No. 16-3820

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

COREY GRANT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (No. 2:90-cr-00328-JLL)

REPLY BRIEF OF DEFENDANT-APPELLANT COREY GRANT

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

Attorneys for Defendant-Appellant

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INTRODUCTION

The Government interprets *Miller v. Alabama*, 567 U.S. 460 (2012), to require courts to consider a juvenile homicide offender's youth only to determine whether a sentence of life without parole (LWOP) is permissible; otherwise, the Government contends, courts may sentence juveniles as though they were adults, provided a juvenile who is capable of reform has an opportunity for release "some years" before death. Grant's sentence is constitutional, the Government argues, because he should live 4.7 years past his release at age 72. Additionally, the Government asserts that the district court properly declined to resentence Grant *de novo* on all counts even though his new sentence was unquestionably inflated by his former, unconstitutional one.

The Government's position ignores the language and reasoning of multiple Supreme Court cases recognizing the differences between juveniles and adults, the ways those differences undermine penological justifications, and the harshness of such long sentences for juveniles. It also waves away the procedural and substantive facts of Grant's case. As discussed below and in Grant's initial brief, Grant's sentence should be vacated and the matter remanded for resentencing.

I. A Juvenile Who Is Not Incorrigible Must Receive an Opportunity for Personal Fulfillment, Which Grant's Sentence Denies.

Grant argues that because *Graham v. Florida* decried juvenile LWOP for allowing "no chance for fulfillment outside prison walls, no chance for

reconciliation with society, no hope," 560 U.S. 48, 79 (2010), and because *Miller* incorporated *Graham*'s reasoning as its "foundation stone," 567 U.S. at 470 n.4, *Miller* applies to sentences that deprive juvenile offenders of the chance for fulfillment after the service of their prison sentences. DB22-27. Grant's sentence violates this standard because the district court found him not "incorrigible," *i.e.*, "irredeemably depraved" and without "the capacity for change," *Graham*, 560 U.S. at 77, but still sentenced him to a term that permits release only at age 72, too late to reintegrate into society. DB28-31.

In response, the Government does not contest that term-of-years sentences implicate *Miller*,[1] but argues that under *Miller*, juveniles who are not incorrigible are entitled only to "'*some years* of life outside prison walls,'" which Grant should receive. GB25-27, 29, 33 (quoting *Montgomery*, 136 S.Ct. at 737) (emphasis in GB).. Respectfully, the Government is wrong.

A. The Government Identifies and Applies the Wrong Standard.

The Government offers no argument or authority for the "some years" standard it proposes. Rather, it asserts that the Eighth Amendment applies only to sentences that allow "'*no chance* to leave prison,' ever"; in the Government's view, a juvenile defendant must therefore have only "'*some meaningful*

[1]The Government states, "Even were this Court inclined to extend the logic of *Miller* to sentences that greatly exceed anyone's life expectancy, it should not do so here." GB27 (citation omitted). It does not, however, present any argument that *Miller* should not apply to sentences of *de facto* LWOP.

opportunity to obtain release,'" which need not come at any particular time. GB32-33 (quoting *Graham*, 560 U.S. at 75, 79) (emphasis in GB).

This argument misses that the constitutional problem with juvenile LWOP articulated by the Supreme Court is more profound than denial of release:

> [A] categorical rule [barring LWOP] gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.

560 U.S. at 79; *id.* 69-70 ("[LWOP] deprives the convict of . . . hope of restoration"); *id.* at 73 ("A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity."). This language, which the Government does not address, provides a starting point for understanding the "meaningful opportunity for release" that the Eighth Amendment requires. Specifically, a "meaningful opportunity for release" is a chance for release at a time that will permit "fulfillment outside prison walls" and "reconciliation with society," as the progeny of *Miller* hold. *See Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1047 (Conn. 2015) ("[The] Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it 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."); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) ("a juvenile offender sentenced to a lengthy term of years sentence will not have a 'meaningful opportunity for release'"); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) ("geriatric release . . . does not provide a 'meaningful opportunity'") (citation omitted); *see also* Sarah Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 376 (2014) ("meaningful opportunity for release" means "the chance of release must come at a meaningful point in time in the offender's life").

