmed the judgment on direct appeal, rejecting among other things, defendant's assertion that his sentence was excessive. *People v. Nieto*, No. 1-09-0670 (2011) (unpublished order under to Supreme Court Rule 23(c)). Specifically, defendant argued that his 78-year sentence was the equivalent of a life sentence and negated the possibility of restoring him to useful citizenship. We stated, "[t]here is no dispute that this young man represents a rather tragic figure and that the arc of his life has been unredeemably sad." Nonetheless, we adhered to the legal presumption that the trial court considered all mitigating evidence, absent any contrary indication. We did not, however, question whether the trial court was able to discern what factors were aggravating and mitigating.

¶ 17 D. Petition Under the Act

***4** ¶ 18 On February 21, 2012,

defendant filed a *pro se* petition under the Act, raising several claims not at issue here. The trial court summarily dismissed defendant's petition on April 5, 2012, and defendant filed a timely notice of appeal. Subsequently, however, the United States Supreme Court held in *Miller,* 567 U.S. at ----, ----, ----, 132 S.Ct. at 2464, 2469, 2475, that the eighth amendment prohibits sentencing schemes that mandate the imposition of life sentences without parole on even juveniles who commit homicide. This decision followed two other landmark cases involving sentencing requirements for juvenile offenders. *Roper v. Simmons,* 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that the eighth amendment prohibits a trial court from imposing the death penalty where an offender is under 18 years of age when the offense was committed); *Graham v. Florida,* 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (prohibiting the imposition of a life sentence without parole on juveniles who did not commit homicide). On appeal, defendant asserts only that his sentence violates *Miller.*

¶ 19 II. ANALYSIS

¶ 20 A. The Act

[1] [2] [3] ¶ 21 The Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Tate,* 2012 IL 112214, ¶ 8, 366 Ill.Dec. 741, 980 N.E.2d 1100. The Act's forfeiture rule, however, provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." (Internal quotation marks omitted.) *People v. Williams,* 2015 IL App (1st) 131359, ¶ 14, 397 Ill.Dec. 196, 41 N.E.3d 607 (quoting 725 ILCS 5/122-3 (West 2012)). This rule is more than a suggestion and appellate courts generally may not overlook forfeiture caused by a defendant's failure to include an issue in his petition. *Id.*

¶ 22 Defendant concedes that he did not raise this as-applied constitutional issue in his petition, which was filed prior to *Miller,* but argues that we may review this issue because an unconstitutional sentence can be challenged for the first time on appeal. The State disagrees. Resolving this dispute requires us to consider the Illinois and United States Supreme Court case law that has followed *Miller.*

¶ 23 B. The Progeny of *Miller*

¶ 24 1. *Davis*

¶ 25 In *People v. Davis,* 2014 IL 115595, ¶ 9, 379 Ill.Dec. 381, 6 N.E.3d 709, the defendant asserted in a motion for leave to file a successive petition under the Act that his mandatory life sentence was unconstitutional, but the trial court denied leave. While his appeal was pending, the decision in *Miller* was issued. *Id.* ¶ 10. The appellate court determined that *Miller* applied and granted the defendant relief. *Id.*

¶ 26 Before the supreme court, the defendant argued he could challenge, in a collateral proceeding, the statutory scheme requiring him to be sentenced to natural life in prison for a crime committed as a juvenile because *Miller* rendered his sentence void. *Id.* ¶¶ 4, 24. Our supreme court found that while a statute is void *ab initio* where facially unconstitutional, the sentencing statute requiring the defendant to be sentenced to natural life in prison was not facially unconstitutional because it could be validly applied to adults. *Id.* ¶¶ 5, 25, 27, 30.

***5** ¶ 27 Nonetheless, the court concluded that the mandatory term of natural life without parole was unconstitutional as applied to this juvenile defendant. *Id.* ¶ 43. The court determined that *Miller* applied retroactively to the defendant's collateral proceeding because *Miller* created a new substantive rule. *Id.* ¶¶ 34, 38. Specifically, *Miller* placed a particular class of persons covered by

the statute beyond the State's power to impose a particular category of punishment. *Id.* ¶ 39. We note that unlike the present case, the petition filed in *Davis* did challenge the defendant's sentence, albeit before *Miller* was issued.

¶ 28 2. *Thompson*

¶ 29 In *People v. Thompson,* 2015 IL 118151, ¶¶ 6-7, 398 Ill.Dec. 74, 43 N.E.3d 984, the defendant was convicted of two counts of first degree murder, committed when he was 19 years old, and was sentenced to natural life in prison. In contrast to the defendant in *Davis,* defendant Thompson's petition, filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), did not challenge the constitutionality of his sentence (*Thompson,* 2015 IL 118151, ¶¶ 14-17, 398 Ill.Dec. 74, 43 N.E.3d 984). The petition was dismissed on the State's motion and the defendant appealed, arguing for the first time that his sentence was unconstitutional as applied under *Miller. Id* . ¶ 18.

¶ 30 Before the supreme court, the defendant recognized that *Miller* expressly applied to minors under 18 years of age but argued that *Miller* 's policy concerns applied with equal force to a 19-year-old. *Id.* ¶ 21. Additionally, the defendant argued that because his as-applied constitutional challenge constituted a challenge to a void judgment, he could raise it at any time. *Id.* ¶ 30.

[4] [5] ¶ 31 Our supreme court observed that judgments are void where jurisdiction is lacking or where a judgment is based on a facially unconstitutional statute, which is void *ab initio. Id.* ¶¶ 31-32. The defendant's as-applied challenge, however, fit within neither category. *Id.* ¶ 34. Additionally, the supreme court rejected the defendant's assertion that it was illogical to permit a defendant to raise facial constitutional challenges to a sentence at any time but not as-applied challenges. *Id.* ¶¶ 35-36. While a facial challenge requires demonstrating that a statute is unconstitutional under any set of facts, an as-applied challenge requires a showing that the statute is unconstitutional under the particular circumstances of the challenging party. *Id.* ¶ 36. Because as-applied challenges are dependent on the particular facts, "it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *Id.* ¶ 37. Based on this reasoning, the parties on appeal now dispute whether *Thompson* prohibits all as-applied constitutional challenges raised for the first time on appeal, or, whether a defendant may still raise an as-applied challenge for the first time on appeal where all facts necessary to review the defendant's claim appear in the record.

***6** ¶ 32 In any event, the supreme court found in *Thompson* the record contained neither information about how science on juvenile maturity and brain development applied to the defendant's case, nor any factual development of whether *Miller* 's rational should be extended to minors over 18 years old. *Id.* ¶ 38. Accordingly, the court found the "defendant forfeited his as-applied challenge to his sentence under *Miller* by raising it for the first time on appeal." *Id.* ¶ 39.

¶ 33 Finally, the supreme court rejected the defendant's reliance on two appellate court cases: *People v. Luciano,* 2013 IL App (2d) 110792, 370 Ill.Dec. 587, 988 N.E.2d 943, and *People v. Morfin,* 2012 IL App (1st) 103568, 367 Ill.Dec. 282, 981 N.E.2d 1010. Presumably, the defendant in *Thompson* relied on those cases because in each instance, the defendant obtained relief where raising *Miller* for the first time on appeal. See *People v. Thompson,* 2014 IL App (1st) 121729-U, ¶¶ 16, 18, 21.

¶ 34 In *Luciano,* the defendant, who committed murder at age 17, argued for the first time on appeal from the denial of his petition filed under the Act that his life sentence was

unconstitutional as-applied under *Miller. Luciano,* 2013 IL App (2d) 110792, ¶¶ 41, 46, 370 Ill.Dec. 587, 988 N.E.2d 943. The reviewing court found, contrary to *Thompson,* that even an as-applied sentencing challenge could be raised at any time. *Id.* ¶¶ 41, 46–48. The court ultimately granted the defendant relief. *Id.* ¶ 89. Additionally, the reviewing court in *Morfin* determined that *Miller* applied retroactively, although apparently, the State did not argue forfeiture in that case. *Morfin,* 2012 IL App (1st) 103568, ¶¶ 11, 20, 56, 367 Ill.Dec. 282, 981 N.E.2d 1010.

[6] ¶ 35 Despite that defendant Thompson relied on *Luciano* to support his contention that he could raise his as-applied challenge for the first time on appeal, as defendant Luciano did, our supreme court did not expressly find that *Luciano* was wrong in that regard. Instead, *Thompson* distinguished *Luciano,* and *Morfin,* on their merits: specifically, the defendants in those cases were minors whereas the defendant in *Thompson* was not. *Thompson,* 2015 IL 118151, ¶ 39, 398 Ill.Dec. 74, 43 N.E.3d 984. We further observe that while *Thompson* found the appellate court's holdings were consistent with *Davis* 's determination that *Miller* applies retroactively (*id.*¶ 42), forfeiture appears to present a distinct legal issue. See, *e.g.*, *People v. Reed,* 2014 IL App (1st) 122610, ¶ 94, 388 Ill.Dec. 727, 25 N.E.3d 10 (addressing forfeiture and retroactivity as separate issues).[2] When considered as a whole, *Thompson* implies that courts must overlook forfeiture and review juveniles' as-applied eighth amendment challenges under *Miller,* notwithstanding the general rule prohibiting as-applied challenges raised for the first time on appeal.

¶ 36 3. *Montgomery*

[7] ¶ 37 More recently, the United States Supreme Court in *Montgomery* indicated that state courts must give *Miller* effect in collateral proceedings. The Court, like our supreme court in *Davis,* held that *Miller* announced a substantive rule, which courts must apply retroactively. *Montgomery,* 577 U.S.at ––––, 136 S.Ct. at 727. Specifically, substantive rules set forth categorical constitutional guarantees that place certain laws and punishments beyond the State's power to impose. *Id.* at ––––, 136 S.Ct. at 729. The Court found that while *Miller* did not bar punishment for all juvenile offenders, it did bar life without parole for all but the rarest juvenile offender and consequently, was substantive. Compare *Id.* at ––––, 136 S.Ct. at 734, with *Miller,* 567 U.S. at ––––, 132 S.Ct. at 2471 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham.* Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."). Additionally, the Court found that *Miller* 's procedural component did not change the result, as substantive legal changes may, on occasion, be attended by a procedure permitting a prisoner to demonstrate that he falls within the category of persons no longer subject to punishment. *Montgomery,* 577 U.S. at ––––, 136 S.Ct. at ––––.

***7 [8] [9]** ¶ 38 Moreover, when a new substantive rule of constitutional law controls a case's outcome, state collateral review courts must give the rule retroactive effect. *Id.* at ––––, 136 S.Ct. at 729. A court lacks authority to leave in place a conviction or sentence which violates a substantive rule, regardless of whether the judgment became final before the rule was announced. *Id.* at ––––, 136 S.Ct. at 729. The Court further stated, "[i]f a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings." *Id.* at ––––, 136 S.Ct. at 731.

[10] ¶ 39 Following *Davis* and *Montgomery, Miller* clearly applies retroactively to collateral

proceedings. *Thompson* and *Montgomery* further suggest, however, that Illinois' procedural rules regarding forfeiture cannot be applied to juvenile defendants raising claims under *Miller.* But see *Kinkel v. Persson,* Nos. 13C13698, A155449, 6 n. 6 (Or.Ct.App. Feb. 10, 2016) (finding that where the defendant raised an eighth amendment challenge on direct appeal, Oregon law prohibited him from seeking collateral relief under the subsequently rendered decision in *Miller* and concluding that *Montgomery* did not preclude operation of this state procedural bar). While *Montgomery* did not expressly discuss forfeiture, the Court found that state courts have no authority to leave intact a sentence that violates *Miller.* The Court placed no conditions on this constraint of a state court's power. Furthermore, this is consistent with *Thompson* 's implicit finding that juveniles can raise as-applied *Miller* challenges for the first time on appeal. Accordingly, we now determine whether defendant's sentence is unconstitutional under *Miller.*

¶ 40 C. Applying *Miller*

¶ 41 1. *De Facto* Life Sentences

[11] [12] [13] ¶ 42 The parties dispute whether multiple sentences can cumulatively constitute a life sentence under *Miller.* Compare *People v. House,* 2015 IL App (1st) 110580, ¶ 93 (observing that *de facto* life sentences do not permit courts to account for the differences between juveniles and adults), and *Gipson,* 2015 IL App (1st) 122451, ¶ 61, 393 Ill.Dec. 359, 34 N.E.3d 560 (finding that a juvenile defendant's sentences may cumulatively constitute natural life under the eighth amendment), with *People v. Pace,* 2015 IL App (1st) 110415, ¶ 131, 398 Ill.Dec. 349, 44 N.E.3d 378 (declining to follow *Gipson* 's determination regarding *de facto* life sentences). We adhere to our prior determination in *Gipson* that the concerns of *Miller* "are not satisfied by pretending that a cumulative sentence labeled as a term of years will in all cases be distinct from a sentence of natural life without the possibility of parole." *Gipson,* 2015 IL App (1st) 122451, ¶ 61, 393 Ill.Dec. 359, 34 N.E.3d 560. While we acknowledge that Illinois typically treats consecutive sentences as individual sentences and does not aggregate them for purposes of evaluating whether a sentence is excessive (*People v. Carney,* 196 Ill.2d 518, 529, 256 Ill.Dec. 895, 752 N.E.2d 1137 (2001)), we believe a different analytical framework is called for in the context of consecutive sentences imposed for crimes committed by a juvenile. Given that defendant will not be released from prison until he is 94 years old, we find that he effectively received a sentence of natural life without parole. Notwithstanding our determination, defendant's sentence was not mandatory.

***8** ¶ 43 Defendant's first degree murder conviction carried a sentencing range of 20 to 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2006). That conviction was also subject to a mandatory, consecutive firearm enhancement of 25 years. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006). In addition, defendant's Class X aggravated battery conviction required a sentence of between 6 and 30 years in prison. 720 ILCS 5/12-4.2(a)(1), (b) (West 2006). Furthermore, defendant was required to serve consecutive sentences. See 730 ILCS 5/5-8-4(a) (West 2006) (stating that "[t]he court shall impose consecutive sentences if * * * one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury"). While the trial court cumulatively sentenced defendant to 78 years in prison, the court could have sentenced defendant to only 51 years in prison.[3] Accordingly, defendant was not sentenced to life in prison without the possibility of parole due to a lack of discretion on the trial court's part. See *Miller,* 567 U.S. at ----, ----, ----, 132 S.Ct. at 2464, 2469, 2475.

¶ 44 2. Mandatory vs. Discretionary

¶ 45 Prior to *Montgomery,* courts in

this state understood *Miller* as prohibiting no more than mandatory life-sentences without parole for juveniles. *Davis,* 2014 IL 115595, ¶ 43, 379 Ill.Dec. 381, 6 N.E.3d 709; see also *People v. Edwards,* 2015 IL App (3d) 130190, ¶ 78, 392 Ill.Dec. 116, 32 N.E.3d 116 (Where the defendant's 90-year aggregate sentence was not the 76-year minimum available, the court found *Miller* granted the defendant no relief.). Indeed, the Court in *Miller* stated, "[w]e therefore hold that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." (Emphasis added and internal quotation marks omitted.) *Miller,* 567 U.S. at ----, 132 S.Ct. at 2460. The language in *Montgomery,* however, strongly suggests that *Miller* does more. See also *Montgomery,* 577 U.S. at ----, 136 S.Ct. at 743 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.) ("It is plain as day that the majority is not applying *Miller,* but rewriting it."); *House,* 2015 IL App (1st) 110580, ¶ 92 (noting that legal scholars recognize the United States Supreme Court is moving toward the complete abolition of life without parole sentences for juveniles).

[14] ¶ 46 The Court stated in *Montgomery* that "*Miller* did bar life without parole * * * for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery,* 577 U.S. at ----, 136 S.Ct. at 734. We note that the Court did not say *Miller* banned only the *mandatory* imposition of life without parole for all but the rarest of juveniles. But see *Davis,* 2014 IL 115595, ¶ 39, 379 Ill.Dec. 381, 6 N.E.3d 709 (finding that *Miller* constituted "a substantive change in the law that prohibits *mandatory* life-without-parole sentencing" (emphasis added and internal quotation marks omitted). "Even 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." (Internal quotation marks omitted.) *Montgomery,* 577 U.S. at ----, 136 S.Ct. at 734 (quoting *Miller,* 567 U.S. at ----, 132 S.Ct. at 2469, quoting *Roper,* 543 U.S. at 573); see also *Montgomery,* 577 U.S. at ----, 136 S.Ct. at 734 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.) (observing that "even when the procedures that Miller demands are provided the constitutional requirement is not necessarily satisfied"). Consequently, *Montgomery* indicates that not even an exercise of discretion will preclude a Miller challenge.

***9** [15] [16] ¶ 47 *Montgomery* further states that the procedural requirement of *Miller,* requiring a sentencer to consider a juvenile's youth and attendant characteristics before imposing life without parole, merely "enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Montgomery,* 577 U.S. at ----, 136 S.Ct. at 735 (majority opinion). "[W]hen the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class." *Id.* at ----, 136 S.Ct. at 735. After *Montgomery, Miller* requires that a juvenile be given an opportunity to demonstrate that he belongs to the large population of juveniles not subject to natural life in prison without parole, even where his life sentence resulted from the trial court's exercise of discretion.

¶ 48 We further note that shortly before *Montgomery* was issued, the United States Court of Appeals for the Seventh Circuit found, "[t]here is more to *Miller* " than its holding "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (Internal quotation marks omitted.) *McKinley v. Butler,* 809 F.3d 908, 910 (7th Cir.2016). There, the court found the sentencing judge did not fully consider the defendant's youth and the concept that "children are different" before sentencing him to a

discretionary, *de facto* life sentence of 100 years in prison. (Internal quotation marks omitted.) *Id.* at 911. Additionally, the court found the concept that sentencing courts must consider that children are different "cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors." *Id.*

[17] ¶ 49 Following *Montgomery,* we agree that there is more to *Miller.* Trial courts must consider a juvenile's special characteristics even when exercising discretion. See *People v. Holman,* 2016 IL App (5th) 100587-B, ¶ 41 ("*Miller,* however, requires not only that the sentencing court have the opportunity to consider these mitigating circumstances; it also requires that the court actually do so."). Where the record affirmatively shows that the trial court failed to comprehend and apply such factors in imposing a discretionary sentence of natural life without the possibility of parole, a juvenile defendant is entitled to relief. To be clear, we are not suggesting that the eighth amendment requires a trial court to expressly make findings regarding each factor discussed in *Miller.* See *Id.* ¶¶ 37-38. Nonetheless, a defendant is entitled to relief where the record affirmatively indicates that the trial court has deviated from the principles discussed therein.

¶ 50 In reaching this determination, we recognize that the Illinois Supreme Court and other courts of this state have interpreted *Miller* differently prior to *Montgomery.* Additionally, the Illinois Supreme Court has not yet had the opportunity to address the impact of *Montgomery.* Nonetheless, we are compelled to follow the United States Supreme Court's most recent pronouncement on this matter.

¶ 51 3. Defendant's Sentencing Hearing

***10** [18] ¶ 52 Although the trial court exercised discretion in imposing defendant's sentence, the court's reasoning did not comport with the juvenile sentencing factors recited in *Roper, Graham, Miller* and *Montgomery.*

[19] [20] ¶ 53 Life in prison without parole is disproportionate unless the juvenile defendant's crime reflects irreparable corruption. *Montgomery,* 577 U.S. at ----, 136 S.Ct. at 726. Sentencing courts must consider a child's diminished culpability as well as his heightened capacity for change. *Id.* at ----, 136 S.Ct. at 726. Children are immature, irresponsible, reckless, impulsive and vulnerable to negative influence. *Miller,* 567 U.S. at ----, 132 S.Ct. at 2464. Additionally, they lack control over their environment and the ability to extricate themselves from crime-producing circumstances. *Id.* at ----, 132 S.Ct. at 2464. Because a juvenile's character is not well formed, his actions are less likely to demonstrate irretrievable depravity. *Id.* at ----, 132 S.Ct. at 2464. It follows that youth diminishes penological justifications: (1) reduced blameworthiness undermines retribution; (2) impetuosity undermines deterrence; and (3) ordinary adolescent development undermines the need for incapacitation. *Id.* at ----, 132 S.Ct. at 2465. Additionally, life without parole entirely negates the possibility of rehabilitation. *Id.* at ----, 132 S.Ct. at 2465.

[21] ¶ 54 Consequently, "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " *Montgomery,* 577 U.S. at ----, 136 S.Ct. at 733 (quoting *Miller,* 567 U.S. at ----, 132 S.Ct. at 2469).

¶ 55 While we do not fault the trial court for failing to apply principles of law and science that had not yet been adopted by the Court, the trial court's findings do not imply that it believed defendant was the *rarest* of juveniles whose crime showed that he was permanently incorrigible. The court clearly found that for the foreseeable future, defendant was

likely to engage in further criminal conduct in light of the Latin Kings' influence over him and the tragic shooting of his brother. Given juveniles' susceptibility to peer pressure and recklessness, this is hardly surprising. Yet, susceptibility to peer pressure and recklessness erode with age. Indeed, the trial court found that in the future, defendant could change his life and even help other gang members change their ways. Although the court found defendant would have to do that in prison, contributing to the prison population differs from the opportunity to contribute to society. Additionally, the court found defendant's sentence was necessary to deter not only him, but other gang members. We now know, however, that defendant's sentence is not likely to deter anyone. See *Id.* at ----, 136 S.Ct. at 726 (observing that deterrence is diminished in juvenile sentencing because juveniles' recklessness, immaturity and impetuosity make them less likely to consider possible punishment).

