SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF HARTFORD

S.C. 19954

STATE OF CONNECTICUT

V.

TAUREN WILLIAMS-BEY

BRIEF OF THE STATE OF CONNECTICUT- APPELLEE WITH ATTACHED APPENDIX

To Be Argued By:

MICHELE C. LUKBAN
Senior Assistant State's Attorney
Office Of The Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Telephone: (860) 258-5807
Facsimile: (860) 258-5828
Juris Number: 409700
Michele.Lukban@ct.gov
Dcj.Ocsa.Appellate@ct.gov

CERTIFIED QUESTIONS FOR REVIEW

1. Under the Connecticut constitution, article first, §§ 8 and 9, are all juveniles entitled to a sentencing proceeding at which the court expressly considers the youth related factors required by the United States constitution for cases involving juveniles who have been sentenced to life imprisonment without the possibility of release? See Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012)

2. If the answer to the first question is in the affirmative and a sentencing court does not comply with the sentencing requirements under the Connecticut constitution, does parole eligibility under General Statutes § 54-125a (f) adequately remedy any state constitutional violation?

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NATURE OF THE PROCEEDINGS

On December 20, 1997, the then 16 year old defendant, Tauren Williams-Bey, along with two friends, jumped out of a van, and shot and killed the victim. T.2/25/00: 2, 6. The state charged the defendant with murder as an accessory, in violation of General Statutes (Rev. to 1997) §§ 53a-54a and 53a-8, and conspiracy to commit murder, in violation of General Statutes (Rev. to 1997) §§ 53a-54a and 53a-48. Defendant's Appendix ("D.App."), A1 (Information), A25 (Judgment). On January 4, 2000, the defendant, at the age of 19, pleaded guilty to murder as an accessory. T.2/25/00: 2. Both parties waived the preparation of the presentence investigation report ("PSI"), the trial court accepted the waiver,[1] and continued the matter for sentencing. Id. On February 25, 2000, in accordance with a court-indicated agreement, the trial court, Clifford, J., imposed a 35 year term of incarceration, 25 of which was mandatory. Id. at 2, 8. The state nolled Count Two, conspiracy to commit murder, and withdrew its sentence enhancement. Id. at 8; D.App., A25 (Judgment).

On December 16, 2013, the defendant filed a Motion to Correct Illegal Disposition pursuant to Practice Book § 43-22 and, on April 1, 2014, an Amended Motion to Correct Illegal Disposition with a Brief in Support of Defendant's Motion to Correct. D.App., A3 (Docket Entries), A5 (Amended Motion to Correct Illegal Disposition), A8 (Brief in Support of Defendant's Motion to Correct), A25 (Judgment). In his Amended Motion, the defendant alleged that his sentence had been imposed in an illegal manner in violation of Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455 (2012), and Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010).[2] The trial court, Alexander, J., dismissed the defendant's Motion to

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[1] Prior to the enactment of 2015 Public Acts No. 15-84, § 2, a juvenile defendant could waive the PSI with the consent of the sentencing judge and prosecutor. See General Statutes § 54-91a(b).

[2] In Roper v. Simmons, 543 U.S. 551, 578 (2005), the United States Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." The Roper Court explained that, based on certain enumerated differences between adults and (continued...)

Correct for lack of jurisdiction. D.App., A16 (Memorandum of Decision).

On appeal, the Appellate Court concluded that under both the federal and state constitutions, if a 35 year sentence entitled the defendant to a sentencing hearing in compliance with Miller, the recently enacted juvenile parole statute, codified at General Statutes § 54-125a(f), provided a constitutionally adequate, pragmatic and fair opportunity to gain consideration of the mitigating factors of youth and thus provided a constitutionally adequate remedy. State v. Williams-Bey, 167 Conn. App. 744, 747, 763, 769 (2016). The Appellate Court further determined that the trial court had improperly concluded that it

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juveniles, the latter group could not reliably "be classified among the worst offenders" and, thus, were not deserving of our judicial system's most severe penalty. Id. at 569-71.

In Graham v. Florida, 560 U.S. 48, 52-53, 82 (2010), the United States Supreme Court held that the Eighth Amendment prohibited the imposition of life without the possibility of parole for juvenile offenders who committed nonhomicide crimes. The Graham Court concluded that although "[s]ociety is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime," the state must give defendants who had committed such crimes when they were below the age of 18 "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 71, 74-75. The Graham Court further specified that the "State is not required to guarantee eventual freedom" and that the Eighth Amendment "does not require the State to release that offender during his natural life." Id. at 75.

In Miller v. Alabama, 567 U.S. 460, 465 (2012), the United States Supreme Court addressed whether a mandatory sentence of life without the possibility of parole, for the crime of murder, violates the Eighth Amendment prohibition of cruel and unusual punishment if imposed upon a defendant who was under the age of 18 at the time of the crime. Based on Roper and Graham, the Miller Court concluded that mandatory life without parole sentences for juveniles violate the Eighth Amendment. Id. at 479. The Court based its conclusion on the Eighth Amendment's requirement that punishment should be graduated and proportioned to the offender and the offense, and its earlier jurisprudence that had determined that "children are constitutionally different from adults for purposes of sentencing." Id. at 469, 471. The Court objected to mandatory penalty schemes which prevented a sentencer from taking into account "the central considerations" of youth and "disregard[ ] the possibility of rehabilitation even when the circumstances most suggest it" and led to "too great a risk of disproportionate punishment." Id. at 474-79. The Court specified that the Eighth Amendment did *not* foreclose a sentencer's ability to determine that life without parole was an appropriate sentence in homicide cases. Rather, it merely required a sentencing court "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480.

lacked jurisdiction to entertain the defendant's Motion to Correct. Id. at 759-61. After this Court issued its decision in State v. Delgado, 323 Conn. 801 (2016),[3] upon order of this Court, the Appellate Court reconsidered its jurisdictional ruling, concluded that the trial court had properly dismissed the defendant's Motion to Correct for lack of jurisdiction, and affirmed the judgment. State v. Williams-Bey, 173 Conn. App. 64, 66 (2017).

Thereafter, this Court granted the defendant's Petition for Certification challenging the Appellate Court's decision under our state constitution. State v. Williams-Bey, 326 Conn. 920 (2017).

COUNTERSTATEMENT OF THE FACTS

A. The Imposition Of Sentence

At the beginning of the proceeding on February 25, 2000, the trial court, Clifford, J., noted that the defendant had pleaded guilty to murder as an accessory and that there was a court-indicated sentence of 35 years' incarceration. T.2/25/00: 2. The state stated that it was the shot from the defendant's gun that had fatally wounded the victim. Id.

Defense counsel noted that the defendant was 16 years old at the time of the crime. T.2/25/00: 4. Counsel further stated that he knew the defendant's mother, and that the defendant was not raised to engage in criminal conduct. Id. at 4, 5. With regard to the defendant and the plea, counsel stated that the defendant knew that "he would have been convicted of being an accessory at least at trial if the other people testified," that he did not really have a defense other than being with a group of young men, and that there had been an argument. Id. at 5. Although the defendant declined to address the trial court, the court acknowledged that it had read the letter submitted by the defendant. Id. at 5-6.

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[3] As set forth further, below, in State v. Delgado, 323 Conn. 801, 810, 812 (2016), this Court concluded that, as a result of the enactment of the juvenile parole statute, the defendant could no longer claim that he is serving a sentence of life imprisonment, or its functional equivalent, without parole. Because Delgado now is eligible for parole, he had failed to raise a colorable claim that his sentence was illegal and, therefore, failed to invoke the court's jurisdiction for purposes of a motion to correct an illegal sentence.

B. Motion to Correct Illegal Sentence

In his Amended Motion to Correct Illegal Disposition, the defendant alleged that his sentence, and the manner in which it was imposed, failed to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation in violation of Miller[4] and Graham.[5] D.App., A5. In his Brief in Support of his Motion, the defendant argued that the "unconstitutionality" of his punishment "arises not from the imposition of a sentence of life in prison, but from the absolute denial of any possibility of parole" for juvenile offenders based on their unique characteristics. D.App. A10 (4/1/14 Brief in Support, p. 3); see General Statutes (Rev. to 2015) § 54-125a(b)(1)(e). He also set forth a brief state constitutional analysis in accordance with State v. Geisler, 222 Conn. 672, 684-85 (1992); D.App., A12 (4/1/14 Brief in Support, pp. 5-6).

The trial court, Alexander, J., held a hearing on the defendant's Amended Motion to Correct on April 2, 2014.[6] The defendant, through counsel, argued that although his sentence was not life without parole, the rationale of Miller was applicable and that his sentence was unconstitutional because he was not eligible for parole. T.4/2/14: 4-5, 7-8.

[4] "A Miller claim or Miller violation refers to the sentencing court's obligation to consider a juvenile's age and circumstances related to age at an individualized sentencing hearing as mitigating factors before imposing a sentence of life imprisonment without parole." Delgado, 323 Conn. at 806 n.5; see State v. Williams-Bey, 167 Conn. App. 744, 751 n.3 (2016).

[5] "A Graham claim or Graham violation refers to the sentencing court's obligation to provide a meaningful opportunity for parole to a juvenile who is sentenced to life imprisonment." Delgado, 323 Conn. at 806 n.5; see Williams-Bey, 167 Conn. App. at 751 n.3.

In light of the legislature's enactment of Public Acts 2015, No. 15-84 and the United States Supreme Court's decision in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), discussed further, below, the defendant withdrew his Graham claim in his Reply Brief before the Appellate Court. Williams-Bey, 167 Conn. App. at 759 n.8; see Defendant's Reply Brief, pp. 2-3, Appellate Court Records and Briefs, May Term, 2016.

[6] At the hearing, the defendant informed the trial court that he was withdrawing a pending habeas petition. T.4/2/14: 3. Out of an "abundance of caution," however, the defendant argued that counsel's representation was inadequate while also recognizing that this was "probably not" the correct forum for such a claim. Id. The habeas petition, however, is still pending and scheduled for trial on April 25, 2018. Williams v. Warden, TSR-CV12-4004803-S.

The defendant thereafter personally addressed the court, informing it that he had completed all the programs that had been offered while incarcerated. He further stated that his Amended Motion to Correct was not about innocence, because he had pled guilty, but was about allowing him some meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation. Id. at 10-11.

