Corrected

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, Ch. U.S.D.J.

SUPPLEMENTAL BRIEF FOR APPELLEE

CRAIG CARPENITO
UNITED STATES ATTORNEY
Attorney for Appellee
970 Broad Street
Newark, New Jersey 07102-2535
(973) 645-2700

On the Brief:

Bruce P. Keller
Assistant U.S. Attorney
Special Counsel to the U.S. Attorney
(973) 645-2930

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

TABLE OF ABBREVIATIONS v

INTRODUCTION 1

ARGUMENT 3

I. THERE IS NO EIGHTH AMENDMENT VIOLATION BECAUSE GRANT'S RESENTENCING RESULTED IN A SHORTER, NON-LIFE SENTENCE 3

A. What the Eighth Amendment Forbids, What It Permits and What It Requires for Juvenile Offenders 3

B. Grant Did Not Receive a *De Facto* LWOP Sentence. 6

II. GRANT CANNOT SHOW PLAIN ERROR 14

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page(s)**

Ala. State Fed'n of Labor v. McAdory,
325 U.S. 450 (1945) 12

Atkins v. Virginia,
536 U.S. 304 (2002) 16, 17

Barber v. Thomas,
560 U.S. 474 (2010) 7

Gov't of V.I. v. Vanterpool,
767 F.3d 157 (3d Cir. 2014) 16

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

Hassan v. City of New York,
804 F.3d 277 (3d Cir. 2015) 12

Henderson v. United States,
568 U.S. 266 (2013) 15

Kelly v. Brown,
851 F.3d 686 (7th Cir. 2017) 20

Kennedy v. Louisiana,
554 U.S. 407 (2008) 17, 19

Miller v. Alabama,
567 U.S. 460 (2012) ..... *passim*

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

Puckett v. United States,
556 U.S. 129 (2009) 16

Roper v. Simmons,
543 U.S. 551 (2005) 3

Setser v. United States,
566 U.S. 231 (2012) 14

United States v. Cotton,
535 U.S. 625 (2002) 15

United States v. Grant,
887 F.3d 131 (3d Cir.), *vacated*, 905 F.3d 285 (3d Cir. 2018) 11, 13, 16

United States v. Miknevich,
638 F.3d 178 (3d Cir. 2011) 15

United States v. Olano,
507 U.S. 725 (1993) 15

United States v. Whitted,
541 F.3d 480 (3d Cir. 2008) 13

Virginia v. LeBlanc,
137 S. Ct. 1726 (2017) 11

White v. Woodall,
572 U.S. 415 (2014) 12

Statutes

18 U.S.C. § 3582(c)(1)(A) 7, 13, 14

18 U.S.C. § 3624(b) 7

18 U.S.C. § 3624(c) 7

D.C. CODE § 24-403.03 (2018) 18

MASS. GEN. LAWS ch. 119 (2018) 18

N.D. CENT. CODE § 12.1-32-13.1 (2018) 18

Pub. L. No. 115-391 (2018) 2, 7, 13

WASH. REV. CODE § 9.94A.730 (2018) 18

WYO. STAT. ANN. § 6-10-301 (2013) 19

Rules and Guidelines

Fed. R. Crim. P. 52 .....15, 16

U.S.S.G. § 1B1.13 .....13, 14

Other Authorities

Scott, Grisso, Levick & Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMPLE L. REV. 675, 695 (2016)..... 10

TABLE OF ABBREVIATIONS

"A"	refers to the Appendix filed by Grant.
"DB"	refers to Grant's Opening Brief, filed May 3, 2017.
"DRB"	refers to Grant's Reply Brief, filed September 5, 2017.
"DRP"	refers to Grant's Response to the Government's petition for rehearing *en banc*, filed September 6, 2018.
"DSB"	refers to Grant's Supplemental Brief, filed December 21, 2018.
"GB"	refers to the Government's Brief, filed July 25, 2017.
"GP"	refers to the Government's petition for rehearing *en banc*, filed August 16, 2018.
"JLC"	refers to the amicus brief by the Juvenile Law Center, filed December 24, 2018.
"JSP"	refers to the amicus brief by the Juvenile Sentencing Project, filed December 28, 2018.
"LC"	refers to the amicus brief by the Lawyers' Committee for Civil Rights under Law, filed December 28, 2018.
"LS"	refers to the amicus brief by the Legal Scholars, filed December 28, 2018.
"SA"	refers to the Supplemental Appendix filed by the Government.