***11** ¶ 56 As we recognized on direct appeal, the trial court expressly considered defendant's "young age." See also *Holman,* 2016 IL App (5th) 100587-B, ¶ 43 (observing that we presume the court considers mitigating evidence before it). With that said, the record shows that the court did not consider the corresponding characteristics of defendant's youth. In support of defendant's sentence, the State notes the aggravating factors found by the trial court, defendant's prior convictions, the unsatisfactory termination of probation, the death of his brother, his gang violence, his pride in announcing that he "lit up some flakes" and "hit a dome shot," his use of police scanners and his decision to shoot unarmed victims. Yet, examining these factors through the lenses of *Miller* may have led to a shorter sentence. Accordingly, defendant is entitled to relief.

[22] ¶ 57 Relief following a first-stage dismissal under the Act ordinarily involves remand for second-stage proceedings. See, *e.g* ., *People v. Brown,* 236 Ill.2d 175, 337 Ill.Dec. 897, 923 N.E.2d 748 (2010). The particular issue raised in this appeal, however, requires us to vacate defendant's sentence and remand for resentencing. See also *Davis,* 2014 IL 115595, ¶¶ 1, 43, 379 Ill.Dec. 381, 6 N.E.3d 709 (remanding for a new sentencing hearing on appeal from the denial of leave to file a successive petition). In light of our determination, we need not consider defendant's challenge under Illinois' proportionate penalties clause. Furthermore, as stated, defendant has abandoned all issues originally raised in his petition. Accordingly, we affirm the trial court's dismissal of those claims.

¶ 58 III. CONCLUSION

¶ 59 Following *Montgomery,* we vacate defendant's sentence and remand for resentencing. The judgment is affirmed in all other respects.

¶ 60 Affirmed in part and vacated in part; cause remanded with directions.

Presiding Justice MASON and Justice PUCINSKI concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2016 IL App (1st) 121604, 2016 WL 1165717

Footnotes

1 According to the Illinois Department of Corrections website, defendant's projected discharge date is May 13, 2084. See *People v. Gipson,* 2015 IL App (1st) 122451, ¶ 66, 393 Ill.Dec. 359, 34 N.E.3d 560 (observing that this website is subject to judicial notice).

2 Retroactivity may, as a practical matter, preclude a finding of forfeiture or waiver. See, *e.g., In re Rolandis G.,* 232 Ill.2d 13, 28–29, 327 Ill.Dec. 479, 902 N.E.2d 600 (2008) (no forfeiture on direct appeal when new rule announced after the

appeal was filed); see also *People v. Stechly,* 225 Ill.2d 246, 268, 312 Ill.Dec. 268, 870 N.E.2d 333 (2007) (same); *People v. Craighead,* 396 Ill.Dec. 211, 39 N.E.3d 1037, 2015 IL App (5th) 140468, ¶ 17 (finding the defendant showed cause and prejudice with regard to the *Miller* claim raised in a successive petition under the Act because *Miller* applies retroactively).

3 Defendant does not contend that even the minimum cumulative sentence would have constituted a *de facto* life sentence. We also note that while defendant does not challenge the mandatory consecutive nature of his prison terms, this undoubtedly made his sentence more arduous.

End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Certiorari Granted by People v. Rainer, Colo., December 22, 2014

2013 WL 1490107

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.

Colorado Court of Appeals,
Div. VI.

The PEOPLE of the State of Colorado, Plaintiff–Appellee,
v.
Atorrus Leon RAINER, Defendant–Appellant.
No. 10CA2414
|
Announced April 11, 2013
|
Rehearing Denied May 9, 2013

City and County of Denver District Court No. 00CR630, Honorable Robert L. McGahey, Jr., Judge

Attorneys and Law Firms

John W. Suthers, Attorney General, Rebecca A. Jones, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Ashley Ratliff Attorney at Law, LLC, Ashley Ratliff, Denver, Colorado, for Defendant-Appellant

Opinion

Opinion by JUDGE LOEB

***1** ¶ 1 Defendant, Atorrus Leon Rainer, appeals the trial court's order denying his Crim. P. 35(c) motion, which argued that his 112-year sentence is unconstitutional, pursuant to *Graham v. Florida*, --- U.S. ----, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). As a matter of first impression, we conclude that, under the circumstances here, Rainer's aggregate sentence is functionally a life sentence without parole and, thus, constitutes cruel and unusual punishment under the Eighth Amendment. Accordingly, we reverse the order, vacate the sentence, and remand for resentencing.

I. Procedural History and Background

¶ 2 In 2000, when he was seventeen years old, Rainer burglarized an apartment, stealing a stereo. During the incident, he shot two victims multiple times with a handgun, seriously injuring them and leaving them in critical condition. Rainer was arrested and was charged and tried as an adult in the district court, pursuant to Ch. 283, sec. 1, § 19-2-517(1)(a)(II)(A), 1996 Colo. Sess. Laws 1640.

¶ 3 Following a jury trial in 2001, as pertinent here, the jury found Rainer guilty of two counts of attempted first degree murder, two counts of first degree assault, one count of first degree burglary, one count of aggravated robbery, and sentence enhancement counts for crimes of violence.

¶ 4 At the sentencing hearing, the parties agreed that Rainer was subject to mandatory statutory sentencing requirements under the then applicable statutory framework for crimes of violence, with a sentencing range of 72 to 224 years. Rainer's counsel argued for the minimum sentence under the statutory sentencing range (72 years) based on Rainer's age, low IQ, learning disability, and family situation. The prosecution asked the court to impose the maximum allowed aggregate sentence of 224 years. After hearing argument and statements from the victims and their family members, the trial court sentenced Rainer to the Department of Corrections for the maximum sentences statutorily allowed: 48 years for attempted first degree murder of each victim, 32 years for first degree assault of each victim, 32 years for first degree burglary, and 32 years for aggravated robbery. The court ordered the sentences to run consecutively for a total prison term of 224 years, reasoning that this was the appropriate sentence given that Rainer had used a deadly weapon to inflict serious lifetime injuries on the victims.

¶ 5 Rainer filed a direct appeal, and in 2004, a division of this court affirmed the convictions but vacated the consecutive sentences for the

first degree assault and attempted murder convictions, remanding with directions to impose concurrent rather than consecutive terms on those counts. *People v. Rainer,* (Colo.App. No. 01 CA 1401, Feb. 5, 2004) 2004 WL 1120876 (not published pursuant to C.A.R. 35(f)). The mandate issued on June 13, 2004. On remand, the trial court resentenced Rainer for these counts to run concurrently rather than consecutively, and, consequently, reduced Rainer's original sentence of 224 years to 112 years. Also on remand, Rainer filed a motion for reconsideration of sentence and modification of mandatory sentence for a violent crime, which the trial court denied.

***2** ¶ 6 In January 2005, Rainer filed a motion for postconviction relief pursuant to Crim. P. 35(a) and (c), arguing that his sentence was illegal under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The trial court denied the motion without a hearing. Rainer appealed, and a division of this court dismissed the appeal as untimely filed.

¶ 7 Rainer then filed a Crim. P. 35(c) motion for postconviction review of the trial court's denial of his motion to suppress statements. The trial court summarily denied the motion, and, on appeal, a division of this court affirmed. *People v. Rainer,* (Colo.App. No. 06CA1765, Feb. 28, 2008) 2008 WL 525686 (not published pursuant to C.A.R. 35(f)).

¶ 8 In 2008, Rainer filed a third motion for Crim. P. 35(c) postconviction relief, based on alleged ineffective assistance of counsel and various trial court errors. The trial court denied the motion on the basis that it did not have jurisdiction, because the mandate had not yet issued from Rainer's previous appeal. Rainer refiled this motion four months later after mandate had issued, and the trial court summarily denied it.

¶ 9 In March 2009, Rainer filed yet another motion for postconviction relief based on ineffective assistance of counsel, which the trial court denied. On appeal, a division of this court affirmed, holding that Rainer's ineffective assistance of counsel claims were successive. *People v. Rainer,* (Colo.App. No. 09CA0071, Feb. 11, 2010) 2010 WL 457332(not published pursuant to C.A.R. 35(f)).

¶ 10 In August 2010, after the Supreme Court's decision in *Graham,* Rainer filed another motion for postconviction relief pursuant to Crim. P. 35(c). He argued that, in light of *Graham's* newly established constitutional prohibition on sentences to life without parole for juvenile offenders who did not commit homicide, his 112-year sentence was unconstitutional. Specifically, Rainer asserted that his aggregate term-of-years sentence was the functional equivalent of a life sentence without the possibility of parole, and thereby constituted cruel and unusual punishment in violation of the Eighth Amendment, pursuant to *Graham.* The prosecution did not file a response to Rainer's motion.

¶ 11 In October 2010, the trial court denied the motion, ruling that Rainer was not entitled to relief under *Graham* for two reasons:

> First of all, Defendant's sentence is not of the same nature as the sentence prohibited in *Graham* [life without parole for a nonhomicide juvenile]. Additionally, even if the Defendant's sentence was of the same nature of that discussed in *Graham,* he would still not be entitled to relief because the rule created in *Graham* will not be applied retroactively.

¶ 12 This appeal followed.

II. Preliminary Issues

¶ 13 We first must address three interrelated preliminary issues before considering the merits of Rainer's constitutional claim: (1) whether *Graham* applies retroactively to Rainer's sentence; (2) whether Rainer's motion is time-barred under section 16-5-402, C.R.S.2012; and (3) whether his motion is successive under Crim. P. 35(c)(3)(VII). As discussed below, we conclude *Graham* applies retroactively to Rainer's sentence and that his Crim. P. 35(c) motion is neither time-barred nor successive.

A. Retroactivity

***3** ¶ 14 Rainer contends that the trial court erred in ruling that *Graham* does not apply retroactively to his sentence. We agree.

[1]¶ 15 The summary denial of a Crim. P. 35(c) motion for postconviction relief without a hearing presents a question of law we review de novo. *People v. Gardner,* 250 P.3d 1262, 1266 (Colo.App.2010).

¶ 16 Rainer argued in his Crim. P. 35(c) motion that the rule announced in *Graham* should be applied retroactively to his sentence.[1] The trial court expressly rejected Rainer's argument.

¶ 17 In its ruling, the trial court relied on *Edwards v. People,* 129 P.3d 977, 980–83 (Colo.2006), which adopted the analytical framework for retroactivity set out in *Teague v. Lane,* 489 U.S. 288, 307, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The trial court here stated:

> According to *Teague,* [a] new constitutional rule[ ] of criminal procedure generally should not be applied retroactively to cases on collateral review unless (1) it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or (2) it requires the observance of "those procedures that are implicit in the concept of ordered liberty." [489 U.S. at 307, 109 S.Ct. 1060.]
>
> The first exception is not relevant because the *Graham* holding does not decriminalize a particular type of conduct.
>
> To fall within the second exception, a new rule must fulfill two criteria: (1) "infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction"; and (2) "the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Edwards,* 129 P.3d at 987 (quoting *Tyler v. Cain,* 533 U.S. 656, 665, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001)).
>
> Here, Defendant's sentence in no way diminished the accuracy of his conviction or the fairness of the proceeding. Because the rule created in *Graham* does not fall into either one of the categories adopted in *Teague,* it should not be applied retroactively.

¶ 18 We disagree with the trial court's analysis. To the contrary, we conclude that *Edwards* does not control here because that case applies only to new constitutional rules of criminal procedure, and, in our view, *Graham* created a new substantive rule of constitutional law.

[2] [3]¶ 19 "New substantive rules generally apply retroactively," and include rules that apply when a defendant "faces a punishment that the law cannot impose on him." *Schriro v. Summerlin,* 542 U.S. 348, 351–52, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). A rule is substantive rather than procedural "if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 352, 124 S.Ct. 2519.

¶ 20 The rules announced by the Supreme Court in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (barring the death penalty for mentally retarded defendants), and *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (barring the death penalty for juveniles), have consistently been

applied retroactively as new substantive rules. *See**In re Sparks,*657 F.3d 258, 261–62 (5th Cir.2011) (per curiam) ("the Supreme Court's decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect, as has the Court's decision in *Roper*" (citation omitted)); *Little v. Dretke,* 407 F.Supp.2d 819, 824 (W.D.Tex.2005); *Baez Arroyo v. Dretke,* 362 F.Supp.2d 859, 883 (W.D.Tex.2005), *aff'd sub nom.* *Arroyo v. Quarterman,* 222 Fed.Appx. 425 (5th Cir.2007); *see also* Cara H. Drinan, *Graham on the Ground,* 87 Wash. L.Rev. 51, 64–67 n. 108 (2012) (listing cases that have retroactively applied *Roper* and *Atkins*).

***4** [4]¶ 21 Similarly, we conclude that the rule announced in *Graham* is a new substantive rule that should be applied retroactively to all cases involving juvenile offenders under the age of eighteen at the time of the offense, including those cases on collateral review. Like the rules in *Atkins* andRoper, Graham categorically recognizes "a punishment that the law cannot impose upon [a defendant]," *Schriro,* 542 U.S. at 352, 124 S.Ct. 2519, specifically, that it is categorically unconstitutional for nonhomicide juvenile offenders to face a sentence of life imprisonment without parole. *See**In re Moss,* 703 F.3d 1301, 1302 (11th Cir.2013) (*Graham* set out a new rule of constitutional law); *In re Sparks,* 657 F.3d at 262 (*Graham* states a new and retroactive rule of constitutional law similar to *Atkins* and *Roper*).

¶ 22 Even if *Teague* applied here, we would conclude that *Graham* applies retroactively because it also falls under the first exception set forth in *Teague,* which "should be understood to cover ... rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh,* 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds by**Atkins,* 536 U.S. at 321, 122 S.Ct. 2242; *see also**In re Moss,* 703 F.3d at 1303 (*Graham* applies retroactively because it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense" (quoting *Penry,* 492 U.S. at 330, 109 S.Ct. 2934)); *In re Sparks,* 657 F.3d at 262 ("*Atkins* and *Roper* both 'prohibit[ ] a certain category of punishment for a [certain] class of defendants because of their status or offense'; so too does *Graham,* which bars the imposition of a sentence of life imprisonment without parole on a juvenile offender." (citation omitted) (quoting *Penry,* 492 U.S. at 330, 109 S.Ct. 2934)); *Loggins v. Thomas,* 654 F.3d 1204, 1221 (11th Cir.2011) (same).

¶ 23 Accordingly, we conclude that *Graham* applies retroactively to Rainer's case on collateral review because it introduces a substantive new constitutional rule and because it falls under the first *Teague* exception.

B. Timeliness

[5]¶ 24 On appeal, the People contend for the first time that Rainer's motion is time-barred under section 16–5–402(1), C.R.S.2012 and that Rainer cannot establish justifiable excuse or excusable neglect for the untimely filing of his motion. Rainer acknowledges that his motion is untimely, but contends that, because his motion is based on the new substantive rule of law announced in *Graham,* he has established justifiable excuse and, thus, his motion should be considered on its merits. We agree with Rainer.

[6]¶ 25 Whether a motion is untimely, or can be considered on the merits based on justifiable excuse or excusable neglect, is a matter of law we review de novo. *Close v. People,* 180 P.3d 1015, 1019 (Colo.2008).

¶ 26 The parties agree that Rainer's motion is properly characterized as a Crim. P. 35(c) motion. Section 16–5–402(1) imposes a three-year time limitation after the final judgment for a collateral attack on a defendant's non-class 1 felony convictions. Here, Rainer's motion was filed approximately six years after

his conviction became final when the mandate issued from his direct appeal. *People v. Hampton,* 876 P.2d 1236, 1238 (Colo.1994).

[7] [8]¶ 27 However, section 16-5-402(2)(d), C.R.S.2012, provides an exception where "the failure to seek relief within the [three-year] period was the result of circumstances amounting to justifiable excuse or excusable neglect." "[T]he applicability of the justifiable excuse or excusable neglect exception must be evaluated by balancing the interests under the facts of a particular case so ... that a defendant [has] the meaningful opportunity required by due process to challenge his conviction." *People v. Wiedemer,* 852 P.2d 424, 441 (Colo.1993). If a defendant's motion for postconviction relief is untimely, the defendant bears the burden of establishing justifiable excuse or excusable neglect. *People v. Abad,* 962 P.2d 290, 291 (Colo.App.1997).

***5** [9]¶ 28 A reviewing court has the discretion to address the merits of an untimely motion for postconviction relief if the motion is premised on newly arising authority of constitutional magnitude. *People v. Gardner,* 55 P.3d 231, 232 (Colo.App.2002) (citing *People v. Kilgore,* 992 P.2d 661 (Colo.App.1999); *People v. Chambers,* 900 P.2d 1249 (Colo.App.1994)).

¶ 29 Accordingly, because *Graham* established a new rule of substantive constitutional law which was not previously available to Rainer before 2010, we conclude that he has established justifiable excuse under section 16-5-402(2)(d), and we choose to address his motion on its merits. *Gardner,* 55 P.3d at 232.

¶ 30 Contrary to the People's argument, Rainer had no legal basis for an Eighth Amendment challenge to his sentence prior to the announcement of *Graham*. There was no Colorado authority or decision of the United States Supreme Court prior to *Graham* that provided a juvenile convicted and tried as an adult with a constitutional right to challenge the imposition of a life sentence with or without the possibility of parole. Indeed, contrary to the dictates of *Graham,* existing case law in Colorado expressly precluded a court from using the age of a defendant as a factor in conducting a proportionality review of a defendant's sentence. *See* *Valenzuela v. People,* 856 P.2d 805, 809 (Colo.1993); *People v. Fernandez,* 883 P.2d 491, 495 (Colo.App.1994).

¶ 31 Thus, we hold that Rainer's motion is not time-barred under section 16-5-402(1).

C. Successiveness

[10]¶ 32 We also reject the People's argument, again made for the first time on appeal, that we should decline to address Rainer's motion on its merits because the motion is successive.

¶ 33 A postconviction motion is properly denied as successive if it alleges claims that were raised and resolved, or that could have been presented, in a prior appeal or postconviction proceeding. *See* Crim. P. 35(c)(3)(VI)-(VII); *People v. Rodriguez,* 914 P.2d 230, 249 (Colo.1996). However, Crim. P. 35(c)(3)(VII)(c) provides an exception for "[a]ny claim based on a new rule of constitutional law that was previously unavailable, if that rule should be applied retroactively to cases on collateral review." Determining whether a claim falls under this exception requires a three-part inquiry: (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 nonretroactivity. *People v. Wenzinger,* 155 P.3d 415, 420 (Colo.App.2006).

¶ 34 It is undisputed that Rainer's conviction became final when the mandate issued from his direct appeal in June 2004. Further, as we have discussed and concluded above, *Graham* established a new rule of substantive law which should be applied retroactively. Thus, we further conclude that Rainer's claim is not successive.

III. Merits

¶ 35 Rainer contends that the Eighth Amendment's prohibition of a sentence to life without parole for juvenile nonhomicide offenders, which was established in *Graham,* also applies to sentences that are the functional equivalent of a life sentence without parole imposed on juveniles who commit a nonhomicide offense. Thus, Rainer argues that his 112-year sentence is the functional equivalent of life without parole because it does not afford him any "meaningful opportunity to obtain release" within his lifetime, as required under *Graham,*--- U.S. at ----, ----, 130 S.Ct. at 2030, 2033.

***6** ¶ 36 In support of his contention, Rainer argues that, although he will be technically first eligible for parole in 2057, after serving one-half of his 112-year sentence pursuant to section 17-22.5-403, C.R.S.2012, this possibility does not afford him a meaningful opportunity for release. Specifically, the record shows that in 2057, Rainer will be 75 years of age. Based on statistics from the Centers for Disease Control, Rainer notes that he has a life expectancy of only between 63.8 years and 72 years, and, thus, he argues, he will likely die while still incarcerated. Furthermore, Rainer notes that even if he is still alive when he first becomes eligible for parole, he is unlikely to receive parole at that time, because, according to the Colorado State Board of Parole, almost ninety percent of those eligible for discretionary parole are denied parole when they first become eligible. Accordingly, he asserts that his aggregate sentence is the functional equivalent of life in prison without any realistic opportunity for release, and is, thus, categorically prohibited as cruel and unusual punishment under *Graham.*

¶ 37 Rejecting Rainer's argument, the trial court concluded that *Graham* does not apply to Rainer's sentence:

> The final holding in *Graham* states that "[a] [s]tate need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." [--- U.S. at ----, 130 S.Ct. at 2034.] Defendant's sentence is in compliance with that holding.... Here, Defendant has an opportunity to be released on parole in 2057, fifty-six years before his sentence is set to expire. Defendant points out that even if he were released on parole at the first possible opportunity, he would still be seventy-five years old by the time he was released. This, however, does not diminish the fact that the Defendant does have an opportunity to be released well before the end of his term.

¶ 38 We disagree with the trial court's analysis. Rather, we conclude that Rainer's aggregate sentence does not offer him, as a juvenile nonhomicide offender, a "meaningful opportunity to obtain release" before the end of his expected life span and, thus, constitutes the functional equivalent of a life sentence without parole and is unconstitutional under *Graham* and its reasoning.

