No. 16-3820

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

v.

COREY GRANT,

Appellant

Appeal from the Final Judgment in a Criminal Case of the United States District Court for the District of New Jersey (Crim. No. 90-328). Sat Below: Honorable Jose L. Linares, U.S.D.J.

BRIEF FOR APPELLEE

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TABLE OF ABBREVIATIONS

"A"	refers to the Appendix filed by Defendant.
"DB"	refers to Defendant's Brief.
"DE"	refers to a District Court's docket entries. (Cites to a specific page of a filed pleading, if not included in the Appendix or Supplemental Appendix, are to the ECF legend at the top of that pleading.)
"LWOP"	refers to "life imprisonment without parole."
"PSR"	refers to the 2016 Pre-Sentence Report filed under seal with this Court.
"1992 PSR"	refers to Grant's original Pre-Sentence Report filed under seal with this Court.
"SA"	refers to the Supplemental Appendix filed by the United States.

PRELIMINARY STATEMENT

In the late 1980's, the E-Port Posse gang, led by Bilal Pretlow, tried to consolidate and control all illegal drug distribution in Elizabeth, N.J. using a combination of escalating tactics: Negotiation, threats, physical violence and murder.

For the latter methods, Corey Grant was the Posse's preferred "enforcer." Grant participated in, *inter alia*, the attempted murder and murder of rival drug dealers, the mob-style execution of an unsuspecting witness and the neck-severing, followed by the dismemberment, of a police informant. *United States v. Bethea*, 834 F. Supp. 659, 665-66 (D.N.J. 1992).

Tried as an adult, even though he committed his crimes as a juvenile, Grant was convicted of racketeering and other crimes in 1992. Based on the then-mandatory Guidelines, he was sentenced to LWOP.

Twenty years later, however, the Supreme Court held that the Eighth Amendment's prohibition of cruel and unusual punishment precluded mandatory LWOP sentences for juveniles. Instead, a sentencing court first must expressly consider the role transient immaturity may have played in a juvenile's commission of the crimes of conviction, including homicides. *Miller v. Alabama*, 567 U.S. 460 (2012). Grant, who murdered and committed his

other crimes before he reached 18, qualified under *Miller* for resentencing. *Grant v. United States*, 2014 WL 5843847 (D.N.J. Nov. 12, 2014).

Throughout Grant's resentencing hearing, the District Court had *Miller* firmly in mind. It repeatedly recognized (a) Grant was not an adult when he committed his crimes and (b) *Miller*'s view that LWOP for juveniles should be reserved for crimes that reflect an irreparably corrupt individual. *See* A150-51. Accordingly, it vacated Grant's LWOP sentences and re-sentenced him to 60 years. Coupled with the mandatory, consecutive five-year sentence Grant received on his related firearms conviction, that resulted in a total sentence of 65 years. A20, 155-56.

Grant challenges his new sentence, but not in the usual way. He does not argue that his new prison term is substantively unreasonable in that no other, reasonable sentencing judge would have imposed the same sentence for the reasons provided by the District Court. Instead, Grant contends his new sentence is a form of *de facto* LWOP because it lasts until the end of what he characterizes as his average life expectancy. He then argues, under *Miller*, that *de facto* LWOP also violates the Eighth Amendment.

Grant's reasoning suffers from two, fundamental flaws, both of which doom his appeal. First, Grant's *de facto* LWOP argument is both factually and legally incorrect. To begin, he has miscalculated his life expectancy by

measuring from birth, as opposed to using his current age of 44. At 44, Grant's current average life expectancy is 76.7, not 72, the age at which he is scheduled for release. Moreover, the inherent inexactitude of average life expectancy tables when applied to specific individuals has led courts to reject Grant's central proposition: That a sentence lasting until close to average life expectancy is *de facto* LWOP. It is not.

Second, Grant incorrectly cites *Miller* and the other relevant sentencing precedent to essentially argue the characteristics of youth must be considered not only to determine whether LWOP for a juvenile offender is an appropriate sentence, but also, after a sentencing court decides against LWOP, to drive down whatever term of years may be selected as an appropriate alternative sentence.

Neither *Miller*, nor any other binding precedent, supports that approach to sentencing. To adopt it would skew application of the 18 U.S.C. § 3553(a) sentencing factors and circumscribe sentencing discretion for juvenile offenders in ways the Supreme Court expressly rejected.

Grant's new sentence is not unreasonable, let alone unconstitutional. If anything, the District Court gave Grant the benefit of the doubt. Despite his long history of repeated, cold-blooded and extremely brutal criminal conduct that separated Grant from his juvenile peer members of the Posse, it

considered Grant's age-related mitigation arguments and vacated his LWOP sentences. Grant's true objection is that the District Court did not weigh those arguments even more heavily and reduce his sentence even further, but nothing in *Miller*, or any other case, required it to do so.

Grant is scheduled to complete his new sentence when he reaches the age of 72, well before his current average life expectancy of 76.7 years. He did not receive a *de facto* life sentence and the one he did receive does not violate the Eighth Amendment.

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

In 1992, Grant was convicted of (a) racketeering conspiracy and racketeering, including acts of murder and attempted murder, (b) drug trafficking and (c) use of a firearm in connection with drug trafficking and crimes of violence. At that time, the Guidelines were mandatory and Grant's Guidelines range was life imprisonment. As a result, Grant received life sentences on the racketeering convictions, which ran concurrently with the 40-

year prison sentence he received for the drug convictions. For his gun conviction, he received a mandatory, consecutive five years.

Although tried as an adult and 19 years old when sentenced, Grant committed his crimes as a juvenile. Relying on *Miller*, Grant sought and obtained resentencing. At his hearing, the District Court reduced Grant's LWOP sentences to 60 years, resulting in a total sentence of 65 years.

Grant's appeal raises three issues:

I. Whether the District Court plainly erred when it did not, *sua sponte*, use the sentencing package doctrine to resentence Grant on his drug and gun convictions, which total 45 years, as well as his LWOP sentences.

II. Whether the Eighth Amendment prohibited the District Court from reducing Grant's LWOP sentences to 60-years' imprisonment, with his total sentence amounting to 65 years, when Grant relies on an incorrect calculation of his life expectancy and misreads *Miller* as prohibiting lengthy sentences for all juveniles, even those who commit violent, premeditated homicides.

III. Whether the District Court plainly erred when it relied on the characteristics of juveniles identified in *Miller* to reduce Grant's sentences, but did not weigh Grant's mitigation arguments as heavily as Grant would have liked, based on evidence that Grant, as the Posse's enforcer: (i) helped sever

the neck of, then dismember, a police informant; (ii) eliminated a rival drug dealer by shooting him in the neck; and (iii) helped "dispatch[]," with four shots to the back of her head, a teenage girl who accidentally stumbled on the drugs and money stashed in an apartment used by Grant's gang.

STATEMENT OF RELATED CASES AND PROCEEDINGS

On direct appeal, this Court affirmed Grant's 1992 convictions and sentences, along with those of his fellow gang members. *United States v. Grant*, 6 F.3d 780 (Table) (3d Cir. 1993), *cert. denied*, 510 U.S. 1061 (1994). His habeas petition, asserting that his LWOP sentence was unlawful before the Supreme Court ruled *Miller* was retroactive in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), also was consolidated with the petitions of other defendants. *See In re Pendleton*, 732 F.3d 280 (2013). His co-defendants also filed unsuccessful collateral attacks. *See Jackson v. United States,* 190 F. App'x 207 (3d Cir. 2006); *In re Bethea*, 15-1201 (3d Cir. March 19, 2015).

The United States knows of no other related cases or proceedings.

STATEMENT OF THE FACTS AND CASE

I. THE E-PORT POSSE.

From approximately March 1987 through January 1990, Pretlow and the Posse sought control of the drug distribution market in Elizabeth, N.J., focusing on its housing projects. PSR¶¶ 1, 62. Although Pretlow's right-

hand men were other adults, PSR¶ 2, Corey Grant, not yet 18, was the reliable "enforcer" for the Posse, PSR¶ 52; PSR¶ 92 (Pretlow commenting on Grant's usefulness as their enforcer); A443 (same).

Pretlow ran his enterprise like a mob organization out of an old gangster movie. He tried to consolidate his power by assembling rival drug dealers at a meeting where he announced his plan to be the principal drug dealer in Elizabeth and encouraged their cooperation. 1992 PSR¶ 68; PSR¶ 62. Anyone who refused was threatened and, if necessary, attacked or murdered. 1992 PSR¶ 69; PSR¶ 63.