INTRODUCTION

This appeal presents a single overriding question. Does defendant Corey Grant's aggregate, discretionary sentence of 65 years' imprisonment for multiple felonies, including three murders, an attempted murder and drug-trafficking, violate the Eighth Amendment? The controlling law is what the Supreme Court actually held in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Under that law, the answer is "No."

Grant's imprisonment is scheduled to end several ***years*** before he reaches his projected life expectancy. That gives him the "chance to leave prison before life's end," *Graham*, 560 U.S. at 79, meaning Grant received neither an actual nor *de facto* life sentence without possibility of parole. Because his sentence does not guarantee his death behind bars, the Eighth Amendment's procedural requirements play no role. But even if they did, the District Court satisfied them by making an individualized determination of whether Grant's crimes, GB8–11; GP1, 5–6, reflected irreparable corruption, as opposed to the transient immaturity of youth, *Miller*, 567 U.S. at 479–80; *see* GB41–42 (citing the many instances in which the District Court recognized Grant's age at the time as a mitigating factor).

Grant now has received the meaningful ***opportunity*** to reduce his sentence that the Supreme Court explicitly held would remedy a "*Miller* violation." *Montgomery*, 136 S. Ct. at 736. His claim that the Eighth

Amendment requires more, in the form of actual release years earlier, is not only unpreserved, but wrong. The Eighth Amendment does not "guarantee eventual freedom to a juvenile offender," only "some meaningful opportunity to obtain release." *Graham*, 560 U.S. at 75; *see Montgomery*, 136 S. Ct. at 736 ("permitting juvenile homicide offenders ***to be considered***" for release satisfies the Eighth Amendment) (emphasis added). On top of that, Grant has another meaningful opportunity to seek an even earlier release. Through the newly-enacted First Step Act of 2018, Pub. L. No. 115-391 (2018), he now may seek compassionate release whether or not his prison warden supports it.

Throughout this appeal, Grant has ignored what the Supreme Court actually has held the Eighth Amendment prohibits for juvenile offenders: A sentence that dooms the defendant to die in prison without any hope of obtaining release. Instead, he emphasizes policy arguments and cherry-picks *dicta*. His latest approach is to claim 12 state statutes (his *amici* cite a handful more) reflect an "emerging social consensus" that corrigible juvenile offenders should have a presumptive, 30-year cap on imprisonment. DSB4–7.

Grant's consensus argument is seriously flawed. The statutes he cites create no cap, presumptive or otherwise. Instead, they establish dates (that vary by decades) by which a parole or other sentence modification hearing must occur. In other words, they create exactly the remedy Grant already received, 24 years after his original sentence was imposed, and which the

Supreme Court has held can cure the constitutional violation in a prior, mandatory life-without-parole sentence. Grant's 65-year aggregate sentence does not violate the Eighth Amendment and should be affirmed.

ARGUMENT

I. THERE IS NO EIGHTH AMENDMENT VIOLATION BECAUSE GRANT'S RESENTENCING RESULTED IN A SHORTER, NON-LIFE SENTENCE.

The Eighth Amendment prohibits infliction of "cruel and unusual punishments." What counts as "cruel and unusual" punishment for juvenile offenders has changed over time. But under the Supreme Court's controlling precedents, Grant's sentence does not violate the Eighth Amendment. It would require an improper expansion of those precedents to overturn his sentence on this record.

A. What the Eighth Amendment Forbids, What It Permits and What It Requires for Juvenile Offenders

Several Supreme Court decisions address juvenile sentencing. *Roper v. Simmons*, 543 U.S. 551 (2005), held that "the death penalty is disproportionate punishment for offenders under 18," *id*. at 574, because "juvenile offenders cannot with reliability be classified" as incorrigible, placing them "among the worst offenders," *id*. at 569.

Then in *Graham*, the Supreme Court prohibited juvenile life without possibility of parole ("LWOP") for non-homicide offenses by juveniles. LWOP, like the death sentence prohibited in *Roper*, "guarantees" death in

prison by denying "any meaningful opportunity to obtain release." 560 U.S. at 79. That "alters" a juvenile offender's life with a "forfeiture that is irrevocable," making it, like capital punishment, disproportionate. *Id*. at 69–70.