A. Standard of Review

[11] [12] [13]¶ 39 "A trial court has broad discretion over sentencing decisions, and will not be overturned absent a clear abuse of that discretion. However, reviewing courts must pay particular attention to lower courts' applications of legal standards to the facts when defendants' constitutional rights are at stake." *Lopez v. People,* 113 P.3d 713, 720 (Colo.2005) (citation omitted); *see alsoPeople v. Al-Yousif,* 49 P.3d 1165, 1169 (Colo.2002). Therefore, review of constitutional challenges to sentencing determinations is de novo. *Lopez,* 113 P.3d at 720.

B. Relevant Supreme Court Eighth Amendment Jurisprudence Prior to *Graham*

[14] [15]¶ 40 The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. *Graham,*-

-- U.S. at ----, 130 S.Ct. at 2021.[2] "To determine 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.' " *Id.* (quoting *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)).

[16]¶ 41 "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Id.* (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)).

¶ 42 The Supreme Court's cases addressing the proportionality of sentences fall within two general classifications: the first is concerned with the particular circumstances of the case and whether the defendant's sentence for a term of years is grossly disproportionate given the particular offense. *Id.* at ---- - ----, 130 S.Ct. at 2021–22; *see also**Harmelin v. Michigan,* 501 U.S. 957, 1005, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Close v. People,* 48 P.3d 528, 536–38 (Colo.2002) (noting that Colorado has adopted Justice Kennedy's "rule of *Harmelin* " regarding mechanisms for proportionality reviews). The second classification of cases is concerned with categorical rules as applied to either groups of offenses or groups of offenders. *Graham,*--- U.S. at ----, 130 S.Ct. at 2022. For example, Supreme Court categorical rulings related to categories of offenses prohibit the imposition of the death penalty for nonhomicide crimes against individuals. *Id.* (citing *Kennedy v. Louisiana,* 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008)). Categorical rulings related to categories of offenders prior to *Graham* prohibited the death penalty for defendants who committed their crimes before the age of eighteen, *Roper,* 543 U.S. at 575, 125 S.Ct. 1183, or whose intellectual functioning is in a low range, *Atkins,* 536 U.S. at 321, 122 S.Ct. 2242.

***7** ¶ 43 In the cases adopting categorical proportionality rules, the Court first considers "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. *Roper,* 543 U.S. at 563, 125 S.Ct. 1183. In this phase of the analysis, the Court has regularly relied on social sciences data and statistics to discern "society's evolving standards of decency." *Id.* at 560–77, 125 S.Ct. 1183 (survey of rulings relying on sociological studies, behavioral sciences, and review of national and international practices). Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court determines whether the punishment in question violates the Constitution. *Graham,* --- U.S. at ----, 130 S.Ct. at 2022 (quoting *Kennedy,* 554 U.S. at 421, 128 S.Ct. 2641).

¶ 44 Under this analytical framework, the Court's Eighth Amendment jurisprudence has evolved steadily toward more protection for incompetent and juvenile offenders; from its 1989 holding in *Penry* that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally disabled, to the opposite conclusion in *Atkins* in 2002; and from its position in *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), that it was not a violation of the Eighth Amendment to execute a juvenile offender who was older than fifteen when he or she committed a capital crime, to the ruling in *Roper* that it is unconstitutional to impose the death penalty on offenders who were under the age of eighteen at the time of their offense.

¶ 45 As pertinent here, in *Roper,* the Court redefined its categorical prohibition against the death penalty for juveniles based in large part on social science research indicating that youth have lessened culpability and are less deserving of the most severe punishments. 543 U.S. at 569–

75, 125 S.Ct. 1183. The Court stated that juvenile offenders are fundamentally different from adults for purposes of sentencing for three reasons: they have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.* at 569-70, 125 S.Ct. 1183 (quoting in part *Johnson v. Texas,* 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)). Because of these characteristics, the Court noted, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573, 125 S.Ct. 1183.

C. *Graham*

¶ 46 *Graham* is the first Eighth Amendment case where the Court considered "a categorical challenge to a term-of-years sentence" (as opposed to the death penalty). --- U.S. at ----, 130 S.Ct. at 2022. In *Graham,* the Court used the same categorical proportionality analysis employed in *Atkins, Roper,* and *Kennedy,* extending it beyond the death penalty to sentences of life without parole for juveniles who have committed nonhomicide offenses.

¶ 47 In *Graham,* sixteen-year-old Terrance Graham was charged with armed burglary and attempted armed robbery of a restaurant in Florida. *Id.* at ----, 130 S.Ct. at 2018. Graham pleaded guilty to both charges and was convicted pursuant to a plea agreement. *Id.* Under the agreement, the trial court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent three-year terms of probation with jail time. *Id.*

¶ 48 Less than six months later, when Graham was seventeen years old, Graham was arrested again after allegedly committing a home invasion and avoiding arrest. *Id.* at ----, 130 S.Ct. at 2018-19. His probation officer filed an affidavit asserting that he had violated probation by committing crimes, possessing a firearm, and associating with persons engaged in criminal activity. *Id.* at ----, 130 S.Ct. at 2019. About a year later, he appeared before the trial court, where he maintained that he had no involvement in the home invasion robbery. *Id.* However, Graham admitted violating his probation by fleeing arrest, even though the court underscored that the admission could expose him to a life sentence based on his previous charges. *Id.*

***8** ¶ 49 After a hearing, the trial court found that Graham had violated his probation by committing a home invasion robbery, possessing a firearm, associating with persons engaged in criminal activity, and fleeing. *Id.* At the sentencing hearing, the trial court had the statutory option to sentence Graham to between five years and life. *Id.* The trial court sentenced Graham to a life sentence, the maximum sentence authorized by law, explaining,

> I don't know why it is that you threw your life away. I don't know why.
>
> But you did....
>
> [I]n a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me....
>
> ... I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away.
>
> The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you.... We can't do anything to deter you....
>
> ... [I]f I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the

community from your actions.

Id. at ----, 130 S.Ct. at 2019-20. Because Florida had abolished its parole system, a life sentence gave Graham no possibility of release unless he was granted executive clemency. *Id.*

¶ 50 Graham filed a motion challenging his sentence under the Eighth Amendment. *Id.* The First District Court of Appeal of Florida affirmed, concluding that Graham's sentence was not grossly disproportionate to his crimes and that he was incapable of rehabilitation. *Id.* The Florida Supreme Court denied review, and the United States Supreme Court granted certiorari. *Id.*

¶ 51 The Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Id.* at ----, 130 S.Ct. at 2030. The Court explained:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of nonhomicide crime. What the State must do, however, is give defendants like Graham *some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life.... The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. *It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.*

Id. at ----, 130 S.Ct. at 2030 (emphasis added).

¶ 52 The Court further supported its adoption of a new categorical proportionality rule by stating, "[The rule] gives all juvenile nonhomicide offenders *a chance to demonstrate maturity and reform.* The juvenile should not be deprived *of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.*" *Id.* at ----, 130 S.Ct. at 2032 (emphasis added).

¶ 53 As in its previous Eighth Amendment jurisprudence, the *Graham* Court relied heavily on social science research and principles. First, the opinion conducted a statistical survey of life without parole sentences for juvenile nonhomicide offenders, and concluded, "The sentencing practice now under consideration is exceedingly rare. And 'it is fair to say that a national consensus has developed against it.' " *Id.* at ----, 130 S.Ct. at 2026 (quoting *Atkins,* 536 U.S. at 316, 122 S.Ct. 2242). The Court then relied on the social and hard sciences when considering whether the challenged sentencing practice served "legitimate penological goals." *Id.* It specifically adopted the analysis from *Roper* that juvenile offenders are fundamentally different from adults for purposes of sentencing because (1) they have "a lack of maturity and an underdeveloped sense of responsibility"; (2) they "are more vulnerable or susceptible to negative influences and outside pressures"; and (3) their characters are "not as well formed." *Id.* (quoting *Roper,* 543 U.S. at 569-70, 125 S.Ct. 1183). The Court in *Graham* noted, "No recent data provide reason to reconsider the Court's observations in *Roper* about

the nature of juveniles":

> ***9** [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper,* 543 U.S. at 570, 125 S.Ct. 1183.... It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." [*Id.*]

--- U.S. at ----, 130 S.Ct. at 2026-27 (additional citation omitted). The Court extrapolated the reasoning in *Roper* and applied it to juvenile offenders who commit nonhomicide crimes, stating, "[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id.* at ----, 130 S.Ct. at 2027.

¶ 54 With respect to a life without parole sentence, the Court stated that it is "an especially harsh punishment for a juvenile," which "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at ---- - ----, 130 S.Ct. at 2027-28 (quoting *Naovarath v. State,*105 Nev. 525, 779 P.2d 944, 944 (1989)). The Court held that such a sentence cannot be justified by the valid penological goals of retribution, deterrence, incapacitation, and rehabilitation, given the unique psychological characteristics of juvenile offenders. *Id.* at ---- - ----, 130 S.Ct. at 2028-30.

D. Subsequent Case Law Interpreting and Applying *Graham*

¶ 55 The parties have not cited any published Colorado appellate decisions discussing or applying *Graham.*[3] However, the Supreme Court and a number of other federal and state courts have issued opinions discussing the scope of *Graham* 's holding and reasoning.

¶ 56 Since *Graham,* the Supreme Court has continued on its decisional trend of providing more constitutional protections for juvenile offenders. In *Miller v. Alabama,*--- U.S. ----, ---- - ----, 132 S.Ct. 2455, 2457-58, 183 L.Ed.2d 407 (2012), the Court explicitly extended the reasoning of *Roper* and *Graham,* holding that a mandatory sentence of life imprisonment without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. *See**People v. Banks,*2012 COA 157, ¶¶121-23, --- P.3d ---- (relying on *Miller* and holding that Colorado's statutory scheme mandating life without parole sentences for first degree murder was unconstitutional as applied to juveniles); *see also**J.D.B. v. North Carolina,*--- U.S. ----, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (a child's age properly informs the *Miranda* custody analysis).

¶ 57 Other federal and state courts have also grappled with the full implications of the Court's holding in *Graham*. *See* Michelle Marquis, Note, *Graham v. Florida: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates,* 45 Loy. L.A. L.Rev. 255, 274 (2011) (noting that some scholars contend that *Graham* has "completely altered the landscape of the Court's Eighth Amendment jurisprudence"). Specifically, and as pertinent here, a number of cases nationwide have considered whether the holding in *Graham* should be extended to apply to term-of-year sentences which are materially indistinguishable from life without parole, and the rulings in those cases reveal a split

of authority on that issue.[4] Because Colorado has not yet addressed this issue, a summary of these rulings in other jurisdictions helps to inform our analysis.

***10** ¶ 58 In several cases, courts have read *Graham* narrowly and have either explicitly or implicitly rejected the argument that *Graham* applies to lengthy term-of-year sentences that are the functional equivalent of life without parole. *See*Bunch v. Smith, 685 F.3d 546, 550 (6th Cir.2012) (upholding an Ohio state court's determination that an eighty-nine-year sentence for a juvenile nonhomicide offender did not violate the Eighth Amendment on the basis that *Graham* does not clearly apply to aggregate sentences that amount to the practical equivalent of life without parole); Goins v. Smith, 2012 WL 3023306, at *6 (N.D.Ohio No. 4:09-CV-1551, July 24, 2012) (unpublished opinion and order) ("even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham* 's holding unless the sentence is technically a life sentence without the possibility of parole"); *State v. Kasic,* 228 Ariz. 228, 265 P.3d 410, 415-16 (Ariz.Ct.App.2011) (concurrent and consecutive prison terms totaling 139.75 years for a nonhomicide child offender furthered Arizona's penological goals and was not unconstitutional under *Graham*); *Henry v. State,* 82 So.3d 1084, 1089 (Fla.Dist.Ct.App.2012) (*review granted* Nov. 6, 2012) (based on a formalistic reading of *Graham,* holding that a nonhomicide child offender's ninety-year sentence is not unconstitutional); *Walle v. State,* 99 So.3d 967, 972-73 (Fla.Dist.Ct.App.2012) (refusing to extend *Graham* to aggregate sentences totaling ninety-two years on reasoning that *Graham* applies only to single sentences); *Adams v. State,*288 Ga. 695, 707 S.E.2d 359, 365 (2011) (child's seventy-five-year sentence and lifelong probation for child molestation did not violate *Graham*); *People v. Taylor,*2013 IL App (3d) 110876, 368 Ill.Dec. 634, 984 N.E.2d 580, ---- (Ill.App.Ct. 2013) (*Graham* does not apply because the defendant was only sentenced to forty years and not life without possibility of parole); *Diamond v. State,*---S.W.3d ----, ----, 2012 WL 1431232 (Tex.Crim.App. Nos. 09-11-00478-CR & 09-11-00479-CR, Apr. 25, 2012) (upholding a sentence of ninety-nine years for a nonhomicide child offender without mentioning *Graham*).

¶ 59 However, we are more persuaded by the reasoning in a number of other cases where courts have explicitly or implicitly held that *Graham* 's holding or its reasoning can and should be extended to apply to term-of-year sentences that result in a de facto life without parole sentence.

¶ 60 In several of those cases, courts have relied on *Graham* (or its reasoning) to reverse a juvenile defendant's term-of-years sentence on the ground that it was the functional equivalent of life without parole, and thus unconstitutional under the Eighth Amendment. In *People v. Caballero,*55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291 (2012), the Supreme Court of California held that term-of-years sentences that extend beyond a juvenile's life expectancy, and are imposed for nonhomicide offenses, violate the Eighth Amendment pursuant to *Graham*. In *Caballero,* the Supreme Court of California reversed an intermediate court, ruling as follows:

> Consistent with the high court's holding in *Graham*... we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity

> to demonstrate their rehabilitation and fitness to reenter society in the future.

145 Cal.Rptr.3d 286, 282 P.3d at 295. Consistent with *Graham,* the court further directed that, when sentencing nonhomicide juvenile offenders, California courts must consider the defendant's age and mental development in order to impose an appropriate time when the juvenile will be able to seek parole from the parole board. *Id.* Furthermore, the court ruled that the parole board must base its decisions whether to release juvenile offenders on "demonstrated maturity and rehabilitation," as required under *Graham. Id.* (quoting *Graham,*--- U.S. at ----, 130 S.Ct. at 2030)

¶ 61 In its reasoning, *Caballero* drew on *People v. Mendez,* 188 Cal.App.4th 47, 114 Cal.Rptr.3d 870, 886 (2010), a previous California appellate case, in which the court held that a sentence of eighty-four years to life for a nonhomicide child offender constituted cruel and unusual punishment because it was the equivalent of life without parole. The court in *Mendez* acknowledged that *Graham* was not expressly controlling because Mendez's sentence was "not technically" a life without parole sentence, but said, "We are nevertheless guided by the principles set forth in *Graham* ...." *Id.* at 883. Noting that the Court in *Graham* "did not define what constitutes a 'meaningful' opportunity for parole," the *Mendez* court concluded that "common sense dictates that a juvenile who is sentenced at the age of 18 and who is not eligible for parole until after he is expected to die does not have a meaningful, or as the Court put it, 'realistic,' opportunity of release." *Id.* (citing *Graham,*--- U.S. at ----, ----, 130 S.Ct. at 2030, 2034).

***11** ¶ 62 At least three other appellate court decisions in California, prior to and after *Caballero* and *Mendez,* reached the same conclusion. In *People v. Nunez,* 195 Cal.App.4th 414, 125 Cal.Rptr.3d 616, 624 (2011), the court was particularly concerned with "the failure of any penological theory to rationally justify 'the severity of life without parole sentences,' " (quoting *Graham,*--- U.S. at ----, 130 S.Ct. at 2030). It concluded:

> A term of years effectively denying any possibility of parole is not less severe than a LWOP [life without parole] term. Removing the "LWOP" designation does not confer any greater penological justification. Nor does tinkering with the label somehow increase a juvenile's culpability. Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label, as the trial court did, is arbitrary and baseless.
>
> ... Absent any penological rationale, the sentence the trial court imposed precluding any possibility of parole for 175 years is unconstitutional under the Eighth Amendment
>
> ....

Id.; *see also* *People v. J.I.A.,* 196 Cal.App.4th 393, 127 Cal.Rptr.3d 141, 149 (2011) (concluding that it was cruel and unusual punishment to sentence a juvenile nonhomicide offender so that he would not be eligible for parole until seventy years of age, "about the time he is expected to die," based on undisputed data from the Centers for Disease Control on life expectancies for incarcerated males), vacated and remanded, --- Cal.4th ----, 148 Cal.Rptr.3d 499,287 P.3d 70 (2012); *People v. Argeta,* 210 Cal.App.4th 1478, 149 Cal.Rptr.3d 243, 244-45 (Cal.Ct.App.2012) (reversing a sentence of 100 years to life for a juvenile offender convicted of aiding and abetting one count of murder and five counts of attempted murder because the sentence was the functional equivalent of life without parole and unconstitutional under Graham).

¶ 63 As noted above, although two Florida decisions have ruled to the contrary, we are more persuaded by the

greater number of Florida cases that have applied *Graham* to sentences that are the functional equivalent of life without parole. In that regard, we are particularly persuaded by the reasoning in *Adams v. State,*--- So. 3d ----, ----, 2012 WL 3193932 (Fla. Dist. Ct.App. No. 1 D 11-3225, Aug. 8, 2012), a case that is factually similar to ours.[5]

***12** ¶ 64 In *Adams,* the court held that a sentence requiring a nonhomicide juvenile offender to serve at least 58.5 years in prison was a de facto sentence to life, because the defendant would not be eligible for release until he was nearly seventy-six years old, which exceeded his life expectancy according to data from the Centers for Disease Control. *Id.* at ----, at *2. The *Adams* court specifically defined a de facto life sentence as "one that exceeds the defendant's life expectancy." *Id.* After acknowledging the split opinions in Florida and that "the issue framed by this case is one of great public importance," the *Adams* court directly certified to the Florida Supreme Court the question of whether *Graham* applies "to lengthy term-of-years sentences that amount to de facto life sentences." *Id.*

¶ 65 In yet other post-*Graham* cases, several courts have held that some term-of-years sentences may qualify as the functional equivalent of life sentences for purposes of the Eighth Amendment and *Graham,* but have declined to invalidate the sentence at issue on the particular facts and circumstances in each of those cases. *SeeGridine v. State,* 89 So.3d 909 (Fla.Dist.Ct.App.2011) (*review granted* Oct. 11, 2012) (a child's seventy-year sentence for attempted first degree murder was not the functional equivalent of a life sentence, but stating in dicta that some term-of-years sentences may be under *Graham*); *Thomas v. State,* 78 So.3d 644 (Fla.Dist.Ct.App.2011) (child offender's fifty-year sentence was not the functional equivalent of a life sentence, but some term-of-years sentences may be); *Angel v. Commonwealth,*281 Va. 248, 704 S.E.2d 386, 401-02 (2011) (three consecutive life sentences did not violate *Graham* specifically because defendant could petition for parole at age sixty, and, thus his sentence complied with *Graham's* requirement for a "meaningful" opportunity to obtain release based on demonstrated maturity and rehabilitation); *In re Diaz,* 170 Wash.App. 1039 (No. 42064-3-II, Sept. 18, 2012) (unpublished opinion) (acknowledging the argument that *Graham* may apply to term-of-years sentences that are the functional equivalent of life sentences but declining to decide the matter on the basis that it is the role of the legislature to do so).

E. Application of *Graham* to Rainer's Sentence

[17]¶ 66 Based on our consideration of the Supreme Court's Eighth Amendment jurisprudence, and federal and state rulings since *Graham,* we conclude that the term of years sentence imposed on Rainer, which does not offer the possibility of parole until after his life expectancy, deprives him of any "meaningful opportunity to obtain release" and thereby violates the Eighth Amendment. *See Graham,* --- U.S. at ----, 130 S.Ct. at 2033.

¶ 67 On the undisputed record before us, Rainer's sentence qualifies as an unconstitutional de facto sentence to life without parole. As noted earlier, the parties agree that Rainer will not even be eligible for parole until he is seventy-five years of age. Further, the record shows he has a life expectancy of only between 63.8 years and 72 years, based on Center for Disease Control life expectancy tables.[6] Life expectancy data was expressly cited by Rainer both in the trial court and in his briefs on appeal and is not disputed by the People. Furthermore, Rainer notes that, even if he is still alive when he first becomes eligible for parole, he is unlikely to receive it, based on data from the Colorado State Board of Parole, showing that almost ninety percent of those first eligible for discretionary parole are denied release.