Grant played an important role in Pretlow's consolidation efforts. He was big and strong. PSR¶ 174. He also had a penchant for violence, repeatedly helping Pretlow maintain control by terrorizing, physically assaulting and, ultimately, eliminating drug dealing competitors and others who threatened the organization. *See, e.g.*, 1992 PSR¶ 75; PSR¶¶ 52, 60, 62-63, 85 (describing the murder of Mario Lee); PSR¶¶ 81-83 (describing the attempted murder of Lee's brother, Dion Lee). By the time of his 1992 trial, Grant had earned the reputation as one of Pretlow's "top" men. SA112.[1]

[1] These and other selected excerpts of testimony from Grant's 1992 trial are reproduced in the Government's Supplemental Appendix, each following the cover page of the relevant transcript in which they appear.

Several incidents graphically illustrate the calculated, brutal behavior through which Grant earned his position. In 1989, the Posse was using an apartment rented by Mutah Sessoms as a stash house to store and package cocaine. The police raided that stash house and arrested Sessoms, who despite recognizing the risk to his life, began providing information about the Posse and its members. *Bethea*, 834 F. Supp. at 665-66; SA4-6.

The Posse needed to silence Sessoms. Grant, nearing his sixteenth birthday, played a crucial role. He drove an unwitting Sessoms to his planned execution, then lured Sessoms inside an apartment where he grabbed him around the neck from behind to crush his windpipe to render Sessoms unconscious, while others bashed Sessom's skull with a hammer. SA35-39; 834 F. Supp. at 665.

Sessoms begged, in vain, for mercy. Pretlow's brother, Robert, used a machete to chop Sessoms' neck. *Id.* When Sessoms finally expired, (his body continued to make noises until a towel was used to muffle his severed neck), *id.*, Grant used an electric saw and other tools to help dismember the corpse in a bathtub. Sessom's feet, hands and head were dumped into two metal pails filled with acid which Grant and Pretlow had bought for the occasion. Grant then helped stuff Sessoms' other body parts inside suitcases,

also purchased for that purpose, to scatter his remains around the streets of Newark. *Id*. at 666; SA21-79.[2]

Later that summer, Grant (then 16) encountered a group of rival drug dealers while delivering drugs for Pretlow. One of them, Dion Lee, had been a Posse member, but struck out on his own. PSR¶ 81. Grant warned Lee not to "hang around" the area unless Lee was selling drugs for Pretlow, but Lee refused to listen. Soon thereafter, Grant again ran into Lee on the Posse's turf. Grant upped the ante by reiterating his warning at gunpoint. PSR¶ 82. When Lee would not back down, another Posse member attacked him. PSR¶ 83. Lee fought back until Grant intervened, smashing Lee on the skull with a gun, threatening to shoot Lee if he did not leave, then actually shooting at Lee as he retreated. *Id*. He missed. SA82-92.

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[2] Grant notes that he was not convicted of Sessoms' murder. DB14; *see* PSR¶¶ 16, 94. At Bethea's sentencing, however, the District Court stated that, had it been "the trier of fact," it "would have found ***beyond a reasonable doubt***" that the trial testimony established Sessom's "depraved, heinous and sadistic" murder occurred with Bethea, Grant and others playing the roles described above. 834 F. Supp. at 667 (emphasis in original). Accordingly, at Grant's resentencing, the District Court was permitted to, and did, A56-57, 62-63, consider that murder. *United States v. Watts*, 519 U.S. 148, 156 (1997) (*per curiam*) (sentencing court may consider conduct underlying even acquitted charges, provided the conduct is proven by at least a preponderance of evidence).

Mario Lee, Dion's brother, was another drug dealer operating on the Posse's turf. He was not so lucky. PSR¶ 63. Grant and one James Holman confronted Mario in an apartment courtyard. Grant had a "smile on his face," SA101, as they threatened Mario in front of witnesses. They tried to force him inside an apartment building, SA105 ("get in the fucking hallway"), but Mario broke free and tried to make a run for it. Grant stood right next to Lee's girlfriend (and mother of Lee's child), SA95,103-04, who witnessed the entire incident, and ordered Holman to shoot Lee, SA100 ("shoot him . . . bust that nigger"). Mario took a bullet to the neck and died. PSR¶¶ 84-85. Afterwards, the Grant and Holman members hid out at an Irvington hotel. To avoid detection, Grant used an alias, *id.*, "Andre Campbell," a name he had assumed in the past, 1992 PSR, Addendum, p. 23.

Grant also played a significant role in the murder of 16-year old Melanie Baker.[3] On June 14, 1989, Baker's body was found in an abandoned car, shot four times in the back of her head. PSR¶ 67. The testimony at trial established that Baker accidentally discovered yet another Posse stash house. PSR¶¶ 47, 68. As a result, she had to be "dispatched." PSR¶ 68.

[3] Again, Grant was not convicted, PSR¶¶ 16, 94, but the preponderance of evidence allowed consideration of his role, *see* n. 2 *supra*.

Once again, Grant played a crucial role. Through one of Baker's girlfriends, he misled Baker into believing Grant wanted to take her to the movies. He picked her up in a stolen car, but rather than take the unsuspecting Baker to a movie, he drove her to a parking lot in Newark. Given a cue by Grant, Pretlow, who had been hiding in the back seat, sat up and shot her. PSR¶¶ 67-71; SA9-17. She was found dead, in the front seat of that car, where she had been sitting next to Grant.

II. THE POSSE MEMBERS ARE CONVICTED.

By 1990, most of the Posse was arrested. Grant was charged, along with Pretlow, Jackson, Bethea and five others, in a 36-count Indictment alleging RICO, drug-trafficking and firearms offenses. After the grand jury returned a superseding indictment adding two capital counts against Pretlow, his trial was severed. *Bethea*, 787 F. Supp. at 76. That trial ended when Pretlow committed suicide in jail. PSR¶ 37.

Grant, Bethea and Jackson all chose to go to trial. It lasted three months. All were convicted of multiple RICO and drug-trafficking counts; Grant also was convicted of possessing a firearm in furtherance of a crime of violence, specifically, the attempted murder of Dion Lee. Predicate acts for Grant's RICO convictions included his murder of Mario Lee and his attempted murder of Dion Lee. PSR¶ 16; A18. The jury acquitted Grant of

another RICO predicate -- the murder of Melanie Baker -- and could not reach a verdict on two more RICO predicates -- the murder of Mutah Sessoms and the attempted murder of Milton Pettaway -- and a related § 924(c) count. *Id*.

Because Grant was convicted of the racketeering act of murder, the Probation Office recommended that, under the then-mandatory Guidelines, his total offense level was 43. 1992 PSR¶¶ 88-112. It also recommended the District Court reject Grant's requests for downward adjustments for minor role and acceptance of responsibility. 1992 PSR at pp. 23-24. Probation also recommended, over Grant's objection, that his numerous prior juvenile adjudications placed him in Criminal History Category III, *id*. at 24, resulting in a Guidelines range of life imprisonment for the combined RICO and drug trafficking convictions, plus a mandatory consecutive sentence of five years' imprisonment for the § 924(c) conviction. 1992 PSR¶¶ 141-45.

The District Court adopted, without objection, Probation's Guidelines calculation in full, including that Grant receive no downward adjustment. A443-44. The District Court "listened very carefully to" defense counsel's "lengthy, well-articulated arguments" but had "difficulty correlating what" counsel "had to say" with "the case that" the court "listened to for many months." A441-42. The record was "clear" that Grant "used pressure and violence to ensure cooperation with the Pretlow gang" and that Grant was

nowhere "near the bottom" of that criminal enterprise. A443. Finding that Grant had not "even come close to" deserving the leniency he sought, the District Court "declined to entertain" his departure motion based principally on his youth, A444, and instead ruled that a Guidelines sentence would be imposed. When given an opportunity to address the District Court, Grant refused, stating, "I have no respect for a man that wears a dress." A445

The District Court imposed the sentence prescribed by the mandatory Guidelines: Life imprisonment on the two RICO counts, a concurrent 40-year term of imprisonment on the drug-trafficking counts, and a five-year consecutive term of imprisonment on the § 924(c) count. A451.

III. Grant's Direct and Collateral Attacks.

Grant appealed his convictions and sentence on multiple grounds. This Court affirmed by judgment order, and the Supreme Court denied Grant's certiorari petition. *See* Statement of Related Cases, *supra*. Twelve years later, Grant sought a writ of habeas corpus under 28 U.S.C. § 2241 in the Middle District of Pennsylvania. This Court affirmed the dismissal of that application for lack of jurisdiction. *Grant v. Williamson*, 198 F. App'x 263 (3d Cir. 2006) (not precedential). Grant then filed a § 2255 motion in the District of New Jersey, which the District Court dismissed as untimely. *Grant v. United States*, 2008 WL 360982 (D.N.J. Feb. 8, 2008).