C. Trial Court's Memorandum Of Decision

The trial court issued its Memorandum of Decision on July 29, 2014, dismissing the defendant's Motion for lack of jurisdiction. D.App., A16 (Memorandum of Decision ("Mem. Dec.")) at 2, 8-9. Based on Graham and Miller, the trial court concluded that the United States Supreme Court had "considered the imposition of life imprisonment as an integral part of its analysis, in conjunction with the denial of an opportunity for parole." Mem. Dec. at 6. Here, the defendant's 35 year sentence did not amount to either his natural life or life as defined by statute, General Statutes § 53a-35b, and therefore was neither the "harshest" nor "most severe" penalty as contemplated by the United States Supreme Court. Mem. Dec. at 6 and nn. 9, 10 and 11. Even though the defendant was not eligible for parole, "this is not the case where, as a juvenile offender, he will face certain death in prison." Id. at 6. Rather, he "will be released before the end of his natural life, as his sentence will expire when he is approximately fifty-two years old. There is, therefore, incentive for him to work on his rehabilitation and an opportunity for him to demonstrate his efforts and maturity upon his reentrance into society." Id. at 6-7.

The trial court further reasoned that to apply Miller as the defendant requested would necessitate a deviation from the current statutory scheme. Mem. Dec. at 7. The court explained that it would not "exceed its authority by crafting reforms to either the sentencing or parole statutes," and would not assess the defendant's "claimed rehabilitation for potential release" because that is a "function more appropriately engaged in by the Board of Pardons and Paroles." Id. The court did not address the defendant's claim under the state constitution.

D. The Appellate Court's Decision

After setting forth that the jurisprudence relating to juvenile sentencing requires that juvenile offenders facing life without parole, or its functional equivalent, are entitled to individual consideration that takes into account the mitigating factors of their youth, the Appellate Court stated that the case before it "concerns the important question of where such consideration must be given for juvenile offenders who were sentenced prior to the recent developments in the law." State v. Williams-Bey, 167 Conn. App. at 747. The Appellate Court disagreed with the defendant's assertion that such juveniles were entitled to be resentenced, concluding that "a parole hearing provides the class of juveniles under consideration with a constitutionally adequate, pragmatic, and fair opportunity to gain consideration of the mitigating factors of their youth." Id. at 747.

The Appellate Court began by reviewing the relevant caselaw pertaining to juvenile sentencing, both at the federal and state levels, i.e. Miller, Graham, Casiano v. Commissioner of Correction, 317 Conn. 52 (2015), cert. denied, *sub nom.* Semple v. Casiano, 136 S. Ct. 1364 (2016), and State v. Riley, 315 Conn. 637 (2015), cert. denied, 136 S. Ct. 1361 (2016).[7] Williams-Bey, 167 Conn. App. at 750-53. It noted that there had

[7] In State v. Riley, 315 Conn. 637, 640-41 (2015), cert. denied, 136 S. Ct. 1361 (2016), this Court held that the 17 year old defendant's aggregate 100 year sentence for homicide and nonhomicide crimes, and the procedure by which it was imposed, violated the Eighth Amendment. In extending Miller to discretionary sentencing schemes, this Court concluded that Miller requires "(1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a lifetime in prison." Id. at 653. At that time, the defendant had "no possibility for parole before his natural life expires." Id. at 640.

In Casiano v. Commissioner of Correction, 317 Conn. 52, 71 (2015), cert. denied *sub nom.* Semple v. Casiano, 136 S. Ct. 1364 (2016), this Court held that the "individualized sentencing process required by Miller" applied retroactively on collateral review. This Court further concluded that the petitioner's 50 year sentence without parole for felony murder was subject to Miller because Miller and Graham "implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." Id. at 78. This Court specifically did not address whether "a term of less than fifty years *without parole* on a (continued...)

been two significant changes after the trial court had issued it decision and since this Court had decided Riley and Casiano; first, our legislature's enactment of 2015 Public Acts, No. 15-84 and, second, the United States Supreme Court's decision in Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Id. at 753.

As to Public Act No. 15-84, the Appellate Court noted that the legislature had enacted this legislation in direct response to Miller, Graham, Riley and Casiano[8] and that §§ 1 and 2 provided both for parole eligibility for juveniles sentenced to greater than 10 years' incarceration prior to Miller and Graham, and for "prospective sentencing procedures that bring Connecticut into compliance with the requirements of Graham and Miller going forward."[9] Williams-Bey, 167 Conn. App. at 753-55. The Appellate Court observed that the criteria for consideration at a juvenile parole hearing, as set forth in General Statues § 54-

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juvenile offender would require the procedures set forth in Miller," and expressed its anticipation that our legislature would be addressing the implications of Graham and Miller. Id. at 79. At that time, the defendant was not eligible for parole on the felony murder conviction. Id. at 55.

[8] See Connecticut Senate Bill 796, File 904. State's Appendix ("St.App."), A-46-A-47.

[9] Public Act No. 15-84 § 1 amended the parole statute, General Statutes § 54-125a, by adding parole eligibility for "a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015." If the sentence is 50 years' incarceration or less, the juvenile becomes parole eligible after serving 60 percent of his sentence, or 12 years, whichever is greater. If the sentence is more than 50 years, the juvenile is parole eligible after serving 30 years. This amendment is codified at General Statutes § 54-125a(f).

Public Act No. 15-84 § 2 created a new statutory provision, codified at General Statutes § 54-91g, effective October 1, 2015, specifying the sentencing proceeding for juveniles transferred to the regular criminal docket being sentenced for a class A or B felony, and requiring the trial court to consider, in addition to any other relevant information, "the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development." General Statutes § 54-91g(a)(1). The Court Support Services Division also was required to "compile reference materials relating to adolescent psychological and brain development to assist courts in sentencing children pursuant to this section." General Statutes § 54-91g(d).

125a (f)(4)(C), "substantially encompass the mitigating factors of youth referenced in Miller and Riley" and that, "[o]verall, the legislature not only gave Miller retroactive application, but also effectively eliminated life without the possibility of parole, even as a discretionary sentence, for juvenile offenders in Connecticut." Id. at 756-57.

As to Montgomery, the Appellate Court observed that in applying Miller to previously sentenced juvenile offenders who had not had the opportunity to demonstrate the mitigating factors of youth at sentencing, the United States Supreme Court recognized the "practical limitations" of retroactive application and "emphasized that this violation of Miller could be remedied by affording those juvenile offenders parole eligibility, thus providing, in the context of Graham, a meaningful opportunity for release." Williams-Bey, 167 Conn. App. at 758, *citing* Montgomery, 136 S. Ct. at 736. The Appellate Court further noted the Montgomery Court's rationale that "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." Id. at 758, *quoting* Montgomery, 136 S. Ct. at 736.

With regard to the defendant's 35 year sentence, the Appellate Court noted that even if the defendant were to serve his sentence in its entirety, he would be 52 years old when released. Williams-Bey, 167 Conn. App. at 748. Thus, the Appellate Court concluded that the defendant's sentence did not violate the Eighth Amendment as interpreted by Miller. Id. at 749. In arriving at this conclusion, the Appellate Court relied on this Court's observation in State v. Taylor G., 315 Conn. 734, 745 (2015), that although the deprivation of liberty for any amount of time "is not insignificant," Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005), Graham, and Miller, "cannot be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude."[10] Id. at 763 n.11. The

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[10] In State v. Taylor G., 315 Conn. 734, 738, 739 (2015), the defendant was 14 and 15 years old when he committed nonhomicide offenses for which the trial court imposed a total effective sentence of 10 years' imprisonment followed by 3 years' special parole. This (continued...)

Appellate Court further relied on its decision in State v. Logan, 160 Conn. App. 282, 293 (2015), cert. denied, 321 Conn. 906 (2016), in which it concluded that a 31 year sentence is not the functional equivalent of life without parole and, thus, did not implicate Miller. Id. at 762 n.11. The Appellate Court concluded that it could see "no legally meaningful distinction" between the 31 year sentence without parole in Logan and the defendant's 35 year sentence without parole here. Id. at 763 n.11. Thereafter, for the limited purpose of analyzing whether juvenile parole eligibility provided a constitutionally adequate remedy, the Appellate Court assumed, without deciding, that the defendant's sentence violated the Eighth Amendment under Miller. Id. at 763 n.11.

With regard to the defendant's claim under the federal constitution, the Appellate Court concluded that "for juvenile offenders who were entitled to be, but were not, sentenced with consideration of [the Miller factors], § 54-125a (f) offers a constitutionally adequate remedy under the eighth amendment to those who qualify for parole under its provisions." Williams-Bey, 167 Conn. App. at 763.

With regard to the defendant's claim under the state constitution, the Appellate Court engaged in a full Geisler analysis and concluded that under Article First, §§ 8 and 9, "parole eligibility under § 54-125a (f) is a constitutionally adequate remedy" for sentences that were imposed in violation of Miller and that, therefore, resentencing is not required. Williams-Bey, 167 Conn. App. at 768, 769. The Appellate Court's analysis of the text and history of our state constitution resulted in a conclusion that these factors essentially were neutral and that the remaining four factors weighed against the defendant. Id. at 769-81.

As to Connecticut precedent, the Appellate Court determined that this Court's

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(...continued)
Court concluded that "the ten and five year mandatory minimum sentences [that the defendant would serve concurrently], under which the defendant [was] likely to be released before he reaches the age of thirty, do not approach what the [United States Supreme Court] described in Roper, Graham and Miller as the two harshest penalties" and thus, "do not implicate the factors deemed unacceptable in Roper, Graham and Miller when those penalties are imposed on juveniles." Id. at 745-46.

precedent weighed against expanding the state constitution to require resentencing. Williams-Bey, 167 Conn. App. at 769-70. The Appellate Court noted that this Court had not had the opportunity to consider the remedy of parole eligibility because § 54-125a (f) had not been enacted at the time of Riley, Casiano and Taylor G., and considered it significant that in Casiano this Court had expressed its expectation that the legislature would be enacting legislation providing an appropriate remedy in response to Graham, Miller, Riley and Casiano. Id. at 770. The Appellate Court reasoned that "[r]equiring resentencing under the state constitution, even though parole eligibility is adequate under the federal constitution, would seem to undermine the very legislative response that our Supreme Court contemplated in Casiano." Id.

As to federal precedent, the Appellate Court determined that the jurisprudence upon which the defendant relied was readily distinguishable and not persuasive. Williams-Bey, 167 Conn. App. at 770-71.