The Court returned to the "correspondence" between juvenile LWOP and the death penalty in *Miller*, 567 U.S. at 474–75. Because both are the "harshest penalties," *id*. at 477, mandatory LWOP sentences for juvenile offenders are unconstitutional — even for murderers — because they preclude considering how the capacity of youth to mature "counsel[s] against irrevocably sentencing them to a lifetime in prison," *id*. at 479–80.

Finally, the irrevocable nature of LWOP led the Court in *Montgomery* to conclude that, as a substantive matter, the Eighth Amendment precludes a sentence that condemns juvenile homicide offenders "to die in prison" unless "their crime[s] … reflect irreparable corruption" and, as a result, they are not capable of maturing over time. 136 S. Ct. at 736. Because *Montgomery* held *Miller* was retroactive, *id*. at 734, the Court also identified the remedy for those defendants, like Grant, previously sentenced to mandatory LWOP: An outside date by which they must be ***considered*** for sentence modification or parole, *id*. at 736, although, as *Graham* held, release is never guaranteed, 560 U.S. at 82.

Collectively, these cases establish that the Eighth Amendment permits the following sentences for juvenile offenders who commit serious felonies:

1) Discretionary LWOP, but only for those who commit homicide and are incorrigible, *Montgomery*, 136 S. Ct. at 736.

2) For everyone, life sentences that offer a meaningful opportunity to obtain earlier release, whether through parole hearings or otherwise, *Graham*, 560 U.S. at 82.

3) Sentences shorter than life, which inherently provide a meaningful opportunity for release, whether imposed at the outset or, as here, reduced through a resentencing, *Montgomery*, 136 S. Ct. at 736.

Determining which category applies turns on whether the offender's crimes reflect transient immaturity or irreparable corruption. *Miller*, 567 U.S. at 480.

Because parole generally is not available in the Federal system, applying the Supreme Court's Eighth Amendment juvenile sentencing jurisprudence to fashion a Federal sentence might sometimes pose a square-peg-round-hole issue. But not so here. Grant's 65-year aggregate sentence falls easily into the third category. The District Court carefully considered Grant's youth as a mitigating factor in his crimes. Counterbalanced against that, however, was Grant's guilt in one murder, his attempt at another and his role in the murder and dismemberment of a cooperating witness and the execution-style murder of a 16-year-old girl. Unlike other juveniles in Grant's gang, whose roles were limited to "the distribution of … drugs," A152, Grant was the enforcer for a profit-making, "drug trafficking … enterprise," who distinguished himself from other juveniles with his "horrible" and "gruesome" conduct, A152–53.[1]

[1] Given these facts, critiques of the "super-predator" theory do not advance the Eighth Amendment analysis governing this appeal. LC2–8.

Although the District Court did not conclude that Grant's crimes reflected incorrigibility, the new sentence still needed to "deter Mr. Grant when he comes out of jail." A155–56. Accordingly, the court reduced Grant's previously mandatory LWOP sentence to an aggregate 65-year term of imprisonment and imposed "supervised release for life" on his drug counts of conviction. *Id.* (That the District Court did not reflexively re-impose the same terms of supervised release imposed in 1992 provides yet another reason, *see* GB18–23, why the sentencing package doctrine cannot justify another resentencing here. *See* DB48 (arguing the doctrine applies absent some "reconstruct[ion]" of his original "sentencing architecture").)

B. Grant Did Not Receive a *De Facto* LWOP Sentence.

Grant continues to claim that because he will "likely be dead before he is released," his sentence amounts to *de facto* LWOP. DB23; DSB2 n.2 (incorporating that argument by reference). The record shows, as an actuarial matter, he's wrong. That should doom his Eighth Amendment claim.