After the Supreme Court's 2012 decision in *Miller*, Grant sought and received leave from this Court to file a second § 2255 motion. *Pendleton*, 732 F.3d 280. He argued that his LWOP sentence was imposed without consideration of mitigating circumstances related to his age at the time of his crimes. The District Court agreed and held a new sentencing hearing on September 27, 2016.

At the conclusion of that hearing, based on *Miller*, the Court reduced Grant's two life sentences for his racketeering convictions to 60 years each, to be served concurrently. A20, 36, 38-41, 52, 151-52, 155. Grant states that he was resentenced to "65 years," DB1, 4, 18, 21, 22, 23, but that is the total term of years of all of his sentences combined. DB17 (the "effective" current sentence is "65-years-imprisonment without parole" because his 5-year sentence for his firearms conviction, by statute, must run consecutively).

Although not central to this appeal, Grant also states, DB16 n. 1, that the District Court inadvertently erred when, at the end of the hearing, it imposed a 60-year sentence on Count 4, one of the drug trafficking convictions. A155. Count 4, however, was another conviction that carried a potential life sentence. *See* PSR¶¶ 11, 16; 21 U.S.C. § 841(a)(1). The District Court did not explicitly say so, but its reference to Count 4 seems to have been intended to make clear it was sentencing Grant to a term of years for all

convictions for which Grant could have received life. *See* A46 (Government acknowledging that had Grant been sentenced to life on the one drug conviction, "[t]hat would have violated the Eighth Amendment . . . because it was a non-homicide count"); A151-52 (District Court distinguishing between life sentences, which had become "constitutional[ly] infirm[]" under *Miller*, from Grant's other "drug" and "gun" sentences").[4]

SUMMARY OF ARGUMENT

I. Grant was resentenced because of *Miller*, not because any of his convictions were overturned. Nonetheless, he incorrectly claims, for the first time on appeal, that the sentencing package doctrine required the District Court to reconsider each of the sentences he received in 1992. This Court, however, does not apply the doctrine when, as is true here, all of a defendant's underlying convictions remain intact.

Moreover, the doctrine does not "require" anything. It is a rule of flexibility, not a straitjacket. A vacated conviction allows a sentencing court to consider adjusting interrelated sentences on remand, but is not constrained to do so. The District Court did not plainly err when it did not, *sua sponte*,

[4] Nonetheless, the Government would not oppose a limited remand to clarify the new, 60-year sentence is limited to the RICO counts. As a practical matter, however, as Grant acknowledges, DB17, this issue has no effect on his total sentence.

reduce the non-LWOP sentences. Nothing in *Miller* implicated the 40- and 5-year imprisonment terms Grant received for the crimes he committed in addition to murder.

See pp. 18-22, *infra*.

II. The reduction of Grant's life sentences to 60 years, resulting in a total sentence of 65 years, is not disproportionate punishment under the Eighth Amendment. Grant's contrary arguments rest on mistakes of fact and law.

His factual mistake is the use of an average life expectancy figure measured from birth, instead of from 44, his current age, or, alternatively, the age he will have reached at the expiration of the other sentences he first must complete. Under either scenario, his new sentence expires years before Grant reaches his correctly calculated average life expectancy. His is not a *de facto* life sentence.

Grant also incorrectly argues that the Eighth Amendment guarantees a juvenile, even one who committed gruesome murders, release before old age. There is no such guarantee. Multiple defendants convicted of federal crimes have been resentenced since *Miller* to life or other lengthy terms of imprisonment based on the severity of their offenses and other relevant factors. Doing so does not violate the Eighth Amendment.

See pp. 23-38, *infra*.

III. At a post-*Miller* sentencing, a court may not impose LWOP on a juvenile without first considering that the characteristics of youth militate against such sentences except in cases involving irreparably corrupt individuals. Once a decision is made that LWOP is not the appropriate sentence, the court retains discretion to impose the term of years sentence it deems appropriate in light of the requisite 18 U.S.C. § 3553(a) factors. Here, the District Court plainly considered Grant's age at the time of his crimes and reduced Grant's LWOP sentences to 60 years on that basis. That it did not go further, by weighing Grant's age-based mitigation arguments more heavily, provides no basis for vacating the new sentence.

See pp. 38-53, *infra*.

ARGUMENT

I. THE SENTENCING PACKAGE DOCTRINE DOES NOT APPLY WHERE NONE OF GRANT'S CONVICTIONS WAS VACATED; RESENTENCING ON HIS DRUG AND FIREARMS CONVICTIONS WAS NOT REQUIRED.

Standard of Review: Plain error. ***United States v. Flores-Mejia*****, 759 F.3d 253 (3d Cir. 2014).**

Grant's principal arguments challenge his 65 years of imprisonment as cruel and unusual punishment.[5] DB21-46. He claims that 65 years is a *de facto* life sentence that violates the Eighth Amendment. DB21-31.

Grant, however, does not stop there. In the last few pages of his brief, DB47-53, he argues, for the first time, that the District Court was required to vacate all of his prior sentences under the sentencing package doctrine. DB47-53 ("resentencing *de novo*" under the sentencing package doctrine "should be required.") DB53. He is wrong.

Grant never raised the sentencing package doctrine below. That makes his new argument subject to plain error review. *United States v. Flores-Mejia*, 759 F.3d 253, 258 (3d Cir. 2015) (*en banc*). An error is plain if it is "clear" or "obvious," "affects substantial rights," and "affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Dragon*, 471 F.3d

[5] Those arguments are incorrect for the reasons explained below. *See* pp. 23-53, *infra*.

501, 505 (3d Cir. 2006) (quoting *United States v. Olano*, 507 U.S. 725, 732, 736 (1993)). An error "affects substantial rights" when it is prejudicial, that is, when it "affected the outcome of the district court proceedings." *Id*. (quoting *Olano*, 507 U.S. at 734); *see United States v. Marcus*, 560 U.S. 258 (2010). Even if those requirements are satisfied, this Court may deny a remedy. *See United States v. Tyson*, 653 F.3d 192, 211 (3d Cir. 2011).

The District Court did not commit any error, let alone plain error, when it did not, *sua sponte*, apply the sentencing package doctrine to resentence Grant *de novo* on the convictions that did not result in a LWOP sentence. Regardless of the interconnected nature of his multiple convictions, the sentencing package doctrine did not "require[]," DB47, 53, resentencing on his drug and gun convictions.

To begin, Grant's view of the sentencing package doctrine is not the view of this Court. As Grant concedes, DB49, this Court has held the sentencing package doctrine provides a basis for a *de novo* resentencing when "a conviction on one or more interdependent counts is vacated." *United States v. Miller*, 594 F.3d 172, 181-82 (3d Cir. 2010); *see United States v. Davis*, 112 F.3d 118, 122 (3d Cir. 1997) (policy underlying the doctrine is based on common sense; when a "conviction on one or more" component counts is vacated, on remand the sentencing judge should be "free" to reconstruct the

overall architecture of the package of sentences) (citations omitted); *see also Greenlaw v. United States*, 554 U.S. 237, 253 (2008) (sentencing package cases "typically involve . . . a successful attack . . . on some but not all counts of conviction"). That, of course, does not describe this case: All of Grant's convictions were affirmed, as the District Court correctly noted. A42 ("He appealed. The Court of Appeals affirmed everything."); *see Grant*, 6 F.3d 780.

In *Miller*, this Court addressed the differing approaches to the doctrine among the Circuits. Some follow a default rule of limited resentencing absent express direction from the remanding appellate court; others hold "resentencing is *de novo* absent explicit direction otherwise." 594 F.3d at 179-180. *Miller* contrasted those approaches with the one in the Second Circuit, which "splits the difference." *Id*. at 180. It distinguishes between (a) a resentencing when a conviction is vacated, in which case *de novo* resentencing is the rule, and (b) one resulting from a sentencing error, which (unless the error undoes the entire calculation) results in a resentencing limited to the erroneous calculation. *Id*.

Miller ultimately did not choose from among these varying approaches because one of the defendant's interdependent convictions had been vacated. *Id*. at 176. Since then, however, at least one panel, citing *United States v. Ciavarella*, 716 F.3d 705, 735 (3d Cir. 2013), has opined that *de novo*

resentencing still would not be required, even when a conviction is vacated, unless the vacated count affects the defendant's total offense level or guideline range. *United States v. Walpole*, 599 F. App'x 56, 58 (3d Cir. 2015) (not precedential) ("*Ciavarella* instructs" that even conviction errors "do not always require a *de novo* resentencing"; if the error had no effect on defendant's "total offense level and guideline range," a "limited resentencing on remand" was the proper approach).