The Government's scattershot response is confused and confusing. It argues that *Miller* does not apply to lengthy term-of-years sentences because "the basis" for the Court's decisions is "the rarity of [juvenile] LWOP," bringing that sentence, as opposed to those "routinely imposed," within the "unusual" prong of the Eighth Amendment. GB28-29. However, the Eighth Amendment has no distinct "unusual" prong. *See Trop v. Dulles*, 356 U.S. 86, 100 n. 32 (1958) (questioning "[w]hether the word 'unusual' has any qualitative meaning different from 'cruel[.]'"). Moreover, although the rarity of particular sentences[2] reveals "society's standards" for purposes of Eighth Amendment proportionality analysis, *Graham*, 560 U.S. at 61, that analysis also turns on the Court's "independent

[2]Of course, the Supreme Court has never characterized sentences like Grant's to be "routinely imposed." Indeed, the Government itself argues that *Miller* and *Graham* "said nothing about term-of-years sentences." GB28.

judgment" with regard to "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Id.* at 67. And here, the Court has repeatedly held that that the shortcomings of youth undermine justifications for the harshest punishments. *Id.* at 67-79; *Miller*, 567 U.S. at 479-80.

Next, the Government alleges that because "the Eighth Amendment does not 'guarantee eventual freedom,'" it cannot require release at any particular point. GB29-30 (citation omitted). But this argument misses the point of *Miller*: a juvenile may be held for life if he is determined to be incorrigible at sentencing, *Miller*, 567 U.S. at 479-80. But Grant was found not to be incorrigible:

> When one looks at his upbringing, the debilitating characteristics of youth, inherent in being a young person and the limited decision-making abilities of a minor . . . . and I do recognize that by all accounts, it appears that he has been violence free as an inmate since 2006. All of this leads me to concur that Mr. Grant is not that rarest of exception referenced in *Miller*, where the lifetime without parole is appropriate[.]

A151. Accordingly, the Eighth Amendment requires that Grant be released at a time that permits fulfillment and reconciliation with society.[3]

The Government cites unpersuasive authority to support its position. Some cases hold—though the Government does not argue, *see supra* at 2 n.1—that sentences amounting to *de facto* LWOP do not fall within the proscriptions of

[3]Parole hearings also "may remedy a *Miller* violation," *Montgomery*, 136 S.Ct. at 736, but there is no federal parole, Pub.L.No.98-473, § 224 (1984).

Graham and *Miller*. *See United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (*Miller* does not apply beyond mandatory LWOP), and *People v. Rainier*, 394 P.3d 1141, 1144 (Colo. 2017) (LWOP is a "specific, distinct sentence," under *Graham* and *Miller*). GB34. Others—*Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017); *Starks v. Easterling*, 659 Fed.Appx. 277 (6th Cir. 2016); *Goins v. Smith*, 556 Fed.Appx. 434 (6th Cir. 2014), and *Demirdjian v. Gipson*, 832 F.3d 1060 (9th Cir. 2016)—were reviewed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which asks whether the prior decision "was contrary to, or involved an unreasonable application of, clearly established Federal law …'" 28 U.S.C. § 2254(d)(1). Accordingly, these decisions state only that lengthy term-of-years sentences were not before the Court in *Miller* and *Graham*, *see*, *e.g.*, *LeBlanc*, 137 S.Ct. at 1728-29 ("*Graham* did not decide that a geriatric release program . . . failed to satisfy the Eighth Amendment because that question was not presented."), but do not address the question here presented on direct appeal whether sentences that deny a juvenile defendant the opportunity for fulfillment and reconciliation can be constitutional. *See Demirdjian*, 832 F.3d at 1064 ("Under AEDPA, the question is not whether we think [defendant] received . . . an unconstitutional sentence.").[4] Similarly, *United States v. Walton*, 537 Fed. Appx.

[4]*See generally Williams v. Taylor*, 529 U.S. 362, 411 (2001) ("[Under AEDPA], a federal habeas court may not issue the writ simply because that court concludes in

430 (5th Cir. 2013), cited by the Government, GB34, reviewed a *Miller* challenge to a 40-year-term only for plain error, denying relief because it would have "require[d] the extension of precedent." 537 Fed.Appx. at 437. Such an extension, based upon the principles of the Supreme Court's decisions, is appropriate here however, on direct appeal and with preserved claims.

The Government also lists 15 federal homicide resentencings under *Miller*, noting the sentences imposed. GB36-37. But because no transcripts are provided, it is impossible to know whether the sentences in those cases were imposed after a finding of incorrigibility, which would permit sentences of life or its functional equivalent. Here, the district court specifically found the opposite. Further, 9 of the 15 cases upon which the Government relies resulted in sentences of 25 to 42 years, GB36-37, leaving it unclear how they support the Government's argument.

In sum, the Supreme Court decisions upon which Grant relies, *see* DB21-31, should be interpreted to require that any sentence imposed upon a juvenile not deemed incorrigible allow an opportunity for fulfillment outside prison walls and reconciliation with society. Because Grant's sentence does not, it must be vacated.

B. The Government Misapplies the Law to Grant's Case.

The Government argues that whatever the standard for finding a sentence unconstitutional under *Miller*, Grant does not meet it. GB24-27, 30-32. First, the

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its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.").