***13** ¶ 68 In reaching our conclusion, initially we reject the People's argument that our constitutional proportionality analysis in this case should be governed by our supreme court's decision in *Close*. To the contrary, because *Graham* established a categorical proportionality analysis for nonhomicide juvenile offenders sentenced to life without parole, we conclude that the proportionality analysis adopted in *Close,* 48 P.3d at 538, and relied on by the People on appeal, is no longer valid as applied to this particular category of offenders. Specifically, the holding in *Close* relies on the line of cases concerned with the "grossly disproportionate" proportionality review, which considers whether under the particular circumstances of a case, the defendant's sentence for a term of years is grossly disproportionate given the particular offense. *See, e.g.,Graham,*---U.S. at ---- - ----, 130 S.Ct. at 2021-22; *Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680; *Close,* 48 P.3d at 532-34. The *Close* proportionality analysis also considers each separate sentence imposed rather than consecutive sentences imposed in the aggregate. *Close,* 48 P.3d at 540. In contrast, *Graham* explicitly conducted a categorical proportionality review for juveniles convicted of nonhomicide offenses, regardless of the offense or particular circumstances of the case, as it had previously done in both *Roper* and *Atkins*. *Graham,*--- U.S. at ---- - ----, 130 S.Ct. at 2021-23. Accordingly, we conclude that *Graham* effectively overruled *Close* with respect to this particular class of defendants. *SeeRaile v. People,*148 P.3d 126, 130 n.6 (Colo.2006) (state court must follow precedent of United States Supreme Court on matters of federal constitutional law); *People v. VanMatre,* 190 P.3d 770, 774 (Colo.App.2008) (same); *see alsoPeople v. Hopper,* 284 P.3d 87, 93 n.3 (Colo.App.2011) (noting that *Davis v. United States,* 564 U.S. ----, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), effectively overruled*People v. McCarty,* 229 P.3d 1041 (Colo.2010)).

¶ 69 Further, as discussed above, we are persuaded by the reasoning of those cases that have extended *Graham* to de facto sentences to life without parole. *SeeMendez,* 114 Cal.Rptr.3d at 883 (citing *Graham,*--- U.S. at ----, ----, 130 S.Ct. at 2030, 2034) ("common sense dictates that a juvenile ... who is not eligible for parole until after he [or she] is expected to die does not have a meaningful, or as the Court put it, 'realistic,' opportunity of release."); *Nunez,* 125 Cal.Rptr.3d at 624 (for a juvenile offender, "[a] term of years effectively denying any possibility of parole is not less severe than a LWOP [life without parole] term").

¶ 70 We are also particularly struck by the similarities between Rainer's sentence and the one at issue in *Adams*. In *Adams,* as here, the juvenile nonhomicide defendant faced a sentence under which he could not be considered for release until he was nearly seventy-six years old, which exceeded his life expectancy according to Centers for Disease Control data. The court in *Adams* ruled that this sentence was the functional equivalent of a life sentence without parole, and therefore, prohibited under *Graham*. We are persuaded by the Florida court's reasoning in *Adams,* and reach the same conclusion here with respect to Rainer's sentence.

¶ 71 In our decision to align ourselves with those courts that have extended *Graham* 's holding to sentences that are the functional equivalent of life without parole, we also find instructive the language in *Graham* that readily lends itself to this approach. In *Graham,* the Court did not employ a rigid or formalistic set of rules designed to narrow the application of its holding. Instead, it utilized broad language, condemning the sentence of life without parole in that case for qualitative reasons, such as because it "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope"; because "[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual"; and because the prison system itself sometimes

reinforces the lack of development of inmates, leading to "the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." *Graham,* --- U.S. at ---- - ----, 130 S.Ct. at 2032-33.

¶ 72 Likewise, *Graham* employed expansive language to define its sentencing requirements for juvenile nonhomicide offenders, stating that sentences must offer "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *id.* at ----, 130 S.Ct. at 2030; and "give [ ] all juvenile nonhomicide offenders a chance to demonstrate maturity and reform" and "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at ----, 130 S.Ct. at 2032. Indeed, even the closing words of the *Graham* opinion do not focus on a specific formalistic definition of what constitutes an allowable term-of-years sentence for a nonhomicide juvenile offender, but provide only that while a state "need not guarantee the [nonhomicide juvenile] offender eventual release ... it must provide him or her with *some realistic opportunity to obtain release.*" *Id.* at ----, 130 S.Ct. at 2034 (emphasis added).

***14** ¶ 73 Given what we view as the broad nature of *Graham* 's directives, we conclude that the Court's holding and reasoning should apply to a sentence that denies a juvenile offender any meaningful opportunity for release within his or her life expectancy, or that fails to recognize that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.* at ----, 130 S.Ct. at 2026 (quoting *Roper,* 543 U.S. at 570, 125 S.Ct. 1183). Accordingly, Rainer's 112-year sentence, with the virtually nonexistent possibility of parole at the age of seventy-five, violates the holding and reasoning of *Graham* because it virtually "guarantees he will die in prison without any meaningful opportunity to obtain release, ... even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Id.* at ----, 130 S.Ct. at 2033; *see also* *Mendez,* 114 Cal.Rptr.3d at 883.

¶ 74 We also find it instructive that, while Colorado appellate courts have not addressed whether *Graham* should apply to nonhomicide juvenile offender sentences that are the functional equivalent of life without parole, the Colorado General Assembly, both before and after *Graham,* has adopted legislation aligned with the principles articulated in *Roper,* *Graham,* and *Miller.*

¶ 75 In 1993, well prior to *Graham,* Colorado established the Youthful Offender System as an alternative sentencing option for certain juveniles. Ch. 2, sec. 5, § 16-11-311, 1993 Colo. Sess. Laws 1st Extra. Sess. 13. The statute, as amended, stated the legislative intent that offenders sentenced to the youthful offender system should "be housed and serve their sentences in a facility specifically designed and programmed for the youthful offender system" and that "offenders so sentenced be housed separate from and not brought into daily physical contact with inmates sentenced to the department of corrections." Ch. 227, sec. 1, § 16-11-311(1)(c), 2000 Colo. Sess. Laws; *see* § 18-1.3-407(1)(a), C.R.S.2012. Establishment of this youth-specific penal system demonstrates that, even before *Graham,* public policy in Colorado was trending toward the view that sentencing and treatment of juveniles in the criminal context should, with few exceptions, be qualitatively different from the treatment of adult offenders. *See also* *Flakes v. People,* 153 P.3d 427, 436 (Colo.2007) ("A decision to impose an adult sentence on a juvenile without judicial findings risks an arbitrary deprivation of a juvenile's liberty interest in avoiding a harsh punishment."); *A.C. v. People,* 16 P.3d 240, 242 (Colo.2001) (noting that an adult sentence is the harsh punishment that the Colorado Children's Code was designed to avoid).

¶ 76 Also, at the time *Graham* was decided, there apparently were no juvenile nonhomicide offenders serving life without parole sentences in Colorado. *Graham,*--- U.S. at ----, 130 S.Ct. at 2024. *See**United States v. C.R.,* 792 F.Supp.2d 343, 494 (E.D.N.Y.2011) (an important inquiry in determining excessiveness of a term of imprisonment is the "actual sentencing practices" in a jurisdiction) (citing *Graham,*--- U.S. at ----, 130 S.Ct. at 2026; *Thompson v. Oklahoma,* 487 U.S. 815, 831-32, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988); *Roper,* 543 U.S. at 564-65, 125 S.Ct. 1183; *Kennedy,* 554 U.S. at 433-35, 128 S.Ct. 2641); *see also*§ 18-1.3-401(4)(b)(I), C.R.S.2012 (as of July 1, 2006, requiring that all juveniles convicted as adults of a class 1 felony be sentenced to a term of life imprisonment with the possibility of parole after serving a period of forty years).

¶ 77 In 2012, the General Assembly enacted House Bill 12-1271, which, as relevant here, exempts most juvenile offenders from certain mandatory minimum crime of violence sentencing provisions under section 18-1.3-406, C.R.S.2012 (including those imposed on Rainer). *See*§ 19-2-517(6)(a)(I), C.R.S.2012. The legislative history of House Bill 12-1271 reveals that the provisions in this bill were, in large part, motivated by the social science studies on the development of juveniles that were at the heart of the reasoning articulated by the Supreme Court in *Roper, Graham,* and *Miller. See* Hearings on H.B. 1271 before the S. Judiciary Comm., 68th Gen. Assemb., 1st Sess. (Mar. 8, 2012) (comments of Senator Giron, co-sponsor) ("[O]ur brains continue to develop well into our mid-twenties.... Children are less culpable than adults and they are also much more likely to respond to rehabilitation. Even the United States Supreme Court has recognized these findings in recent decisions."); *see also* Colorado General Assembly, Summaries by Bill for HB 12-1271, *http://www.leg.state.co.us/CLICS/CLICS 2012A/csl.nsf/Committee? OpenFrameSet* (follow "Summaries by Bill"; then follow "HB 12-1271"; then follow "3/08/2012, House Judiciary, Bill Summary" or "3/26/2012, Senate Judiciary, Bill Summary") (last visited Mar. 6, 2013).

***15** ¶ 78 While we acknowledge, as did the Court in *Graham,* that juvenile defendants such as Rainer "may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives," the holding and reasoning in *Graham* forbid states "from making the judgment at the outset that those offenders never will be fit to reenter society." --- U.S. at ----, 130 S.Ct. at 2030. The trial court here appears to have made this very judgment when it imposed Rainer's sentence, and the record shows that, at sentencing, the trial court acknowledged and indeed intended that Rainer would spend the rest of his life in prison. Nor, contrary to the People's argument, did the trial court take into account Rainer's age or the developmental differences between juveniles and adults in imposing Rainer's sentence. Thus, Rainer's sentence, which from the outset failed to offer him any meaningful chance at parole during his lifetime, "improperly denies [him] a chance to demonstrate growth and maturity," as required under *Graham. Id.* at ----, 130 S.Ct. at 2029.

¶ 79 Accordingly, we conclude that Rainer's sentence is the functional equivalent of life without parole and is unconstitutional pursuant to the Eighth Amendment and *Graham. Id.* at ----, 130 S.Ct. at 2033.

F. New Arguments

¶ 80 We decline to consider new arguments made by the People during oral argument that were not made either in the trial court or in the People's answer brief on appeal. *See People v. $11,200 U.S. Currency,*--- P.3d ----, ----, 2011 WL 3612233 (Colo.App. No. 10CA1805, Aug. 18, 2011); *People v. Scearce,* 87 P.3d 228, 231 (Colo.App.2003).

G. Remedy

¶ 81 Having determined that Rainer's sentence is unconstitutional under the Eighth Amendment, we remand to the trial court for resentencing consistent with this opinion and the principles announced in both *Graham* and *Miller*. We also direct that Rainer should be appointed counsel to represent him at the resentencing proceeding.

¶ 82 In sentencing Rainer, the trial court must ensure that his sentence is constitutionally proportional in light of the categorical proportionality analysis for youth offenders articulated in *Roper, Graham,* and *Miller*.

¶ 83 The order is reversed, the sentence is vacated, and the case is remanded for further proceedings.

JUDGE GABRIEL and JUDGE DUNN concur.

All Citations

--- P.3d ----, 2013 WL 1490107, 2013 COA 51

Footnotes

1 As noted, the prosecution did not respond to Rainer's motion in the trial court, nor did the People address the retroactivity issue in their answer brief on appeal. At oral argument, the People conceded that *Graham* applies retroactively to Rainer's sentence. Because the trial court ruled against Rainer on retroactivity, we address this issue notwithstanding the People's concession.

2 *See also*Colo. Const. art. II, § 20. The parties have argued this case exclusively under the Eighth Amendment to the United States Constitution, and, thus, we limit our analysis accordingly.

3 In *People v. Lucero,* 2013 COA 53, ¶¶ ——, —— P.3d —— (Colo.App.2013), also announced today, another division of this court declined to address and resolve the constitutional issues we consider here, concluding, on the record in that case, that the defendant's sentence was not a de facto sentence to life without parole because he will be eligible for parole consideration at age fifty-seven, well within his natural lifetime.

4 The division in *Lucero* acknowledged this split of authority, but declined to address the constitutional issue whether *Graham* "applies only to actual life without parole sentences, not de facto life without parole sentences." *Lucero,* ¶ ___.

5 Other relevant Florida rulings include *United States v. Mathurin,* 2011 WL 2580775, at *3 (S.D. Fla. No. 09–21075–CR, June 29, 2011) (unpublished order) (holding a combined sentence of 307 years for a child offender convicted of armed robbery and carjacking "constitutionally offensive" under *Graham*); *Floyd v. State,* 87 So.3d 45 (Fla.Dist.Ct.App.2012) (per curiam) (holding that a child sentenced to a combined eighty-year sentence for two counts of armed robbery constituted cruel and unusual punishment as the functional equivalent of a life sentence without parole); and *Smith v. State,* 93 So.3d 371 (Fla.Dist.Ct.App.2012) (declining to rule out that *Graham* can apply to some term of years sentences, but holding an aggregate eighty-year sentence constitutional because Florida's gain time statutes offer "meaningful opportunity to obtain release" as required under *Graham*).

6 Numerous cases, including *J.I.A., Mendez, Adams,* and the magistrate judge recommendation in *Thomas v. Pennsylvania,* 2012 WL 6697971, at *11 (E.D. Penn. No. CV–10–4537, June 5, 2012) (unpublished magistrate's report and recommendation), have utilized Centers for Disease Control life expectancy tables to determine whether a sentence qualifies as the functional equivalent of life without parole. We also note the Supreme Court's extensive reliance on scientific data and statistics in *Roper, Graham,* and *Miller. See*Roper,* 543 U.S. at 560–77, 125 S.Ct. 1183 (survey of rulings relying on sociological studies, behavioral sciences, and review of national and international practices); *Graham,*—— U.S. at ——, ——, 130 S.Ct. at 2026, 2032; *Miller,* ——U.S. at ——, 132 S.Ct. at 2458; *cf. Walle,* 99 So.3d at 971 (court declined to expand the scope of *Graham* to a sentence that is the functional equivalent of life without parole in part because the record on review was devoid of social science data considered in *Graham*).

End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.

2016 WL 1203414
Only the Westlaw citation is currently available.
Court of Appeals of Arizona,
Division 2.

The STATE of Arizona, Respondent,
v.
Gregory Nidez VALENCIA Jr., Petitioner.
The State of Arizona, Respondent,
v.
Joey Lee Healer, Petitioner.
Nos. 2 CA–CR 2015–0151–PR, 2 CA–CR 2015–0182–PR.
|
March 28, 2016.

Petitions for Review from the Superior Court in Pima County; Nos. CR051447 and CR48232; The Honorable Catherine M. Woods, Judge, The Honorable James E. Marner, Judge. REVIEW GRANTED; RELIEF GRANTED.

Attorneys and Law Firms

Barbara LaWall, Pima County Attorney by Jacob R. Lines, Deputy County Attorney, Tucson, Counsel for Respondent.

Dean Brault, Pima County Legal Defender by Alex Heveri, Assistant Legal Defender, Tucson, Counsel for Petitioner Gregory Nidez Valencia Jr.

Steven R. Sonenberg, Pima County Public Defender by David J. Euchner and Katherine A. Estavillo, Assistant Public Defenders, Tucson, Counsel for Petitioner Joey Lee Healer.

Judge ESPINOSA authored the opinion of the Court, in which Presiding Judge MILLER and Chief Judge ECKERSTROM concurred.

OPINION

ESPINOSA, Judge.

***1** ¶ 1 Gregory Valencia Jr. and Joey Healer seek review of trial court orders denying their respective petitions for post-conviction relief, in which they argued *Miller v. Alabama,* --- U.S. ----, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), constitutes a significant change in the law applicable to their natural-life prison sentences. Because *Miller,* as clarified by the United States Supreme Court in *Montgomery v. Louisiana,* --- U.S. ----, ----, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016), "bar[s] life without parole" for all juvenile offenders except those "whose crimes reflect permanent incorrigibility," we accept review and grant relief.

Procedural Background

¶ 2 Valencia and Healer were each convicted of first-degree murder in addition to other offenses and were sentenced to natural life in prison. Both were juveniles at the time of their offenses. Although we vacated one of Valencia's non-homicide convictions on appeal, we affirmed his remaining convictions and sentences. *State v. Valencia,* No. 2 CA-CR 96-0652 (memorandum decision filed Apr. 30, 1998). We affirmed Healer's convictions and sentences on appeal. *State v. Healer,* No. 2 CA-CR 95-0683 (memorandum decision filed Dec. 24, 1996).

¶ 3 In 2013, Valencia filed two notices of post-conviction relief, along with a supplement, raising various claims, including that *Miller* constituted a significant change in the law pursuant to Rule 32.1(g), Ariz. R.Crim. P. The trial court, treating Valencia's second notice as a petition for post-conviction relief, summarily denied relief. On review, we granted partial relief, determining Valencia had not been given an adequate opportunity to raise his claim based on *Miller* because the court had erred in construing his second notice as his petition for post-conviction relief. We thus remanded the case to the trial court for further proceedings related to that claim, but otherwise denied relief. *State v. Valencia,* No. 2 CA-CR 2013-0450-PR (memorandum decision filed May 6, 2014).

¶ 4 Healer also sought post-conviction relief in 2013, seeking to raise a claim pursuant to *Miller* and requesting that counsel be appointed. The trial court, however, summarily dismissed his notice, concluding

Miller did not apply. We granted relief, determining Healer was entitled to counsel and to file a petition for post-conviction relief and remanding the case to the trial court for further proceedings. *State v. Healer,* No. 2 CA-CR 2013-0372-PR (memorandum decision filed Jan. 28, 2014).

¶ 5 Valencia and Healer then filed separate petitions in which they raised the same argument—that *Miller* constituted a significant change in the law applicable to their respective natural-life sentences. They contended that under *Miller,* Arizona's sentencing scheme is unconstitutional because a life sentence was essentially a sentence of life without a meaningful opportunity for release due to the abolition of parole. Each further argued our sentencing scheme is unconstitutional because "it completely fails to take any account of the attendant characteristics of youth." Last, both argued "the process by which [they] w[ere] sentenced was unconstitutional" because the court "failed to give proper weight to youth and its attendant characteristics."

***2** ¶ 6 The trial court in each proceeding summarily denied relief. The court in Valencia's proceeding noted that, "at the time of sentencing" the court believed "that it had the discretion to impose natural life or, alternatively, life with the opportunity for parole after 25 years." It further observed that Valencia had been given individualized sentencing consideration as required by *Miller* and that, after that consideration, the court found his youth to be a mitigating factor but, in consideration of other factors, had nonetheless determined a natural-life sentence was appropriate.

¶ 7 The trial court in Healer's proceeding determined that any constitutional infirmity in Arizona's sentencing scheme had been resolved by recent statutory changes reinstating parole for juvenile offenders given a life sentence with an opportunity for release. The court further determined that, in any event, the sentencing court had found Healer's age to be a mitigating factor and had imposed a natural-life sentence in compliance with *Miller.* Healer and Valencia each filed petitions for review, which we consolidated at their request.

Discussion

[1] ¶ 8 In their petitions for review, Healer and Valencia repeat their argument that *Miller* is a significant change in the law entitling them to be resentenced. *See* Ariz. R.Crim. P. 32.1(g). In *Miller,* the United States Supreme Court determined that a sentencing scheme "that mandates life in prison without possibility of parole for juvenile offenders" violated the Eighth Amendment's prohibition against cruel and unusual punishment. --- U.S. at ----, 132 S.Ct. at 2469; *see also State v. Vera,* 235 Ariz. 571, ¶ 3, 334 P.3d 754, 755–56 (App.2014). The Court further stated that, before a juvenile offender is sentenced to natural life, courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller,* --- U.S. at ----, 132 S.Ct. at 2469.

¶ 9 While Healer's and Valencia's petitions were pending, the Supreme Court accepted review of another case involving juveniles sentenced to life imprisonment without the possibility of parole in order to determine whether *Miller* should be applied retroactively. *Montgomery v. Louisiana,* ---U.S. ----, 135 S.Ct. 1546, 191 L.Ed.2d 635 (2015) (granting writ of certiorari); *see also Montgomery,* --- U.S. at ----, 136 S.Ct. at 727. We stayed the current proceeding and ordered the parties to provide supplemental briefs when that decision issued.

¶ 10 The Supreme Court decided *Montgomery* in January 2016. It explained that, in *Miller,* it had determined a natural-life sentence imposed on a juvenile offender "violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.' " *Montgomery,* --- U.S. at

----, 136 S.Ct. at 734, *quoting Miller,* --- U.S. at ----, 132 S. Ct at 2469. Thus, the Court clarified, the Eighth Amendment requires more than mere consideration of "a child's age before sentencing him or her to a lifetime in prison," but instead permits a natural-life sentence only for "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* The Court further determined that the rule announced in *Miller* was a substantive constitutional rule that was retroactively applicable pursuant to *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Montgomery,* --- U.S. at ----, 136 S.Ct. at 735-36.

***3** ¶ 11 Valencia and Healer argue on review that, pursuant to *Miller,* Arizona's sentencing scheme for juveniles convicted of first-degree murder is unconstitutional because it permits the imposition of a natural-life term without requiring the court to "take any account of the attendant characteristics of youth." They also assert their respective sentencing courts did not sufficiently consider those characteristics in imposing natural-life sentences.[1] To be entitled to relief pursuant to Rule 32.1(g), Valencia and Healer must show there "has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence."

[2] ¶ 12 As the state concedes, the Supreme Court settled in *Montgomery* the question whether the rule announced in *Miller* applies retroactively. Thus, the question before us is whether that rule constitutes a significant change in Arizona law. A significant change in the law is a "transformative event, a 'clear break from the past.' " *State v. Werderman,* 237 Ariz. 342, ¶ 5, 350 P.3d 846, 847 (App.2015), *quoting State v. Shrum,* 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009). "Such change occurs, for example, 'when an appellate court overrules previously binding case law' or when there has been a 'statutory or constitutional amendment representing a definite break from prior law.' " *Id., quoting Shrum,* 220 Ariz. 115, ¶¶ 16-17, 203 P.3d at 1178-79.