Because Grant's argument requires extending the doctrine to cases where no convictions have been vacated, the purported error Grant identifies could not possibly be "plain." *See United States v. Clark*, 237 F.3d 293, 297 (3d Cir. 2001). Moreover, Grant's argument fails for another, independent reason: The sentencing package doctrine does not "require[]"*de novo* resentencing. DB47, 53.

In both this and the other circuits, the doctrine is applied to permit flexibility and the exercise of discretion -- it does not "require[]" anything. *Davis*, 112 F.3d at 122-23 (doctrine leaves a judge "free to review," "entitled to reconsider" and with "jurisdiction to recalculate" § 2255 petitioner's entire sentence); *see United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989) (*en banc*) (if "appellate court unwraps the package and removes one or more charges from its confines" the sentencing judge "is in the best position to assess

the effect . . . and to redefine the package's size and shape . . . if . . . appropriate") (cited with approval in *Greenlaw*, 554 U.S. at 253-54).

Grant's emphasis on his sentences being "interconnected," DB49, 51, does not change the analysis because no one disputes the underlying premise: A defendant's various sentences, when "collect[ed] . . . in the aggregate," DB51-52, constitute an entire package. *Pimienta-Redondo*, 874 F.2d at 14. That, however, does not transform a doctrine that leaves a sentencing judge free on remand to reconsider that package on remand into one that ties its hands and requires resentencing on every conviction.[6]

Here, the District Court recognized that all of Grant's sentences constituted a package. Moreover, even though Grant's § 2255 motion seeking resentencing was based solely on the Supreme Court's decision in *Miller* and its effect on his mandatory LWOP sentences, the District Court went further to take a "look at" his other, "drug" and "gun" convictions to see if they should be adjusted. A151-52. It concluded, based on the significant role Grant played in distributing drugs for the Posse, that no adjustment was necessary.

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[6] Also unavailing is Grant's citation to *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014). DB53. As the quote on which Grant relies makes clear, given that all the defendant's convictions had been vacated, on remand the sentencing judge was free "***to consider*** the entire sentencing package," 334 P.3d at 141, but not required by the Wyoming Supreme Court to resentence on the burglary convictions. *Id*. at 147.

Id. Thus, even under Grant's incorrect view of the doctrine, his package of sentences received all the review required.

II. GRANT'S NEW SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT.

Standard of Review: Plenary. *United States v. Miknevich*, 638 F.3d 178, 185 (3d Cir. 2011).

Incarcerated since his 1990 arrest, 1992 PSR at 1, Grant claims his new sentence qualifies him for release from prison no later than when he reaches age 72. DB23. Nonetheless, based on two false premises, he contends that reduced sentence still "violates the Eighth Amendment." DB22.

First, Grant incorrectly cites average life expectancy calculations to claim he "likely" will "be dead before he is released." DB23; SA177. To the extent the generalized information of average life expectancy is meaningful to a particular individual, the correct calculation shows Grant living years beyond age 72. His *de facto* life sentence argument, the linchpin of this appeal, is factually incorrect.

Grant's second false premise is that the Eighth Amendment also prohibits, in addition to LWOP for most juveniles, "lengthy terms-of-years" sentences resulting in release "only in old age." DB30. That is wrong. Instead, the Eight Amendment guarantees only that a juvenile's age be taken into account when considering whether a sentence of LWOP is warranted.

The District Court did that: Grant's age at the time of his crimes was the reason it reduced Grant's LWOP sentence, albeit not to time served, as Grant had requested. A98. Notwithstanding this reduction, Grant argues his new sentence is too long. He does not do so directly, by challenging the total of 65 years as substantively unreasonable. Instead, he argues the *Miller* factors apply, not only in the gatekeeping context to separate those deserving of LWOP from those who are not, but again, even after the decision not to impose LWOP is made, as part of a "constitutional directive" to minimize any term of years sentence imposed as an alternative. DB33-44.

Again, Grant is wrong. Were this Court to adopt his reasoning, it would substantially restrict the discretion of courts imposing non-LWOP sentences in ways the Supreme Court repeatedly has declined to do.

A. Grant's Prison Sentence, Totaling 65 Years, Is Not A *De Facto* Life Sentence.

Grant argues that a prison sentence totaling 65 years is effectively the same as a sentence of LWOP because he will likely "die in prison." DB23-24. To support that, he points to life expectancy tables showing the average life expectancy for the applicable category, non-Hispanic black males, is 72, the age at which Grant will be eligible for release. DB23; SA177. That is inaccurate.

Seventy-two years represents Grant's actuarial life expectancy measured from his birth, not from his current age: 44. PSR at p. 3. Having just turned 44, his remaining life expectancy is 32.7 more years, meaning, on average, it exceeds 76.7 years. SA153 (Nat'l Vital Statistics Reports, Vol. 66, No. 3, at Table 17 (April 11, 2017). *United States v. Bullion*, 466 F.3d 574, 576 (7th Cir. 2006) (correct starting point for determining average life expectancy uses current age; "remaining life expectancy increases with every year one lives"); *United States v. Wurzinger*, 467 F.3d 649, 651 n. 2 (7th Cir. 2006) (it is a "mistake" to equate an adult defendant's life expectancy to that "of a newborn child").

Moreover, a life expectancy of at least 76 means Grant has "a 50% chance of dying before his 7[6]th birthday and a 50% chance of dying after." *Bullion*, 466 F3d at 576. It "doesn't mean that [Grant] won't live considerably longer," than 76, even in prison. *Id*. Simply put, Grant's actuarial support for his *de facto* LWOP argument is therefore wrong, even if one improperly ignores his current good health (PSR¶¶ 189, 197).[7] *United States v. Johnson*,

[7] Grant does not challenge the 40 year concurrent sentences he also must serve for his drug convictions as *de facto* LWOP, only the additional 25 years he must serve beyond that for his RICO and § 924(c) convictions. Accounting for good time credit, Grant will have reached 54 when the 40 years he first must complete expires. At 54, his life expectancy exceeds 78.

685 F.3d 660, 662-63 (7th Cir. 2012) (properly made, arguments like Grant's require correct use of life expectancy tables and individual's health; even then, "the most refined statistical calculation of . . . life expectancy will leave considerable residual uncertainty"); *United States v. Tocco*, 135 F.3d 116, 132 (2d Cir. 1998) (sentence "close to a person's life expectancy based on actuarial tables is not the functional equivalent of a sentence for the actual life of the person"). Unlike a "life" sentence, which would guarantees that Grant will die in prison no matter how long he lives, Grant's current sentence provides the very realistic chance that he lives for years outside of confinement.

Grant's *de facto* LWOP argument also ignores that, assuming he no longer is a "danger to the safety of any other person or to the community" he may qualify for release under 18 U.S.C. § 3582(C)(1)(A)(ii) when he reaches age 70, by which time he will have spent more than 30 years in prison.[8] That too, represents a meaningful opportunity for release. *Virginia v. LeBlanc,* 137 S. Ct. 1726 (2017) (not objectively unreasonable to conclude Virginia geriatric release program satisfied *Graham*'s requirement of meaningful opportunity for release).

[8] This is in addition to the good time credits Grant may earn pursuant to 18 U.S.C. § 3624(b)(1).

Even were this Court inclined to extend the logic of *Miller* to sentences that greatly exceed anyone's life expectancy, *McKinley v. Butler*, 809 F.3d 908, 910-11 (7th Cir. 2016) (absent radical increases in longevity, 100-year sentence is *de facto* life; failure of sentencing judge to think "defendant's youth at all relevant" required remand under *Miller*), it should not do so here. Because the sentence Grant received will not "likely" exceed his life expectancy, the rationale of cases like *Butler* does not apply. As a factual matter, Grant is wrong to argue that his new sentence is invalid under *Miller*. DB24-27.

B. The Supreme Court Has Not Equated Lengthy Sentences With LWOP.

Perhaps recognizing his *de facto* LWOP argument is actuarially incorrect, Grant offers an alternative. Even release from prison at age 72, he argues, leaves him with "minimal prospects for a meaningful life," DB27, 31, and that too is a disproportionate penalty for his homicide offenses. Under this theory, minimal prospects post-prison also equate to a *de facto* life sentence. Because LWOP cannot be imposed as a juvenile sentence unless the "crimes reflect 'permanent incorrigibility' or irreparable corruption," DB22, and because the District Court did not place Grant's crimes in that category, his 65 years "without the possibility of parole . . . [also] violates the Eighth Amendment." DSB22.

The fundamental flaw with that chain of reasoning is that the Supreme Court has ***not equated*** any term of years sentences for juveniles, even those that do not result in release until old age, DB30-31, with LWOP. Instead, it repeatedly has ***distinguished between*** the two types of sentences.