As to sibling states, the Appellate Court determined that "the trend, though not definitive, appears to be that in states that have enacted a statute providing parole eligibility for juveniles whose life without parole and functional equivalent sentences were imposed without consideration of Miller, courts have concluded that parole eligibility is constitutionally adequate to remedy a Miller violation."[11] Williams-Bey, 167 Conn. App. at 771-72.

The Appellate Court explained that the defendant's reliance on caselaw from New Jersey and Illinois was not persuasive because the defendants in the cited cases would be parole eligible only after 63.75 or 75.3 years, well beyond the time periods that our legislature had defined as a life sentence (60 years), that this Court in Casiano determined was a de facto life sentence for juvenile offenders (50 years), and that the legislature established as the maximum period of parole ineligibility for a juvenile offender (30 years).

[11] In reaching this determination, the Appellate Court relied on decisions from California, Arizona, Nebraska, Ohio, Hawaii and Massachusetts that had concluded that under the federal constitution parole eligibility remedied a Miller violation. Williams-Bey, 167 Conn. App. at 772-73 nn. 19, 21 (and cases cited therein).

Williams-Bey, 167 Conn. App. at 774-75. The Appellate Court also acknowledged that after Montgomery, some courts have remanded cases for resentencing. It determined, however, that these cases were not persuasive because such remands were "especially true" in jurisdictions that do not have parole, or have limited parole eligibility, for juvenile offenders sentenced prior to Miller. Id. at 775-76 and n.23 (and cases cited therein).

As to considerations of applicable economic and sociological norms, the Appellate Court noted that the laws of our state have evolved to provide special protections to juveniles and that § 54-125a (f) is one such law. Williams-Bey, 167 Conn. App. at 777. The Appellate Court therefore determined that this factor "does not support the defendant's assertion that the remedy [§ 54-125a(f)] provides is not constitutionally adequate," particularly because "it was specifically enacted by the legislature to respond to Miller and Graham by providing increased parole eligibility to juvenile offenders." Id.

The Appellate Court further discussed "the practical challenges . . . inherent in requiring resentencing" for previously sentenced juvenile offenders. Williams-Bey, 167 Conn. App at 777. Looking at the sentencing factors set forth in General Statutes § 54-91g for juveniles sentenced after October 1, 2015, the Appellate Court observed that it would be "exceedingly difficult for a sentencing court to retroactively make the determination required by § 54-91g" when the inquiry under Miller focuses on whether the offender "'was seen to be incorrigible when he was sentenced – not whether he has proven corrigible and so can safely be paroled today.' Montgomery v. Louisiana, supra, 136 S. Ct. 774 (Scalia, J., dissenting)." Id. at 778. The Appellate Court further reasoned that resentencing now would "in reality be more akin to a parole hearing" and the issue of whether a defendant has undergone sufficient rehabilitation to safely rejoin society "is precisely the determination that the parole board is statutorily designated to make." Id. at 778-79, 780. The Appellate Court noted that our trial courts had the same practical concerns. Id. at 779 n.24 (discussing State v. Ellis, (Fasano, J.), judicial district of Waterbury, Docket No. CR-91-196561 (June 3, 2016), and State v. Guess, (Clifford, J.), judicial district of New Haven,

Docket No. CR-93-0385471 (May 5, 2016)). The Appellate Court also was cognizant that a new sentencing hearing would impose emotional burdens on the victims. Id. at 780.

Lastly, the Appellate Court rejected the defendant's argument that to conclude that parole eligibility remedies a Miller violation would violate the separation of powers doctrine because juvenile offenders released on parole would still be subject to incarceration if they violate parole. Williams-Bey, 167 Conn. App. at 780 n.25. The Appellate Court reasoned that Montgomery requires a meaningful opportunity for release and "does *not* require that all juvenile offenders be released with *no further supervision* by the criminal justice system. Whether juvenile offenders who are granted release pursuant to § 54-125a (f) return to prison or not is to be determined by *their* subsequent behavior." (Emphasis in original). Id.

ARGUMENT

Our state constitutional due process clauses, Article First, §§ 8 and 9, have been interpreted to prohibit governmental infliction of cruel and unusual punishments. State v. Santiago, 318 Conn. 1, 17, reconsideration denied, 319 Conn. 912, stay denied, 319 Conn. 935 (2015). As this Court has recognized, the contours of these provisions "derive from the United States Supreme Court precedent concerning the eighth amendment." Id. at 18.

Geisler analysis reveals that if the first certified question is asking whether all juvenile offenders facing a sentence of life without parole are entitled to individual consideration of youth and its attendant circumstances, then the answer is "yes," under Article First, §§ 8 and 9, "juveniles who have been sentenced to life imprisonment without the possibility of release" are entitled to a sentencing proceeding, in accordance with Miller. The answer is "yes" because under the federal constitution, juvenile offenders sentenced to life without parole are entitled to a Miller hearing and our state constitution cannot be interpreted to require any lesser protection.

If, however, the first certified question is asking whether "all juveniles," whether or not they were sentenced to life without parole are entitled to consideration of the Miller factors at sentencing, then the answer is "no," under Article First, §§ 8 and 9, "all juveniles"

are not entitled to a sentencing proceeding in accordance with Miller. Analysis of the Geisler factors reveals that federal precedent, our own state precedent, sibling states and economic/sociological norms do not support expansion of the Miller concerns beyond a sentence of life, or the functional equivalent, without parole.

If the answer to the first certified question is "yes," then the second certified question must be addressed. An analysis of the federal precedent, Connecticut precedent, sibling states and economic/sociological norms, reveals that if a sentencing court had not considered youth and its attendant circumstances, under the Connecticut constitution resentencing is not required. Rather, "parole eligibility under General Statutes § 54-125a(f) adequately remed[ies] any state constitutional violation" because a constitutional violation no longer exists. A constitutional violation no longer exists because parole eligibility removes the possibility that a juvenile offender is serving a disproportionate sentence.

Therefore, because the defendant's 35 year sentence is less than life without parole, he is not entitled to a Miller hearing. If, however, the defendant is entitled to a Miller hearing, he is not entitled to a new sentencing hearing at which the Miller factors are considered because parole eligibility provides an adequate remedy under our state constitution. In the alternative, if parole eligibility does not provide an adequate remedy, because Miller cannot be applied retroactively to undermine a sentence that is the result of a plea agreement, the defendant is not entitled to resentencing.

I. UNDER ARTICLE FIRST, §§ 8 AND 9, JUVENILES WHO PREVIOUSLY HAVE BEEN SENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE ARE ENTITLED TO A MILLER PROCEEDING; HOWEVER, THOSE JUVENILES NOT SENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF RELEASE ARE NOT ENTITLED TO A MILLER PROCEEDING

Upon a grant of certification, the focus of this Court's review is the actions of the Appellate Court and this Court ordinarily considers the issues in the form in which they were framed in the Appellate Court. State v. Saucier, 283 Conn. 207, 221 (2007); State v. Torrence, 196 Conn. 430, 433-34 (1985). Upon a grant of certification this Court also considers only those issues that are squarely raised in the petition. State v. Cecil J., 291

Conn. 813, 819 n.8 (2009).

The Appellate Court's decision under the state constitution pertained solely to whether "juvenile offenders facing life without parole or its functional equivalent are entitled to individual consideration that takes into account the mitigating factors of their youth." Williams-Bey, 167 Conn. at 747. In the defendant's September 12, 2016 and May 29, 2017 Petitions for Certification to Appeal, the "Questions Presented" broadly ask "whether the Appellate Court erroneously [held] that the defendant's sentence was not disproportionate" and, alternately, whether the Appellate Court erroneously held that General Statutes § 54-125a (f) remedies a sentence imposed in violation of Article First, §§ 8 and 9. In addition, all of the relevant caselaw under discussion, i.e, Graham, Miller, Riley and Casiano, pertain to juveniles sentenced to life, or its functional equivalent, without parole.

Based on the foregoing jurisprudence, the first certified question therefore would be limited to the issue of whether juvenile defendants who have been sentenced to life, or its functional equivalent, without the possibility of parole are entitled to a Miller compliant hearing. If this is an accurate reading of the first certified question, then the answer is "yes."

In his brief, however, the defendant argues that "all juvenile offenders regardless of the offense of conviction or the label of the punishment" are entitled to a Miller sentencing proceeding. Defendant's Brief ("D.Br.") at 13-14; see D.Br. at 19-20, 20-22, 31, 34, 35. The amicus Connecticut Criminal Defense Lawyer's Association makes a similar assertion. See Brief of the Amicus Curiae, CT Criminal Defense Lawyers Association, at 8-9. Because the wording of the first certified question is susceptible to such a reading, if the defendant is correct that the first certified question pertains to all juvenile offenders, regardless of the length of their sentence, then the answer to the first certified question is "no."

A. Juvenile Offenders Who Have Been Sentenced To Life Imprisonment Without Release Were Entitled To A Miller Proceeding

As the Appellate Court recognized, "federal constitutional law establishes a minimum national standard for the exercise of individual rights." Williams-Bey, 167 Conn. App. at 768. As previously discussed, Montgomery, 136 S. Ct. at 729, 735, held, that on collateral

state review, Miller applies retroactively to juvenile offenders who have previously been sentenced to mandatory life without the possibility of parole. Therefore, this minimum standard establishes that for the juvenile offenders to whom Miller clearly applies, under our state constitution they would necessarily have been entitled to an individualized proceeding in accordance with Miller.

B. Juvenile Offenders Who Have Not Been Sentenced To Life Imprisonment Without Release Were Not Entitled To A Miller Proceeding

Consideration of the relevant Geisler factors reveals that, under our state constitution, juvenile offenders who have not been sentenced to a term of life without parole were not entitled to a sentencing hearing in accordance with Miller.[12]

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[12] Not every Geisler factor is relevant in all cases. State v. Jenkins, 298 Conn. 209, 262 (2010). For both of the certified questions, the state does not disagree with the Appellate Court's analysis of the first and fifth Geisler factors. Williams-Bey, 167 Conn. App. at 769, 776-77. Although the defendant, under the textual approach, asserts that Article First, §§ 8 and 9 "prohibit cruel and unusual punishment regardless of age," Defendant's Brief ("D.Br.") at 9; he does not appear to take issue with the Appellate Court's observation that these constitutional provisions do not address the specific issues before this Court.

As to the fifth factor, the historical approach, the defendant's discussion of this factor is a historical recitation of legislative enactments pertaining to juveniles. D.Br. at 24-29. There is no dispute that juveniles have been, and are, treated differently than adults. Because legislation is "the clearest and most reliable objective evidence of contemporary values;" State v. Rizzo, 303 Conn. 71, 191 (2011), cert. denied, 568 U.S. 836 (2012); the state will address the defendant's reliance on this legislative history in its discussion of the sixth Geisler factor in relation to the second certified issue. See, § II,D, pp. 35-35, below.