Government argues that the court merely "refused to rule Grant was not 'the rarest case,'" which the Government calls "not even close to a conclusion that Grant is 'capable of reform, if not already rehabilitated.'" GB32 (citations omitted). But the district court found that "Mr. Grant is not that rarest of exception referenced in *Miller*, where the lifetime without parole is appropriate," A151, *i.e.*, Grant was not "the rare juvenile offender whose crimes reflect irreparable corruption," *Miller*, 567 U.S. at 479-80. And since "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption," *Montgomery*, 136 S.Ct. at 734, the district court found that Grant's offenses reflected transient immaturity and that he has "the capacity for change," *Graham*, 560 U.S. at 77.

The Government takes issue with the district court's consideration of post-sentencing conduct in reaching this conclusion. GB30-32. But this argument is belied by the Government's position below that "*Pepper* [*v. United States*, 562 U.S. 476 (2011)] said that [Grant] has the right to rely on post sentencing rehabilitation at a resentencing hearing." A129. Nor did the Government cross-appeal. The Government is also wrong because, in a *Miller* resentencing, as the Government has recognized, A129, post-sentencing conduct "informs the assessment of whether the offender is permanently incorrigible or irreparably corrupt[,] . . . . remov[ing] much of the guess work[.]" *Garnett v. Wetzel*, 2016

WL 439244, at *2 (E.D. Pa. Aug. 17, 2016).[5] Nor is the Government correct that admitting such evidence blurs the distinction between a *Miller* resentencing and a parole hearing, for, as the Supreme Court makes clear, "A State may remedy a *Miller* violation by permitting juvenile offenders to be considered for parole, rather than resentencing them," *i.e.*, these proceedings are alternative remedies. *See Montgomery*, 136 S.Ct. at 736.

In any event, the Government, argues, Grant is ineligible for relief under its preferred "some years" standard because his life expectancy, calculated from his current age, is 76.7 years, which is some years beyond his release date at age 72.[6]

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[5]The Government also argues that Grant's post-sentencing conduct does not benefit him. GB30-32. But the Government conceded below that such evidence "do[es] benefit [Grant] to some degree." A136. And the district court found that "the activities of the defendant post[-]conviction" supported the conclusion that "Mr. Grant is not that rarest of exception referenced in *Miller*." A151.

[6]The Government's suggestion that the correct starting point for a life expectancy calculation is Grant's current age raises serious Due Process and Ex Post Facto concerns. As the Government notes, GB25, life expectancy goes up with every year of survival such that the Government's estimate, 76.7, is 9.5 years higher than what actuarial tables would have predicted in 1992 at Grant's original sentencing. *See* Vital Statistics of the United States, Vol. II, Part. A, Section 6, at 15, *available at* https://www.cdc.gov/nchs/data/vsus/mort92_2a.pdf. Use of Grant's current age would thus extend the length of Grant's permissible sentence. *See United States v. Spivey*, 181 Fed.Appx. 296, 297 (3d Cir. 2006) ("While the Ex Post Facto Clause bars only legislatures from expanding the scope of criminal laws, courts are 'barred by the Due Process Clause from achieving precisely the same results by judicial construction.' This rule derives from 'core due process concepts of notice, foreseeability, and in particular, the right to fair warning. It applies with equal force to . . . 'after-the-fact increases in the degree of punishment.'") (citations omitted).

GB23. Of course, the Government does not argue that release at age 72 engenders a "meaningful opportunity" for "fulfillment outside prison walls," or a "chance for reconciliation with society." *Graham*, 560 U.S. at 79. Nor does the Government's calculation of life expectancy, even as it argues that health should be taken into account, GB25-26, consider that extended incarceration is actually detrimental to health. *See* DB23 (empirical study shows life expectancy for black men incarcerated since adolescence is 50.6).

Finally, the Government is also incorrect that the constitutional problem is addressed by the fact that Grant may seek geriatric release at age 70 under 18 U.S.C. § 3582(C)(1)(A)(ii). GB24-27. A decision under this provision is entirely discretionary with the Bureau of Prisons (BOP) and is "simply *judicially unreviewable*." *Chu v. Hollingsworth*, 2014 WL 3730651, at *3 (D.N.J. July 14, 2014) (emphasis in original); *accord Share v. Krueger*, 553 Fed.Appx. 207, 209 (3d Cir. 2014) ("without a motion from the BOP, the district courts have no authority to reduce a federal inmate's sentence"); *Voelzke v. Kirby*, 2014 WL 12206621 (W.D. Pa. June 3, 2014) ("It is hard to find a clearer legislative statement than in 18 under § 3582(c)(1)(A) that the filing of a petition . . . is committed to the discretion of the 'Director of the Bureau of Prisons."). Moreover, as the Department of Justice has observed, "[t]he BOP does not have clear standards on when compassionate release [under § 3582(c)(1)(A)] is warranted,