That is clear from the basis for the Court's holding in *Graham*, which was the rarity of LWOP, compared to term of years sentences, as a penalty for juveniles convicted of non-homicide offenses. 560 U.S. at 64-67 (emphasizing "how rarely these sentences are imposed"). Although such rare sentences might be "unusual" within the meaning of the Eighth Amendment, that is not true of those routinely imposed. In *Miller*, the question for which certiorari was granted was whether mandatory LWOP for a juvenile "convicted of homicide" violated the Eighth Amendment given, once again, the "extreme rarity of such sentences." Petition for Writ of Certiorari, No. 10-9646, March 21, 2010, 2011 WL 5322568 at i. Building on *Graham*, "the foundation stone" of majority opinion in *Miller*, 567 U.S. at 470 n. 4, the Court held such rare sentences were unconstitutional, but, again, said nothing about term of years sentences. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari").

Montgomery also distinguished LWOP from other sentences. LWOP can be "just and proportionate" for juveniles only when "exceptional circumstances" are present. 136 S. Ct. at 736. In all other cases, "***hope for some years*** of life outside prison walls" must be provided. *Id.* at 737. The Court did not, however, hold that there was any minimum number for those years.

Most recently, in *LeBlanc*, the Court drew another distinction. 137 S. Ct. at 1729. The question before the Court was whether a geriatric release program, which applies to lengthy sentences that do not permit release until old age, runs afoul of the Eighth Amendment. It declined the opportunity to hold it had condemned lengthy sentences in *Graham*. *Id*.

Other aspects of the Court's reasoning also make clear that lengthy sentences are not constitutionally equivalent to LWOP. For example, *Graham* expressly holds the Eighth Amendment does not "guarantee eventual freedom," *Graham*, 560 U.S. at 75, for juvenile offenders, let alone freedom while they are still young. *Id*. ("[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.").

Miller underscored that point when it refused to "categorically bar" any "penalty for a class of offenders or type of crime." 567 U.S. at 483. For that

reason, even LWOP is not an unconstitutional, "excessive sentence" for juveniles unless the nature of the crimes committed do not "reflect transient immaturity." *Montgomery*, 136 S. Ct. at 734. *A fortiori*, Grant's shorter, term of years sentence, imposed for multiple offenses, including murder and attempted murder, after due consideration of his age at the time, cannot be constitutionally disproportionate.

Notwithstanding the number of times the Court has refused to equate term of years sentences with LWOP, Grant insists that unless his crimes reflect "permanent incorrigibility," *id.*, a sentence that keeps him in prison until he is 72, "when he will either be dead or with no real prospects for societal reintegration," is disproportionate and, therefore, cruel and unusual. DB18-19, 22, 27.[9] His reasoning, however, does not support his conclusion.

To begin, Grant's appeal is from the new sentencing for his homicide offenses, making his contention that, "after 27 years of incarceration and at the age of 43, he clearly "is not incorrigible," DB22, irrelevant. At sentencing, the relevant question was the degree of depravity Grant's crimes reflected, *Montgomery*, 136 S. Ct. at 734-35, not whether his post-incarceration record

[9] For this reason, it appears Grant's challenge is "as applied," (his particular sentence is disproportionate), as opposed "categorical" (all sentences over "X" years for juveniles violate the Eighth Amendment. *Graham*, 560 U. S. at 59. It does not matter because his arguments fail under any analysis.

could have supported a shorter sentence. *Montgomery* distinguished between a *Miller* resentencing, which focuses on the degree of corruption reflected by the crime committed, and a parole hearing, where post-incarceration progress may be considered. The latter is an alternative procedure to a new sentencing. *Montgomery*, 136 S. Ct. at 736; *Miller*, 567 U.S. at 478-79 (distinguishing between the need to consider "possibility of rehabilitation" at sentencing and "demonstrated maturity and rehabilitation" at a later, "meaningful opportunity to obtain release").

Grant, however, conflates those two distinct proceedings by interjecting facts and arguments about his post-incarceration record. DB15, 17, 22, 44. He would create an ersatz federal parole procedure for those juveniles who obtain a new sentencing hearing under *Miller*. That, however, improperly confuses distinct considerations. The District Court correctly kept its focus on the crimes Grant committed, A129 ("It is not really . . . *de facto* parole . . . we are muddying up the record along those lines"). A new, post-*Miller* sentencing is unlike a motion for a reduction in sentence based on a retroactive amendment to the sentencing Guidelines under 18 U.S.C. § 3582(c)(2). There, the degree to which a defendant can demonstrate rehabilitative efforts

while incarcerated can be considered.[10] That is not the case when the focus is on what a juvenile's crimes reflect.

Grant also misreads the record when he claims the District Court found him "rehabilitated." DB22, 44. It did not even find he was "capable of redemption." *Id*. It stated only that Grant "appeared to have been violence free as an inmate since 2006," A151, and refrained from placing him in the "rarest of exception[s] referenced in *Miller*," where LWOP "is appropriate." *Id*. The context of the violence-free comment, however, hardly helps Grant, who had over 4 dozen infractions while in prison. PSR¶ 166. That is why, when he asserted he was a "model prisoner," A101, the District Court disagreed. *Id*. ("I think you are wrong"). The District Court's refusal to rule Grant was "the rarest case," A150, however, is not even close to a conclusion that Grant was "capable of reform, if not already rehabilitated." DB44.

Grant's "minimal prospects for a meaningful life" argument, DB27, 31, also is wrong. The Supreme Court has never held that a juvenile offender is

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[10] Even in that context, however, where rehabilitative efforts matter, commendable progress since incarceration does not always override the original crime, criminal history, use of firearms, need for deterrence and public safety concerns. *United States v. Styer*, 573 F.3d 151, 154 (3d Cir. 2009) ("While Styer disagrees with the comparatively little weight the Court accorded his post-conviction conduct in relation to other factors, we cannot conclude that the Court's reasoned balancing of those factors was an abuse of discretion.").

entitled to a "meaningful life" after prison. It has held juvenile offenders are entitled to "***some meaningful opportunity*** to obtain release." *Graham*, 560 U.S. at 75 (emphasis added). It explicitly contrasted that with someone who has "***no chance*** to leave prison," ever. *Graham*, 560 U.S. at 79 (emphasis added). That is why it concluded LWOP sentences for juveniles share a characteristic with "no other sentences" except the death penalty. *Graham*, 560 U.S. at 69. Imprisoning a defendant until he dies is an irrevocable forfeiture, *id.*, and, as a sentence for most juveniles, is so harsh as to be analogous to capital punishment. *Miller*, 567 U.S. at 475 (noting how *Graham* had likened LWOP "to the death penalty itself," particularly given that a juvenile sentenced to LWOP will spend more time in prison than an adult receiving that sentence).

Simply put, Grant's new sentence does not implicate the Court's concerns. It does not irrevocably sentence him to death in prison, *see* pp. 23-27, *supra,* and it was imposed only after his juvenile status was taken into account. *See* pp. 40-42, *infra*. To the contrary, it does what *Montgomery* holds: Offer Grant "hope for some years of life" after prison. 136 S. Ct. at 737.

Multiple courts have noted this distinction and refused to equate mandatory LWOP with other sentences that provide an opportunity for release, if "only in old age." DB30; *see United States v. Jefferson,* 816 F.3d 1016,

1019 (8th Cir. 2016) (noting "[o]ur sister circuits have uniformly declined" to extend *Miller* beyond mandatory LWOP) (citing cases); *Starks v. Easterling*, 659 F. App'x 277, 280 (6th Cir. 2016) (not published) ("Supreme Court has not yet" held that *de facto* life sentences violate Eighth Amendment); *Goins v. Smith*, 556 F. App'x 434 (6th Cir. 2014) (not published) ("*Miller* does nor clearly apply" to aggregate term of years); *Demirdjian v. Gipson*, 832 F.3d 1060, 1076-1077 (9th Cir. 2016) (*Miller* emphasized the characteristics shared by mandatory LWOP and death sentences; two consecutive 25 year sentences were "materially []distinguishable," quoting *Lockyer v. Andrade*, 538 U.S. 63, 73-74 (2003)); *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013) (not published) (holding, on plain error review, neither *Graham* nor *Miller* apply to discretionary 40-year federal sentence); *see also People v. Ranier*, 394 P.3d 1141, 1144 (Colo. 2017) ("*Graham* and *Miller* do not apply to aggregate term of years sentences;" LWOP is a specific, distinct sentence).