¶ 13 At the time of Valencia's and Healer's offenses, Arizona's sentencing scheme required the court to consider their age in determining which sentence to impose. *See former* A.R.S. § 13-703(G)(5); 1988 Ariz. Sess. Laws, ch. 155, § 1; *see also* A.R.S. § 13-702(E)(1); 1984 Ariz. Sess. Laws, ch. 43, § 1. And courts have long understood that the sentencing considerations for juveniles are markedly different from those for adults, noting in particular a sentencing court should consider a juvenile defendant's age as well as his or her "level of maturity, judgment and involvement in the crime." *State v. Greenway,* 170 Ariz. 155, 170, 823 P.2d 22, 37 (1991); *see also Thompson v. Oklahoma,* 487 U.S. 815, 823-24, 833-34, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

[3] ¶ 14 But the mere requirement that a sentencing court consider a juvenile defendant's youth before imposing a natural-life sentence does not comply with the Supreme Court's recent directive forbidding a natural-life sentence "for all but the rarest of juvenile offenders." *Montgomery,* --- U.S. at ----, 136 S.Ct. at 734. Instead, as the Court explained, the sentencing court must determine whether the juvenile defendant's "crimes reflect [ ] transient immaturity," or whether the defendant's crimes instead "reflect permanent incorrigibility." *Id.* Only in the latter case may the sentencing court impose a sentence of natural life. *See id.*

[4] ¶ 15 In its supplemental brief following the Court's decision in *Montgomery,* the state maintains that *Miller* is nonetheless inapplicable to Valencia and Healer because their natural-life terms were not mandatory. We agree that the core issue presented in *Miller* concerned the mandatory imposition of a natural-life sentence. But there is no question that the rule in *Miller* as broadened in *Montgomery* renders a natural-life sentence constitutionally impermissible,

notwithstanding the sentencing court's discretion to impose a lesser term, unless the court "take[s] into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " *Montgomery,* --- U.S. at ----, 136 S.Ct. at 733, *quoting Miller,* --- U.S. at ----, 132 S.Ct. at 2469. Moreover, after taking these factors into account, the court can impose a natural-life sentence only if it concludes that the juvenile defendant's crimes reflect permanent incorrigibility.[2] *See id.* at ----, 136 S.Ct. at 734.

***4** ¶ 16 The state also contends that, in any event, Valencia's and Healer's respective sentencing courts "took [their] ages into account" in imposing that term. As we have explained, however, the Eighth Amendment, as interpreted in *Montgomery,* requires more than mere consideration of age before imposing a natural-life sentence. *See id.* at ----, 136 S.Ct. at 734–35. The state does not argue that the facts presented at Valencia's and Healer's respective sentencing hearings would require, or even support, a finding that their crimes reflect permanent incorrigibility. In any event, in light of the heretofore unknown constitutional standard announced in *Montgomery,* the parties should be given the opportunity to present evidence relevant to that standard. *See, e .g., State v. Steelman,* 120 Ariz. 301, 320, 585 P.2d 1213, 1232 (1978) (remanding for redetermination of sentence in light of recent case law).

Conclusion

¶ 17 The Supreme Court's determination in *Montgomery* that a natural-life sentence imposed on a juvenile defendant is unconstitutional unless the juvenile's offenses reflect permanent incorrigibility constitutes a significant change in Arizona law that is retroactively applicable.[3] *See* Ariz. R.Crim. P. 32.1(g); *Montgomery,* --- U.S. at ----, 136 S.Ct. at 735-36. Valencia and Healer are therefore entitled to be resentenced. Accordingly, we accept review and grant relief, and this case is remanded to the trial court for further proceedings consistent with this decision.

All Citations

--- P.3d ----, 2016 WL 1203414

Footnotes

1 Valencia and Healer additionally maintain that, pursuant to *Miller,* the mandatory minimum sentence of twenty-five years to life for murder is unconstitutional for juvenile offenders. But the Supreme Court in *Miller* did not address mandatory minimum sentences for juveniles; its discussion was limited to natural-life sentences. *See* ––– U.S. at –––, 132 S.Ct. at 2469. Accordingly, we reject this argument.

2 Justice Scalia, in his dissent, asserts that the majority's reasoning can be read as a "way of eliminating life without parole for juvenile offenders." *Montgomery,* ––– U.S. at –––, 136 S.Ct. at 744 (Scalia, J., dissenting) (joined by Justice Thomas and Justice Alito). Although the majority states "it will be the rare juvenile offender who can receive [a natural-life] sentence," we do not view that pronouncement an absolute bar against such a sentence. *Id.* at –––, 136 S.Ct. at 734.

3 We need not address Valencia and Healer's argument that the sentencing scheme in place at the time of their sentences was unconstitutional. And we decline to address pending legislation that may affect the issues presented in this case.

End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.

2016 WL 1079462
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
James ZARATE, a/k/a Navajas Zarate,
Defendant–Appellant.

Argued Telephonically Feb. 24, 2016.
|
Decided March 21, 2016.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 09-02-00262.

Attorneys and Law Firms

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Aiello, of counsel and on the briefs).

John McNamara, Jr., Assistant Prosecutor, argued the cause for respondent (Fredric M. Knapp, Morris County Prosecutor, attorney; Mr. McNamara, Jr., on the briefs).

Before Judges SABATINO, ACCURSO and SUTER.

Opinion

PER CURIAM.

***1** Defendant James Zarate, also known as Navajas Zarate, returns to this court seeking relief from his life sentence following a January 2014 resentencing. The trial court conducted the resentencing on remand pursuant to the prior unpublished opinion we issued on direct appeal. *See State v. James Zarate,* No. A-0070-09 (App.Div. Aug. 27, 2012), *certif. denied,* 212 *N.J.* 460 (2012). For the reasons that follow, we remand for the trial court to reconsider its proportionality analysis in light of the United States Supreme Court's recent opinion in *Montgomery v. Louisiana,* --- U.S. ----, 136 *S.Ct.* 718, 193 *L. Ed.*2d 599 (2016), with the benefit of life expectancy data showing that defendant is statistically likely to either die in prison or within only a year after his earliest parole eligibility date.

I.

As our prior opinion noted, defendant was tried as an adult and convicted by a jury in 2009 for murder and related offenses he committed in 2005. His conduct involved the fatal stabbing of a teenage victim who was defendant's classmate and with whom he had a long-standing dispute. The State's evidence showed that the victim was stabbed repeatedly, that her body was mutilated, and that defendant and others attempted to dispose of her remains in a footlocker that they planned to toss from a bridge into a waterway. *Id.* at 4-12.

At the time of the murder, defendant was fourteen years old, several days shy of his fifteenth birthday. In the initial sentencing, the trial court imposed for the murder a life sentence carrying a mandatory parole ineligibility period of 63.75 years pursuant to the No Early Release Act ("NERA"), *N.J.S.A.* 2C:43-7.2, plus thirteen additional consecutive years corresponding to the related nonhomicide offenses.

Although our prior opinion rejected all of defendant's multiple claims of error concerning his conviction, *id.* at 13-33, we remanded the case for resentencing. *Id.* at 33-37. We did so because of the need to merge a weapons offense into the murder conviction and also because we perceived support in the record to have the trial court address the potential application of mitigating factor thirteen, *N.J.S.A.* 2C:44-1(b)(13) (whether "[t]he conduct of a youthful defendant was substantially influenced by another person more mature than the defendant").

At the ensuing January 2014 resentencing, the trial judge merged the weapons count as we directed. In addition, the judge concluded, after considerable reflection, that mitigating factor thirteen did not apply. The judge found that

defendant's personal culpability for the murder, and the dismemberment and attempted concealment of the body of the minor victim, was not substantially influenced by his brother Jonathan[1], who was eighteen years old at the time of the crimes and who participated with defendant in those brutal and gruesome acts. Even so, in recognition of defendant's efforts toward rehabilitation since the time of his original sentence in 2009, the judge modified the sentences for the nonhomicide offenses to make them concurrent rather than consecutive. That modification removed thirteen years of additional custodial time after completion of the life sentence.

***2** As a result of this chronology, defendant is now serving a life sentence in State prison with a 63.75-year NERA parole disqualifier. According to information from the Department of Corrections noted in the parties' briefs, defendant will not become eligible to be considered for parole until April 2069, at which time he would be seventy-eight years and eight months old if he lives that long. Defendant contends that this amounts to a de facto life-without-parole sentence.

In a supplemental brief defendant submitted at our request addressing our recent published opinion in *State v. Zuber,* 442 *N.J.Super.* 611, 126 A.3d 335 (App.Div.2015), *certif. granted,* --- *N.J.* ---- (2016), he points to life expectancy data indicating that he is statistically unlikely to live more than a year past his earliest parole eligibility date in April 2069. The State provides a slightly different statistical analysis, which it contends shows that a person of defendant's age, on average, will live to the age of eighty.[2] The State contends that defendant's life sentence is not a de facto life-without-parole sentence. The State argues, as a matter of law, that a sentence is not the constitutional equivalent of a "die in jail" sentence if life expectancy tables show that the defendant is expected to live at least some time, however short, past his earliest parole eligibility date.

Given the projected length of his life and the 63.75-year minimum parole ineligibility period mandated by NERA, defendant argues that his modified sentence is unconstitutional under both the Eighth Amendment of the United States Constitution as well as Article I, Paragraph 12 of the New Jersey Constitution. In that regard, he relies upon several opinions issued in recent years by the United States Supreme Court involving the Cruel and Unusual Punishment Clause of the Eighth Amendment.

In particular, defendant invokes principles set forth in *Graham v. Florida,* 560 *U.S.* 48, 130 *S.Ct.* 2011, --- L.Ed.2d ----, 176 *L.Ed.* 825 (2010) (declaring unconstitutional sentences of life without parole for juveniles convicted of nonhomicide offenses); *Miller v. Alabama,* 567 *U.S.* ----, 132 *S.Ct.* 2455, 183 *L.Ed.*2d 407 (2012) (disallowing life-without-parole sentences imposed on juveniles for homicide offenses except in "rare" situations, based upon a sentencing judge's discretionary decision-making that takes into account various factors specific to youthful offenders); and, most recently in January 2016, *Montgomery, supra,* --- *U.S.* at ----, 136 *S.Ct.* at 718, 193 *L.Ed.* at 599 (declaring that *Miller* applies retroactively to juvenile sentences imposed before *Miller,* and further delineating the specific considerations that a sentencing judge must take into account in imposing a life-without-parole sentence upon a juvenile in a homicide case).

Defendant further contends that the 63.75-year parole ineligibility facet of his sentence violates the New Jersey Constitution because imposing such a sentence upon a fourteen-year-old offender is "disproportionately cruel" and is inconsistent with our State's sentencing scheme. Defendant further asserts that a recent change in the juvenile waiver statute effective March 1, 2016, *N.J.S.A.* 2A:4A-26.1(c)(1), prospectively disallowing the waiver to adult court of offenders under the age of fifteen, reflects a legislative and societal judgment that it is disproportionately cruel in our State to sentence

juveniles under that age to a sentence above the thirty-year mandatory minimum for knowing or purposeful murder. *See N.J.S.A.* 2C:11-3(b)(1). He thus urges that we reduce his life sentence to a thirty-year term.

***3** Defendant raises the following points in his main brief and reply brief, and in his supplemental brief submitted at our request addressing the recent opinions in *Montgomery* and *Zuber:*

POINT ONE

BECAUSE ZARATE WAS 14 YEARS OLD AT THE TIME OF THE OFFENSE, THE DE FACTO LIFE-WITHOUT-PAROLE SENTENCE THAT HE RECEIVED VIOLATED THE PROHIBITION AGAINST CRUEL AND UNSUAL PUNISHMENT UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS.

A. The Imposition Of A Life-Without-Parole Sentence On A Juvenile Offender Violates The Prohibition Against Cruel And Unusual Punishment Under The State And Federal Constitutions.

B. Zarate's De Facto Life-Without-Parole Sentence Violates The Eighth Amendment Because The Sentencing Court Failed To Give Meaningful Consideration To The Youth Factors Set Forth In *Miller v. Alabama.*

POINT TWO

A SENTENCE IMPOSED ON A JUVENILE HOMICIDE OFFENDER THAT IS LONGER THAN THE 30-YEAR MINIMUM MANDATORY REQUIRED UNDER *N.J.S.A.* 2C:11-3b(1) IS DISPROPORTIONATELY CRUEL, AND INCONSISTENT WITH THE SENTENCING SCHEME CREATED BY THE NEW JERSEY JUVENILE AND CRIMINAL CODES, PARTICULARLY WHERE THE JUVENILE WAS 14 OR 15 AT THE TIME OF THE OFFENSE OR CONVICTED OF FELONY MURDER.

POINT THREE

UNDER NEW JERSEY LAW, ZARATE'S LIFE SENTENCE CANNOT STAND BECAUSE THE RESENTENCING COURT ERRONEOUSLY FOUND THAT MITIGATING FACTOR (13) DID NOT APPLY, AND FAILED TO CONSIDER ZARATE'S POST-OFFENSE ACCOMPLISHMENTS, AS REQUIRED UNDER *STATE V. RANDOLPH* AND *STATE V. JAFFE.*

A. The Trial Judge's Reasons For Rejecting Mitigating Factor (13) Were Not Supported By The Record.

B. The Court Erred In Failing To Consider Zarate's Post-Offense Rehabilitative Accomplishments In Weighing The Offender-Based Sentencing Factors.

POINT FOUR

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISQUALIFY [THE TRIAL JUDGE].[3]

REPLY POINT ONE

[THE TRIAL COURT'S] SENTENCE DID NOT SATISFY THE *MILLER* REQUIREMENTS, AS THE STATE CONTENDS.

A. This Was Not The "Uncommon" Case In Which The "Hallmark Features" Of Youth, Including A Juvenile's Greater Capacity For Reform, Did Not Militate "Against Irrevocably Sentencing [A Juvenile] To A Lifetime In Prison."

B. [The Trial Judge] Did Not Sufficiently "Explain [ ] Why He Concluded Mitigating Factor 13 Was Entitled To No Operative Weight," As The State Contends.

SUPPLEMENTAL POINT ONE

THE IMPACT ON THIS APPEAL OF THIS COURT'S RECENT DISCUSSION IN *STATE V. ZUBER.*

A. The Impact Of *State v. Zuber* On Zarate's Claim That His Sentence Violates The Eighth Amendment.

B. The Impact Of *State v. Zuber* On Zarate's Claim That A Sentence In Excess Of The 30-Year Mandatory Minimum Violates Article I, Paragraph 12 Of The New Jersey Constitution.

SUPPLEMENTAL POINT TWO

THE IMPACT ON THIS APPEAL OF THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *MONTGOMERY V. LOUISIANA.*

Having considered these arguments, we remand this matter for reconsideration in light of *Montgomery, Zuber,* and the recently-supplied life expectancy data.

II.

***4** The governing principles of law under the Eighth Amendment relating to juvenile sentencing have evolved considerably in United States Supreme Court precedents over the past few years, specifically in *Graham, Miller,* and *Montgomery.* We briefly discuss those opinions as a framework for our federal constitutional analysis.

In 2010, the Court held in *Graham v. Florida, supra,* 560 *U.S.* at 79, 130 *S.Ct.* at 2032–33, 176 *L. Ed.*2d at 848, that the Eighth Amendment prohibits a juvenile offender to be sentenced to life in prison without parole for nonhomicide crimes. *Graham* was the first Supreme Court case to apply a categorical classification under the Eighth Amendment to a so-called "term-of-years" sentence. *Id.* at 61, 130 *S.Ct.* at 2022, 176 *L. Ed.*2d at 837. The defendant in *Graham* was convicted of armed burglary and attempted armed robbery, crimes that he committed when he was sixteen years old. The trial court sentenced him to the maximum term on both crimes: life imprisonment for the armed burglary, and fifteen years for the attempted armed robbery. *Id.* at 57, 130 *S.Ct.* at 2020, 176 *L. Ed.*2d at 834. Because the State of Florida had abolished its parole system, Graham's life sentence was, in effect, a mandatory life term. *Id.* at 57, 130 *S.Ct.* at 2020, 176 *L. Ed.*2d at 834–35.

The Court held that Graham's sentence violated his Eighth Amendment constitutional protections because it

> guarantees he will *die in prison without any meaningful opportunity to obtain release,* no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. *This the Eighth Amendment does not permit.*
>
> [*Id.* at 79, 130 *S.Ct.* at 2033, 176 *L. Ed.*2d at 848 (emphasis added).]

In reaching its decision, the Court relied on what it depicted as emerging national consensus concerning the impropriety of imposing mandatory life terms upon juvenile nonhomicide offenders. *Id.* at 67, 130 *S.Ct.* at 2026, 176 *L. Ed.*2d at 841. Relying on its reasoning in an earlier case, *Roper v. Simmons,* 543 *U.S.* 551, 125 *S.Ct.* 1183, 161 *L. Ed.*2d 1 (2005), the Court noted that juvenile offenders have a lessened moral culpability as compared to adult offenders, and that mandatory life imprisonment was particularly harsh on that category of offenders. *Id.* at 68, 130 *S.Ct.* at 2026, 176 *L. Ed.*2d at 841. Neither did such a sentence, the Court explained, serve any of the penological interests in retribution, deterrence, incapacitation, or rehabilitation. *Id.* at 71–74, 130 *S.Ct.* at 2028–30, 176 *L. Ed.*2d at 843–45.

***5** The Court thus concluded in *Graham* that all mandatory life sentences for juvenile nonhomicide offenders are unconstitutional. The Court tempered that holding, however, explaining that:

> *A State is not required to guarantee eventual freedom* to a juvenile offender convicted of a nonhomicide crime. *What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.* It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit

> truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. *The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.*
>
> [*Id.* at 75, 130 *S.Ct.* at 2030, 176 *L. Ed.*2d at 845-46 (emphasis added).]

Graham did not provide specific guidance on what constitutes a "meaningful opportunity" for a juvenile offender to obtain release. Nor did it attempt to define how long a mandatory term of incarceration for a juvenile must be to trigger Eighth Amendment constraints.

Two years after *Graham,* the Court in *Miller, supra,* 567 *U.S.* at ----, 132 *S.Ct.* at 2469, 183 *L. Ed.*2d at 424, extended these principles to the context of juveniles who are convicted of homicide offenses. *Miller* declared unconstitutional any codified sentencing scheme that *mandates* for juvenile homicide offenders a sentence of life in prison without the possibility of parole. *Ibid.*

Miller involved the consolidated appeals of two juveniles who were fourteen years old at the time of the commission of their respective homicide crimes. *Id.* at ----, 132 *S.Ct.* at 2460183 *L. Ed.*2d at 414. Both were tried as adults and eventually sentenced to mandatory life terms. *Ibid.* Under the respective statutory schemes, the trial judges had no discretion to deviate from that maximum penalty. *Ibid.*

In considering these circumstances in *Miller,* the Court reaffirmed the reasoning it had set forth in *Graham* two years earlier. *Id.* at ----, 132 *S.Ct.* at 2464-69183 *L. Ed.*2d at 418-24. The Court again noted the diminished culpability of juvenile offenders as compared to adult offenders. *Ibid.* Moreover, the Court explained that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific[.] *Graham's* reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id.* at ----, 132 *S.Ct.* at 2465183 *L. Ed.*2d at 420. As the Court's majority opinion in *Miller* observed:

> ***6** [T]he mandatory penalty schemes at issue here prevent the sentence from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.
>
> [*Id.* at ----, 132 *S.Ct.* at 2466183 *L. Ed.*2d at 420-21.]

Miller's holding differs from *Graham* in one critical respect that bears upon the present homicide case. Although *Graham* places a categorical prohibition against the imposition of mandatory life terms on juvenile *nonhomicide* offenders, *Miller* does no such thing for juvenile *homicide* offenders. Indeed, *Miller* permits the imposition of life-without-parole sentences on juvenile homicide offenders, so long as the sentencing judge was reposed with and appropriately exercised the discretion to consider factors such as the defendant's youth in reaching that sentence.

Earlier this year in *Montgomery v. Louisiana, supra,* --- *U.S.* at ----, 136 *S.Ct.* at 734, 193 *L. Ed.*2d at 619-20, the Supreme Court held that *Miller's* holding applies retroactively to cases of juvenile offenders whose

convictions and sentences were final when *Miller* was decided in 2012. In addition to that retroactivity ruling, the Court also expounded further upon the principles it had expressed earlier in *Graham* and *Miller.*

The underlying facts in *Montgomery* involved a juvenile who murdered a deputy sheriff when he was seventeen years old. *Id.* at ----, 136 *S.Ct.* at 725193 *L. Ed.*2d at 610. At the time of Montgomery's final conviction[4] in 1970, "[t]he jury returned a verdict of 'guilty without capital punishment [,]' " which "required the trial court to impose a sentence of life without parole. Under Louisiana law .... [t]he sentence was automatic upon the jury's verdict, so Montgomery had no opportunity to present mitigation evidence to justify a less severe sentence." *Id.* at ----, 136 *S.Ct.* at 725–26193 *L. Ed.*2d at 610. The Supreme Court noted "[t]hat evidence might have included Montgomery's young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation." *Id.* at ----, 136 *S.Ct.* at 726193 *L. Ed.*2d at 610.