resulting in *ad hoc* decisionmaking." U.S. Dep't of Justice, *The Federal Bureau of Prisons' Compassionate Release Program*, at i (2013), *available at* https://oig.justice.gov/reports/2013/e1306.pdf. Thus, § 3582(c)(1)(A)(ii) does not guarantee the "meaningful opportunity for release" that the Eighth Amendment requires because it does not assure, subject to judicial review, consideration of youth and attendant circumstances. *See Hayden v. Keller*, 134 F.Supp.3d 1000, 1009 (E.D.N.C. 2015) (parole proceedings violated *Graham* because discretionary decision did not satisfactorily account for youth); *Greiman v. Hodges*, 79 F.Supp.3d 933, 943 (S.D. Iowa 2015) (whether parole proceedings comport with *Graham* present an Eighth Amendment question for judicial review).

At the end of the day, this Court must decide whether *Miller* permits sentencing a juvenile defendant who has is capable of reform to a term that allows release at the age of 72. For the reasons set forth above and in Grant's earlier brief, such a sentence constitutes *de facto* LWOP and thus violates the reasoning, logic, spirit, and science of *Graham*, *Miller* and *Montgomery*. Grant's sentence should be vacated and his case remanded for resentencing.

II. The District Court Gave Inadequate Consideration and Weight to the *Miller* Factors.

The Government argues that the *Miller* factors[7] serve only the "precise, constitutional purpose [of] . . . 'separat[ing] those juveniles who may be sentenced' to LWOP 'from those who may not.'"GB43 (citation omitted). The district court need not have considered those factors in determining a sentence, the Government contends, so there was no error in the court's failure to do so. The Government is mistaken.

A. Courts Must Apply the *Miller* Factors to Determine an Appropriate Sentence.

The Government cites *Montgomery* for the proposition that the *Miller* factors serve only to distinguish between juveniles who are incorrigible and those who are not. GB43 (citing *Montgomery*, 136 S.Ct. at 735). But *Montgomery* specifically described "youth and its attendant circumstances" as "sentencing factors." *Id.* at 735. And while it made clear that their consideration is "necessary to distinguish those who may be sentenced to life from those who may not," *id.*, *Montgomery* never limited the *Miller* factors to this purpose or otherwise defined

[7]The "*Miller* factors" are "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," "the family and home environment that surrounds [the juvenile defendant]," "the circumstances of the homicide offense, including the extent of [the defendant's] participation in the conduct and the way familial and peer pressures may have affected him," "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," and "the possibility of rehabilitation." 567 U.S. at 477.

their full scope, which was beyond the question presented, regarding the retroactivity of Miller.

The broader purpose of the *Miller* factors is to give effect to the fact that juveniles are different in ways that "diminish the penological justifications [retribution, deterrence, incapacitation, and rehabilitation][8] for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. Thus, when *Miller* specifically states that "a sentencer misses too much if he treats every child as an adult," *id.* at 477, this means that courts must account for the ways that juveniles are different in determining what punishment is justified, as the *Miller* Court made clear in describing the *Miller* factors applicable to one defendant: "[a]ll these circumstances go to [defendant's] culpability[.]" *Id.* at 478.

Indeed, at least some of the *Miller* factors offer no insight on the issue of incorrigibility, but clearly sound in mitigation. For example, that a juvenile offender "might have been charged and convicted for a lesser offense" but for his immaturity—as was true in Grant's case, DB43-44—says nothing about incorrigibility. It speaks to the fairness of a long sentence where youth "impair[ed] the quality of [] representation." *Graham*, 560 U.S. at 78. And evidence of a juvenile's "family and home environment" *Miller*, 567 U.S. at 477—highly

[8]Of course, federal sentencing turns on the same penological justifications. 18 U.S.C. § 3553(a)(2).

relevant to culpability, *id.* at 476—does not necessarily establish a capacity for reform, and may even suggest the opposite. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 262 (2007) ("evidence of childhood neglect and abandonment and. . . a troubled childhood" could support inference of future dangerousness). In sum, the *Miller* factors are sentencing factors which, the Supreme Court mandated, must be considered in imposing sentence upon juveniles facing lengthy terms.

The Government responds that this would somehow "eschew individualized sentencing." GB44. But sentencing juveniles by use of the *Miller* factors *is* individualized, as *Miller* itself demonstrated, noting how age may have affected one juvenile defendant's risk-assessment and ability not to follow his peers. *Miller*, 567 U.S. at 478. Likewise, for both *Miller* defendants, "family and home environment" was highly relevant, but the analysis for each was different. *Id.* at 478-79. Thus, application of the *Miller* factors does not undermine individualized sentencing—it provides additional considerations that must be applied individually to fulfill the constitutional mandate.