Grant's lengthy string cites, DB26-27, 29-30, do not support his contention that his new sentence remains constitutionally disproportionate. Most of his cases address whether a juvenile offender's sentence that either allows no meaningful opportunity for release, was imposed without consideration of youth, or both, triggers a resentencing under *Graham* or *Miller*. *See Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017) (131.75 years before

opportunity for parole triggers rehearing under *Graham*); *Butler*, 809 F.3d 908 (100 years; same); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (254 years; same); *Thomas v. Pa.*, 2012 WL 6678686 (E.D. Pa. Dec. 21, 2012) (eligibility at age 83, over 10 years beyond life expectancy, same); *State v. Boston*, 363 P.3d 453 (Nev. 2016) (approximately 100 years; same); *State v. Moore*, 2016 WL 7448751 (Ohio, Dec. 22, 2016) (77 years before parole; same).

Others misread *Graham* by extending it to conclude geriatric release does not satisfy the Eighth Amendment. *LeBlanc*, 137 S. Ct. at 1728-29; *see State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013); *Bear Cloud v. State*, 334 P.3d 132, 141-43 (Wyo. 2014) (aggregate sentences, which nonetheless provided for meaningful opportunity for release as early as age 61, could not be imposed unless a *Miller* analysis was first conducted); *Casiano v. Comm'r of Corr.*, 317 Conn. 52, 79 (Conn. 2015) (release in "late sixties" does not escape rationale of *Graham*); *State v. Ronquillo*, 361 p.3d 779, 784 (2015) (same; citing *Null* and *Casiano*); *People v. Buffer*, 75 N.E.3d 470, 483 (Ill. App. 2017) (prospect of geriatric release not enough to satisfy *Graham*); *State v. Zuber*, 152 A.3d 197, 213 (N.J. 2017) ("potential release after five or six decades of incarceration" when defendants would be in 70s or 80s, "implicates the principles of *Graham* and *Miller*."); *Contreras v. Davis*, 2017 WL 372330 at *5 (E.D. Va. Jan. 26, 2017) (geriatric release cannot satisfy *Graham*).

Still others directly reject Grant's core proposition, holding a new, lengthy sentence, ensuring release in old age, is not unconstitutional. *See State v. Ramos*, 387 P.3d 650, 668 (Wash. 2017) (85-year sentence imposed after a *Miller* rehearing); *Brown v. State*, 10 N.E.3d 1, 7 (Ind. 2014) (150-year sentence reduced to 80 years).

More relevant are the multiple federal, post-*Miller* hearings that result in new life or other, term of years sentence after conducting an individualized assessment that considers not just youth, but all relevant § 3553(a) factors. These include:

- *United States v. Orsinger*, (D. Ariz.) (life for homicide offense), SA193 (DE576);
- *United States v. Briones* (D. Ariz.) (life for homicide offense), SA238 (DE355)
- *United States v. Bryant* (D. Nev.) (80 years for homicide offense), SA278 (DE694)
- *United States v. Friend,* (E.D. Va.) (65 years for homicide offense), SA328 (DE788)
- *United States v. Pete* (D. Ariz.) (54 years for homicide offense), SA394 (DE463)
- *United States v. Jefferson,* (D. Minn.) (50 years for homicide offense), SA457 (DE1639)
- *United States v. Johnson,* (D. Minn.) (42 years for homicide offense), SA558 (DE298)

- *United States v. Stone*, (E.D.N.Y.) (40 years for homicide offenses); SA620-21 (DE536)

- *United States v. Thomas*, (D. Md.) (40 years for homicide offenses); SA629 (DE466)

- *United States v. Kwok,* (E.D.N.Y.) (37 years for homicide offense), SA702-03 (DE 439);

- *United States v. Evans-Garcia,* (D.P.R.) (37 years for homicide offense); SA794 (DE779)

- *United States v. Williams*, (E.D. Mo.) (35 years for homicide offense); SA804 (DE344)

- *United States v. Lawrence,* (N.D.N.Y) (31 years and five months for homicide offense); SA832 (DE317)

- *United States v. Perez-Montanez,* (D.P.R.) (30 years for carjacking resulting in death); SA842 (DE230)

- *United States v. Alejandro,* (S.D.N.Y.) (25 years for homicide offense), SA897-98 (DE202)

Here, Grant sought and obtained the individualized assessment to which he was entitled under *Miller*. *Grant*, 2014 WL 5843847. The District Court repeatedly considered Grant's age at the time of his crimes and agreed with him that he was not the rarest of juvenile defendants, A150-51, which, based on Probation's calculation of his Total Offense Level of 43, would have supported the re-imposition of a life sentence under the Guidelines. A70-74, 81. *See* pp. 41-43, *infra*. Neither, however, did it agree that Grant's age-based arguments warranted a total sentence shorter than 65 years. A150-56.

Grant, however, improperly bootstraps the District Court's decision not to impose LWOP into something it is not: A finding that his age made him sufficiently less culpable so as to foreclose his new, 60-year RICO sentences. Grant received what he asked for in the form of a new sentence other than LWOP. His 65 year total sentence guarantees him release years before he reaches his current life average expectancy. As explained below, the District Court committed no error in imposing that new sentence and it does not violate the Eighth Amendment.

III. THE DISTRICT COURT DID NOT PLAINLY ERR WHEN IT CONSIDERED GRANT'S AGE-BASED ARGUMENTS AND REDUCED HIS SENTENCE ACCORDINGLY, BUT BY LESS THAN GRANT ADVOCATED.

Standard of Review: Plain error. ***United States v. Miknevich*****, 638 F.3d 178, 185 (3d Cir. 2011).**

The bulk of Grant's brief, DB31-47, argues that the District Court failed to properly consider and weigh the multiple, age-related arguments offered to mitigate his crimes. That procedural objection should have been contemporaneously raised to avoid plain error review. *Flores-Mejia*, 759 F.3d at 259. Grant, however, raised no objection whatsoever after he was resentenced. A157.[11]

[11] Immediately after sentence was imposed, Grant's then-counsel was specifically asked if he had "anything else" to say in response. He did not. A156-67. To the extent Grant felt that one or more of his *Miller*-related

The District Court, however, committed no error, let alone plain error, in the way it meaningfully considered Grant's *Miller*-based arguments and gave him the relief of a new sentence for which he had petitioned. Grant tries to imbue this issue with constitutional overtones by arguing he should have received an even shorter sentence. DB32-33 (*Miller* and *Montgomery* identify a "constitutional directive" to fully consider . . . then give significant weight to youth as a mitigating factor). Sentencing courts, however, do not commit error, constitutional or otherwise, when they meaningfully consider, but ultimately disagree with, arguments in mitigation. *United States v. Lessner*, 498 F.3d 185, 204 (3d Cir. 2007) ("decision by the Court . . . not to give . . . mitigating factors the weight . . . [defendant] contends they deserve" is not a basis for vacating sentence); *United States v. Bungar*, 478 F.3d 540, 546 (3d Cir. 2007) (failure to give mitigating factors the weight a defendant contends they deserve not procedural error).

Grant's arguments about youth are no different. The weight and consideration of all sentencing factors is expressly left to a sentencing court's

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arguments had not been sufficiently considered, he should have said so, "allowing the judge to immediately . . . clarify and supplement" what Grant now points to as 'inadequate explanations." *Flores-Mejia*, 759 F.3d at 258. Contemporaneous objections "prevent[] 'sandbagging' of the court." *Id*. at 257.

discretion and a reviewing court must afford deference to a reasoned appraisal of those factors. *Kimbrough v. United States*, 552 U.S. 85 (2007). None of the Supreme Court's juvenile sentencing decisions purport to limit that discretion.

Here, the District Court expressly satisfied, many times over, its "concrete" obligation to acknowledge and respond to Grant's *Miller*-based arguments. *United States v. Begin*, 696 F.3d 405, 411 (3d Cir. 2012). It relied on those arguments to conclude that LWOP was not an appropriate sentence, then explained why, given all "of the § 3553(a) factors applicable" to Grant, it deemed 60 years the appropriate new sentence for the RICO convictions. *United States v. Handerhan*, 739 F.3d 114, 123-24 (3d Cir. 2014). Having specifically addressed Grant's "non-frivolous arguments . . . in a way that allows" this Court to review the sentence imposed, it committed no error. *United States v. Jackson*, 467 F.3d 834, 841-42 (3d Cir. 2006).

