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)

ON REHEARING *EN BANC* FROM THE DECISION IN *United States v. Grant*, 887 F.3d 131 (3d Cir. 2018)

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT COREY GRANT IN RESPONSE TO LETTER FROM THE COURT FILED MARCH 1, 2019

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

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

Table of Authorities ii

1. Plenary or Plain Error Standard: 1

2. SPD's Applicability to Vacated Sentences: 3

3. The District Court Erred.. 5

4. Remedy:.. 7

CERTIFICATIONS 11

TABLE OF AUTHORITIES

Page(s)

Cases

Bear Cloud v. State,
334 P.3d 132 (Wyo. 2014) 6, 8

Brennan v. Norton,
350 F.3d 399 (3d Cir. 2003) 1, 2

Budder v. Addison,
851 F.3d 1047 (10th Cir. 2017) 8

Comm. v. Costa,
33 N.E.3d 412 (Mass. 2015) 5, 6

Dumas v. Clarke,
Slip Op., 2017 WL 3446640 (E.D. Va. July 14, 2017) 6

Graham v. Florida,
560 U.S. 48 (2010) 8, 9

Greenlaw v. U.S.,
554 U.S. 237 (2008) 3

Henry v. State,
175 So.3d 675 (Fla. 2015) 8

McKinley v. Butler,
809 F.3d 908 (7th Cir. 2016) 8

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

Montgomery v. Louisiana,
136 S.Ct. 718 (2016) 6, 8

Moore v. Biter,
725 F.3d 1184 (9th Cir. 2013) 8

People v. Caballero,
282 P.3d 291 (Cal. 2012) 8

People v. Reyes,
63 N.E.3d 884 (Ill. 2016) 8

Pepper v. U.S.,
562 U.S. 476 (2011) 3, 7

Songster v. Beard,
201 F.Supp.3d 639 (E.D. Pa. 2016) 9

State v. Boston,
363 P.3d 453 (Nev. 2015) 8

State v. Moore,
76 N.E.3d 1127 (Ohio 2016) 8

State v. Null,
836 N.W.2d 41 (Iowa 2013) 8

State v. Ramos,
387 P.3d 650 (Wash. 2017) 8

State v. Zuber,
152 A.3d 197 (N.J. 2017) 8

U.S. v. Brown,
385 F.App'x 147 (3d Cir. 2010) 4

U.S. v. Busic,
639 F.2d 940 (3d Cir. 1981) 3

U.S. v. Ciavarella,
716 F.3d 705 (3d Cir. 2013) 2, 5, 6

U.S. v. Davis,
112 F.3d 118 (3d Cir. 1997) 3, 5

U.S. v. Dragon,
471 F.3d 501 (3d Cir. 2006) 5

U.S. v. Fumo,
513 F.App'x 215 (3d Cir. 2013) 4

U.S. v. Grant,
887 F.3d 131 (3d Cir. 2018) 1, 3, 4

U.S. v. Grayson,
795 F.2d 278 (3d Cir. 1986) 4

U.S. v. Guevremont,
829 F.2d 423 (3d Cir. 1987) 4

U.S. v. Harvey,
2 F.3d 1318 (3d Cir. 1993) 4

U.S. v. Hawthorne,
806 F.2d 493 (3d Cir. 1986) 4

U.S. v. Levy,
865 F.2d 551 (3d Cir. 1989) 4

U.S. v. McMulligan,
256 F.3d 97 (3d Cir. 2001) 1, 2

U.S. v. Miller,
594 F.3d 172 (3d Cir. 2010) 2, 4, 5

U.S. v. Miller,
833 F.3d 274 (3d Cir. 2016) ....*passim*

United States v. Catrell,
774 F.3d 666 (10th Cir. 2014) 4

Statutes

18 U.S.C. § 3553(a) 10

Other Authorities

Eighth Amendment 8, 10

Rules

Fed. R. Crim. P. 51(b) 1

Appellant Grant answers the Court's letter of March 1, 2019, as follows:

1. Plenary or Plain Error Standard: Grant's sentencing package doctrine ("SPD") claim was preserved and is, accordingly, subject to plenary review. A defendant preserves an argument by advancing it with "sufficient specificity to alert the district court," *Brennan v. Norton*, 350 F.3d 399, 418 (3d Cir. 2003), of "'the action which [he] desires the court to take . . . and the grounds therefore,'" *U.S. v. McMulligan*, 256 F.3d 97, 101 (3d Cir. 2001) (quoting Fed. R. Crim. P. 51(b)). As Judge Cowen noted in dissent from the panel decision on this issue, "there is no 'magic words' requirement." *U.S. v. Grant*, 887 F.3d 131, 156 (3d Cir. 2018) (Cowen, J., dissenting); *see also U.S. v. Miller*, 833 F.3d 274, 283-84 (3d Cir. 2016) ("we do not require any particular incantantion"); *U.S. v. McCulligan*, 256 F.3d 97, 101 (3d Cir. 2001) (holding "intonation of the word '*Apprendi*' unnecessary to present the issue squarely").