Grant's life expectancy, correctly measured from his current age, now is 77. SA153; DRB9 n.6 (conceding life expectancy increases with every year of survival). According to Grant's own calculation, with good time credit, his prison term could end before he turns 72, DB18 n.2, at least five years ***before***

his current life expectancy.[2] And he could be transferred to a halfway house up to a year (and to home confinement up to six months) before then. 18 U.S.C. § 3624(c)(1)–(c)(2). Thus, Grant could leave prison when he is 71, even without compassionate release through 18 U.S.C. § 3582(c)(1)(A). Because his sentence does not condemn him to death in prison, it does not qualify under the Supreme Court's definition of a LWOP sentence. GB24–27.[3]

That should end the Eighth Amendment analysis. A juvenile sentence is not disproportionate unless it "guarantees" a corrigible juvenile will "die in prison," thus raising the "same concerns" as "an execution that [brings] ***life to its end***." *Graham*, 560 U.S. at 79 (emphasis added); *id*. at 69–70 (the violation is the ***irrevocable*** forfeiture of ***any*** life outside of prison by denying ***all*** parole or other sentence modification opportunities); *Montgomery*, 136 S. Ct. at 736 (the

[2] Even longer incarceration, lasting until Grant's life expectancy, would not ***guarantee*** his death in prison. Life expectancy calculations simply establish the age at which an individual has a 50% chance of living longer. GB25; GP9–10.

[3] Section 102(b) of the First Step Act amended 18 U.S.C. § 3624(b) to determine the maximum amount of good time credit (54 days per year) by the length of the prison sentence, not how much of that sentence remains. For Grant, that difference could shave 455 more days — 1¼ years — from his sentence. *See generally Barber v. Thomas*, 560 U.S. 474 (2010). The Bureau of Prisons' Inmate Locator currently projects a later "release date," but that projection does not reflect the change in calculating good time credit. Adjusting for that means Grant could leave prison for a halfway house as early as 71. The larger point remains: Grant is not guaranteed to die in prison, so his is not a LWOP sentence.

violation is precluding all opportunity to "demonstrate the truth of *Miller*'s central intuition": "children who commit even heinous crimes" can change).

Accordingly, an impermissible juvenile sentence offers a corrigible offender "***no chance*** for fulfillment outside prison walls, ***no chance*** for reconciliation with society, ***no*** hope" and "***no chance*** to leave prison ***before life's end***." *Graham*, 560 U.S. at 79 (emphasis added). "[T]he Eighth Amendment does not permit" denying such an offender "***any chance***" of release before death. *Id*.; *see Miller*, 567 U.S. at 479–80 (constitutional "sentencing scheme" may not "***irrevocably sentenc[e]***" juvenile offenders "to a ***lifetime*** in prison") (emphasis added). Although the Eighth Amendment never guarantees release for corrigible juvenile offenders, it does preclude denying them all opportunity to seek such release.

Where, as here, a juvenile offender has received not only the meaningful opportunity for youth to be considered as a mitigating factor, but also a non-life sentence as a result, no additional remedy is required. The "procedure *Miller* prescribes," *Montgomery*, 136 S. Ct. at 735, is the one Grant received: A hearing where the characteristics of youth are "considered as sentencing factors" to separate those juveniles who may receive LWOP sentences (or resentences) "from those who may not." *Graham*, 560 U.S. at 82 (juvenile life sentences remain permissible when accompanied by a procedure providing "some realistic opportunity to obtain release before the end of that term").

Here, the separation *Graham* requires took place at a hearing conducted exactly as Grant (and his now current counsel) argued it should proceed. A54–55. They agreed there would be no constitutional issue were the District Court to sentence Grant based on "considerations specific to this defendant," including his "youth." *Id*. The District Court did as requested, "taking into account all that *Miller* … and *Montgomery* require[]," *id*., and sentencing Grant "based on the 3553 factors," A81. In so doing, the court made clear Grant's sentence had to reflect ***all*** of his crimes, several of which had previously resulted in proper 40-year sentences. Whether one looks at the meaningful opportunity Grant received substantively (by focusing on his non-life sentence) or procedurally (by focusing on his *Miller* resentencing), he received what the Eighth Amendment requires.

Grant nonetheless claims he deserves more, proposing a presumptive, 30-year cap. DSB4–7, 17–20. But if the severity of the offense warrants it, even actual life sentences for corrigible juveniles remain constitutional, provided they are not mandatory and permit a meaningful opportunity for release. *Graham*, 560 U.S. at 75 (Eighth Amendment does not preclude life sentences; it precludes "making the judgment at the outset that [juvenile] offenders never will be fit to reenter society"). The District Court properly concluded that the severity of Grant's many offenses, which included three murders committed on separate occasions, warranted a non-life, aggregate sentence of 65 years.