The Government protests that requiring district courts to give weight to these considerations would impinge on sentencing discretion, citing *Kimbrough v. United States*, 552 U.S. 85 (2007). GB40. But neither *Kimbrough* nor any other case authorizes courts to exercise their discretion in a manner contrary to categorical limitations imposed by the Eighth Amendment, which necessarily

curtail judicial discretion. Indeed, the Supreme Court has made this clear in applying *Atkins v. Virginia*, 536 U.S. 304 (2002), which, like *Miller*, sets forth a process for determining when a defendant may not be eligible for certain penalties. *SeeMontgomery*, 136 S.Ct. at 734 (both *Miller* and *Atkins* prescribe procedural rules "necessary to implement a substantive guarantee" under the Eighth Amendment). Twice now the Court has held that states do not have "unfettered discretion" in how they implement the procedural requirement to identify individuals with intellectual disability, lest the Eighth Amendment guarantee that such individuals cannot be executed "become a nullity." *Moore v. Texas*, 137 S.Ct. 1039, 1052-53 (2017) (Texas standard for determining intellectual disability improperly ignored expertise of medical community); *see also Hall v. Florida*, 134 S.Ct. 1986, 1998 (2014) (rejecting Florida's strict cutoff of an IQ score of 70 or below). So too does the constitutional mandate of *Miller* necessarily remove some judicial discretion, in order to effectuate its Eighth Amendment guarantee.

Finally, the Government argues that a requirement to consider the *Miller* factors in determining a sentence would amount to "double-counting." GB43. But the Government only counts the *Miller* factors twice because it artificially bifurcates sentencing between a decision whether to impose LWOP and, if not, determination of a lesser sentence. In fact, application of the *Miller* factors is a singular process: courts first apply the *Miller* factors and then determine an

appropriate sentence for the defendants before them, whether LWOP or something less. Moreover, the Government itself would allow the *Miller* factors to be considered, not only to determine incorrigibility, but also as mitigation under § 3553(a), so long as courts are not required to do so. GB39-40. If the Government means by its double-counting argument, however, that the *Miller* factors may not be considered as mitigation, then the Government's position is not only inconsistent with its other statements, but makes little sense, since it would, for example preclude a court from considering a defendant's mental limitations in sentencing simply because those limitations also precluded the defendant from being sentenced to death under *Atkins*. This is not the law.

B. Grant's Argument under the *Miller* Factors Is Preserved.

The Government views Grant's argument under the *Miller* factors as a mere procedural objection to the way in which the district court balanced aggravating and mitigating evidence. Accordingly, it argues waiver under *United States v. Flores-Mejia*, 759 F.3d 253, 258 (3d Cir. 2014) (*en banc*) ("[A] party must object to a procedural error after the sentence is pronounced[.]"). GB38-39. *Flores-Mejia*, however, has never been held to reach this kind of constitutional claim. Nor does its logic apply: it requires a defendant to object after sentencing so the district court may "clarify and supplement" its reasoning, and to prevent "sandbagging." 759 F.3d at 257-58. But as the Government repeatedly points out, GB22, 24, 40,

application of the *Miller* factors was the sole reason that Grant was resentenced, so the court was well aware of its obligation to apply the *Miller* factors. *See*, *e.g.*, GB40 (listing statements of district court evidencing awareness of obligations under *Miller*); *see also General Refractories Co. v. First State Ins. Co.*, 855 F.3d 152, 162 (3d Cir. 2017) (issue was preserved where it "ha[d] always been at issue").

Flores-Mejia is also inapposite because Grant's claim is a substantive, not procedural one: the district court failed to give the *Miller* factors the requisite weight, resulting in an improper sentence. *See*, *e.g.* DB32, 46-47; *see United States v. Doe*, 617 F.3d 766, 770 (3d Cir. 2010) (substantive claims concern "'whether the final sentence . . . was premised upon appropriate and judicious consideration of the relevant factors.'") (citation omitted). And *Flores-Mejia* is clear that its rule does not apply to substantive objections. 759 F.3d at 257.

As a result, preservation of Grant's claim required only that he "unequivocally put [his] position before the trial court at a point and in a manner that permit[ted] the court to consider its merits." *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999). This was done. *See*, *e.g.*, A85 ("It's a new opportunity to consider Corey Grant in light of *Miller* and what should be an appropriate sentence."); *e.g.* A95 (reading *Miller* factors); *see e.g.* Def. Sentencing Memo., A198 ("[T]his Court is now "*require[d]* . . . to take into account how

children are different . . . .') (citation omitted) (emphasis in original); A199 ("Under *Miller*, the sentencing court must consider the 'mitigating qualities of youth[.]'") (citation omitted). Accordingly, Grant's argument is well preserved. *See Huber v. Taylor*, 469 F.3d 67, 75 (3d Cir. 2006) (issue was preserved where "inherent in the parties' positions throughout").