At resentencing, defense counsel repeatedly and specifically alerted the District Court of the desired action (resentencing *de novo*) and the grounds therefore (that the original aggregate sentence was a package, *i.e.* the individual sentences were interdependent, and *de novo* resentencing was, in any event required under *Miller v. Alabama*, 567 U.S. 460 (2012)). He stated:

> [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.

> [I]n light of *Miller*, . . . we never broke this down, Judge. I mean, we were confronted with a juvenile being sentenced for his life without parole[.] A42.
>
> [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

This was "sufficient[ly] specific[]," *Brennan*, 350 F.3d at 418, because where one sentence out of an aggregate term is vacated, the basis for application of the SPD is the interdependence of the original sentences. *U.S. v. Ciavarella*, 716 F.3d 705, 734 (3d Cir. 2013) ("District courts should resentence *de novo* when an interdependent count of an aggregate sentence is vacated."); *U.S. v. Miller*, 594 F.3d 172, 180 (3d Cir. 2010) ("[T]he sentencing package doctrine should be confined to cases in which the sentences on the underlying counts were *interdependent*. Interdependent offenses result in an aggregate sentence, not sentences which may be treated discretely.") (citations and quotation marks omitted).

Further, there can be no question that the District Court was "alert[ed]," *Brennan*, 350 F.3d at 418, of "'the action … desire[d] … and the grounds therefore,'" *McMulligan*, 256 F.3d at 101, as the Court responded to counsel, "I

understand your point. You are saying that I should look at this as one cohesive sentence of life . . . in determining what is an appropriate total sentence." A42; *accord* A44 ("I understand your point. You say it is part and parcel of all one sentence, and that the sentence as a whole was offensive to the *Miller* concept[.]"). In sum, Grant fully preserved the issue, and this Court's review is therefore plenary.

2. SPD's Applicability to Vacated Sentences: The SPD applies if one or more sentences within an interdependent, aggregate sentence is vacated, regardless of whether the underlying conviction, or only the sentence, was flawed (hence, the "sentencing package doctrine"). This follows from the rationale underlying the doctrine, that "[a] criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent," such that a court's "original sentencing intent may be undermined by altering one portion of the calculus," *Pepper v. U.S.*, 562 U.S. 476, 507 (2011) (citations and quotation marks omitted), making de novo resentencing necessary "so that, on remand, the trial court can reconfigure the sentencing plan," *Greenlaw v. U.S.*, 554 U.S. 237, 253 (2008). Its purpose is to "reduce the possibility of disparate and irrational sentencing." *U.S. v. Busic*, 639 F.2d 940, 948 (3d Cir. 1981); *accord U.S. v. Davis*, 112 F.3d 118, 122 (3d Cir. 1997) (describing the doctrine as "necessary to ensure that the punishment still fits"). Thus, it is irrelevant whether a conviction or sentence is vacated, as either may "unbundle" the package. *See Grant*, at 157 (Cowen, J., dissenting) ("[W]hat

real difference is there between a vacated sentence and a vacated conviction …? A vacated sentence on one or more counts may mean that what remains no longer fits[.]"). What matters, as noted, is simply whether "the sentences on the underlying counts were interdependent." *Miller*, 594 F.3d at 180.

To be sure, some cases have "offhandedly mentioned that the doctrine applies [w]hen one of [the] *counts* is set aside," but this is "best viewed as *descriptive* rather than *prescriptive*." *United States v. Catrell*, 774 F.3d 666, 690 (10th Cir. 2014) (citation and quotation marks omitted). Indeed, no court has ever specifically limited the SPD to vacated convictions. And this Court has repeatedly affirmed or ordered resentencing *de novo* in response to a vacated sentence, standing alone. *See*, *e.g.*, *U.S. v. Harvey*, 2 F.3d 1318, 1330 (3d Cir. 1993); *U.S. v. Levy*, 865 F.2d 551, 559 n.5 (3d Cir. 1989); *U.S. v. Guevremont*, 829 F.2d 423, 428 (3d Cir. 1987); *U.S. v. Hawthorne*, 806 F.2d 493, 500-01 (3d Cir. 1986); *U.S. v. Grayson*, 795 F.2d 278, 287 (3d Cir. 1986); *U.S. v. Fumo*, 513 F.App'x 215, 218-19 (3d Cir. 2013); *U.S. v. Brown*, 385 F.App'x 147 (3d Cir. 2010). The panel dismissed pre-1997 authority, before this Court "adopted" the SPD, because earlier cases "d[id] not explicitly invoke the doctrine." *Grant*, 887 F.3d at 154 n.21. But that later decisions adopted a useful shorthand does not make earlier ones less binding. In sum, were the Court to confine the SDP to cases of vacated convictions, it would not only rewrite Circuit

precedent, but would defy this Court's tradition that "we will not elevate form over substance." *U.S. v. Dragon*, 471 F.3d 501, 506 (3d Cir. 2006).