The amicus Connecticut Criminal Defense Lawyers Association ("CCDLA") submits that the Appellate Court's discussion of the historical approach "missed the historical point" that this state "has recognized that juveniles may lack sufficient maturity to understand the consequences of otherwise criminal acts" and that this recognition pre-dates Roper, Graham and Miller. Brief of Amicus Curiae, CCDLA, at 4, 6, 7. Even assuming the validity of this assertion, there is no dispute that at the time of the adoption of the 1818 Constitution, Connecticut treated 14 and 15 year olds as adults when charged with a felony offense. State v. Jose C., (Devlin, J.) No. CR 6421185, 1996 WL 165549, *11 (Mar. 21, 1996), aff'd *sub nom.*, State v. Angel C., 245 Conn. 93 (1998). Juvenile status, and any special treatment derived therefrom, does not emanate from the state or federal constitutions. Rather, it is, and has been, a matter of legislative grace. Angel C., 245 Conn. at 104-05, 124; accord In re Tyvonne, 211 Conn. 151, 157 (1989). The Appellate Court (continued...)

1. Federal Precedent

Graham, Miller and Montgomery, addressed and analyzed only a juvenile offender's sentence of life without parole. This factor therefore weighs against expanding our state constitution to include sentences less than life without parole.

2. Connecticut Precedent

In Casiano, this Court specifically did not decide "whether the imposition of a term of less than fifty years imprisonment without parole on a juvenile offender would require the procedures set forth in Miller." Casiano, 317 Conn. at 79. In State v. Logan, 160 Conn. App. 282, 293, cert. denied, 321 Conn. 906 (2016), the Appellate Court concluded that a 31 year sentence for a homicide offender was not the "functional equivalent of a life imprisonment without the possibility of parole," and thus the sentencing court "did not have to apply Miller" prior to accepting the defendant's plea and imposing sentence. The defendant in Logan was 17 years old when he committed murder. Id. at 285. After reviewing the relevant federal and state case law, including State v. Taylor G., 315 Conn. 734 (2015), the Appellate Court reasoned that because the defendant would be "released before he reaches the age of fifty," his punishment did not approach the "two harshest penalties" described by Roper, Graham and Miller. Id. at 293. In concluding that the trial court had not abused its discretion in denying the defendant's motion to correct an illegal sentence, the Logan Court stated that,

> Like the defendant in Taylor G., the defendant in the present case, even if he is not paroled,[ ] will be able to work toward rehabilitation, and can look forward to release at an age when he will still have the opportunity to live a meaningful life outside prison and to become a productive member of society. "Although the deprivation of liberty for any amount of time, including a single year, is not insignificant, Roper, Graham and Miller cannot be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude." State v. Taylor G., supra, 315 Conn. 745-46.

(...continued)
therefore did not "miss the historical point" and correctly concluded that this factor arguably weighs against the defendant.

(Footnote omitted). Id. at 293-94.

The defendant takes issue with Logan, alleging that it is lacking in analysis and is contrary to the *dissent* in Taylor G. D.Br. at 19 n.16. A review of Logan reveals that it is based on a thorough analysis and accurate application of this Court's controlling precedent. Therefore, the defendant's argument is unavailing and review of this factor weighs against expanding our state constitution to include sentences less than life without parole.

3. Sibling States

Similar to Casiano, sibling states have applied Miller and Graham to terms of imprisonment that are the functional equivalent of life without parole but not to sentences less than that. See e.g., **California:** People v. Franklin, 370 P.3d 1053, 1059-60 (Cal. 2016) (defendant parole eligible at age 66), cert. denied, 137 S. Ct. 573 (2016).[13]

The defendant relies on three jurisdictions, Iowa, Washington and Wyoming, to support his assertion that Miller and Riley should be expanded to encompass all juvenile offenders. First, the defendant argues that Iowa and Washington have held that Miller applies to all juvenile offenders, "irrespective of the length of the sentence" and cites to State v. Lyle, 854 N.W.2d 378, 380-81, 400, 402-03 (Iowa 2014), and State v. Houston-Sconiers, 188 Wash. 2d 1, 391 P.3d 409, petition for review granted, 393 P.3d 362 (Table) (2017). D.Br. at 20-21. The defendant's reliance on these cases is misplaced because at issue was whether a juvenile defendant could be mandatorily sentenced under a mandatory minimum sentencing scheme. Both Courts reasoned that a mandatory minimum sentencing scheme deprived a sentencing court of the ability to take into account youth and

[13] See also, **Florida:** Henry v. State, 175 So. 3d 675, 679-80 (Fla. 2016) (sentenced to "ninety years and require[d] . . . to be imprisoned until . . . nearly ninety-five years"), cert. denied, 136 S. Ct. 1455 (2016); **Illinois:** People v. Reyes, 2016 IL 11927, 163 N.E.3d 884, 888, 407 Ill.Dec. 452 (Ill. 2016) (mandatory 97 year sentence; defendant parole eligible after 89 years, at age 105); **New Jersey:** State v. Zuber, 227 N.J. 422, 152 A.3d 197, 201, 212-13 (N.J. 2017) (defendant sentenced to 110 years with parole after 55 years at age 72; co-defendant sentenced to 75 years with parole after 68 years 3 months, at age 85), cert. denied, 138 S. Ct. 152 (2017); **Washington:** State v. Ramos, 187 Wash.2d 420, 387 P.3d 650, 659-61 and n.6 (Wash. 2017) (85 year sentence), cert. denied, 138 S. Ct. 467 (2017).

its attendant circumstances and, therefore, sentencing courts should be allowed to depart from imposing a mandatory minimum sentence. The Lyle Court specified that it was not holding that juvenile offenders could not be sentenced to a minimum term of years, it was holding only that, under the Iowa state constitution, "the one-size-fits-all mandatory sentencing for juveniles" was unconstitutional. Lyle, 854 N.W.2d at 403.

The defendant relies on two cases, State v. Pearson, 836 N.W.2d 88, 96-97 (Iowa 2013), and Bear Cloud v. State, 334 P.3d 132, 141-42 (Wyo. 2014), to show that "at least two states have applied Miller to effective sentences of less than 50 years in prison." D.Br. at 21-22. The defendant's reliance on these cases is unavailing. First, the defendant in Pearson was sentenced to 55 years in prison with the possibility of parole after 35 years, for four non-homicide offenses. Pearson, 836 N.W.2d at 89. The Pearson Court concluded that, under the Iowa constitution, parole eligibility only after 35 years was unconstitutional.

In Bear Cloud, the defendant received a 45 year sentence and would not be released until the age of 61. With good time credit, he had the possibility of release after 35 years, at age 51. Bear Cloud, 334 P.3d at 136 and n.3. This single case, however, is not enough to establish that sibling states support expansion, especially in cases similar to the case before this Court. Here, the defendant, a juvenile homicide offender, received a sentence of 35 years, 10 years less than Bear Cloud, and is eligible for parole after 21 years when he will be 38 years old. This is a far cry from Bear Cloud and what this Court identified in Taylor G. and Casiano as resulting in futility of rehabilitation, deprivation of "all hope," and as being at an age precluding "fulfillment outside prison walls," thus warranting consideration of the Miller factors.

Therefore, sibling state precedent weighs against expanding our state constitution to include juvenile offenders who have received a sentence less than life without parole.

4. Contemporary Understandings Of Applicable Economic/Sociological Norms

"[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Santiago, 318 Conn. at 59-60. Public Acts

No. 15-84, § 2, codified at § 54-91g, specifies the procedure for juvenile offenders, transferred to the adult court, being sentenced for A or B felonies. That the legislature limited Miller hearings to A and B felonies reveals that as a matter of public policy, expanding Miller to less serious sentences is not warranted. In addition, although § 54-125a (f) applies only to total effective sentences of 10 years or more, it necessarily encompasses juvenile offenders who have been sentenced to "lesser" crimes and has afforded them the opportunity to show that their crimes were the result of transient immaturity.

As set forth at length, below, § II,D, pp. 33-35, continued deference to the legislature is warranted. Therefore, consideration of this factor weighs against expanding our state constitution to encompass all juveniles who have received a sentence of less than life without the possibility of parole.

5. Summary

In this case, the defendant was sentenced when he was 19 years old. The trial court imposed a total effective sentence of 35 years' incarceration and he now is parole eligible after 21 years, at approximately 39. See Williams-Bey, 167 Conn. App. at 773-74. If presentence confinement is taken into consideration, it appears that the defendant will be eligible for release on parole in 2019, at the age of 38.[14] See Borelli v. Commissioner of Correction, 113 Conn. App. 805, 818 (2009) (calculation for sentence with pre-trial confinement); General Statutes § 18-98d (Sentencing credit for pre-trial confinement). The defendant thus will be in his late thirties when he is eligible for early release and in his early fifties if he serves his full sentence. The defendant's release from prison at either age 38 or 52 is well below the time period that courts have identified as an age when rehabilitation and hope are futile and when a defendant no longer has the opportunity to become a productive member of society and to have a "meaningful life outside of prison." See

[14] The defendant was admitted to DOC custody, as a result of his arrest for the underlying murder, on April 22, 1998 and currently, his maximum release date, not including the possibility of parole, is April 20, 2033, when he will be 52 years old. See Department of Correction Inmate Information. St.App, A-52.

Casiano, 317 Conn. at 77-78; Taylor G., 315 Conn. at 746.

Analysis of the Geisler factors, and as illustrated by the facts of this case, reveals that our state constitution should not be expanded to encompass "all juveniles" who have been sentenced to less than life without parole.

II. THE APPELLATE COURT PROPERLY CONCLUDED THAT UNDER OUR STATE CONSTITUTION, GENERAL STATUTES § 54-125a(f) HAS PROVIDED AN ADEQUATE REMEDY FOR JUVENILES FACING LIFE WITHOUT PAROLE TO GAIN CONSIDERATION OF THE MITIGATING FACTORS OF YOUTH

Consideration of the relevant Geisler factors reveals that, under our state constitution, General Statutes § 54-125a (f) provides an adequate remedy if a juvenile offender was sentenced to life imprisonment without parole without consideration of the Miller factors.[15] The creation of parole eligibility has removed any concern that the sentence is disproportionate and unconstitutional. Resentencing therefore is not required.