C. The *Miller* Factors Do Not Support Grant's Sentence.

On the merits, the Government lists the district court's general statements about *Miller* to show that the court had *Miller* "in mind." GB2, 40, 50. But these statements are inadequate for the reasons discussed in Grant's initial brief. DB31-47. Indeed, the Government concedes that the district court "kept its focus on the crimes Grant committed," GB31, arguing that the *Miller* factors would not support a different outcome. Thus, the Government argues that "Grant's multiple, specific crimes warranted a lengthy prison sentence." DB44. But the Supreme Court has made explicit that the Eighth Amendment does not permit "the brutality or cold-blooded nature of any particular crime" to "overpower mitigating arguments based on youth as a matter of course." *Roper*, 543 U.S. at 573. The district court was thus *required* to consider Grant's offenses in the context of his youth. *See State v. Riley*, 110 A.3d 1205, 1217-18 (Conn. 2015) (vacating under *Miller* where "[t]he main thrust of the court's comments at sentencing related to the innocence of the victims and the choice made by the defendant to commit these senseless crimes");

State v. Pearson, 836 N.W.2d 88, 97 (Iowa 2013) (vacating under *Miller* where "the district court emphasized the nature of the crimes to the exclusion of the mitigating features of youth").

The Government responds that the *Miller* factors do not apply because Grant's offenses were not committed "in a spur of the moment fashion" or "at the immediate urging of Pretlow [the adult gang leader]." GB45. But even assuming these characterizations—in fact, the record suggests that two of Grant's offenses were not premeditated, PSR ¶¶ 81-85, while the other two were at Pretlow's specific direction, *id.* at ¶¶ 68, 73-76—the *Miller* factors are not so limited. An offense that was not impetuous may nonetheless be mitigated by other characteristics of youth. *See*, *e.g. Roper*, 543 U.S. at 556-57, 571-72 (characteristics of youth undermined retribution and deterrence for defendant who premeditated homicide by burglarizing home, binding elderly victim, and throwing her off a bridge). And there is no requirement that peer pressure be "immediate" to be mitigating—the Government invents this without citation. GB45-46. As argued in Grant's underlying brief, the record proves that peer pressure was a highly mitigating factor in Grant's case, and should have been, but was not, weighed accordingly. *See* DB5-11, 40-43.

Finally, in a last-ditch effort to defend the district court's failure to apply the *Miller* factors, the Government argues that "[n]ot all juveniles share all the

characteristics of their category," noting of Grant that "[u]nlike the 14 year-old defendants in *Miller*, [he] was hardly a child" because he was 15 and 16 at the time of offenses; that he allegedly initiated the offense conduct; that he refused to plead guilty even after turning 18; and that, age 19, he acted disrespectfully at sentencing. GB47-48. Of course, the Government cites no legal or scientific authority that such evidence means a juvenile does not "share the characteristics of [his] category"—none exists. But regardless, the court found that Grant was not incorrigible, and because *Miller* "drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption," *Montgomery*, 136 S.Ct. at 734, the court's finding that Grant fell into the latter category means his offenses reflect transient immaturity, *i.e.*, that he in fact "shares [in] the characteristics of [his] category." Moreover, that Grant demonstrated the mitigating characteristics of youth was determined contemporaneously by social workers and mental health professionals. DB8-10, 35. The Government argues otherwise only by studiously avoiding the record evidence.

Finally, the court's failure to properly apply the *Miller* factors requires reversal even under plain error review. Reversal for plain error is proper when a court commits error that is "plain," "clear," and "obvious," *United States v. Syme*, 276 F.3d 131, 143 n.4 (3d Cir. 2002) (citations omitted), and the error is

"prejudicial" and "'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Nappi*, 243 F.3d 758, 762 (3d Cir. 2001) (citation omitted). For the reasons stated above and those argued in Grant's original brief, DB31-47, failure to adequately consider the *Miller* factors in imposing sentence plainly violated the Eighth Amendment and resulted in an overlong sentence that both prejudices Grant and undermines the fairness of judicial proceedings demanded by the Supreme Court.