Grant's proposed cap, even if only presumptive, contradicts the Supreme Court's actual Eighth Amendment holdings. That is why Grant (and his *amici*) cherry-pick *dicta* regarding "fulfillment outside prison walls" and "reconciliation with society." *See* DSB2, 12, 20; JSP2; JLC7; *see also* JLC3 (literally replacing the Supreme Court's emphasis on an absolute "guarantee[]" of death in prison with the incorrect argument that a sentence is unconstitutional if it "effectively" sentences a juvenile "to spend the rest of his life in prison"). *But see* Scott, Grisso, Levick & Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMPLE L. REV. 675, 695 (2016) (acknowledging that, even if the Court extended its reasoning to *de facto* life, a juvenile sentence would have to exceed "the juvenile offender's life expectancy" to violate the Eighth Amendment).

To be clear: Holding that actual reconciliation and fulfillment are ***required*** would contravene the principles that the Eighth Amendment does ***not*** prohibit life sentences and eventual release is ***never*** guaranteed. *Graham*, 560 U.S. at 75, 82; *see Miller*, 567 U.S. at 479 (reiterating that the Eighth Amendment requires only "some meaningful opportunity" for release, not the "eventual freedom" that follows release). Instead, the Court used the considerations cited by Grant to illustrate why a ***mandatory*** LWOP sentence — one that precludes both tailoring a juvenile sentence at the outset and reducing it later — is disproportionate when imposed on a corrigible offender. No

matter what changes maturity may bring, that sentence "makes an irrevocable judgment about that person's value and place in society." *Graham*, 560 U.S. at 74. That mandatory, immutable aspect is disproportionate.

Accordingly, the constitutional violation does ***not*** turn on obtaining actual reconciliation or fulfillment. It therefore is irrelevant under the Eighth Amendment whether Grant's preferred sentences would provide him more time to marry or raise a family. DSB12–14. The Eighth Amendment is not violated by diminishing the "qualitative aspects of adult life." DSB13. Were that the standard, the Eighth Amendment would guarantee eventual freedom. The Supreme Court held just the opposite.[4] Although corrigible juvenile offenders may not be denied ***any*** opportunity to seek release, *Graham*, 560 U.S. at 79, so long as that opportunity arrives, as it already has for Grant, juvenile offenders can still be denied release. But unlike those offenders, Grant's sentence by its own terms will expire before he reaches his life expectancy.

The absence of parole in the Federal system might make a new sentence so long that it denies any meaningful chance to leave prison. *But see Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) ("'Perhaps the logical next step from' *Graham* would be to hold that a geriatric release program does not satisfy the

[4] The Panel recognized that in entitling juvenile offenders to "some meaningful opportunity to obtain release," *Miller*, 567 U.S. at 479, *Graham*, 560 U.S. at 75, the Supreme Court was not holding that they also have a right to the "opportunity to live a meaningful life" outside of prison. *United States v. Grant*, 887 F.3d 131, 150 (3d Cir.), *vacated*, 905 F.3d 285 (3d Cir. 2018).

Eighth Amendment, but 'perhaps not.' '[T]here are reasonable arguments on both sides.'" (citations omitted) (quoting *White v. Woodall*, 572 U.S. 415, 477 (2014)).[5] That issue, however, does not arise here because Grant, after his *Miller* resentencing, received a sentence that, by its terms and with good time credit, guarantees release several years before life expectancy. That represents both the procedural opportunity and substantive sentence required by the Eighth Amendment. The constitutional infirmity with the prior, mandatory LWOP sentence has been cured. GB38–43.

For that reason, Grant's presumptive cap creates significant Article III problems. He invites this Court to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Hassan v. City of New York*, 804 F.3d 277, 301 n.12 (3d Cir. 2015) (citations omitted); *see Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (Article III courts cannot give advisory opinions and do not decide any constitutional question until it is necessary). There are prudential reasons to decline Grant's premature invitation, too: To avoid wasting judicial resources, minimize the risk that unnecessary decisions may be wrong, and recognize that

[5] The Government acknowledges "very long" sentences — "100" or "150" years — might deny all opportunity for release, thus raising the same issues the Supreme Court identified in *Graham* and *Miller*. Audio of Argument starting at 41:00, *available at* https://www2.ca3.uscourts.gov/oralargument/audio/16-3820USAvGrant.mp3. As explained below, however, the possibility of compassionate release, especially now that defendants may seek it by motion, still would provide a meaningful release opportunity. *See* pp. 13–14, *infra*.

specific facts stimulate more concrete and accurate adjudication. *United States v. Whitted*, 541 F.3d 480, 492–93 (3d Cir. 2008) (Chagares, J., concurring).