Grant now pejoratively characterizes the degree to which the District Court actually had *Miller* firmly in mind, DB33 ("superficial," "cursory"), DB36 ("short shrift"), DB40 ("overlooks"), DB41 ("failure"), but those overstated objections cannot be correct: Grant's youth at the time of his crimes was ***the*** reason his life sentences were reduced. The District Court could not have been clearer about the extent to which it was considering age-related mitigation arguments throughout the hearing:

- "The spirit of *Miller* is that ***courts should consider*** as a sentencing factor the ***youthfulness*** of the offender" in connection with "psychological condiderations" such as that minors are ***"more impressionable . . .impulsive . . .*** [***and***] ***that their decision making process is different***," A43;

- "[***O***]***bviously*** his ***age is going to factor in*** . . . ***That is the whole idea*** of it," A50;

- "***We are dealing with*** . . . an appropriate sentence for this type of crime with this type of ***relevant conduct for a person that was not an adult at the time*** . . .," A53;

- "[A]t the end of the day . . . I know I have discretion here and I know that ***I should and will consider factors*** that perhaps were ***not allowed*** to be considered ***under the previous guidelines***," A74;

- Regardless of the Guidelines calculation, "I don't give any presumption to a life sentence here. In fact, ***I have given this*** . . . ***a presumption of not a life sentence*** . . . because I felt that ***under Miller***, the defendant was entitled to this consideration by the Court," A78;

- This is "a resentencing in light of *Miller* and ***taking into consideration*** the things that *Miller* indicated . . . ***in sentencing someone who is a juvenile at the time*** of the offense conduct," A129;

- "[***E***]***ncompassed within Miller is*** the recognition that young people, ***juveniles***, not that they are incapable of decision-making, but that the ***decision-making is impaired*** by virtue of their age," A133-34;

- "***I have also considered*** the law as it applies to this case and in connection with, of course, the decision by the Court in *Miller*, ***defendant's youth at the time*** of the commission of the crime, and all of the other attendant circumstances pertaining to his conviction," A149 (emphasis added).

Finally, when it came time to determine whether to reimpose LWOP, the District Court emphasized that "I need to look at the circumstances . . . the defendant . . .was a minor. He was a juvenile, 16 years old. He was a teenager . . . one looks at the debilitating characteristics of youth, inherent in being a young person and the limited decision-making abilities of a minor." Based on that, the District Court declined to conclude Grant was the "rarest of exception referenced in *Miller*." A150-51. Accordingly, recognizing his age at the time of his crimes, it applied the 18 U.S.C. § 3553(a) factors and imposed the 60-year sentences in lieu of the previous LWOP. A150-55. That was the correct procedure, one Grant's current counsel appeared to endorse below. A54-55 (once *Miller* was taken into account, the constitutional aspects of his LWOP sentence were addressed and court was at the "3553(a) . . . step[]").

Accordingly, the record as a whole shows "extensive and thoughtful" comments and questions by the District Court, which "more than adequately demonstrates . . . meaningful consideration" of Grant's arguments. *Lessner*, 498 F.3d at 203-04. Nonetheless, Grant argues he is entitled to more. He claims there is a "constitutional directive," DB33, requiring the District Court to give "significant weight," DB32, to the characteristics of juveniles as a class,

even if a sentencing court has concluded a crime does not reflect irreparable corruption and LWOP is not being imposed.

Not so. The distinctive attributes of youth are considered for a precise, constitutional purpose: "[T]o separate those juveniles who may be sentenced" to LWOP "from those who may not." *Montgomery*, 136 S. Ct. at 735. The whole point of "tak[ing] into account how children are different" is to accomplish the "difficult[]" task of distinguishing, at an "early age, between juveniles whose crimes reflect irreparable corruption and those reflecting "unfortunate yet transient immaturity," because only the former can receive LWOP. *Miller*, 567 U.S. at 479-80.

Given that the Court emphasized it was not in any way "foreclos[ing] a sentencer's ability to make that judgment" and impose LWOP, *id*., it makes no sense to conclude it did foreclose, *sub silentio*, a court's broad discretion to fashion an appropriate term of years sentence in the alternative. Yet the essence of Grant's argument is that he is entitled to a form of double counting. He contends that, after succeeding in convincing the District Court to decide against LWOP, he should not have gotten a long sentence because the District Court was required to "then . . . significant[ly] weigh[]"youth, as opposed to any other relevant sentencing factors. DB32.

None of the Supreme Court's cases say that and Grant's "significant weight" rubric would have this Court essentially eschew individualized sentencing for juveniles in favor of the categorical mitigation of all sorts of crimes, regardless of the horrible conduct they may reflect. DB36-37 (criticizing the District Court for giving "short shrift" to immaturity; it improperly "held Grant to account" for his horrendous crime as an adult); DB40-42 (criticizing the court for committing "constitutional error" when it focused on Grant's crimes, rather than how Grant was influenced to commit them by Pretlow). That would resurrect the "one size fits all" approach to juvenile sentencings the Supreme Court has rejected. Grant's heavy emphasis on the generalized qualities of youth discussed in *Miller*, DB33-47, is completely inconsistent with a tailored sentence that fits the criminal, not just the crime. *Pepper v. United States*, 562 U.S. 476, 487 (2011). It was not error, plain, constitutional or otherwise, for the District Court to eschew that approach.

The District Court was not in any way restricted from exercising its discretion to conclude Grant's multiple, specific crimes warranted a lengthy prison sentence. Juvenile defendants, like any others, will fall along a spectrum of culpability, according to the circumstances of their crimes and their particular character traits. At the far end is "the rare juvenile offender

whose crime reflects irreparable corruption." *Miller*, 567 U.S. at 479-80; *Montgomery*, 136 S. Ct. at 736. They can receive LWOP. The Supreme Court has never held that, for all others, only short sentences are appropriate. To the contrary, where a given juvenile may fall along the rest of the sentencing spectrum is to be assessed by considering all relevant factors, not just the mitigating factors of youth. *Miller*, 567 U.S. at 479. " '[Y]outh is one factor, among others, that should be considered in deciding' " an appropriate sentence. *Miller*, 567 U.S. at 474 (quoting *Graham*, 560 U.S. at 96).

Here, the District Court read the entire 1992 trial record, paying "specific attention" to the portions that described Grant's crimes. A37. That evidence showed, by more than a preponderance, Grant did not commit his multiple crimes in a spur of the moment fashion, at the immediate urging of Pretlow. Instead, repeatedly, over a period of months, Grant established himself, in a way no other juvenile Posse member did, as its violent, go-to enforcer, 1992 PSR¶ 60; PSR¶ 92. He provided crucial assistance to a drug dealing enterprise by eliminating its competition, informants and witnesses.[12]

[12] The facts in *Miller* were quite different. He "committed a vicious murder . . . when high on drugs and alcohol consumed with the adult victim . . .he had tried to kill himself four times, the first when he should have been in kindergarten . . . Nonetheless, Miller's past criminal history was limited." 567 U.S. at 478-79.

Despite Grant's suggestion, DB40-41, the PSR does not state Pretlow "organized, supervised and directed" Grant's murder of Mario Lee and attempted murder of Dion Lee. The descriptions of those specific events do not even mention Pretlow. PSR¶¶ 81-85. The PSR also does not state, DB41, that Grant committed those and other crimes to avoid being threatened or beaten. PSR¶ 60. That happened to other juvenile members of the Posse whose parents complained to the police. 1992 PSR¶¶ 53, 64. By Grant's own account, his mother was not among those. DB38 (describing how his mother and her boyfriend neglected Grant and abused drugs and alcohol); A284-85. These other "clockers," were drug sellers, not killers. PSR¶ 58. Grant did much more than sell drugs. A152 (even with respect to only the drug charges, Grant "wasn't just a clocker" but played "an additional role in connection with this enterprise"); DB39 (Grant differentiated because of "his imposing size"); A66 (jury verdict necessarily meant Grant was more culpable than other "clockers"); *see* A288-89 (Grant's sentencing submission to the District Court, emphasizing that that Pretlow treated him generously and made him feel "valuable" because he was "big for his age . . . good at fighting").

Grant emphasizes the impetuosity of youth, DB31, 33-37, something true of juveniles as a category of offenders.[13] Not all juveniles share all of the characteristics of their category, however, nor is a sentencing court required to assume they do. In fact, emphasizing the characteristics of youth in every juvenile sentencing case would be the opposite of an "individualized" sentencing. The District Court was therefore entitled to consider that:

- Unlike the 14 year-old defendants in *Miller*, Grant was hardly a child: He either had reached, or was about to reach, 16 when he played a principal role in helping to commit multiple murders, PSR¶ 2;

- The attempted murder of Dion Lee and the murder of Mario Lee were acts taken on Grant's initiative, not under the influence of adults on the scene, PSR¶¶ 81-85;

- No longer a juvenile, but 18, he repeatedly refused to plead guilty and elected to go to trial, rather than accept responsibility, A134;

- He was 19 when, given an opportunity to speak on his own behalf just before sentence was imposed, he told Judge Ackerman "I

[13] Grant quotes Dr. Steinberg as noting Grant committed his offenses at the age when "maturational imbalance in brain systems . . . is greatest" in juveniles as a class. DB35. Dr. Steinberg, however, did not examine Corey Grant and offers extremely general, qualified opinions. A324 ("imbalance is believed to cause deficiencies . . . so often associated with juveniles[];" a "16-year-old . . . is likely to have deficiencies in self-control;" refusal to plead guilty was "characteristic of someone" Grant's age). The District Court was entitled to give such generalities less weight than Grant urges.