The Court held in *Montgomery* that *Miller's* holding applied to cases on collateral review. The Court noted that *Miller* established, in part, a new substantive rule of law (i.e., the "conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders [and] raises a grave risk that many are being held in violation of the Constitution"). Even though *Miller* also had procedural elements, the Court instructed in *Montgomery* that *Miller's* holding must be applied retroactively. *Id.* at ----, 136 *S.Ct.* at 736193 *L. Ed.*2d at 622. The Court noted that the procedural requirements imposed by *Miller* on a sentencing court "do [ ] not replace but rather give [ ] effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* at ----, 136 *S.Ct.* at 735193 *L. Ed.*2d at 621.[5]

***7** The Court majority specifically observed in *Montgomery* that "*Miller* ... did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole[.]" *Id.* at ----, 136 *S.Ct.* at 734193 *L. Ed.*2d at 619. The Court emphasized that "sentencing a child to life without parole is *excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption* [.]' " *Ibid.* (quoting *Miller, supra,* 567 *U.S.* at ----, 132 *S.Ct.* at 2469, 183 *L. Ed.*2d at 424 (emphasis added)). The Court in *Montgomery* further underscored that *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 ----, 136 *S.Ct.* at 734193 *L. Ed.*2d at 620 (quoting *Penry v. Lynaugh,* 492 *U .S.* 302, 330, 109 *S.Ct.* 2934, 2953, 106 *L. Ed.*2d 256, 285 (1989)).

One published[6] opinion in our State thus far has applied the principles of *Graham, Miller,* (and now *Montgomery*) to a juvenile sentence: this court's October 2015 decision in *Zuber, supra,* 442 *N.J.Super.* at 611, 126 A.3d 335. *Zuber* involved a nonhomicide defendant who was nearly eighteen years old and had an extensive juvenile record when he committed two gang rapes. *Id.* at 614–15, 126 A.3d 335. Zuber was ultimately resentenced to a total of fifty years in prison with twenty-five years of parole ineligibility for the first rape and sixty years in prison with thirty years of parole ineligibility for the second. *Id.* at 615–16, 126 A.3d 335. He argued that his aggregate sentence was unconstitutional under *Graham* because his prison sentence of one-hundred-and-ten years (fifty-five of which were to be served without eligibility for parole) equated to a prohibited life-without-parole sentence for a juvenile. *Id.* at 617, 126 A.3d 335.

Although we assumed in *Zuber,* without deciding, that "*Graham* could be extended to apply to a sentence for a single offense expressed, not as 'life without parole,' but as a term of years without parole equaling or

exceeding the life expectancy of a person of [the] defendant's age[,]" *id.* at 624, 126 A.3d 335, we ultimately found that Zuber's sentence was not prohibited under the Eighth Amendment. *Id.* at 634, 126 A.3d 335. Our reasoning was based in part upon the most recent National Vital Statistics Report ("NVSR") provided by the Center for Disease Control in existence at the time the trial court denied defendant's motion to correct his sentence as unconstitutional. *Id.* at 629, 126 A.3d 335.

Zuber, who was forty-eight years old at the time of his post-judgment motion, would be seventy-seven at the date he was first eligible for parole. *Id.* at 630, 126 A.3d 335. Hence, we found that Zuber's sentence gave him "an opportunity to be paroled approximately eight years before the end of the eighty-year predicted lifespan of a forty-eight-year-old." *Ibid.* Consequently, we concluded that such an opportunity for parole was "meaningful and realistic" within the meaning of *Graham* because it was not a sentence that left Zuber "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Ibid.* (quoting *Graham, supra,* 560 *U.S.* at 79, 130 *S.Ct.* at 2032, 176 *L. Ed.*2d at 848).[7]

III.

***8** Guided by these recent precedents, we first turn to defendant's principal claims of an Eighth Amendment violation.

A.

The specific holding of *Graham,* which pertains to juvenile nonhomicide offenders, is inapplicable to the present case because defendant was convicted of murder and his life sentence was imposed for that homicide. Hence, although the broader principles expressed in *Graham* recognize special aspects of juvenile offenses that more generally bear upon this matter, *Graham's* specific prohibition of life-without-parole sentences for *nonhomicide* juvenile offenders does not control here. Instead, *Miller* and *Montgomery,* both of which address juvenile homicide cases, are more on point.

The State is correct that the strand of *Miller* prohibiting *statutorily-mandated* life-without-parole sentences is not applicable here. The trial judge had the discretion under the statutory scheme to sentence defendant to a sentence between the mandatory minimum of thirty years and the maximum of life in prison. *See* *N.J.S.A.* 2C:11-3(b)(1). Applying that discretion, the judge chose, both at the original sentencing and on resentencing, to impose a life sentence. There was no per se statutory obligation here to impose a life sentence with its attendant parole ineligibility consequences.

B.

The next related question under *Miller* and *Montgomery* is whether the sentencing judge, in exercising his discretion, appropriately took into account the special characteristics of a juvenile offender in imposing a life sentence with a 63.75-year NERA parole disqualifier upon defendant.

Defendant argues that there are essentially five separate youth-related considerations required by *Miller:* (1) the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the juvenile's "family and home environment"; (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) "the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and (5) whether the circumstances suggest "possibility of rehabilitation." *Miller, supra,* 567 *U.S.* at ----, 132 *S.Ct.* at 2468, 183 *L. Ed.*2d at 423. He maintains that the trial judge on resentencing gave short shrift to these considerations.

In the course of resentencing defendant, the trial judge had the benefit of the Supreme Court's opinion in *Miller.* The judge specifically referred to *Miller* and its youth-related principles repeatedly during the course of his extensive oral ruling. The judge also considered a psychiatric report presented by a defense expert, Dr. Martin Weinapple, which discussed *Miller* and the youth-offender considerations sentencing judges are to consider in juvenile homicide cases. The judge addressed at length why such considerations do not warrant a modification of defendant's NERA life sentence for the murder conviction.

***9** As a major part of his resentencing analysis, the trial judge thoroughly addressed whether defendant had been substantially influenced by his older brother Jonathan in these offenses and the comparative degree of defendant's personal culpability. We quote at length from the judge's observations on the record on this subject:

> [T]he defense introduced a statement that he gave to police after his arrest. In it, the defendant said Jonathan told him to leave the family room when the victim came to the door, and he went to sleep on the couch. He woke when he heard big thumps and Jonathan asked him to help put a foot locker in the Jeep.
>
> Why the stipulation [that was introduced at trial]? Why reading the statement? Again, [defendant's] not believable. What is believable, however, [i]s he stated he had nothing to corroborate his version of the events. Also, other than his bare assertion, there were no proofs or examples of Jonathan's maturity.
>
> It's interesting to note that in defendant's allocution while claiming innocence and no participation in the murder, and with a sentence yet to be announced by this court, he comments about his mother's suffering because her only two sons were doing life in prison....
>
> Although expressing sorrow for the pain he caused his parents, he claims he did not seek their assistance either that morning or the next at the party gatherings. What about the clean up of the blood? Which he acknowledged existed. The odor from the bleach, detergents and other materials that were used. Are we to believe that would go unnoticed by his family, especially the odor[?]
>
> *I make these observation[s] as the defendant appears to be a manipulator and not the one being manipulated.*
>
> ....
>
> The fact is, however, that *with all I have viewed and heard throughout these proceedings, I cannot find that the defendant was substantially influenced by his brother.* His words at sentencing, no matter how well organized and presented in my view are just not believable, any more than his stipulated claim that his brother acted alone, or the claim that he was asleep on the couch or that the victim's body was already in the foot locker when Jonathan asked him to help put it in the Jeep.
>
> He didn't even see the dismembered legs which were not in the trunk. Even the detailed description of what Jonathan allegedly did alone given to the police and introduced at trial for someone not there, stretches the imagination.
>
> A[m] I to believe that a young woman admires the 18 year old brother, has a crush on him, therefore the 18 year old kills her, that he takes a young woman who just turned 16 who was unarmed and defenseless, beats her with a pole, stabs her with a knife, stabs her in the neck and in other places, inserts things into her throat to prevent her screams from being heard, tries to cut off her extremities, one portion which was too difficult so cuts off both her legs, while she's still alive[?] Am I to believe he acted alone?
>
> ***10** *These defendants in my view [were] equally responsible and in the view more importantly of the jury. I cannot in good conscience find that the defendant's conduct although he was youthful, a child if the defense*

> *prefers, was substantially influenced by another person more mature that he. It is difficult not to accept the view that the opposite is the case.*
>
> In all likelihood, were it not for defendant, this tragedy would not have occurred. And it occurred two years after he had to leave his home, and this was his first encounter with the victim.
>
> I started out by indicating that I had the opportunity to observe the defendant, his reactions during the numerous proceedings and trial. I observed his body language at various times. And when witnesses testify. The two brothers may have fed off of each other when together, but this defendant was not substantially influenced by his brother, who in his own right cannot claim maturity.
>
> ....
>
> *I know any sentence for a youthful offender is a stern one.* But so is the result of the defendant's conduct to an equally youthful victim.
>
> *I find James was not substantially influenced by another person more mature that he.* Accordingly, for the reasons I've set forth, *I do not find that mitigating factor 13 is applicable in this case.*
>
> [(Emphasis added).]

In his revised judgment of conviction, the judge described at length the potential aggravating and mitigating factors, finding that aggravating factors one, two, three and nine applied and that only mitigating factor seven applied, but only to a limited extent. The revised judgment summarizes that analysis as follows:

> This defendant has no history of a conviction for an indictable offense. There is a statutory presumption of imprisonment in this case. Aside from the No Early Release Act, there is a mandatory minimum period of 30 years incarceration pursuant to the statute. The Court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, of which there are arguably none, except limited [mitigating factor] 7. The convictions for which the sentences have been imposed are numerous. The crimes were committed at different times and in separate places. Their objectives were independent of each other, and in our system of jurisprudence, there can be no free crimes for which the punishment shall fit the crime. The jury found ... defendant guilty of all charges in the indictment. These were heinous crimes, extreme and extraordinary occurrences, involving not only murder but mutilation and an orchestrated complicity involving others in an attempt to avoid detection.

The judge then addressed our mandate regarding merger, as well as the consecutive sentences that he had originally imposed for the nonhomicide offenses:

> As determined by the Appellate Division in its decision of August 27, 2012, the consecutive sentence imposed on Count 4 is vacated in light of the merger of that count with Count 1. This Amended Judgment of Conviction is intended to address mitigating factor 13. At the time of the original sentence the Court considered but did not address that factor on the record. It should have.
>
> ***11** All comments and reasons given by

the Court for imposition of this sentence on the date of re-sentence are incorporated and made a part hereof.

We disagree with defendant's contention that the judge failed to take into account general principles that minor offenders tend to be immature and to lack a fully-formed capacity to consider the consequences of their wrongful acts. The judge appropriately focused on defendant's own individual attributes, including his relative level of intelligence and other personal characteristics indicative of his capacity to appreciate the wrongfulness of his actions and to bear responsibility for them.

Although the judge did not discuss all of the various passages from *Miller* now cited by defendant on appeal as a "five-factor test,"[8] he took those youth-related concepts collectively into consideration in exercising his sentencing discretion. The judge did not give lip service to those concepts. In fact, the judge eliminated the thirteen-year consecutive term imposed in the original sentence, in recognition of defendant's post-conviction efforts toward rehabilitation, which reflects the judge's recognition of the potential capacity of this young defendant to reform as an adult.

C.

That said, we agree with defendant on one important subsidiary point that bears greatly upon the Eighth Amendment analysis: the NERA-mandated 63.75-year parole ineligibility period amounts to a de facto life-without-parole sentence. The United States Supreme Court's case law in *Graham, supra,* 560 *U.S.* at 75, 130 *S.Ct.* at 2030, 176 *L. Ed.*2d at 845-46, *Miller, supra,* 567 *U.S.* at ----, 132 *S.Ct.* at 2469, 183 *L. Ed.*2d at 424, and *Montgomery, supra,* --- *U.S.* at ----, 136, *S.Ct.* at 736-37, 193 *L. Ed.*2d at 637, focuses upon whether a juvenile offender will have a "meaningful" opportunity for a future life outside of prison walls.

Although the Court has not defined with precision that pivotal term "meaningful," in *Montgomery* the Court recently stated that "prisoners like [him] must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for *some years of life outside of prison walls* must be restored." *Montgomery, supra,* --- *U.S.* at ----, 136 *S.Ct.* at 736-37, 193 *L. Ed.*2d at 623 (emphasis added). We construe *Montgomery's* reference in the plural to "some years" to convey that a sentence in which a defendant is not statistically predicted to live at least two years beyond his first parole eligibility date would not afford a "meaningful" opportunity for civilian life, and thus comprise the functional equivalent of a sentence to life without parole.

There are several potential ways to calculate defendant's statistical life expectancy, depending on which data is used. According to the life expectancy table in Appendix I to the current (2016) edition of the *Court Rules,* defendant, who was the age of thirteen going on fourteen at the time of the table's *creation* in 2004, would be expected in 2004 to live for another 64.9 years, or until he was 77.9 years old. *See* Life Expectancies for All Races and Both Sexes, Pressler & Verniero, *Current N.J. Court Rules,* Appendix I at www.gannlaw.com (2016). Appendix I was derived from the *National Vital Statistics Reports (NVSR*), Vol. 52, No. 14 (Feb. 18, 2004).[9] This would mean defendant's projected life expectancy under this approach would expire prior to his first parole eligibility date at the age of 78 years and eight months.

***12** Alternatively, if one were to apply this same current Appendix I table[10] to defendant's age at his initial sentencing on July 30, 2009, defendant, who was eighteen going on nineteen at that time, would be expected to live post-sentencing for another 60 years, making his life expectancy 78.0. *See* Life Expectancies for All Races and Both Sexes, Pressler & Verniero, *Current N.J. Court Rules,* Appendix I at 530 (2009). Hence, under this alternative scenario, defendant's

life expectancy likewise has him dying about seven months prior to his earliest parole eligibility date.

If the current Appendix I table were applied to defendant's age at the time of his resentencing hearing in January 2014, defendant, who was then age twenty-three going on twenty-four, was expected at that point to live another 55.3 years. *See* Life Expectancies for All Races and Both Sexes, Pressler & Verniero, *Current N.J. Court Rules,* Appendix I at 2549 (2014). Thus, defendant's life expectancy age calculated in this manner would be 78.3, i.e., about eight months before his earliest parole eligibility date.

Slightly different results may be generated from more recent NVSR data. In fact, this court in *Zuber* recommended that courts "use the NVSR's most recent available data in determining what sentence meets *Graham's* requirements." *Zuber, supra,* 442 *N.J.Super.* at 628, 126 A.3d 335. Consequently, in *Zuber* we looked to the most recent NVSR table available at the time Zuber's motion to correct his sentence was heard. *Id.* at 629, 126 A.3d 335. In accordance with *Zuber,* if we consult the NVSR table that was most recently available at the time of defendant's initial sentencing on July 30, 2009 when he was age eighteen, his life expectancy age then would be 78.7 years, i.e., only a small fraction (less than a tenth of a year) after his earliest parole eligibility date. *National Vital Statistics Reports,* Vol. 56, No. 9 (Dec. 28, 2007).[11]

Lastly, if we alternatively look to the NVSR table that was most recently available at the time of defendant's resentencing on January 17, 2014, when he was age twenty-three, his life expectancy would be 79.5 years old, meaning that he would first become eligible for parole about ten months before the expected end of his life. *See National Vital Statistics Reports,*[12] Vol. 62, No. 7 (Jan. 6, 2014).[13]

The upshot of this statistical data is that, whatever life expectancy table is utilized, a person of defendant's age is not likely to live more than about a year, if that, beyond defendant's earliest parole eligibility date in April 2069. We regard this period of time, even using the data most beneficial to the State, to be so minimal that it does not provide for a "meaningful" opportunity for defendant to be released from prison before his statistically-likely death. The projections also fall short of the "some years" mark established by the United States Supreme Court in *Montgomery. See Montgomery, supra,* --- *U.S.* at ----, 136 *S.Ct.* at 736–37, 193 *L. Ed.*2d at 623. Hence, the court has imposed upon defendant, as he contends, a de facto life-without-parole sentence.

D.

***13** The transcript of the resentencing contains an observation by the judge that "this is not a die in prison sentence." The judge made that observation after discussing *Miller* and another Supreme Court opinion in which the pertinent sentencing statutes had, as the judge put it, "required that the offender die in prison[.]" The judge correctly noted that proscription in the two other states is "not the New Jersey law" because our statutes instead provide trial judges with the discretion to sentence murderers to prison terms of years that are less than life imprisonment. The judge's remark that "this is not a die in prison sentence" therefore might have been intended by him to mean "this is not a punishment *mandated by statute* to be a die-in-prison sentence."

On the other hand, the judge possibly might have been operating under the assumption—not having the benefit of the life expectancy data now furnished to us on appeal—that defendant is likely to live a "meaningful" period of time past his first parole eligibility date in the year 2069. This alternate interpretation of the judge's words is arguably supported by the judge's decision at resentencing to remove the thirteen-year consecutive term that he had originally tacked onto the life sentence. One might reasonably infer

from this modification that the judge intended some "real-time" benefit to accrue to defendant from treating the additional offenses as concurrent, so as to reward him for his post-conviction efforts toward rehabilitation. Hence, the judge's "not a die in prison" observation is somewhat ambiguous.

As we have noted, the judge did not have before him the life expectancy data that has now been supplied to us on appeal in the wake of *Zuber* and *Montgomery.* We do not fault the judge whatsoever for failing to consult the table in Appendix I of the Court Rules, *sua sponte,* when he resentenced defendant. In all fairness to the judge, our October 2015 precedential opinion in *Zuber,* declaring for the first time that life expectancy tables are relevant to determining if a juvenile sentence is a "de facto" life-without-parole sentence, had not yet been issued when he resentenced defendant in January 2014, nor had *Montgomery* been issued.

The sentencing judge did not know that we would conclude on the present appeal that the life expectancy data shows that the impact of the 63.75-year NERA parole ineligibility disqualifier, as applied to defendant, makes this a de facto life-without-parole sentence and does not realistically afford defendant a "meaningful" opportunity for a future life outside of prison walls. Nor should the judge have been expected to predict that the United State Supreme Court in *Montgomery* would declare that such a "meaningful" opportunity envisions that a defendant is expected to live "some years" in freedom beyond his parole date. Conceivably, the judge was aware that as a matter of common knowledge, American males often do not live beyond their late seventies. However, he did not have before him any hard data containing statistical information that more precisely depicted the likelihood of this juvenile offender's death at various ages.

***14** The ambiguity of the judge's "not a die in prison" observation has particular significance under the Eighth Amendment because *Montgomery* instructs that the "procedural component" of *Miller* "*requires* a sentencer to consider a juvenile offender's youth and attendant characteristics *before determining that life without parole is a proportionate sentence.* " *Montgomery, supra,* --- *U.S.* at ----, 136 *S.Ct.* at 734, 193 *L. Ed.*2d at 620 (emphasis added) (citing *Miller, supra,* 567 *U.S.* at ----, 132 *S.Ct.* at 2455, 183 *L. Ed.*2d at 407). If, hypothetically, the trial judge here incorrectly assumed at the resentencing hearing that this is not a de facto life-without-parole sentence, then he might not have sufficiently considered, as *Miller* and *Montgomery* "require," whether that punishment is a "proportionate sentence" that meets the requirements of the Eighth Amendment.

For that matter, if—again hypothetically—the judge's possible unawareness of life expectancy projections led him to assume that defendant is likely to live a considerable number of years after his first parole eligibility date in 2069, such a mistaken assumption could also provide a non-constitutional basis for the judge to reconsider the sentence because of a flawed factual premise. *See, e.g., State v. Jarbath,* 114 *N.J.* 394, 404, 555 A.2d 559 (1989) (noting the court's authority to reconsider sentences when they are based upon incorrect factual grounds).

The "real time" consequences of confinement here for defendant are largely dictated by NERA. As our case law instructs, sentencing courts "must ... be mindful of the real-time consequences of NERA and the role that it customarily plays in the fashioning of an appropriate sentence." *State v. Marinez,* 370 *N.J.Super.* 49, 58, 850 A.2d 553 (App.Div.), *certif. denied,* 182 *N.J.* 142, 861 A.2d 846 (2004). *See also State v. Hernandez,* 208 *N.J.* 24, 50, 26 A.3d 376 (2011) (internal citation omitted) (quoting *Marinez, supra,* 370 *N.J.Super.* at 58, 850 A.2d 553) (likewise recognizing that "sentencing and appellate courts must 'be mindful of the real-time consequences of NERA and the role that it customarily plays in the fashioning

of an appropriate sentence' ").

Given the importance of the constitutional interests at stake in this case and the proportionality analysis required by *Montgomery,* we decline to resolve the Eighth Amendment issues conclusively on the present record. Instead, we remand this matter to the trial court to reconsider defendant's sentence in light of the recently-furnished life expectancy data, the Supreme Court's guidance in *Montgomery,* and our determination in this opinion that defendant's present sentence is indeed a de facto life-without-parole sentence. We shall not presume that such a remand will be a futile exercise, given that the judge at resentencing seemingly was attempting to provide defendant with some actual real-time relief by eliminating the consecutive sentences and rewarding him for his positive post-conviction efforts toward rehabilitation.