Not only does this record not permit the creation of a presumptive cap, but Congress also recently expanded the compassionate release provision that govern all federal sentences: 18 U.S.C. § 3582(c)(1)(A).[6] Under § 603(b) of the First Step Act, Grant may now directly move, 30 days after requesting compassionate release from the warden of his facility, to reduce his non-life term of imprisonment, even if the Bureau of Prisons does not agree any extraordinary or compelling reason warrants earlier release. As the Government explained earlier, this opportunity, like discretionary parole or geriatric release, can provide Grant another meaningful opportunity for release. GP11–12. Even before the First Step Act, "serious deterioration in physical or mental health because of the aging process" could by itself warrant a reduction of sentence for any 65-year-old inmate. U.S.S.G. § 1B1.13, cmt. n.1(B). Although "rehabilitation of the defendant" alone won't suffice, it can be considered "in combination with" other factors. *Id.*, cmt. nn.1(D), 3.

Previously, the Panel deemed § 3582(c)(1)(A) inadequate, because it was discretionary and required a motion by "the Director of the Bureau of Prisons." 887 F.3d at 145 n.10. But parole is discretionary, too, the potential

[6] This makes it even more unnecessary for this Court to "strike down" the "abolition of parole as applied to juveniles." GSB7 n.10.

for which alone cures any Eighth Amendment defect in a juvenile offender's sentence. *See Montgomery*, 136 S. Ct. at 736. And a motion from the Director is no longer necessary. Thus, in addition to the hearing and sentence that cured his "*Miller* violation," 136 S. Ct. at 736, Grant has the right under § 3582(c)(1)(A) to seek a sentence reduction from the District Court, or even outright release, upon exhausting certain procedural requirements. That "provides a mechanism for relief" if his sentence someday "produces unfairness to" him in light of unanticipated developments. *Setser v. United States*, 566 U.S. 231, 242–43 (2012). This opportunity for earlier release cannot be dismissed as meaningless.

* * *

A juvenile sentence violates the Eighth Amendment when it (a) is a mandatory life sentence that (b) denies all meaningful subsequent opportunity for release. Grant's new sentence, under which he could leave prison while he is 71, if not sooner, embodies neither attribute, let alone both. That sentence therefore satisfies the Eighth Amendment.

II. GRANT CANNOT SHOW PLAIN ERROR.

When his new sentence was imposed, Grant had to object on the Eighth Amendment grounds he now raises to avoid plain error review. He did not. A156–57 (Grant's counsel responds "[n]o, your Honor," when asked whether he had "[a]nything" to say after the District Court imposed its judgment).

Grant's sole objection below (made before his sentence was announced) was that "starting at a guideline calculation that suggests life" would violate *Miller* even under advisory Guidelines. A49, 54. The District Court obviated that objection by proceeding exactly as Grant's current counsel (and then-amicus counsel) suggested.

Grant's new argument that the Eighth Amendment entitles him to a resentencing governed by a presumptive cap of 30 years, DSB4, cannot possibly meet the plain error standard. *United States v. Olano*, 507 U.S. 725, 731 (1993) (constitutional right, like any other, may be forfeited); *United States v. Miknevich*, 638 F.3d 178, 185 (3d Cir. 2011) (failure to raise Eighth Amendment challenge to sentence results in plain error review). To establish plain error, Grant must show: (1) the failure to apply a literally unprecedented 30-year presumptive maximum sentence was an error that (2) was plain, (3) affected substantial rights, and (4) would if left uncorrected seriously affect the fairness, integrity or public reputation of judicial proceedings. *See* Fed. R. Crim. P. 52(b); *United States v. Cotton*, 535 U.S. 625, 631 (2002).

He cannot meet either the first or second requirements. Putting aside that Grant's sentence does not violate the Eighth Amendment, pp. 1–14, *supra*, Rule 52(b) requires the "error" — here, the District Court's failure to presumptively cap the new sentence at 30 years' imprisonment — to violate settled law at the time of appellate consideration. *Henderson v. United States*, 568

U.S. 266, 279 (2013); *see Puckett v. United States*, 556 U.S. 129, 135 (2009) (not enough for error to be "subject to reasonable dispute"); *Gov't of V.I. v. Vanterpool*, 767 F.3d 157, 163 (3d Cir. 2014) (Rule 52(b) "does not permit us to reach" constitutional issue "far from being 'clear under current law'").