III. The Sentencing Package Doctrine Required the District Court to Resentence Grant *De Novo*.

The Government does not contest that Grant's unconstitutional LWOP sentences rendered Grant's original sentence on other charges merely symbolic, allowing the original sentencing court to "send a message," A450-451, by imposing a harsh penalty of 40 years on drug charges; indeed, it concedes that Grant's "multiple convictions" were "interconnected." GB19. The Government also recognizes that by not resentencing Grant on drug charges, the court below was forced to go above 40 years to punish him for homicide offenses.[9] Nonetheless, the Government argues that Grant's sentencing package argument

[9]Indeed, the Government advocated for this result. A124 ("45 years really from our perspective is the starting point"); A128 ("45 years is the starting point, and from our perspective, that 45 years . . . doesn't really take account for the murders[.]"); A130 ("[W]e would ask that at a minimum that the term of imprisonment be one that appreciably adds punishment for those terrible offenses, that it be added to the 45 years"); A488 ("the only practical question for this Court is how much more prison time should Grant serve for [homicide offenses]").

was waived, that in any event the sentencing package doctrine is discretionary, and that the district court independently endorsed the 40-year-sentence for drugs. Each of these arguments fails.

A. The Sentencing Package Argument Is Preserved.

At resentencing, defense counsel repeatedly and strenuously argued that Grant's original sentence was a package, requiring resentencing on all counts:

> [T]his was all part and parcel of one sentence. I don't think anybody looked upon this as somehow a breakdown of you got 40 on this, you got 40 on that and five on that. This was a life sentence. A40.
>
> [The 40-year term] is really part and parcel of the entire sentence that was imposed here, Judge. . . . [To now say] you really got this 40, and you got this five, I mean really is not the spirit of *Miller*. A43.
>
> If you parcel out the 40 at this time, Judge, [that] is not really consistent . . . with what [the original court] was doing. [The court] knew . . . that he was giving him life without parole. So, I mean, to say now that, well, this part should stand, I mean, it is not really consistent with what the sentence was. The sentence was life without parole. I submit to your Honor that really what we are here for today is a new sentencing hearing[.] A44.
>
> [I]t should be clear that really it is a whole new sentencing. Everything was part and parcel of imposing a sentence that the Court thought was the correct sentence[.] A85

Counsel's argument was thus "inherent in the [defendant's] positions," *Huber*, 469 F.3d 67, 75 (3d Cir. 2006), and was "presented . . . with sufficient specificity to alert the district court," preserving the issue. *Brennan v. Norton*, 350 F.3d 399, 418 (3d Cir. 2003) (citation omitted). That counsel did not use the magic words "sentencing package doctrine" matters not, since "[p]arties are free . . . to place

greater emphasis and more fully explain an argument on appeal than they did in the District Court." *United States v. Joseph*, 730 F.3d 336, 341 (3d Cir. 2013). Indeed, the district court understood Grant's argument and the relief requested, stating "I understand your point. You are saying that I should look at this as one cohesive sentence of life and treat it that way in determining what is an appropriate total sentence." A42; *accord* A44. And it would be particularly Draconian to hold these claims waived given that counsel, reasonably believing the entire sentence to be before the court, was caught off guard at resentencing.[10] *See United States v. Sherwood*, 850 F.3d 391, 395 (8th Cir. 2017) (no waiver because "lack of notice of an unexpected condition [at sentencing] 'may make it difficult for the defendant to mount an effective challenge to it'") (citation omitted). Grant's argument is preserved.

B. The Sentencing Package Doctrine Requires Resentencing *De Novo* When Part of an Interconnected Sentence Is Vacated.

The Government argues that the sentencing package doctrine applies to resentencings that follow a vacated conviction but not to one following an unconstitutional sentencing, and that the doctrine is discretionary in any event. GB19-23. But this Circuit has consistently held the doctrine applicable where a

[10]The order granting resentencing stated "Petitioner is hereby entitled to a new sentencing hearing." A9. Counsel interpreted this as a remand for resentencing *de novo*. *See* A40. The Government first argued otherwise four days before the hearing. A487.

sentence alone was vacated. *See*, *e.g.*, *United States v. Guevremont*, 829 F.2d 423, 428 (3d Cir. 1987); *United States v. Fumo*, 513 Fed.Appx. 215, 218-19 (3d Cir. 2013); *United States v. Brown*, 385 Fed.Appx. 147 (3d Cir. 2010). This is because application of the doctrine turns on whether "the punishment still fits both crime and criminal'" *United States v. Murray*, 144 F.3d 270, 274 n.4 (3d Cir. 1998) (citation omitted), *i.e.* whether a vacated conviction *or* sentence unbundles the package. *See United States v. Busic*, 639 F.2d 940, 947 n.10 (3d Cir. 1981) ("When a defendant challenges one of several interdependent sentences, he, in effect, challenges the entire sentencing plan.").