3. The District Court Erred in not sentencing Grant de novo, on all counts. First, the components of Grant's original sentence are interdependent, in that they "may [not] be treated discretely," *Davis,* 112 F.3d at 121, because they "form part of an overall plan," *Miller*, 594 F.3d at 180. Here, Grant's mandatory life sentence on counts 1 and 2 rendered the other counts merely symbolic—whatever sentence the District Court imposed on counts 4-6, it knew that Grant would die in prison. *See Comm. v. Costa*, 33 N.E.3d 412 (Mass. 2015) (vacation of life sentence "transformed a choice [regarding other counts] that could be regarded as 'somewhat symbolic' into one of some consequence"). Indeed, the original sentencing transcript reveals that the court imposed just such symbolic sentences on the drug counts, stating "there is a plague in this land . . . in the form of drugs," and "[t]his court wants to send a message[.]" A450. Accordingly, Grant's sentences may not be "treated discretely," *Miller*, 594 F.3d at 180, but were interdependent, as the Government has conceded. See Gov't Br. at 19 (July 25, 2017) (acknowledging "the interconnected nature of [Grant's] multiple convictions"). Under these circumstances, resentencing *de novo* on all counts was required.[1] *Ciavarella*, 716

[1] That some cases have used permissive language in discussing the SPD, *e.g. Davis*, 112 F.3d at 122 ("the judge should be free to review the efficacy of what remains"), simply reflects that courts are not required to *alter* their original sentences on

F.3d at 734 ("Resentencing *de novo* is necessary [where a sentencing package is unbundled]"); *id.* ("District courts should resentence de novo when an interdependent count of an aggregate sentence is vacated.").

Second, resentencing *de novo* was also required in light of *Miller v. Alabama*. Because Grant's original sentences on the drug counts may well have been inflated under the cover of an unconstitutional life sentence, a full remedy for the constitutional violation demanded reconsideration of the entire sentence. *See Costa*, 33 N.E. at 415 (ordering resentencing *de novo* in the *Miller* context because, "[w]e cannot know that the [original] judge would have imposed consecutive sentences had he known about the effect that decision would ultimately have, or had he known about the constitutional differences that separate juvenile offenders from adults"); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014) (holding application of *Miller* "wiped the slate clean," and remanding "to consider the entire sentencing package"); *see also Dumas v. Clarke*, Slip Op., 2017 WL 3446640, at *11 (E.D. Va. July 14, 2017) ("Remanding for resentencing only on the capital murder conviction would unnecessarily tie the hands of the Circuit Court . . . as the court would be weighing the considerations of [] youth in light of *Miller* and *Montgomery* without being able to reflect such considerations in his total sentence[.]"). The alternative—

---

undisturbed counts. Rather, they must *consider* whether the original sentences remain appropriate.

a limited resentencing, in which lengthy sentences are left undisturbed—would violate *Miller*'s mandate that "imposition of [the] most severe penalties on juvenile offenders cannot proceed as though they were not children." 567 U.S. at 474.[2]

But the District Court refused to resentence Grant *de novo*, stating that "it would be almost unfair to the system and unfair to Judge Ackerman," and that a limited resentencing would produce no "clear manifest injustice." A152. This language suggests that the Court applied the law-of-the-case doctrine, which holds that "when a court decides upon a rule of law, that decision should continue to govern" unless the prior decision "is clearly erroneous and would work a manifest injustice."[3] *See Pepper*, 562 U.S. at 506-07. But application of the law of the case doctrine would eviscerate the SPD altogether. *Id*. at 507-08 (holding, because SPD applied, the sentencing court "was not bound by the law of the case doctrine"). Thus, the District Court's refusal to resentence Grant *de novo* on all counts was error.

4. Remedy: This Court should remand for an appropriate resentencing proceeding, one that, first, remedies the District Court's refusal to resentence Grant

[2] Such a result would also often prove anomalous. As Grant has argued, a 45-year term will likely exceed constitutional limits for all but a very few juvenile homicide offenders. To hold that sentences of that length and more may nonetheless be maintained for crimes less severe than homicide would make little sense.