***15** To be sure, the trial judge at resentencing elaborated at length why the nature of defendant's conduct was especially heinous and why his youth at the time of his actions does not justify a shorter sentence. Nevertheless, the trial court might not have intended to impose what we have now determined to be a de facto life-without-parole sentence, within the meaning of that concept as recently clarified by the Supreme Court in *Montgomery.* If the trial court in fact intended to impose a punishment that was short of a "die in prison" sentence, it should clarify that intention on remand, and recalibrate defendant's sentence accordingly in light of the life expectancy data that was not provided to it previously.[14] *See Montgomery, supra,* --- *U.S.* at ----, 136 *S.Ct.* at 734, 193 *L. Ed.*2d at 620. We do not preordain what conclusions the trial court should reach on this question framed in this manner as mandated by *Montgomery.* Instead, we leave it to the trial court to reflect again on its analysis with the benefit of the life expectancy data and the new case law.

IV.

Defendant separately presents a novel argument asserting that, even if his sentence is deemed valid under the Eighth Amendment of the Federal Constitution, it nevertheless violates Article I, paragraph 12 of the New Jersey Constitution. He seeks to have us declare that his sentence is disproportionate under state constitutional principles. Among other things, he points to the fact that the Legislature recently amended the juvenile statutes to disallow waiver to adult court for a youth who commits an offense at the age of fourteen.

Defendant's state constitutional law argument was only alluded to briefly by his counsel in the January 2014 resentencing transcript. It is only mentioned in one sentence in his main brief, with a citation to a Massachusetts state court case. His argument would require a doctrinal finding that the New Jersey Constitution's cruel-and-unusual punishment clause should be construed more broadly than its counterpart in the Eighth Amendment. Our State Supreme Court has done so on one occasion involving an adult defendant in a capital case concerning the *mens rea* requirement for capital murder. *See State v. Gerald,* 113 *N.J.* 40, 75-76, 89, 549 A.2d 792 (1988). Significantly, the Court in *Gerald* noted, in justifying that particular divergence from cognate federal constitutional law principles, that capital punishment is a matter of "particular state interest or local concern and does not require a uniform national policy." *Id.* at 76, 549 A.2d 792 (quoting *State v. Ramseur,* 106 *N.J.* 123, 167, 524 A.2d 188 (1987)).

In contrast to *Gerald,* the present case is not a capital case, nor could it be because it involves a juvenile offender. To date, our State Supreme Court has not held that Article I, paragraph 12 of the New Jersey Constitution should be construed more broadly than the counterpart Eighth Amendment in the realm of juvenile sentencing or in the realm of non-capital cases.

***16** In addition, it is not readily apparent that the so-called state constitutional divergence factors first articulated in Justice Handler's seminal concurring opinion in *State v. Hunt,* 91 *N.J.* 338, 363-68, 450 A.2d 952 (1982) (Handler, J., concurring), compel diverging from the Eighth Amendment standards of cruel and unusual punishment imposed upon a juvenile. Those *Hunt* divergence factors include:

> (1) textual differences in the Constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state. He concluded that reliance on such criteria demonstrates that a divergent state constitutional interpretation "does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."
>
> [*Ibid.; see also State v. Williams,* 93 *N.J.* 39, 57-58, 459 A.2d 641 (1983) (endorsing the *Hunt* factors).]

The parties' briefs on appeal do not address the *Hunt* divergence factors. Without addressing them here fully in the absence of such briefing, we will simply note in passing that there does not appear to be significant textual differences between the cruel-and-unusual punishment clauses in the two Constitutions. Nor have we been supplied with historical indicia of particular state history or traditions signaling that the New Jersey Constitution is intended to be more protective of juveniles at sentencing than under the Eighth Amendment. Indeed, until the United States Supreme Court in recent years decided *Graham, Miller,* and *Montgomery,* the constitutionality of the imposition of life sentences upon juvenile offenders does not appear to have been an issue in any reported opinions in our State.

As an intermediate appellate court, we are reluctant to presume that the New Jersey Supreme Court will take the momentous step of declaring that Article I, paragraph 12 of our State Constitution should be interpreted more broadly in the realm of juvenile and non-capital sentencing than the Eighth Amendment's Cruel and Unusual Punishment Clause. It is conceivable that the Court will have occasion to consider such arguments for state constitutional divergence in *Zuber,* on which it recently granted certification. In any event, we decline to address defendant's novel arguments based on the State Constitution and defer to our Supreme Court's ultimate guidance on the subject.

V.

Lastly, we address defendant's non-constitutional arguments that the trial court erred at the resentencing proceeding in two respects: (1) rejecting mitigating factor thirteen, after having been instructed in our 2012 opinion to consider the potential applicability of that factor; and (2) failing to give adequate credit to defendant for his post-conviction rehabilitative accomplishments. We reject each of these contentions.

A.

***17** First, as to mitigating factor thirteen, we recognize that we did note in our 2012 opinion that there seemed to be "clear support" for that factor, such as indicia that defendant's older brother Jonathan had been a caretaker for defendant and could have taunted defendant into committing these crimes. *State v. James Zarate, supra,* slip op. at 36. We noted that at the original sentencing, the trial judge "did not comment on [defendant's] relationship with his brother or Jonathan's conviction for using a juvenile to commit a crime." *Ibid.*

As we have already shown at length in Part III(B), *supra,* the sentencing judge on remand focused more intently on this potential mitigating factor with a much more detailed analysis.

The judge explicitly considered, among other things, the letters the court received from family members and friends indicating that defendant looked up to his older brother. The judge also considered the psychiatric report from Dr. Weinapple evaluating defendant.[15]

As the judge noted, he had the distinct opportunity to interact with both defendant and his brother at trial and at motion hearings. The judge evaluated the body language, expression, reactions, and other outward manifestations of the two brothers, and found defendant to be the more mature sibling. The judge underscored defendant's past documented animosity toward and bullying of the victim, as well as the fact that V.B., the juvenile friend found on the bridge with defendant and his brother, testified that defendant told him he had stabbed the victim and that his brother had only punched the victim.

The judge additionally found that defendant's brother's conviction for *N.J.S.A.* 2C:24-9 (use of a juvenile to commit a criminal offense) was not dispositive as to mitigating factor thirteen because it was unclear what the jury in that case had based their finding on, especially since V.B. was also a juvenile who helped in the attempt to discard the victim's remains on the bridge.

The judge specifically found that defendant in his assertions to the court in the sentencing proceedings was "not believable" and "without remorse." The judge also found that "defendant appears to be a manipulator and not the one being manipulated."

The judge duly took into account the opinions of the psychiatrists asserting that defendant was young and therefore could in their view, be easily influenced. The judge found those expert opinions were too generalized, that they did not take defendant's intelligence into account, and they did not indicate defendant had any psychiatric disorder. Consequently, the judge did consider such evidence related to this factor, but found it unpersuasive, ultimately concluding that defendant and his brother were "equally responsible[.]"

The judge's lengthy analysis on this subject at the resentencing reflects that he appropriately considered mitigating factor thirteen on remand, as he was directed. The judge provided reasonable grounds to conclude that defendant likely was not influenced to commit these crimes by his older brother, to a degree sufficient to apply this mitigating factor.

***18** Giving due deference to the sentencing judge's much closer "feel for the case," we are persuaded that his ultimate rejection of mitigating factor thirteen is reasonably supported by the record, despite our earlier perception that the circumstances supported the application of that factor. We defer to the trial judge's careful consideration of this sentencing factor, now having the benefit of the expanded analysis he provided on remand in both his oral ruling and the revised judgment of conviction.

The judge's assessment is not manifestly erroneous, and we discern no necessity to direct the court to reconsider the sentence a third time on this basis. *See, e.g.*, *State v. Bieniek*, 200 *N.J.* 601, 612, 985 A.2d 1251 (2010) (noting our limited scope of appellate review of a sentencing decision and the trial court's assessment of aggravating and mitigating factors). Moreover, given the considerable strength of the aggravating factors in this case, we are not persuaded that the presence of mitigating factor thirteen here, even if it had applied, would have tipped the balance and warranted a shorter sentence on this basis.

B.

We need not comment at length regarding defendant's claim that the judge did not sufficiently take his rehabilitative efforts into account at resentencing. To be sure, our case law now makes clear that on a resentencing, the court must take into account a defendant's rehabilitative

efforts up to the time of the proceeding. *See State v. Randolph,* 210 *N.J.* 330, 333, 349, 44 A.3d 1113 (2012). *See also State v. Jaffe,* 220 *N.J.* 114, 124, 104 A.3d 214 (2014) (extending *Randolph* to post-offense rehabilitative efforts at the time of initial sentencing). We are satisfied, however, that the trial judge fulfilled this obligation when he resentenced defendant in January 2014, nearly five years after the original sentencing.

The judge at resentencing extensively referenced the materials submitted on defendant's behalf documenting the post-conviction accomplishments he had made, such as getting his G.E.D., scoring highly on the SAT, becoming spiritual, completing paralegal courses, and other activities. The judge explicitly took these post-incarceration strides into account when he eliminated the thirteen-year consecutive term that had previously been tacked onto his life sentence. The judge noted in his oral remarks that he was "considering what the defendant ha[d] done since [his conviction]" and that defendant's aggregate sentence was being reduced "because he has shown that he's doing some things that he should." The judge was not required to go further than making the consecutive sentences concurrent. He did not manifestly abuse his discretion in finding defendant's post-rehabilitative efforts insufficient to overcome the compelling grounds under state law he cited for re-imposing the life sentence for the homicide.

We recognize that the Supreme Court in *Montgomery* indicated that, as a remedy for a proven *Miller* violation, a court may consider accelerating the parole eligibility date of defendants who demonstrate an ability to reform by their post-sentencing efforts. *Montgomery, supra,* --- *U.S.* at ----, 136 *S.Ct.* at 736, 193 *L. Ed.*2d at 622. The Supreme Court cited in that regard to Montgomery's "evolution from a troubled, misguided youth to a model mentor of the prison community[,]" exemplified by his efforts in establishing an inmate boxing team, his work in the prison's silkscreen department, and his efforts to provide advice and serve as a role model to other inmates. *Ibid.*

***19** That discussion in *Montgomery* is not applicable here for two reasons. First, subject to the remand to reconsider the sentence based on life expectancy data, defendant has not thus far established a *Miller* violation. Second, the defendant in *Montgomery* had been in prison since the 1960s and had a comparatively far longer time than James Zarate to demonstrate his strides toward rehabilitation.

VI.

The balance of defendant's arguments lack sufficient merit to warrant discussion in this opinion. *R.* 2:11-3(e)(2).

VII.

For the reasons we have discussed, this matter is remanded to the trial court to reconsider defendant's homicide sentence in light of the recently-supplied life expectancy data, the guidance of recent case law in *Montgomery* and *Zuber,* and our determination that the life sentence conditioned upon a 63.75-year NERA parole disqualifier comprises a de facto life-without-parole sentence for this juvenile offender. Consistent with *Randolph,* the trial court shall also consider on remand updated information concerning defendant's further efforts, if any, toward rehabilitation since January 2014. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2016 WL 1079462

Footnotes

1 In a separate trial that preceded defendant's, a jury found his brother Jonathan guilty of murder and other offenses.

The court sentenced Jonathan to life in prison, plus twenty-four consecutive years for additional offenses. We upheld Jonathan's convictions but remanded his case to vacate one of the consecutive sentences. *See State v. Jonathan Zarate,* No. A–3315–08 (App.Div. Jan. 27, 2012), *certif. denied,* 212 *N.J.* 431 (2012).

2 Our own calculations differ. *See* Part III(C), *infra.*

3 At oral argument on the appeal, defense counsel withdrew this particular argument in light of the Supreme Court's recent opinion in *State v. Buckner,* 223 *N.J.* 1, 121 A.3d 290 (2015) (upholding the constitutionality of Superior Court judges who are over the age of seventy serving on recall).

4 Montgomery "was convicted of murder and sentenced to death, but the Louisiana Supreme Court reversed his conviction after finding that public prejudice had prevented a fair trial. Montgomery was retried." *Id.* at ––––, 121 A.3d 290, 136 *S.Ct.* at 725193 *L. Ed.*2d at 610 (citation omitted).

5 The State concedes in its supplemental brief that *Montgomery* calls for retroactive application of *Miller* to the present case.

6 We are aware of several unpublished opinions of this court applying *Graham* and *Miller,* several of which were called to our attention by counsel. *R.* 1:36–3. Because those opinions are not precedential, we do not discuss them here. We are also aware of *State in the Interest of C.F.,* ––– *N.J.Super.* –––– (App.Div.2016), citing *Miller* on a proposition that is not relevant to the present appeal. Likewise, we are aware of *In re State ex rel. A.D.,* 212 *N.J.* 200, 215 n. 6, 52 A.3d 1024 (2012), citing *Graham* on another proposition that is not germane to this appeal.

7 Our Supreme Court recently granted certification in *Zuber.* As framed on the Court's website, the question presented for review is: "Does defendant's aggregate sentence, imposed for nonhomicide offenses committed in 1981, violate the proscriptions of *Graham v. Florida,* 560 *U.S.* 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), regarding sentences of juvenile offenders?"

8 We are unaware of any reported cases, including *Montgomery,* that have distilled *Miller* into a five-factor test, although we recognize that all of the listed considerations are mentioned in *Miller.*

9 We note that in its January 2016 Report, the Supreme Court's Civil Practice Committee proposed adopting the life expectancy table from the *November 2014* National Vital Statistics report, which is based upon 2010 statistics. *2016 Report of the Supreme Court Civil Practice Committee (Jan.2016),* http://www.judiciary.state.nj.us/reports2016/Civil PracticeCommittee .pdf. According to that proposed table, defendant, who was nineteen years old going on twenty at the time of the table's creation, would be expected to live for another 60.4 years, making him 79.4 at the time of his first parole eligibility date.

10 The 2009 version of Appendix I is identical to the version in the current 2016 rule book.

11 Under the 2007 NVSR's Table 1, "Life table for the total population: United States, 2004[,]" a person who is between eighteen and nineteen years old has an average life expectancy of 60 .7 years. This is the equivalent table to the one we applied in *Zuber. See Zuber, supra,* 442 *N.J.Super.* at 629, 126 A.3d 335.

12 Under the 2014 NVSR's Table 1, "Life table for the total population: United States, 2009[,]" a person who is between twenty-three and twenty-four years old has an average life expectancy of 56.5 years. This is the equivalent table to that used in *Zuber. See Zuber, supra,* 442 *N.J.Super.* at 629, 126 A.3d 335.

13 The parties suggest that we use different life expectancy calculations. Defendant argues that we utilize the NVSR table most recently adopted at the time of defendant's resentencing on January 17, 2014, (i.e., *National Vital Statistics Reports,* Vol. 62, No. 7 (Jan. 6, 2014)) but calculate his life expectancy with the age he was at the time the statistics were made (i.e., between eighteen and nineteen years old in 2009). Thus, defendant would be expected to live another 61.2 years, or until he was approximately 79.2 years old and about six months past his first parole eligibility date. *National Vital Statistics Reports,* Vol. 62, No. 7 (Jan. 6, 2014). The State conversely suggests that we use the most recent NVSR table available now (but not available at the time of either defendant's initial sentencing or resentencing). *National Vital Statistics Reports,* Vol. 64, No. 11 (Sept. 22, 2015). In *Zuber* we chose not to apply such most recent data because it was not available at the time of the judge's decision. *Zuber, supra,* 442 *N.J.Super.* at 629 n. 11, 126 A.3d 335. In any event, the State argues we look to either the age defendant was when he committed these offenses (i.e., between fourteen and fifteen years old) or to the age he was at the time of his resentencing (i.e., between twenty-three and twenty-four years old) when applying this most recent NVSR table. Applying that 2015 NVSR table to defendant's age of fourteen at the time of his offenses, he would be expected to live another 65.3 years, making his life expectancy age 79.3 years old and about eight months after his earliest parole eligibility date. *National Vital Statistics Reports,* Vol. 64, No. 11 (Sept. 22, 2015). If we alternatively apply the 2015 NVSR table to defendant's age at the time of his January 2014 resentencing, defendant would be expected to live another 56.7 years, making his life expectancy

age approximately 79.7 years old or about one year after his earliest parole eligibility date.

14 In this regard, we note that the assistant prosecutor represented to us during oral argument that defendant apparently is the only fourteen-year-old offender in the State prison system serving a life sentence with a 63.75–year NERA parole ineligibility period. According to the prosecutor, the other two fourteen-year-old juveniles in the prison system with life sentences have thirty-year parole disqualifiers.

15 The trial judge also considered a letter on defendant's behalf from his aunt who is apparently a California psychiatrist.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

2016 WL 1085360
Only the Westlaw citation is currently available.
Supreme Court of Georgia.

VEAL
v.
The STATE.
No. S15A1721.
|
March 21, 2016.

Attorneys and Law Firms

Long Dai Vo, Georgia Public Defender Council, Atlanta, for appellant.

Patricia B. Attaway Burton, Deputy Atty. Gen., Paula Khristian Smith, Sr. Asst. Atty. Gen., Samuel S. Olens, Atty. Gen., Matthew Min-soo Youn, Asst. Atty. Gen., Department of Law, Joshua Daniel Morrison, Sr. Asst. Dist. Atty., Paul L. Howard, Jr., Dist. Atty., Paige Reese Whitaker, Deputy Dist. Atty., Fulton County District Attorney's Office, for appellee.

Opinion

NAHMIAS, Justice.

***1** Appellant Robert Veal challenges his convictions for numerous crimes, including murder and rape, committed in the course of two armed robberies on November 22, 2010. He contends that the evidence at trial as to one set of crimes was insufficient to corroborate the testimony of his accomplice; we reject that contention and affirm all of the convictions. Appellant also contends that the two counts charging him with criminal street gang activity should have merged for sentencing; we reject that contention as well, although we have identified a merger error made in Appellant's favor on an armed robbery count, which the trial court should correct on remand. Finally, Appellant, who was 17½ years old at the time of the crimes, contends that the trial court erred in sentencing him to life without parole for malice murder. Based on the United States Supreme Court's recent decision in *Montgomery v. Louisiana,* --- U.S. ----, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), we agree that Appellant's LWOP sentence must be vacated, and we therefore remand the case for resentencing on the murder count.[1]

[1] 1. Viewed in the light most favorable to the verdicts, the evidence at trial showed the following. On the night of the crimes, Lisa McGraw and her boyfriend, Charles Boyer, returned from a trip to a convenience store to her apartment complex in the Virginia Highlands neighborhood of Atlanta. They were walking toward her apartment when Boyer returned to his car to retrieve something he had forgotten. As McGraw continued toward the apartment, she felt a gun placed to her head and heard a voice from behind ordering her not to turn around. McGraw realized that two men were behind her, and that a third man was with Boyer.

The men ordered Boyer and McGraw to walk to their apartment and to hand over their keys. McGraw gave the men her purse, and then she and Boyer tried to run away. McGraw made it safely into her neighbor's apartment, but Boyer did not. Chris Miller, a neighbor walking his dog, heard a commotion and approached to get a better look. Miller saw Boyer holding a grocery bag and facing three assailants. When Miller saw that one of the assailants had on a mask, he realized that a robbery was occurring and turned back. Miller then heard three gunshots and ran inside his apartment to call 911. The three men fled the scene. Boyer died from gunshot wounds to the torso. His injuries were consistent with his being in a struggle and trying to block a gun from shooting at him and then being shot again while trying to free himself.

Several hours later, John Davis saw three men drive up in a gold Toyota sedan as he walked outside his apartment in the Grant Park neighborhood, which is a few miles away from Virginia Highlands. The men confronted Davis and ordered him at gunpoint to go to his apartment, and all four men went inside, where they found Davis's roommate, C.T., in bed with her boyfriend, Joseph Oliver. The assailants tied up Davis and Oliver in separate rooms. They then moved C.T.

down the hallway to Davis's bedroom, where they raped and sodomized her. DNA from C.T.'s rape kit was later determined to match Appellant's.

***2** The police put together a task force to find the perpetrators of these crimes and other similar crimes in the area. Two days later, the police tracked Boyer's missing cell phone to a black Toyota SUV, which had been abandoned at the Lakewood MARTA Station; the SUV had been stolen by Tamario Wise and another individual a few days before the Boyer shooting. The police also found C.T.'s cell phone in a bag with other stolen phones and belongings on the side of Bicknell Road.

About a month later, the police located and interviewed Raphael Cross as a suspect in the November 22 crimes. During the interview, Cross named Appellant and Wise as his accomplices in both armed robberies. Cross said that the group set out that evening with the intent of finding people to rob, and Appellant and Wise, who were armed, had killed Boyer. Following the interview, Cross was arrested and Appellant and Wise were located and arrested. Further investigation found text messages between Appellant, Wise, and Cross talking about wiping down the black SUV to remove any fingerprints after the SUV had been shown on the television news after the murder. Appellant also sent a text to Wise that said, "PITTSBURGH JACKCITY 15 ROBERTHO F* *K EVERYBODY." Evidence presented at trial showed that Appellant, Wise, and Cross were members of the Jack Boys gang, which hails from the Pittsburgh area of Atlanta. Additional evidence, including the bag of stolen cell phones and belongings found on Bicknell Road as well as testimony from other victims, showed that the Jack Boys had been involved in several armed robberies in Atlanta prior to the November 22 crimes.