The Government is also wrong that the sentencing package doctrine is discretionary. The Government cites *United States v. Davis*, 112 F.3d 118, 122-23 (3d Cir. 1997), for the proposition that a sentencing court is "free to review," "entitled to reconsider" and has "jurisdiction to recalculate" a sentence, and *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989), for the notion that a sentencing court "is in the best position . . . to redefine the package's size and shape . . . if appropriate." GB21-22. But the Government overlooks that in *Davis*, "[t]he issue before the court [was] whether the district court had jurisdiction to recalculate the aggregate sentence," 112 F.3d at 120, and in *Pimienta-Redondo*, it was whether resentencing on counts not vacated was vindictive under *North Carolina v. Pearce*, 395 U.S. 711 (1969), *see* 874 F.2d at 12. In both cases,

permissive language was all that was necessary to reject claims that courts had exceeded their authority. These decisions do not answer whether a district court is required to resentence *de novo* when part of an interdependent sentence is vacated, a question this circuit answers in the affirmative. *United States v. Ciavarella*, 716 F.3d 705, 734 (3d Cir. 2013) ("Resentencing *de novo* is necessary [where a sentencing package is unbundled on appeal]"); *id.* ("District courts should resentence *de novo* when an interdependent count of an aggregate sentence is vacated."); *accord United States v. Miller*, 594 F.3d 172, 180 (3d Cir. 2010) ("[T]he sentences . . . were interdependent, such that the sentencing package doctrine applied, and [defendant's] second sentencing was *de novo*."); *see also United States v. Reed,* 1996 WL 617422, at *4 (E.D. Pa. Oct. 18, 1996) (because an interdependent conviction was vacated, "the Court must [] refashion [defendant's] sentence . . . with respect to [] undisturbed Counts.").

Of course, the need for *de novo* resentencing is even greater here, given the constitutional overlay of *Miller*, which holds that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 567 U.S. at 474. As defense counsel argued at resentencing, it defies

"the spirit of *Miller*," A43, to conduct a limited resentencing where the result is an aggregate sentence that ignores his youth. *See* DB53 (citing cases).[11]

For these reasons, the district court's failure to resentence *de novo* requires reversal even under plain error review. Third Circuit law is "plain," "clear," and "obvious" on this point, *Syme*, 276 F.3d at 143 n.4, and there can be no question but that Grant was prejudiced because his overall sentence is constitutionally tainted, a result that speaks to "fairness" and "integrity," *Nappi*, 243 F.3d at 762.

C. The District Court Did Not Conduct a *De Novo* Resentencing.

Finally, the Government briefly suggests that Grant was, in fact, resentenced *de novo* because the district court "[took] a 'look at' his other, 'drug' and 'gun' convictions" and concluded that "no adjustment was necessary[.]" GB22-23 (quoting A151-52). This contention is unsupported by the record. As Grant has argued, the district court reviewed his other sentences for manifest injustice based on the apparent, erroneous belief that the law-of-the-case doctrine applied—not to determine, *de novo*, whether those sentences should be reimposed. DB at 47-48. This Court should remand for resentencing *de novo*.

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[11]The Government argues that the remand in *Bear Cloud v. State*, 334 P.3d 132, did not require *de novo* resentencing under *Miller*, but left the court "free '*to consider* the entire sentencing package.'" GB22 n.6 (citing *Bear Cloud*, 334 P.3d at 141 (emphasis in GB)). The Government takes this statement out of context, which reads in full, "We remand for the district court to consider the entire sentencing package—that is, sentences for all three counts—when it resentences [Defendant]." 334 P.3d at 141.

CONCLUSION

For the foregoing reasons, Grant respectfully submits that the Court should vacate his sentence and remand for resentencing under *Miller*.

Respectfully submitted,

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Avram D. Frey, Esq.
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

Counsel for Defendant-Appellant

Dated: September 5, 2017

CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Lawrence S. Lustberg, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Word Count, Identical Text, and Virus Check

I hereby certify that this Reply Brief complies with the type and volume limitations set forth in Fed. R. App. P. 32(a)(7). This Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed. R. App. P. 32(a)(6) because this Reply Brief has been prepared using a proportionally spaced typeface using Microsoft Word with 14-point font. According to the word count feature of Microsoft Word, this Reply Brief contains 6,486 words, excluding those parts exempted by Fed. R. App. P. 32(f). The text of the electronic version of this Reply Brief is identical to the text in the paper copies. The electronic PDF brief has been prepared on a computer that is automatically protected with a virus detection program, namely a continuously updated version of Sophos Endpoint Security and Control, version 11.5.4, and no virus was detected.

3. Certification of Service

I hereby certify that on September 5, 2017, I caused the foregoing Reply Brief 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 to have seven (7) paper copies of the Reply Brief delivered to:

Marcia Waldron
The Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

I hereby certify that on September 5, 2017, I caused the foregoing Reply Brief to be served upon the counsel of record for Appellee through the Notice of Docketing Activity issued by this Court's CM/ECF system.

/s/ Lawrence S. Lustberg____
Lawrence S. Lustberg, Esq.

Dated: September 5, 2017