A. Federal Precedent

In Montgomery v. Louisiana, the United States Supreme Court noted that the central substantive guarantee of the Eighth Amendment is the protection against disproportionate punishment and that this guarantee "goes far beyond the manner of determining a defendant's sentence." Montgomery, 136 S. Ct. at 732-33. The Court clarified that, contrary to the defendant's assertion; D.Br. at 33; Miller did not "impose a formal factfinding requirement" and that "[t]he 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. Recognizing that "children are constitutionally different from adults for purposes of sentencing," the Court determined that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, the sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." (Citation and internal quotation marks omitted). Id. at

[15] Parole eligibility also provides an adequate remedy if this Court concludes that juveniles sentenced to less than life without parole were entitled to a Miller hearing.

733-34. Consistent with this explanation, the Montgomery Court concluded that

> Giving Miller retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, *e.g., Wyo. Stat. Ann. § 6-10-301(c) (2013)* (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.
>
> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller's central intuition—that children who commit even heinous crimes are capable of change.

Id. at 736. If, when given the opportunity for parole, a juvenile offender can show that his "crime did not reflect irreparable corruption," then his "hope for some years of life outside prison walls must be restored." Id. at 736-37. Thus, consideration of federal precedent establishes that § 54-125a (f) provides a constitutionally adequate remedy.

B. Connecticut Precedent

Connecticut precedent confirms that parole eligibility under § 54-125a (f) provides a constitutionally adequate remedy. In State v. Delgado, 323 Conn. at 802-04, this Court considered whether the defendant, who had been sentenced to 65 years' imprisonment without parole for murder, was entitled to resentencing because the trial court had failed to consider youth and its attendant circumstances. This Court affirmed the trial court's dismissal for lack of jurisdiction, concluding that the defendant had failed to raise a claim within the jurisdiction of Practice Book § 43-22 because his sentence was no longer invalid as a result of parole eligibility. Delgado, 323 Conn. at 809 n.6, 810, 812, 813. After reviewing Roper, Graham, Miller, Riley, Casiano, Montgomery, and the underlying Appellate Court decision in Williams-Bey; see Delgado, 323 Conn. at 805-808; this Court concluded:

> Following the enactment of P.A. 15-84, . . . the defendant is now eligible for parole and can no longer claim that he is serving a sentence of life imprisonment, or

> its equivalent, without parole. The eighth amendment, as interpreted by Miller, does not prohibit a court from imposing a sentence of life imprisonment *with* the opportunity for parole for a juvenile homicide offender, nor does it require the court to consider the mitigating factors of youth before imposing such a sentence. See Miller v. Alabama, supra, 132 S. Ct. at 2463-69. Rather, under Miller, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life, or its equivalent, *without* parole. Id., 2469. As a result, the defendant's sentence no longer falls within the purview of Miller, Riley and Casiano, which require consideration of youth related mitigating factors only if the sentencing court imposes a sentence of life without parole.

(Emphasis in original). Id. at 810-11.

This Court noted that its conclusion "is consistent with the law in other jurisdictions that have considered this issue and have concluded that Miller simply does not apply when a juvenile's sentence provides an opportunity for parole; that is a sentencing court has no constitutionally founded obligation to consider any specific youth related factors under such circumstances."[16] Delgado, 323 Conn. at 811. This Court further noted that these cases are consistent with Montgomery. Id. at 811-82, *relying on* Montgomery, 136 S. Ct. at 736.

Throughout its discussion, this Court incorporated the Appellate Court's decision in Williams-Bey. First, in its summary of the "Principles of Juvenile Sentencing Law," this Court summarized the Appellate Court's conclusion below. Delgado, 323 Conn. at 808. Second, in its footnote referring to decisions in other jurisdictions, this Court included the Appellate Court's decision below. Id. at 811 n.7. Third, this Court noted that its decision was consistent with the Appellate Court's decision, stating that

> In Williams–Bey, the Appellate Court engaged in a thorough analysis of whether an opportunity for parole satisfies the constitutional concerns discussed in Miller and concluded that it did. See [167 Conn. App.] 768, 780–81. Although this court does not follow the precise analytical path that the Appellate Court took in Williams–Bey, we fully agree that resentencing is not necessary.

Id. at 813 n.8.

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[16] The jurisdictions to which this Court referred are the federal district court of Wisconsin, California, Hawaii, Nebraska, New Jersey and Ohio. Delgado, 323 Conn. at 811 n.7 (and cases cited therein).

This Court also addressed whether the defendant was entitled to resentencing under § 54-91g. Based on the plain language of the enabling legislation, Public Acts No. 15-84 § 2, and the legislative history, this Court concluded that although after October 1, 2015 the legislature intended to require both a Miller compliant hearing and parole eligibility, § 54-91g is not retroactive. Delgado, 323 Conn. at 814-15.

This Court rejected the defendant's argument that Riley and Casiano mandated resentencing because neither case required a sentencing court to consider youth and its attendant circumstance before imposing a sentence of *life with the opportunity for parole*. Delgado, 323 Conn. at 815. Lastly, this Court rejected the defendant's argument that because this Court drew a distinction between Graham and Miller claims in Riley and Casiano, this Court had somehow previously determined that parole legislation would not be an appropriate remedy for a Miller claim. Id. at 815-16.

More recently, in State v. Rivera, 177 Conn. App. 242, 245, 253 (2017), *cert. petition filed* Dec. 21, 2017 (P.S.C. 170342), the Appellate Court declined to expand the contours of our state constitution beyond what Miller, Riley and Casiano have proscribed, a sentence of life without the possibility of parole. In Rivera, the Appellate Court concluded that our state constitution does not afford greater protection to juvenile homicide offenders than provided under the federal constitution and that imposition of the 25 year mandatory minimum sentence for murder upon a juvenile defendant is not cruel and unusual punishment under Article First, §§ 8 and 9. Id. at 245. The defendant had argued that imposition of this mandatory minimum sentence was unconstitutional because it prevented a trial court from imposing a sentence of less than 25 years upon due consideration of the Miller factors. Id. at 245, 250-51. In engaging in a full Geisler analysis, the Appellate Court determined that: (1) federal precedent did not support the defendant because his sentence did not amount to a life sentence without parole, or its functional equivalent, because he is parole eligible and Miller therefore is not applicable; Id. at 259; (2) Connecticut precedent weighed against the defendant because his sentence did not amount to a life sentence, or its functional

equivalent, triggering the application of Miller and further noting that the "'fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, *is properly within the province of legislatures, not courts.*' (Emphasis added; internal quotation marks omitted.) State v. Riley, supra, 315 Conn. 661." Id. at 269, 270; (3) sibling state precedent weighed against the defendant because "numerous state legislature have maintained mandatory minimum sentences for juvenile offenders sentenced in adult court." Id. at 242, 243; and, (4) contemporary understandings of applicable economic and sociological norms weighed against the defendant because our state laws have changed in several areas to provide special protections to juveniles and the enactment of § 54-125a (f) in response to Miller and Graham "reflects the current sociological and economic norms as to youth related sentencing considerations." Id. at 274.

Similarly, based on Roper, Graham, Miller and Riley, the Appellate Court has declined to expand Miller and Riley to apply to defendants who were 18 years or older at the time of the murder. State v. Mukhtaar, 179 Conn. App. 1, 3, 9 (2017) (defendant age 20); Haughey v. Commissioner of Correction, 173 Conn. App. 559, 561, 563, 570-71 (defendant age 25) cert. denied, 327 Conn. 906 (2017). Because the contours of Article First, §§ 8 and 9 "derive from the United States Supreme Court precedent concerning the eighth amendment," federal precedent is particularly weighty and the Appellate Court has properly declined to read these provisions more broadly than under the federal constitution.

In Delgado, this Court considered § 54-125a (f) to have remedied the constitutional violation by eliminating that part of the sentence that deprived juvenile offenders of an opportunity for parole. In Williams-Bey, the Appellate Court considered parole eligibility to have remedied the constitutional violation by providing the opportunity to establish that the crime and sentence were the result of transient immaturity to obviate the risk that the sentence was disproportionate. The Williams-Bey Court's decision therefore focused on the underlying rationale for why the deprivation of parole eligibility created the risk of a disproportionate sentence whereas the Delgado Court's decision focused more broadly on

the fact of the lack of parole, as opposed to its import. Both Delgado and Williams-Bey, however, recognized that as a result of parole eligibility, the concern that a juvenile offender is serving a disproportionate sentence no longer exists because he has the opportunity to show that his crime was the result of transient immaturity.

Contrary to the defendant's assertion, that this Court in Riley and Casiano departed from the express holdings in Graham and Miller does not indicate that our state constitution affords greater substantive protection on the issue of the appropriate remedy. See, D.Br. at 19-20. Rather, the recognition that parole eligibility provides the opportunity for a juvenile to attain "fulfillment outside prison walls, [and] for reconciliation with society;" Casiano, 317 Conn. at 78-79 (quoting Graham, 560 U.S. at 69-70, 79); is entirely consistent with this Court's focus, in Riley and Casiano, on the rationale undergirding Graham and Miller. In Riley and Casiano, this Court eschewed Miller's express holding, "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders;" Miller, 567 U.S. at 479; and focused instead on the United States Supreme Court's analysis of the effect of a sentence of life without parole on a juvenile in light of the unique characteristics of youth. By focusing on this rationale, the Riley Court determined that the effect of a life sentence without parole is the same regardless of whether it was imposed in accordance with a discretionary or mandatory sentencing scheme. Riley, 315 Conn. at 655. This same rationale led this Court in Casiano to determine that a 50 year sentence without parole is the functional equivalent of a life sentence without parole because of "its grim prospects for any future outside of prison walls, no chance for reconciliation with society, [and] no hope." Casiano, 317 Conn. at 78-79. The opportunity for parole, however, has eliminated the penological shortcomings and adverse effect on a juvenile of a sentence of life, or its functional equivalent, without parole and therefore has addressed this Court's concerns in Riley and Casiano.