No court has held such a cap is required for juvenile sentences, and it would directly contravene Supreme Court law to conclude otherwise. The Panel itself noted the novelty of any presumption in favor of releasing juvenile offenders, acknowledging a retirement age limit "raise[d] an issue of first impression," 887 F.3d at 142. That, by definition, means any supposed Eighth Amendment error could not be plain. *See* 887 F.3d at 138 (acknowledging it had to take "the next incremental step in the constitutional dialogue over the contours of" sentencing "juvenile homicide offenders"); *id*. at 146 (noting circuit split as to whether *Miller* even applies to *de facto* life sentences, albeit without acknowledging Grant did not receive one, and basing its conclusions on "[t]he weight of authority"); *see also* GB33–34, 36–37 (citing cases).

That alone defeats Grant's 30-year presumption at step two of plain error review. Nonetheless, it is useful to review the state statutes on which he and his *amici* rely, along with what the Supreme Court has said about such statutes.

As a threshold matter, the statutory consensus Grant identifies does not exist. He misreads *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting death penalty for intellectually disabled criminals), and has his math wrong. DSB5.

Atkins expressly held that even 16 relevant statutes would ***not*** be "sufficient evidence" of a nationwide consensus that the death penalty was a disproportionate punishment for that class of offender. *Atkins* required almost two-thirds of the nation to agree before concluding there was "powerful evidence" of an emerging social consensus. 536 U.S. at 314–16.

Subsequent cases reiterated that a consensus requires more than a majority. In *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008), which prohibited the death penalty for child rape not resulting in death, the Court emphasized that the consensus it found in other cases, including *Atkins* and *Roper*, required at least 30 jurisdictions and, in *Kennedy* itself, 45. Neither Grant nor his *amici* marshal numbers even approximating a consensus among jurisdictions. JSP6–10 (less than half the nation has adopted relevant legislation).[7]

More importantly, *Atkins* notes it is "not so much the number of" statutes, but their consistency, that matters. 536 U.S. at 315; *see Kennedy*, 554 U.S. at 431 ("consistency" of the legislation is far more important than raw numbers). The statutes Grant identifies are consistent, but not in any way that helps him. Far from creating any cap on juvenile sentences, those statutes do

[7] Disparate judicial opinions further demonstrate the complete absence of any national consensus regarding how far *Miller*, *Montgomery* or even *Graham* extend. GB33–37; GP10 n.3, 12. There is no uniformity about whether those decisions extend beyond mandatory LWOP sentences, cover aggregate sentences or even apply to a *de facto* life sentence for a single offense.

no more than set deadlines by which a parole or sentence modification hearing must be held. The text of the statutes themselves, not to mention the summary provided by Grant's *amici*, makes that clear. *See* JSP6–11.

Grant treats these outside hearing dates as if release inevitably follows such a hearing, but that's wrong. Because none of these statutes mandates release, all contemplate it may never occur; some explicitly. *E.g.*, D.C. CODE § 24-403.03 (2018); MASS. GEN. LAWS ch. 119, § 72B (2018); N.D. CENT. CODE § 12.1-32-13.1 (2018); WASH. REV. CODE § 9.94A.730 (2018). Beyond that, the disparity in hearing dates among these statutes demonstrates significant policy differences as to how much time a juvenile offender must serve before even being considered for release. Indeed, some States do not even set a date by which a hearing must be held. JSP10. It is impossible to conclude from these very different approaches that, collectively, there is any consensus on that issue, let alone, as Grant argues, one reflecting a constitutionally imposed sentencing limit. There is no "collective wisdom" among the country's legislatures supporting a presumptive cap. LS10.

Take the Wyoming statute that *Montgomery* highlighted as one way to cure an unconstitutional juvenile LWOP sentence. 136 S. Ct. at 736. Under that statute, a juvenile offender "sentenced to life imprisonment" is eligible for parole after 25 years of incarceration, but is not guaranteed release. Alternatively, if that life sentence has been commuted to "a term of years" —

and there is no limit on the number of those years — the offender remains parole eligible, but, in that case, there is no date by which a hearing must be held and, again, no guarantee of release. WYO. STAT. ANN. § 6-10-301(c) (2013).