At the joint trial of Appellant and Wise, Cross testified as follows. On the evening of the crimes, Appellant and Wise picked Cross up in a dark colored SUV, and the three men drove to the Virginia Highlands neighborhood. They pulled up at an apartment complex where they saw a man and a woman walking. Appellant and Wise exited the vehicle to rob the couple, and Cross got out shortly after. He saw the man struggle with Appellant and Wise, and then saw Wise shoot the man. After the shooting, the three men returned to the SUV and then switched to a gold Toyota Camry before continuing to the Grant Park area and committing the crimes against Davis, Oliver, and C.T.

Appellant and Wise did not testify. Appellant did not dispute his guilt of the charges related to the Grant Park crimes (to which he was linked by his DNA), but argued that he was not present during Boyer's shooting.

When viewed in the light most favorable to the verdicts, the evidence presented at trial and summarized above was sufficient as a matter of constitutional due process to authorize a rational jury to find Appellant guilty beyond a reasonable doubt of the crimes for which he was convicted. See *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). See also OCGA § 16-2-20 (defining parties to a crime); *Vega v. State,* 285 Ga. 32, 33, 673 S.E.2d 223 (2009) (" 'It was for the jury to determine the credibility of the witnesses and to resolve any conflicts or inconsistencies in the evidence.' " (citation omitted)).

***3** [2] 2. Appellant asserts that his convictions related to the Virginia Highlands crimes must be reversed because the State presented insufficient evidence to corroborate the accomplice testimony of Cross identifying Appellant as a participant. Under former OCGA § 24-4-8:

> The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including ... felony cases where the only witness is an accomplice, the testimony of a single

> witness is not sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason.[2]

We have explained that under this statute,

> "sufficient corroborating evidence may be circumstantial, it may be slight, and it need not of itself be sufficient to warrant a conviction of the crime charged. It must, however, be independent of the accomplice testimony and must directly connect the defendant with the crime, or lead to the inference that he is guilty. Slight evidence from an extraneous source identifying the accused as a participant in the criminal act is sufficient corroboration of the accomplice to support a verdict."

Clark v. State, 296 Ga. 543, 547, 769 S.E.2d 376 (2015) (citation omitted).

In this case, Cross's testimony that Appellant participated with him and Wise in the Virginia Highlands crimes was corroborated by the evidence that the three men were all members of the Jack Boys gang and just hours later, Appellant committed a similar armed robbery with Cross and Wise in Grant Park, a nearby neighborhood. In addition, text messages that Appellant sent to Cross and Wise after the murder asked if they had wiped fingerprints off the black Toyota SUV in which Boyer's stolen cell phone was found. And the cell phone stolen from C.T., Appellant's Grant Park rape victim, was found on Bicknell Road with other items stolen by the Jack Boys. Viewed as a whole, the evidence corroborating Cross's testimony was sufficient to satisfy the requirement of former OCGA § 24-4-8. See *Alatise v. State*, 291 Ga. 428, 432, 728 S.E.2d 592 (2012).

3. Appellant was convicted and sentenced separately for two counts of participation in criminal street gang activity based on his participation in the murder of Boyer and the rape of C.T. while associated with the Jack Boys gang. OCGA § 16-15-4(a) provides:

> It shall be unlawful for any person employed by or associated with a criminal street gang to conduct or participate in criminal street gang activity through the commission of any offense enumerated in paragraph (1) of Code Section § 16-15-3.

Under OCGA § 16-15-3(1), "criminal gang activity" means "the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit any of the following offenses," including murder, see § 16-15-3(1)(J), and rape, see § 16-15-3(1)(C).

[3] Appellant contends that the trial court should have imposed only one sentence for criminal street gang activity, even though he committed two offenses separately enumerated under § 16-15-3(1) at different locations and different times against different victims. Nothing in the statute requires that all gang-related offenses be gathered into a single gang activity charge or that all such offenses must merge for sentencing. Instead, the statute makes clear that it can be violated "through the commission of *any* [enumerated] offense," OCGA § 16-15-4(a) (emphasis added), and § 16-15-4(m) says that "[a]ny crime committed in violation of this Code section shall be considered a separate offense." Under the circumstances of this case, Appellant's contention fails as a

matter of fact and of law.

***4** [4] 4. While the merger error suggested by Appellant does not exist, in reviewing his sentences we have identified a merger error that was made in his favor, which the trial court should correct on remand. See *Hulett v. State,* 296 Ga. 49, 54, 766 S.E.2d 1 (2014) (explaining that this Court may correct a merger error noticed on direct appeal even if the issue was not raised by the parties). The trial court merged the count charging Appellant with armed robbery against Boyer (Count 54) into the malice murder count (Count 47). But those counts do not merge, " 'because malice murder has an element that must be proven (death of the victim) that armed robbery does not, and armed robbery has an element (taking of property) that malice murder does not.' " Id. at 55–56, 766 S.E.2d 1 (citation omitted). Accordingly, we vacate the trial court's judgment as to Count 54 and direct the court on remand to sentence Appellant for the additional armed robbery. See id. at 56, 766 S.E.2d 1.

5. Finally, Appellant, who was 17½ years old at the time of his crimes, contends that his sentence of life without parole (LWOP) for his malice murder conviction constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The Supreme Court of the United States recently made it clear that he is correct.

(a) Over the past decade, the Supreme Court has applied its "evolving standards of decency" theory of the Eighth Amendment to promulgate ever-increasing constitutional restrictions on the states' authority to impose criminal sentences on juvenile offenders. In 2005, the Court held that the Eighth Amendment now categorically forbids imposing a death sentence on juveniles, which the Court defined categorically as offenders who had not yet turned 18. See *Roper v. Simmons,* 543 U.S. 551, 568, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (deeming *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), which just 16 years earlier had upheld the death penalty for offenders older than 16, "no longer controlling"). Five years later, the Court held that the Eighth Amendment now categorically prohibits sentencing a juvenile to serve life in prison without possibility of parole for an offense other than homicide. See *Graham v. Florida,* 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). And two years after that, the Court held that the Eighth Amendment also bars "*mandatory* life without parole [sentences] for those under the age of 18 at the time of their crimes." *Miller v. Alabama,* --- U.S. ----, 132 S.Ct. 2455, 2460, 183 L.Ed.2d 407 (2012) (emphasis added). See also id. at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

[5] (b) This case was tried three months after *Miller* came down. After the jury found Appellant guilty of malice murder (and many other crimes) on October 11, 2012, the trial court put off his sentencing for more than five weeks, to November 19. At the sentencing hearing, however, neither party offered any new evidence, nor did either party or the court mention *Miller* or its holding.

***5** In arguing in mitigation of punishment, Appellant's trial counsel did, however, focus on the fact that his client was "very young at the time [of the crimes]. He was 17." Counsel noted Appellant's remorse for the rape of C.T., although Appellant then (as now) claimed to have had no involvement in the murder of Charles Boyer and the other Virginia Highland crimes. Counsel asserted that Appellant was vulnerable to Wise's solicitation to become involved in the crimes, and asked the court to "show some mercy" to Appellant because he was not a "lost cause" and "given some time, which he is obviously going to get, ... he is going to be a changed person at some point." Counsel added that "[a]t 17, ... you think differently than when you are 40. And ... when he gets to be an older man, Judge, he is going to wake up and realize that." Noting that the State

was going to ask for a life without parole sentence, Appellant's counsel argued that "it's going to be a waste of a life, ... because I don't believe that he is going to be the kind of person that would do that for his entire life, these kind[s] of crimes."

In response, the prosecutor noted that the court had heard from "many, many victims" at Wise's sentencing hearing the week before and urged the court to consider that information in sentencing Appellant.[3] The prosecutor emphasized that this is a "brutal case" with respect to both the Virginia Highlands and Grant Park crimes, and he recommended the maximum LWOP sentence for the murder, arguing that the deterrent effect of imposing a penalty for murder greater than the life sentences Appellant faced for his other crimes "outweighs the slim possibility that he may have some moment of self-reflection 30 years down the road."

When it came time for sentencing, the trial court made no explicit mention of Appellant's age or its attendant characteristics, saying only: "based on the evidence and, in particular—please make sure all cell phones are turned off [ ]—it's the intent of the court that the defendant be sentenced to the maximum." The court then imposed a sentence of life without parole for the murder to run consecutively to the six consecutive life-with-parole sentences plus the 60 more consecutive years the court imposed for the other convictions (with another armed robbery sentence still to be imposed on remand).

Two years later, with the assistance of new counsel, Appellant filed an amended motion for new trial, raising for the first time a claim that his LWOP murder sentence was unconstitutional under *Miller.* At the hearing on the motion, neither party offered any new evidence on this issue. Appellant's new counsel argued, however, that the trial court had not made any "specific findings of fact" at sentencing as to why the LWOP punishment was proper for Appellant, who was "technically a minor" at the time of the crimes. As a remedy, Appellant asked for a new sentencing hearing.

***6** The trial court denied the motion. Citing this Court's decisions in *Jones v. State,* 296 Ga. 663, 666-667, 769 S.E.2d 901 (2015), and *Brinkley v. State,* 291 Ga. 195, 196, 728 S.E.2d 598 (2012), the court first held that Appellant's constitutional challenge to his sentence was untimely, as it had not been raised before sentencing but rather for the first time two years later in his amended motion for new trial. The court then alternatively denied the claim on the merits, stating: "As the Court indicated at that time, its sentence was based upon the evidence in the case which included [Appellant's] involvement in several savage and barbaric crimes and also included evidence of [Appellant's] age."

(d) Had this appeal been decided before *Montgomery,* we might have upheld the trial court's rulings on Appellant's belated *Miller*-based Eighth Amendment claim. To begin with, because *Miller* did not purport to prohibit LWOP sentences for juvenile murderers, so long as sentencing courts properly exercise discretion in imposing such sentences, *Miller* appeared to establish a *procedural* rule—a *process* which, if the sentencing court did not follow it correctly, would result in a juvenile's LWOP sentence being not void but voidable, in that the same sentence might be imposed on remand in a given case if the court the second time around properly followed the process. After all, the *Miller* majority said: "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham.* Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller,* 132 S.Ct. at 2471.

[6] [7] As this Court explained in *von Thomas v. State,* 293 Ga. 569, 748 S.E.2d 446 (2013),

Whether a sentence amounts to

> "punishment that the law does not allow" [rendering the sentence void] depends not upon the existence or validity of the factual or adjudicative predicates for the sentence, but whether the sentence imposed is one that legally follows from a finding of such factual or adjudicative predicates.

Id. at 571-572, 748 S.E.2d 446. Although claims that a sentence is void (i.e., illegal) are not subject to general waiver or procedural default rules, a defendant does forfeit a claim that his sentence was merely voidable (i.e., erroneous) if he does not raise the claim in timely and proper fashion. See id. at 573, 748 S.E.2d 446. See also *Tolbert v. Toole,* 296 Ga. 357, 361 n. 8, 767 S.E.2d 24 (2014) (explaining that "Georgia's customary procedural default rule, which holds that claims not raised at trial and enumerated on appeal are waived, does not apply to a claim that a criminal conviction or sentence was void on jurisdictional or other grounds," although such claims may be subject to other procedural limitations); *Nazario v. State,* 293 Ga. 480, 485-486, 746 S.E.2d 109 (2013) (explaining that void conviction and void sentence claims may be considered for the first time on direct appeal and in other proper post-trial proceedings). Nor could Appellant excuse his failure to raise his *Miller* claim at or before his sentencing by asserting that *Miller* was new law for his case, see *Brinkley,* 291 Ga. at 197 n. 1, 728 S.E.2d 598, because *Miller* was decided several months before his sentencing. Thus, as the trial court recognized, Appellant's *Miller* claim appeared to be procedurally barred because it was raised too late under this Court's procedural holdings in *Jones* and *Brinkley.*

***7** We might also have upheld the trial court's alternative ruling on the merits of Appellant's *Miller* claim. We have explained that Georgia's murder sentencing scheme does not implicate the core holding of *Miller,* because "OCGA § 16-5-1 does not under any circumstance *mandate* life without parole but gives the sentencing court discretion over the sentence to be imposed after consideration of all the circumstances in a given case, including the age of the offender and the mitigating qualities that accompany youth." *Bun v. State,* 296 Ga. 549, 550-551, 769 S.E.2d 381 (2015) (emphasis in original). See also *Foster v. State,* 294 Ga. 383, 387, 754 S.E.2d 33 (2014) (similarly rejecting a facial Eighth Amendment challenge to OCGA § 16-5-1 based on *Miller*).[4]

As for the trial court's exercise of that discretion, although at the sentencing hearing the court did not explicitly reference Appellant's age (which was just six months short of adulthood) in imposing the LWOP murder sentence, the court had heard considerable argument regarding that factor as well as other circumstances of Appellant and the case, and the court had also heard the evidence at trial; the court then explained in its order denying the motion for new trial that the life without parole "sentence was based upon the evidence in the case which included [Appellant's] involvement in several savage and barbaric crimes and also included evidence of [Appellant's] age." In previous cases, this Court indicated that the sentencing court's discretion under *Miller* was fairly broad, so long as the trial court considered the defendant's youth. See *Jones,* 296 Ga. at 667, 769 S.E.2d 901 (affirming an LWOP murder sentence against a *Miller* claim where the trial court "explained that it based its sentence on balancing Appellant's youth against the 'vicious, mean, violent behavior and the adult conduct that was engaged in,' which included the murder of not one but two innocent bystanders"); *Bun,* 296 Ga. at 551 n. 5, 769 S.E.2d 381 (suggesting that an as-applied *Miller* claim would have failed where "the trial court's order and [the] sentencing transcript make clear that the trial court considered Bun's youth and its accompanying attributes in making its sentencing decision and whatever the significance attributed to Bun's youth, the trial court found it was outweighed by the severity of his crimes, his criminal history, and his lack of remorse").

But then came *Montgomery.*

(e) *Montgomery's* principal holding—that *Miller* applies retroactively in state habeas corpus proceedings—is irrelevant to this case, both because *Miller* was decided before Appellant was sentenced and because this case is here on direct appeal. Nevertheless, the explication of *Miller* by the majority in *Montgomery* demonstrates that our previous understanding of *Miller*—and the trial court's ruling on Appellant's *Miller* claim—was wrong both as to the issue of procedural default and as to which juvenile murderers a court actually has discretion to sentence to serve life without parole.

***8** First, while *Montgomery* acknowledges that "*Miller's* holding has a procedural component," it explains that the process discussed in *Miller* was really just a "procedure through which [a defendant] can show that he belongs to the [constitutionally] protected class." 136 S.Ct. at 734, 735. Put another way, although *Miller* did not outlaw LWOP sentences for the category of *all* juvenile murderers, *Montgomery* holds that "*Miller* announced a substantive rule of constitutional law" that "the sentence of life without parole is disproportionate for the *vast majority* of juvenile offenders," with sentencing courts utilizing the process that *Miller* set forth to determine whether a particular defendant falls into this *almost-all* juvenile murderer category for which LWOP sentences are banned. Id. at 736 (emphasis added).

> A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Id. at 735.

And a sentence imposed in violation of this *substantive* rule—that is, an LWOP sentence imposed on a juvenile who is not properly determined to be in the very small class of juveniles for whom such a sentence may be deemed constitutionally proportionate—"is not just erroneous but contrary to law and, as a result, void." Id. at 731. It follows, *Montgomery* concludes, that state collateral review courts that are open to federal law claims must apply *Miller* retroactively if a petitioner challenges his sentence under the Eighth Amendment. See id. at 731-732. And it follows, as a matter of Georgia procedural law, that Appellant's *Miller* claim—now understood to be a substantive claim that, if meritorious, would render his sentence void—could be properly raised in his amended motion for new trial and in this direct appeal, despite his failure to raise the claim before he was sentenced. See *Nazario,* 293 Ga. at 487, 746 S.E.2d 109.[5] To the extent *Jones, Brinkley*, or any other Georgia appellate case holds otherwise, it is hereby disapproved.

The *Montgomery* majority's characterization of *Miller* also undermines this Court's cases indicating that trial courts have significant discretion in deciding whether juvenile murderers should serve life sentences with or without the possibility of parole. *Miller* noted that, "given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon.*" *Miller,* 132 S.Ct. at 2469 (emphasis added). *Miller* also indicated that what was essential was that the sentencing court have the discretion to consider an offender's "youth and its attendant characteristics, along

with the nature of his crime," in deciding whether a lesser sentence (like life with the possibility of parole) was more appropriate than a life without parole sentence. Id. at 2460.

***9** The *Montgomery* majority explains, however, that by *uncommon, Miller* meant *exceptionally rare,* and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt.*[6] Thus, *Montgomery* emphasizes that a life without parole sentence is permitted only in "*exceptional* circumstances," for "the *rare* juvenile offender who exhibits such *irretrievable depravity* that rehabilitation is *impossible* "; for those "*rarest* of juvenile offenders ... whose crimes reflect *permanent incorrigibility* "; for "those *rare* children whose crimes reflect *irreparable corruption* "—and not, it is repeated twice, for "the vast majority of juvenile offenders." 136 S.Ct. at 733-736 (emphasis added). The Supreme Court has now made it clear that life without parole sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murderers, much like the Supreme Court has long directed that the death penalty may be imposed only on the worst-of-the-worst adult murderers. To the extent this Court's decisions in *Jones* and *Bun* suggested otherwise, they are hereby disapproved.

In this case, the trial court appears generally to have considered Appellant's age and perhaps some of its associated characteristics, along with the overall brutality of the crimes for which he was convicted, in sentencing him to serve life without parole for the murder of Charles Boyer—a crime for which Appellant may have been convicted only as an aider-and-abetter. The trial court did not, however, make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery.* Whether such a determination may be made in this case is a matter that should be addressed in the first instance by the trial court on remand. Accordingly, we vacate the life without parole sentence imposed on Appellant for malice murder and remand the case for resentencing on that count in accordance with this opinion, *Miller,* and *Montgomery.*

Judgment affirmed in part and vacated in part, and case remanded for resentencing.

All the Justices concur.

All Citations

--- S.E.2d ----, 2016 WL 1085360

Footnotes

1 On January 21, 2011, a Fulton County grand jury indicted Appellant and several other defendants for a series of allegedly gang-related crimes. Appellant was charged with the malice murder of Charles Boyer; two counts of felony murder (based on aggravated assault and possession of a firearm by a convicted felon); four counts of aggravated assault with a deadly weapon (against Boyer, John Davis, Joseph Oliver, and C.T.); possession of a firearm during the commission of a felony; five counts of armed robbery (against Boyer, Lisa McGraw, Davis, Oliver, and C.T.); rape, aggravated sodomy, and kidnapping with bodily injury of C.T.; kidnapping of Davis; false imprisonment of Oliver; and two counts of participation in criminal street gang activity. Appellant and co-indictee Tamario Wise were tried together from October 1 to 11, 2012. The jury found Appellant guilty of all counts except felony murder based on possession of a firearm by a convicted felon and the counts of aggravated assault against Oliver and C.T. The trial court then sentenced Appellant to serve life in prison without parole for malice murder; six consecutive life sentences for the rape, aggravated sodomy, and four of the armed robbery convictions; and a total of 60 consecutive years for possession of a firearm during the commission of a felony, kidnapping, false imprisonment, and the two counts of participation in criminal street gang activity. The remaining felony murder verdict was vacated by operation of law, and the trial court

merged the remaining counts—which, as explained in Division 4 below, was error with respect to the count of armed robbery against Boyer. On December 3, 2012, Appellant filed a motion for new trial, which he amended with new counsel on November 26, 2014. After an evidentiary hearing, the trial court denied the motion on March 11, 2015. Appellant filed a timely notice of appeal, and the case was docketed in this Court for the September 2015 term and submitted for a decision on the briefs.

2 This case was tried under Georgia's old Evidence Code. In our new Evidence Code, this provision is found at OCGA § 24–14–8.

3 The transcript of Wise's sentencing hearing is not in the record on appeal, so we cannot tell if Appellant and his counsel were present. If not, the trial court's reliance in sentencing Appellant on information presented outside his presence could raise concerns about his constitutional right to be present, although that right may be waived in some circumstances and Appellant has not raised the issue. See, e.g., *Dawson v. State,* 283 Ga. 315, 321–322, 658 S.E.2d 755 (2008). We note the issue only as a caution with regard to Appellant's re-sentencing on remand.

4 What was OCGA § 16–5–1(d) at the time of Appellant's sentencing is now § 16–5–1(e)(1); it says, with emphasis added, "A person convicted of the offense of murder shall be punished by death [a penalty not applicable to juveniles after *Roper*], by imprisonment for life without parole, *or* by imprisonment for life." The other sentencing provision of the murder statute, OCGA § 16–5–1(e)(2), establishes a maximum sentence of 30 years for second degree murder.

5 We note in this regard that under Georgia law, a finding of a statutory aggravating factor that would support a death penalty was, until 2009, a statutory requirement to sentence a murderer to life without parole—and the failure to make such a finding contemporaneously with the imposition of a LWOP sentence rendered the sentence void and subject to correction by motion to vacate sentence made long after the conviction. See *Pierce v. State,* 289 Ga. 893, 896–897, 717 S.E.2d 202 (2011).

6 While it is not sufficient simply to consider a juvenile offender's " 'diminished culpability and greater prospects for reform,' " it is important that the sentencing court explicitly consider the "three primary ways" that these characteristics of children are relevant to sentencing, as explained in *Miller* and *Montgomery:*

> "First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity."

Montgomery, 136 S.Ct. at 733 (quoting *Miller,* 132 S.Ct. at 2464) (additional quotation marks omitted).

End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.