C. Sibling States

In Delgado, this Court identified five states (California, Hawaii, Nebraska, New

Jersey and Ohio) that had concluded that Miller was not applicable if a defendant had the opportunity for parole. In Williams-Bey, the Appellate Court identified six states (Arizona, California, Hawaii, Massachusetts, Nebraska and Ohio), that had concluded that parole eligibility constitutes an adequate remedy for a Miller violation. At least nine additional states similarly have concluded, primarily under the federal constitution, that because the defendant has the possibility of parole, at a period of time or at an age comparable to General Statutes § 54-125a (f), the defendant's sentence does not violate Miller.[17]

The defendant relies on cases from Missouri, Florida, North Carolina and

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[17] **Idaho:** State v. Beeson, No. 43864, 2016 WL 3619941, *1 (Ct. App. Idaho, Jun. 29, 2016) (murder; sentence not illegal; Miller not applicable to sentence of life with possibility of parole); St. App., A-81. **Kansas:** Johnson v. State, 404 P.3d 373, *4 (Table) (Ct. App. Kan. 2017) (although sentenced to several life sentences, Miller not applicable because sentenced to life with possibility of parole); Gholston v. State, 404 P.3d 361, *8 (Table) (Ct. App. Kan. 2017) (Miller not applicable to sentence of life with possibility of parole after 40 years). **Maryland:** Bowie v. State, Case No. 10-K-90-012678, 2017 WL 4117870, *2, *5, (Ct. App. Md., Sept. 15, 2017) (Miller not applicable to juvenile homicide offender's sentence of life with possibility of parole after 25 years); St. App., A-76. **Minnesota**: State v. Vang, 847 N.W.2d 248, 262-64 (Minn. 2014) (Miller does not preclude life with possibility of parole; mandatory life sentence with possibility of release after 30 years for felony murder not cruel and/or unusual punishment in violation of Eighth Amendment or Minnesota constitution). **Nevada:** Talbert v. State, No. 64486, 2016 WL 562778, *1 (Nev. Feb. 10, 2016) (newly enacted parole legislation provided "any relief Miller arguably affords as it makes [defendant] parole eligible within his lifetime; appeal moot). St. App., A-82. **New York**: People v. Aponte, 42 Misc. 3d 868, 872, 981 N.Y.S.2d 902 (Supreme Court, Bronx 2013) (juvenile homicide offender's sentence not unconstitutional under Miller or Graham because parole eligible). **South Dakota:** State v. Charles, 892 N.W.2d 915, 920-21 (S.D. 2017) (92 year sentence with possibility of parole when juvenile homicide offender aged 60 provides "meaningful opportunity" for release and not in violation of Miller and Graham), cert. denied, 138 S. Ct. 407 (2017). **Texas:** Shalouei v. State, 524 S.W.3d 766, 768-69 (Ct. App. Tex. 2017) (mandatory sentence of life with possibility of parole after 40 years for capital murder does not fall within scope of Miller), *petition for discretionary transfer refused* (Jun. 28, 2017); Lewis v. State, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014) ("the sentencing scheme in Miller was unconstitutional because it denied juveniles convicted of murder all possibility of parole leaving them no opportunity or incentive for rehabilitation."). **Wisconsin:** State v. Paapa, 377 Wis. 2d 336, 900 N.W.2d 871 (Table), 2017 WL 2791576, *2, *3 (Ct. App. Wis. 2017) (life with parole after 30 years for first degree intentional homicide provides meaningful opportunity for release and "no Miller violation."), review denied, 378 Wis. 2d 223 (2017).

Washington to show that sister states have held that parole eligibility does not remedy a Miller violation and that resentencing is required. D.Br. at 23-24. The defendant's reliance on these cases is unavailing. In State ex re. Carr v. Wallace, 527 S.W.3d 55, 56-57, 62 (Mo. 2017), it appears that the reason for resentencing was because, although the defendant had been statutorily entitled in 1983 to a presentence hearing at which aggravating and mitigating evidence was to be considered by a jury or judge, such a hearing had not occurred. Wallace, 527 S.W.3d at 60-61. Resentencing therefore appears to have been the result of the trial court not following a statutorily mandated procedure.

With regard to the defendant's reliance on Atwell v. State, 197 So.3d 1040, 1046-47, 1050 (Fla. 2016); D.Br. at 24; as the Appellate Court observed, resentencing was warranted because Florida had not provided the statutory alternative of parole. Williams-Bey, 167 Conn. App. at 775-76. With regard to the reliance on Songster v. Beard, 201 F. Supp. 3d 639 (E.D. Pa. 2016), by the amicus Juvenile Law Center ("JLC"); Brief of Amicus Curiae, Juvenile Law Center ("JLC Br.") at 3; resentencing was warranted because Pennsylvania's legislative response to Miller was not retroactive. Because there was "no statute establishing the penalty for those juveniles who were convicted of first degree murder prior to the passage of the new penalty statute," the parole board had no authority to act and parole was not an option." Songster, 201 F. Supp. 3d at 642-43.

The defendant's reliance on State v. Young, 369 N.C. 118, 794 S.E.2d 274 (2016), to show that parole is not a remedy, also is misplaced. D.Br. at 24. At issue in Young was whether a statute in existence in 1999, but subsequently repealed, provided a meaningful opportunity for release. Id. at 276. The statute entitled a defendant to have his sentence reviewed by a judge after 25 years and the judge could then make a recommendation to the Governor, or his designee, as to whether the sentence should be altered. Id. at 278-79. The North Carolina Supreme Court remanded for resentencing after concluding that the statute failed to guarantee a hearing, notice or other procedural rights, provided "minimal guidance as to what types of circumstances would support alteration or commutation of the

sentence," and failed to address the central concern of Miller, that a sentencing court cannot treat minors the same as adults. Id. at 279-80.

In contrast, under General Statutes § 54-125a (f)(3), a juvenile offender has a hearing before the Board of Pardons and Parole ("BPP"), notice, representation by counsel, and both the offender and counsel have the opportunity to speak before the board and to submit reports or other documents. See BPP Policy Number: III.06, p. 4; St.App., A-53. The BPP has the authority to request testimony from mental health professionals or other relevant witnesses and is required to use relevant risk assessment and needs assessment tools. § 54-125a(f)(3), (4). The BPP is further required to take into account the defendant's rehabilitation in light of his character, background, history, his age and circumstances at the date of the crime, whether he has demonstrated remorse and increased maturity, his contributions to the welfare of others through service, his efforts to overcome substance abuse, addiction, trauma, lack of education or other obstacles that he may have faced as a child or youth in the adult correctional system, his opportunities for rehabilitation in the adult correctional system as well as his overall degree of rehabilitation in light of the nature and circumstances of the crime. § 54-125a(f)(4)(C). After the hearing, the BPP articulates its decision for the record and if parole is not granted, the juvenile offender is eligible for a new parole hearing not earlier than two years after the date of the decision. § 54-125a(f)(5). These provisions are in stark contrast to what was at issue in in Young.

Moreover, in State v. Jefferson, 798 S.E.2d 121, 125-26, cert. denied, 804 S.E.2d 527, petition for certiorari filed Dec. 27, 2017 (S.C. No. 17-7252), the North Carolina Court of Appeals concluded that a sentence of life with the possibility of parole after 25 years for juvenile homicide offenders was neither an explicit nor de facto term of life imprisonment without parole. Accordingly, the defendant's sentence was not constitutionally disproportionate. Jefferson, 798 S.E.2d at 126. North Carolina jurisprudence therefore weighs against a conclusion that resentencing is required.

The defendant also relies on authority from Washington. The defendant cites to

State v. Houston-Sconiers, 391 P.3d 409 (Wash. 2017). D.Br. at 24. At issue was whether a sentencing court had the discretion to depart from a mandatory minimum sentence. The Washington Supreme Court's conclusion that parole eligibility did not remedy a Miller violation was within the context of a direct appeal and the Court opined that parole eligibility "may provide a remedy on collateral review." In State v. Scott, 196 Wash. App. 961, 385 P.3d 783, 786-88 (Ct. App. Wash. 2016), petition for review granted, 393 P.3d 362 (Table) (2017), the Washington Appellate Court, in a case on collateral review, concluded that life with the possibility of release after 20 years, under R.C.W. 9.94A.730, cures a Miller violation. The Scott Court reasoned that "[t]he constitutional violation identified in the Miller line of cases is the failure to allow a juvenile offender the opportunity for release when his or her crime was the result of youthful traits."

In a more recent case, State v. Bassett, 198 Wash. App. 714, 394 P.3d 430, 444, cert. granted, 189 Wash.2d 1008 (2017), the Washington Appellate Court held that a sentence of life without parole for aggravated first degree murder violated the Washington state constitution. It further addressed the "Miller-fix" amendment to aggravated first degree murder, R.C.W. 10.95.030. This amendment permitted a trial court to impose a maximum sentence of life imprisonment and a minimum term of 25 years on a juvenile offender. Imposition of the minimum term of life precluded parole eligibility. Id. at 437. The statute further required that in setting a minimum term, the trial court had to take into account youth and its attendant circumstances as provided for in Miller. Id. The Bassett Court concluded that this provision created a "fundamental problem," resulting in a violation of the Washington state constitution. Specifically, this provision placed the sentencing court "in the impossible position of predicting from its application of the Miller factors which juveniles will prove to be irretrievably corrupt." Id. at 445. The Court noted that separating the irretrievably corrupt juvenile from those whose crimes reflect transient immaturity is a task that even expert psychologists cannot complete with certainty. Id., *relying on* State v.

Sweet, 879 N.W.2d 811, 836-39 (Iowa 2016)[18]; see Roper, 543 U.S. at 573; Graham, 560 U.S. at 68; Riley, 315 Conn. at 652. The Court further opined that the Miller factors provide little guidance for a sentencing court and concluded that "[i]n light of the speculative and uncertain nature of the Miller analysis, the Miller-fix statute creates a risk of misidentifying juveniles with hope of rehabilitation from those who are irretrievably corrupt. This is unacceptable under our State's cruel punishment proscription." Bassett, 394 P.3d at 445. Therefore, Washington jurisprudence appears to weigh against a conclusion that resentencing is required.

D. Contemporary Understandings of Applicable Economic/Sociological Norms

The Montgomery Court clarified that Miller did not impose a formal factfinding requirement regarding a juvenile's incorrigibility and left it to the states to develop appropriate ways to ensure that a sentence is not disproportionate. Montgomery, 136 S. Ct. at 735; see Graham, 560 U.S. at 75 ("[i]t is for the State, in the first instance, to explore the means and mechanisms" for giving juvenile defendants convicted of nonhomicide crimes "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."); see also, Riley, 315 Conn. at 661-62 (deference to legislature to provide means and mechanisms to respond to Miller and Graham, appropriate). As set forth previously, legislation enacted by the country's legislatures is the clearest and most reliable objective evidence of contemporary values. Santiago, 318 Conn. at 59-60. As our legislature did in enacting General Statutes § 54-125a (f), in response to Miller a number of other states also enacted retroactive juvenile parole legislation. See e.g., **Arkansas:** A.C.A

[18] In State v. Sweet, 879 N.W.2d 811, 836-39 (Iowa 2016), the Iowa Supreme Court concluded that, based on the known timeline of brain development, it would be "too speculative and likely impossible" for a sentencing court to determine if an offender was "irretrievably corrupt." It further concluded that the determination of irredeemable corruption "must be made when the information is available to make that determination and not at a time when the juvenile character is a work in progress." See Williams-Bey, 167 Conn. App. at 744 n.23. Because the defendant had been sentenced to life without the possibility of parole, the Iowa Supreme Court remanded for resentencing. Sweet, 879 N.W.2d at 839.