Given the Supreme Court's citation to this statute as an example of a remedy for an unconstitutional juvenile sentence, it cannot be that the Eighth Amendment requires a presumptive outside release date. Rather, *Montgomery* must be read as the Court's most recent reaffirmation of the rule that release is never guaranteed. Neither the text of the Wyoming statute nor any other cited by Grant or his *amici*, DSB2, 4-7, supports the judicial creation of any kind of presumptive cap, let alone one that would be decades shorter than the 65-year aggregate term of imprisonment the District Court deemed appropriate. JSP6.

Yet another flaw with Grant's consensus argument is that the Supreme Court has used state statutes to determine whether the Eighth Amendment prohibits an entire category of punishment, *Kennedy*, 554 U.S. at 421–22 ("making a crime punishable by death"), as applied to an entire category of criminals, *id.* at 420 (death penalty limited to offenders whose "extreme culpability" warrants execution). The Supreme Court has not used such statutes to "mandate[] … that a sentencer follow a certain process … before imposing a particular penalty" on a juvenile offender. *Miller*, 567 U.S. at 483.

That, however, is exactly what Grant proposes. GSB17–18 (30-year presumptive cap leaves room for "divergence").

If anything, these statutes expose the illogic of Grant's consensus argument. He has built his presumptive 30-year limit on juvenile sentences on statutes that impose no such limit. Under Grant's own, albeit incorrect, view of the Eighth Amendment, however, those statutes themselves would be unconstitutional. *See Kelly v. Brown*, 851 F.3d 686, 687 (7th Cir. 2017) (juvenile sentence that, *inter alia*, provides for parole eligibility at age 70 "afford[s] all that [offender] was entitled to under *Miller*").

Grant also uses the supposed consensus to encourage this Court to "draw a line short of sentences that guarantee death for corrigible juveniles." DSB3. But the Supreme Court already has drawn that line. Once again, the Eighth Amendment does not "guarantee eventual freedom to a juvenile offender"; it only requires "some meaningful opportunity to obtain release." *Graham*, 560 U.S. at 75. Grant's sentence gives him that opportunity.

CONCLUSION

Grant's mandatory LWOP prison sentence was reduced, after the type of hearing that cures a *Miller* violation, to a total of 65 years. His new sentence enables him to obtain release from prison years before he reaches his life expectancy — more than what the Supreme Court says the Eighth Amendment requires. That sentence is also fitting punishment for the severity of Grant's crimes, which included "gruesome" and "horrible" murders. A153.

Because the District Court did not resentence Grant to life, *de facto* life or anything guaranteeing his death in prison, this Court should reject his invitation to presumptively cap juvenile offender sentences at 30 years' imprisonment. This record presents no basis to overrule the District Court's exercise of its broad discretion to impose an appropriate sentence. Accordingly, this Court should affirm the judgment of sentence.

Respectfully submitted,

CRAIG CARPENITO
UNITED STATES ATTORNEY

Bruce P. Keller
Assistant U.S. Attorney
Special Counsel to the U.S. Attorney
970 Broad Street, Suite 700
Newark, NJ 07102-2535
(973) 645-2930

Date: January 30, 2019

CERTIFICATE OF COMPLIANCE

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

(1) this brief contains 4,866 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 5,000-word limit set by this Court;

(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 is identical to the text of the paper copies of the brief; and

(4) The electronic PDF brief was prepared on a computer that is automatically protected by a virus detection program, namely a continuously updated version of McAfee Endpoint Security 10.5, and no virus was detected.

Bruce P. Keller
Assistant U.S. Attorney

Dated: January 30, 2019

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on January 30, 2019, I caused the corrected Supplemental Brief 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. Twenty-five paper copies of the Brief will be hand-delivered this Friday, February 1, 2019.

I also certify that on January 30, 2019, I caused the Brief to be served by the Notice of Docketing Activity generated by the Third Circuit's electronic filing system, on all counsel of record in this appeal for Defendant Corey Grant and the *amici curiae* who submitted briefs supporting him.

Bruce P. Keller
Assistant U.S. Attorney

Dated: January 30, 2019