[3] The Government conceded this at oral argument *en banc*. When asked whether the District Court was "standing in the shoes of [the original court]," the Government agreed, stating, "[the District Court] said that in the context of reviewing the drug sentences[.]" *En Banc* Tr. at 39:17-18, 40:6-7 (Feb. 20, 2019).

de novo on all counts. That refusal mattered: the District Court regarded the undisturbed 45-year term as a floor, which the Court exceeded in order to punish Grant additionally for his violent offenses.[4]

But more fundamentally, this Court should reverse and remand in order to ensure that Grant is resentenced consistent with the Eighth Amendment. Specifically, as was discussed at oral argument, the Court should instruct that under *Miller*, the District Court must *first*, give due consideration and weight to the mitigating characteristics of youth, even in imposing an aggregate sentence.[5] *Miller*, 567 U.S. at 477-78 (holding, "a sentencer misses too much" if he fails to properly consider youth and its attendant circumstances); *see Montgomery v. Louisiana*, 136

---

[4] The Government repeatedly advocated for this approach. A124 ("45 years really … is the starting point"); A128 ("45 years is the starting point, and . . . doesn't really take account for the murders[.]"); A130 ("[A]t a minimum [] the term of imprisonment [must] . . . appreciably add[] punishment for those terrible offenses, . . . 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]").

[5] As court after court has held, the distinctive attributes of youth, and the ways that these characteristics undermine the traditional justifications for punishment, apply equally whether a juvenile commits one offense or several. Thus, *Miller* and *Graham* have been consistently held to apply to aggregate sentences. *See*, *e.g.*, *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017); *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *State v. Zuber*, 152 A.3d 197 (N.J. 2017); *State v. Ramos*, 387 P.3d 650 (Wash. 2017); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *Henry v. State*, 175 So.3d 675 (Fla. 2015); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *Bear Cloud*, 334 P.3d at 143; *People v. Caballero*, 282 P.3d 291 (Cal. 2012).

S.Ct. 718, 734 (2016); *see*, *e.g.*, *Songster v. Beard*, 201 F.Supp.3d 639 (E.D. Pa. 2016) (remanding pursuant to *Miller* to "consider the rationale for treating juveniles differently from adults and then account for those differences in determining an individualized, proportionate sentence."). As was detailed in Grant's initial brief, the District Court here failed in numerous ways to properly consider the *Miller* factors.[6] *See* Grant Br. at 31-47. That failure alone requires remand.

Second, this Court should also instruct the District Court to ensure that, as a juvenile offender who is not incorrigible, Grant is sentenced to a term that does not deprive him of a chance for "fulfillment outside prison walls" and "reconciliation with society." *Graham v. Florida*, 560 U.S. 48, 79 (2010). At oral argument, Chief Judge Smith asked whether the Court could achieve this by "simply trust[ing] the district judge … to do what she, or he always does and that is engage in individualized sentencing, … making a full record including actuarial projections of life expectancy, and all sorts of other factors." *En Banc* Tr. at 7:11-15. Grant agrees

[6] As Grant has argued, the District Court discussed the *Miller* factors in a limited and superficial fashion, only to immediately dismiss them. A150-51 ("[H]e was a minor. He was a juvenile, 16 years old. He was a teenager. . . but all of those things do not excuse his behavior[.]"); A154 ("[B]ecause of his youth, he did have some limitation in decision-making. He was impulsive . . . Having said that, he was old enough to make decisions, and the decisions that he made . . . were horrendous."). Thus, the Court essentially ignored the wealth of youth-related mitigating evidence in Grant's background, including giving particularly short shrift to his horrific upbringing, an important *Miller* factor. *See* Grant Br. at 4-16, 31-47.

that such a hearing is an appropriate remedy, providing that it includes consideration of all of the factors required by the Eighth Amendment. A careful, individualized actuarial estimate would be a part of this analysis, linked as it would be required to be, to a juvenile offender's capacity for "fulfillment" and "reconciliation" upon release; this in turn, would require full consideration of the factors discussed in Grant's supplemental brief, such as the juvenile offender's probable timetable for reform and his prospects for successful reintegration at the age of release. *See* Grant Supp. Br. at 9-16. And, of course, these factors must be considered alongside those set forth in 18 U.S.C. § 3553(a), including that provision's principle that courts must "impose a sentence sufficient, but not greater than necessary, to comply with" the recognized purposes of sentencing, which the Supreme Court has made clear, apply differently to juveniles. *Miller*, 567 U.S. at 472-73. Only by fully accounting for all of these factors, which the District Court did not do here, will courts adhere to the Eighth Amendment jurisprudence that recognizes the distinct fragility, and capacity for reform, of juvenile offenders. Accordingly, this Court should reverse and remand for resentencing *de novo* on all counts, with appropriate instructions consistent with that jurisprudence.

Respectfully submitted,

Dated: March 8, 2019

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Avram D. Frey, Esq.
Counsel for Defendant-Appellant

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 Brief complies with the type and volume limitations set forth in Fed. R. App. P. 32(a)(7). The text of the electronic version of this 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 March 8, 2019, I caused the foregoing 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. I further hereby certify that on March 8, 2019, I caused the foregoing 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: March 8, 2019