§ 16-93-621 (Effective: Mar. 20, 2017) (juvenile convicted based on crime in which death of another occurred, parole eligible after 25 years if convicted of murder in first degree and no later than 30 years if convicted of capital murder); **California:** Cal. Penal Code § 3051; see People v. Cornejo, 3 Cal. App. 5th 36, 67-08, 207 Cal. Rptr. 3d 366 (2016); **Nevada:** N.R.S. 213.12135; see Talbert v. State, No. 64486, 2016 WL 562778, *1 (Nev. Feb. 10, 2016).

Juvenile parole eligibility fulfills the proportionality concerns expressed in our jurisprudence. First, Graham, Miller, Riley and Casiano were concerned that a sentence of life without the possibility of parole deprived juvenile defendants of "the most basic liberties" and resulted in "no chance of fulfillment outside prison walls, no chance for reconciliation with society, no hope."[19] Casiano, 317 Conn at 59, 79, *quoting* Graham, 560 U.S. at 69-70, 79. Casiano elaborated that juvenile offenders often have no "opportunity to engage meaningfully" in various adult activities such as establishing a career, marrying, raising a family or voting. Casiano, 317 Conn. at 77. A parolee, however, is able "to do a wide range of things open to persons who have never been convicted of any crime." Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593 (1972). For example, a parolee "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." Id. Moreover, release on parole provides that individual with "ongoing supervision and support in the community to encourage success." Testimony of the CT Juvenile Justice Alliance for the Judiciary Committee, March 4, 2015, in Support of S.B. No. 796, p. 2; St.App., A-58.

Second, as set forth in Graham and Miller, society is entitled to impose severe sanctions on juvenile offenders and the state is not required to guarantee eventual freedom or release during an offender's natural life. Miller, 567 U.S. at 479; Graham, 560 U.S. 71, 73, 75. Because of the distinct characteristics of youth, however, the possibility exists that a

[19] See also, Taylor G., 315 Conn. at 745-46 (defendant's sentence which offered him release before 30 does not implicate Roper, Graham and Miller; defendant can work toward rehabilitation and release at relatively young age).

sentence of life without parole is disproportionate and excessive because the crime was the result of transient immaturity. Montgomery, 136 S. Ct. at 735. The "salient characteristics" that distinguish juveniles from adults for purposes of sentencing "mean that it 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." Roper, 543 U.S. at 573; Graham, 560 U.S. at 68; Riley, 315 Conn. at 652. The very notion of the juvenile brain and transient immaturity is based on the assumption that "as the years go by and neurological development occurs, [a defendant's] deficiencies will be reformed." Casiano, 317 Conn. at 60, *citing* Miller, 567 U.S. at 472. By providing for juvenile parole eligibility, legislatures have given juvenile offenders the opportunity to show growth and development at a period of time during which they have had the ability to demonstrate that their crimes were the result of transient immaturity and at a point in time when this decision can be made with more certainty. See State v. Bassett, 394 P.3d at 445 (Wash. App. 2017); State v. Sweet, 879 N.W.2d at 836-39 (Iowa 2016); Brief of the American Psychological Association et al. as Amici Curiae in Support of Petitioners, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos 10-9646, 10-9647) 2012 WL 174239 (2012).[20] Thus, juvenile parole eligibility strikes a balance between the state's interest in punishing juvenile offenders who have committed serious crimes and its interest

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[20] In its amicus brief before the Miller Court, the American Psychological Association informed the Court that in its prior decisions in Roper and Graham, the Court had "recognized what research confirms: Adolescence is transitory, and juveniles change. Indeed, most adolescents who commit crimes will desist from criminal activity in adulthood. Because the adolescent self is not yet fully formed, there is no way reliably to conclude that an adolescent's crime is the expression of an entrenched and irredeemably malign character that might justify permanent incarceration. And, even in the case of the most serious offenses, there is no reliable way to distinguish the juvenile offender who might become a hardened criminal from the far more common offender whose crime is a product of the transient influences of adolescence itself." Brief of the American Psychological Association et al. as Amici Curiae in Support of Petitioners, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos 10-9646, 10-9647) 2012 WL 174239, *35 (2012).

in ensuring that the punishment is not unconstitutionally disproportionate.

Third, the Board of Pardons and Parole ("BPP") is the body statutorily authorized and uniquely qualified to determine whether an individual is able to return to society and function as a responsible, contributing member. See Morrissey v. Brewer, 408 U.S. at 483. All of the BPP's members are statutorily required to be "qualified by education, experience or training in the administration of community corrections, parole or pardons, criminal justice, criminology, the evaluation or supervision of offenders or the provision of mental health services to offenders." General Statutes § 54-124a(a). The BPP therefore is the constitutionally appropriate entity to determine whether the defendant is "a hardened criminal" or "the far more common offender whose crime is a product of the transient influences of adolescence itself." This decision "depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 9-10, 99 S. Ct. 2100 (1979). "The decision turns on a discretionary assessment of a multiplicity of imponderables, entailing what a man is and what he may become rather than simply what he has done." Id. at 10. Moreover, a decision to release an inmate on parole "differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." Id. at 8. Therefore, it is well recognized that parole traditionally is not a judicial function. See Liistro v. Robinson, 170 Conn. 116, 128-29 (1976).

The defendant and amicus JLC advance myriad reasons why public policy favors resentencing under our state constitution. These arguments, however, fail to give proper deference to the legislature in addressing the distinctions between juveniles and adults for purposes of prosecution and sentencing. See State v. B.B., 300 Conn. 748, 760 (2011) (by providing for different justice system based on age, "the statutes recognize the inherent

differences between young people and adults."); State v. Allen, 289 Conn. 550, 585-86 (2008) (in the absence of a constitutional prohibition, "the wisdom" of a sentencing scheme "remains with the legislature"); see also, Riley, 315 Conn. at 661-62. As the defendant discusses at length; D.Br. at 24-28; our legislature has been active in differentiating juveniles from adults in numerous areas of the law. With regard to the criminal justice system, legislative enactments in 2015, Public Acts No. 15-84 and Public Acts No. 15-183,[21] reflect that our legislature actively addresses issues pertinent to juvenile offenders. In addition, the very existence of the Connecticut Sentencing Commission; General Statutes § 54-300; and the Juvenile Justice Policy and Oversight Committee; General Statutes § 46b-121n; ensures that the legislature will continue to be aware of and address issues involving juveniles and the criminal justice system.[22]

Continued deference to the legislature is warranted because determining whether and what rules should govern juveniles in this context requires weighing competing public policies and evaluating a wide variety of interrelated approaches. See Connecticut Sentencing Commission Testimony in Support of SB 796; Judiciary Committee, Joint Favorable Report; St.App., A-60, A-67. Such determinations are best made by the legislature with its ability to invite comment from interested parties and to amass and

[21] Section 1 of Public Acts No. 15-183, An Act Concerning the Juvenile Justice System, amended General Statutes § 46b-127 by raising from 14 to 15 the age at which a juvenile is automatically transferred from the juvenile docket to the regular criminal docket for various crimes, and by enacting a specific procedure for some designated crimes.

[22] The Connecticut Sentencing Commission ("CSC") is a permanent commission comprised of all the stakeholders in the criminal justice system of Connecticut. General Statutes § 54-300(d). It is the function of the CSC to "review the existing criminal sentencing structure in the state and any proposed changes thereto, including existing statutes, proposed criminal justice legislation and existing and proposed sentencing policies and practices and make recommendations to the Governor, the General Assembly and appropriate criminal justice agencies." § 54-300(b). The CSC is the body that studied how the legislature should respond to Miller and Graham and submitted its recommendations to the legislature. State v. Riley, 315 Conn. at 662.

The Juvenile Justice Policy and Oversight Committee is similar in composition to the CSC. Its function is to "evaluate policies related to the juvenile justice system." General Statutes § 46b-121n(a) and (b).

evaluate a vast amount of data. State v. Lockhart, 298 Conn. 537, 574-75 (2010). Especially where, as here, the legislature has spoken, "the primary responsibility for formulating public policy must remain with the legislature." State v. Whiteman, 204 Conn. 98, 103 (1987).

In support of his argument that our state constitution should be interpreted to require resentencing, the defendant asserts that "race disproportionately is represented in juvenile justice statistics." D. Br. at 29, 31. The defendant does not make clear how resentencing will address this concern. Furthermore, legislatures are "better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." (Internal quotation marks omitted). McClesky v. Kemp, 481 U.S. 279, 314-19, 107 S. Ct. 175 (1987). Also, the defendant's reliance on the cost of incarceration; D. Br. at 30; is based on an unsubstantiated assumption that resentencing would result in a shorter sentence.[23]

Both the defendant and the amicus JLC argue that parole does not afford a "meaningful opportunity" for release. As a preliminary matter, this argument is premature with regard to this defendant because he has not yet had a parole hearing and therefore has no basis for his assertion that a parole hearing does not provide a meaningful opportunity for release. See Riley, 315 Conn. at 663 (refraining from addressing Graham claim; cases before court must not present a hypothetical injury based on an event that has not or may never occur); see also, People v. Franklin, 370 P.3d at 1066 (Cal. 2016) ("in absence of any concrete controversy in this case concerning suitability criteria or their application . . . it would be premature for this court to opine on whether, and if so, how existing suitability criteria, parole hearing procedures, or other practices must be revised to conform to the dictates of applicable . . . constitutional law."); Bowie v. State, 2017 WL 4117870, *3-4 (Md. Ct. App. 2017). If after a parole hearing the defendant still maintains

[23] The OFA Fiscal Note identifies a fiscal savings from shifting offenders to supervision on parole. See Connecticut Senate Bill 796, File 904. St.App. A-39.

that § 54-125a (f) does not provide a "meaningful opportunity" for release, an appropriate avenue of redress could be a declaratory judgment action. See General Statutes § 52-29.