> don't care about you. As a matter of fact, I have no respect for a man that wears a dress . . . I got nothing to say to you," A445.[14]

Grant points to a few cases as "unanimous[]" in their understanding that the *Miller* factors are to be given significant weight. DB32. They do not support his assertion.

United States v. Pete, 819 F.3d 1121, 1132-33, (9th Cir. 2016), holds it was error to deny the defendant's motion for psychological expert services that could have developed information relevant to mitigating his sentence at a *Miller* hearing. The "refusal to approve a new psychological appraisal denied Pete the opportunity to respond effectively to the PSR's discussion of his prison record or to provide corroborating evidence that could substantiate his explanations for his prison infractions." *Id*. at 1133. That is a far cry from holding the defendant's youth must be weighted in any particular fashion. Here, unlike *Pete*, the District Court did not limit in any way the submission or consideration of the expert testimony submitted on Grant's behalf. A37

[14] Grant may have recognized how harmful that comment, made at age 19 and long after he learned Pretlow had betrayed him, was to his *Miller* arguments. At his resentencing, he expressed the need, "[f]irst and foremost" to apologize to the late Judge Ackerman for that outburst. A118. It is unclear, however, whether Grant's apologies genuinely were his own, or scripted by his prior counsel. It struck the District Court as so scripted it asked whether the words were Grant's. At that point, Grant's prior counsel interceded, but rather than answer the question, the best he could do was emphasize that the text was in Grant's handwriting. A120.

(acknowledging it had received and read Grant's sentencing materials, which included the expert opinions of Dr. Steinberg, the developmental psychologist cited in *Miller* and related cases, and a mitigation report, both of which were prepared after it had authorized CJA funds for that purpose).

Songster v. Beard, 201 F. Supp. 3d 639 (E.D. Pa. 2016), held that, under *Miller*, the requisite considerations at Songster's state court resentencing should be "immaturity, impulsivity, failure to appreciate . . . risks and consequences . . . family and home environment; . . . participation in the homicide; . . . familial and peer pressure; . . . inability to deal with the police, prosecutor and . . . own attorney." *Id*. at 641. It did not go further and hold that, "in determining an individualized, proportionate sentence," *id*. at 640, those factors needed to be weighed in any particular fashion or to the exclusion of others.[15]

In *United States v. Sheppard*, No. 96-85-4, 2017 WL 875484 (W.D. Mo. Mar. 3, 2017), the resentencing court filtered the *Miller* factors through a traditional analysis but not to the exclusion, or minimization, of any other

[15] Grant includes a transcript from another post-*Miller* resentencing in which the defendant's sentence was reduced from life to 35 years. A167-90. Without the full record from that case, it appears to differ from Grant's at least in that the defendant had obtained what the sentencing court characterized as literally breathtaking support from at least one of the victims of his crimes. A183-84. Not so Corey Grant. A139-48.

factors. If anything, the factor that seemed to most heavily influence the sentence was not age, but that, completely unlike Grant, Sheppard "did not intentionally with malice aforethought" commit murder. 2017 WL 875484 at *12. Instead, he "was convicted of aiding and abetting an act of arson which" in an unforeseen way, ultimately killed six firefighters. *Id*. at *1.

Here, there was no error in the District Court's approach to resentencing Grant. A150-55. It conducted an hours-long hearing, during which it repeatedly acknowledged the importance of and role played by the *Miller* factors, before deciding whether Grant could be considered the rarest of juvenile offenders and sentenced to LWOP. *See* pp. 40-42, *supra*. After deciding against that irrevocable sentence, it considered the nature and circumstances of the offense, the history and characteristics of Grant, as well as his victims, the need to promote respect for the law and provide just punishment and the need to provide adequate deterrence and protect the public. A152-55. At all times, it kept Grant's age at the time of his crimes in mind, but was "not convinced" a sentence of "time served . . . would be appropriate," despite Grant's *Miller*-based arguments to the contrary. *Id*. In the District Court's view, that would not have captured "the seriousness of the drug charges combined with the gun charges" plus Grant's murder and attempted murder convictions "and the relevant conduct," showing, "by a

preponderance of the evidence," that Grant was involved in still other murders. *Id*. That is the individualized assessment *Miller* requires. *Jefferson*, 816 F.3d at 1021 (rejecting substantive reasonableness challenge to 50-year sentence imposed after *Miller* resentencing; district court did not abuse discretion by giving weight to "horrific" crimes as well as youth); *United States v. Bryant*, 609 F. App'x 925 (9th Cir. 2015) (not published) (affirming 80-year total sentence; *Miller* satisfied when court imposed sentence based on individualized assessment and considered how youth counsels against "lifetime in prison").

Grant makes much of the "tragic" consequences of his having refused to accept responsibility and plead. DB43-44. The District Court considered that too, A107-110, but taking all relevant considerations into account, concluded that a total of 65 years' imprisonment remained appropriate. That was a reasonable determination, particularly because Grant who was then no longer a juvenile, still refused to accept responsibility for his crimes and turned down multiple plea offers before trial. A133-34, 306-09. Although Grant's prior counsel attributed that refusal to a combination of loyalty and fear, A69, 306-09, Pretlow no longer was able to influence Grant, through either means, after December 1991. He had committed suicide more than two months

before Grant began trial, PSR¶ 37, well before the Government's final plea offer. A93, 308-09.

Although Grant asserts he remained "under the sway of Pretlow" when he refused to plead, DB43, he does not explain how the chronology supports that argument. In fact, it does not. Nor does the acknowledgement, by Grant's prior counsel, that the "big push" for Grant to plea did not come until after Pretlow's suicide. A93, 308. Nor does the suggestion that Grant's case would have "ended up in a [guilty] plea," had Pretlow been "convicted of something," rather than killing himself. A93. That only underscores Grant affirmatively chose not to plead, even after Pretlow's death, for reasons unrelated to purported fear of retribution. *Id*. At his sentencing, having reached age 19 and with no reason to remain loyal to Pretlow,[16] he remained unrepentant. A445. In short, it is inaccurate to claim the District Court "fail[ed] to acknowledge" the overall impact of Grant's having rejected the plea offers. DB44. To the contrary, it entertained a long discussion on the subject, A94-110, much of which was already in the record it had reviewed,

[16] Grant had learned during his trial that Pretlow told Dion Lee he would have Grant killed as a form of compensation for Grant having murdered Dion's brother, Mario. A292, 309; SA93-93.

A306-11, but, ultimately ,that did not persuade it to further reduce Grant's sentence.

The District Court thus had evidence that much of Grant's conduct was not simply a function of an "adolescent brain[]," not yet "fully mature" in terms of "impulse control, planning ahead and risk avoidance." *Miller*, 567 U.S. at 472 n.5; DB34. He nonetheless convinced the District Court not to impose LWOP and accomplished the purpose of his seeking a *Miller* resentencing. That resentencing does not also require, as Grant argues, that the sentencing scales be further tipped towards leniency when the alternative sentence is crafted. Here, Grant's overall record was more than sufficient to allow the District Court to conclude Grant did not deserve anything close to immediate release he sought below. A85, 98. The District Court did exactly what *Miller* required when, after an individualized assessment based on the entire record, it resentenced Grant to a total of 65 years.

CONCLUSION

Neither Grant's *Miller* arguments, nor any of his others, provide a basis for reversal. This Court should affirm the judgment.

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CERTIFICATE OF COMPLIANCE

I hereby certify as an Assistant United States Attorney for the District of New Jersey that:

(1) this brief contains 11,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 13,000-word limit;

(2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared using a Microsoft WORD 2016 word-processing system and it is in a proportionally spaced typeface, namely Calisto MT, that is at least 14 points;

(3) the text of the electronic PDF brief and appendix is identical to the text of the paper copies of the brief and appendix; and

(4) The electronic PDF brief and appendix have been prepared on a computer that is automatically protected by a virus detection program, namely a continuously updated version of Trend Micro OfficeScan, and no virus was detected.

s/ Bruce P. Keller
Assistant U.S. Attorney

Dated: July 25, 2017

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on July 25, 2017, I caused the Brief and Supplemental Appendix for Appellee to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and by personally causing to be deposited, with the United States Postal Service as postage-prepaid first-class mail, seven paper copies of the Brief and four paper copies of the Supplemental Appendix.

I also certify that on July 25, 2017, I caused the Brief and Supplemental Appendix for Appellee to be served by the Notice of Docketing Activity generated by the Third Circuit's electronic filing system, on the following Filing User:

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