To the extent that this argument is reviewed, it nonetheless fails. In contrast to the cases on which the defendant and JLC rely; D.Br. at 38-39; JLC Br. at 4 n.2; General Statutes § 54-125a (f) embodies the "meaningful opportunity" contemplated by Graham. First, Graham held that juvenile offenders must have "some meaningful opportunity" to obtain release based on demonstrated maturity and rehabilitation and to show that "the bad acts he committed as a teenager are not representative of his true character." Graham, 560 U.S. at 75, 79. By specifying that the BPP must consider criteria encompassing the characteristics of youth, § 54-125a(f)(4)(C) necessarily incorporates the relevant constitutional inquiry to assess whether the crime was the result of transient immaturity. Second, Graham suggests that a "meaningful" opportunity is one that is "realistic" and more than a "remote possibility." Id. at 69-70 75, 82. For purposes of Eighth Amendment proportionality, executive clemency constitutes a "remote possibility" whereas parole is considered part of the rehabilitative process such that, assuming good behavior, it is possible to predict when parole may be granted. See Id. at 69-70, *citing* Solem v. Helm, 463 U.S. 277, 300-01, 103 S. Ct. 3001 (1983). Thus, by establishing specific procedural mechanisms in addition to relevant criteria for assessment of parole eligibility, § 54-125a(f)(3) and (4) establish the existence of a realistic opportunity for parole. Solem, 463 U.S. at 300-03.

Third, the defendant's assertion that the BPP is not required to consider all the Miller factors and does not hear from defense counsel and that defense counsel is not afforded an opportunity to comment on risk assessment reports or other documents, does not appear to be accurate. D.Br. at 3; see BPP Policy Number: III.06, p. 4;[24] St.App., A-53.

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[24] This policy statement appears to be consistent with the understanding of the Office of the Chief Public Defender's ("OCPD") testimony in support of Bill No. 796, dated March 4, 2014, p. 3. The OCPD "strongly support[ed]" this Bill and with regard to the parole hearing, stated that "the parties would have a reasonable opportunity to present testimony (continued...)

First, by statute the BPP is required to consider the Miller factors. General Statutes § 54-125a (f)(4)(C) encompasses Miller factors and this paragraph also requires consideration of § 54-300(c)(1)-(4). The JLC's suggestion; JLC Br. at 4; that § 54-300(c) favors denial of parole ignores the requirement in § 54-300(c)(3), identifying "the imposition of just punishment and the provision of meaningful and effective rehabilitation and reintegration of the offender" as an overriding goal, and the requirement in § 54-300(c)(4) that sentences be "fair, just and equitable." Both of these provisions necessarily encompass the defendant's age and its attendant circumstances.

Second, a review of recorded 15-84 hearings reveals that the defendant and counsel address the BPP and submit materials for consideration. See e.g., Parole Hearing of Michael McClean, 7/11/15, http://www.ctn.state.ct.us/ctnplayer.asp?odID=13056;[25] Parole Hearing of Damon Mahon, 11/22/16, http://www.ctn.state.ct.us/ctplayer.asp?odID=13469.[26] These recordings further reveal that at the beginning of the hearing, the parole officer states that the BPP will be "giv[ing] great weight to the diminished culpabilities of juveniles . . . and the hallmark features of youth and any subsequent growth and maturity." McClean hearing @ 1:26:29; Mahon hearing @ 50:08.

The amicus JLC asserts that the "seriousness of the offense or impact on the victim can always supersede any proof of rehabilitation." JLC Br. at 4. This assertion alone does not establish that resentencing is warranted. For example, Damon Mahon was released on parole despite his conviction of a brutal sexual assault of a 13 year old girl when he was

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(...continued)
through written or oral testimony and the parties are not precluded from presenting information by way of a report or affidavit." St.App., A-63.

[25] See e.g., Defendant begins addressing BPP @1:29:26; Senior Assistant Public Defender William O'Connor addresses BPP @2:07:43-2:20; refers to memorandum discussing statutory criteria, discusses brain development and defendant's background and home environment, refutes determination that defendant is a "moderate risk" of recidivism based on risk assessment performed by Dr. Andrew Meisler; social worker and Dr. Andrew Meisler submitted reports and present at hearing.

[26] See e.g., Defendant addresses BPP @ 55:55; Attorney Michal Brown addresses BPP @1:23, refers to Miller factors and transient immaturity.

just shy of his 18th birthday, and despite the objections of the victim and her family. See State v. Mahon, 97 Conn. App. 503, cert. denied, 280 Conn. 930 (2006); Mahon parole hearing, http://www.ctn.state.ct.us/ctplayer.asp?odID=13469 @1:18 & 1:21:26.

The defendant also takes issue with parole eligibility being determined based on the length of the sentence imposed, especially if the length of the sentence was not the result of a Miller compliant proceeding. D.Br. at 39-40. JLC takes issue with the 12 year minimum opportunity for parole. JLC Br. at 6. The state has a legitimate interest in protecting society from juvenile offenders who commit serious crimes, such as murder. Once this Court has identified the parameters of what constitutes a cruel and unusual sentence, it is for the legislature to create and define our state's sentencing scheme. Casiano, 317 Conn at 76 n.18; State v. Darden, 171 Conn. 677, 679 (1976). The defendant pleaded guilty to murder as an accessory. Murder is the most serious criminal offense with which a defendant can be charged and the legislature has appropriately determined that murder merits the harshest penalty. State v. Higgins, 265 Conn. 35, 64 (2003). The defendant's 35 year sentence, with parole eligibility after 21 years, falls well within the range of punishment for murder. For juvenile offenders who received a sentence of 50 years or more,[27] our legislature has further concluded that the maximum length of time before parole eligibility is 30 years, thus ensuring that a juvenile offender will be allowed to make his case for release no later than his 48th birthday. The range of 12 to 30 years for parole eligibility is well within the purview of the legislature to establish and does not provide a basis for expanding the contours of our state constitution.

Lastly, the JLC argues that § 54-125a "offends the separation of powers doctrine" and constitutes the "legislature's attempt to assign a judicial function to the parole board." JLC Br. at 9-10. There is no merit to this argument. The constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment. Darden, 171 Conn. at 679-80. "A statute violates the constitutional mandate

[27] Sixty percent of 50 years is 30 years.

for a separate judicial magistracy *only* if it represents an effort by the legislature to exercise a power which lies *exclusively* under the control of the courts." (Emphasis in original). State v. Angel C., 245 Conn. at 131. The fatal flaw in JLC's argument is that the trial court's power to impose a particular sentence is defined by the legislature and the legislature may impose minimum terms of imprisonment and may preclude the probation or suspension of a sentence. Darden, 171 Conn. at 680. Therefore, § 54-125a(f) does not violate the separation of powers.

E. Summary

In response to Graham, Miller, Riley and Casiano, and after study and consideration, including the participation of the interested parties through the legislative process, our legislature enacted Public Acts No. 15-84 to address juvenile sentencing issues for felony convictions. General Statutes § 54-125a(f) provides such juvenile offenders a meaningful opportunity to show demonstrated maturity and, thereafter, to attain life outside prison walls, thus ensuring that a juvenile is not serving a constitutionally disproportionate sentence. Not only is parole eligibility consistent with this Court's underlying concerns in Riley and Casiano but, also, it is consistent with the jurisprudence of the United States Supreme Court and many sibling states. Analysis of the Geisler factors therefore establishes that the Appellate Court correctly concluded that our state constitution does not afford juvenile defendants any different or greater protection than the federal constitution for purposes of remedying a Miller violation.

III. ALTERNATIVELY, RESENTENCING IS NOT REQUIRED BECAUSE THE DEFENDANT'S THIRTY-FIVE YEAR SENTENCE IS NOT THE FUNCTIONAL EQUIVALENT OF LIFE IMPRISONMENT

Both the trial court and the Appellate Court concluded that a 35 year sentence is not functionally equivalent to a life sentence. Williams-Bey, 167 Conn. App. at 748-49, 762 n. 11; Mem. Dec. at 6-7. If this Court concludes that parole eligibility does not remove the constitutional concerns that arise as the result of a Miller violation for defendants sentenced to life without parole, this Court can affirm the Appellate Court's decision on the alternate

ground that because a 35 year sentence is not the functional equivalent of a life sentence, Miller does not apply.[28] State v. James E., 327 Conn. 212, 215 (2017). As previously discussed, the defendant is parole eligible after 21 years, at the age of 38 and, even if he serves his entire 35 year sentence, he will be released at the age of 52. For the reasons set forth in Taylor G. and Logan, Issue I,B,2, pp. 16-17, the defendant's sentence does not effectively result in his incarceration for life and therefore the sentencing court was not required to follow the dictates of Miller and Riley.

IV. ALTERNATIVELY, THE DEFENDANT IS NOT ENTITLED TO RESENTENCING BECAUSE HE RECEIVED A DEFINITE SENTENCE AS THE RESULT OF A PLEA AGREEMENT

If this Court concludes that juveniles sentenced to less than life without parole are entitled to a Miller hearing and that parole is not an adequate remedy, the state requests that this matter be remanded to the Appellate Court to address whether, because the defendant availed himself of a plea agreement, he cannot now complain that he is entitled to resentencing under a retroactive application of Miller.[29]

CONCLUSION

For the foregoing reasons, the State of Connecticut respectfully requests that the Appellate Court's judgment be affirmed.

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[28] If this Court concludes that Miller applies to sentences that are less than life or its functional equivalent without parole *and* that parole is an adequate remedy, it need not address this alternate basis.

[29] The state fully briefed this argument before the Appellate Court. See Brief of State of Connecticut – Appellee, pp. 32-43, Appellate Court Records and Briefs, May Term 2016. See also, D.App., A78 (Statement of Alternative Grounds). Because the state's request for permission to file a 50 page brief was denied, it is unable to present a fully briefed argument.

Respectfully submitted,

STATE OF CONNECTICUT

BY:

MICHELE C. LUKBAN
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807
Fax (860) 258-5828
Juris No. 409700
Michele.Lukban@ct.gov
DCJ.OCSA.Appellate@ct.gov

GAIL P. HARDY
State's Attorney
Judicial District of Hartford

VICKI MELCHIORRE
Supervisory Assistant State's Attorney
Judicial District of Hartford

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate procedure § 67-2 that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

MICHELE C. LUKBAN
Senior Assistant State's Attorney