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VIA ECF

Michael Gans, Esq.
Clerk of Court
United States Court of Appeals for the Eighth Circuit
111 South Tenth Street
St. Louis, MO 63102

November 16, 2020

Re: Brown v. Precythe, Nos. 19-2910; 19-3019

Dear Mr. Gans:

The plaintiff class consists of persons who were sentenced to life without possibility of probation or parole for crimes committed when they were under the age of 18. Under *Miller v. Alabama*, 567 U.S. 460 (2012), such a sentence violates the Eighth Amendment.

In SB 590, the Missouri legislature attempted to cure that violation by allowing inmates to seek release. To comply with *Miller*, however, the State must provide a "meaningful opportunity" to obtain that relief "based on demonstrated maturity and rehabilitation." 567 U.S. at 479.

The District Court held that this requirement creates a liberty interest that requires due process. Since the class filed its principal brief, two other courts have agreed. *Hill v. Whitmer*, 2020 WL 2849969 (E.D. Mich. 2020) at *4 ("class members are entitled to a meaningful opportunity to obtain parole, a different standard than that which applies to adult offenders"); *People v. Lora*, 2020 WL 5824162 (N.Y. Sup. 2020) at *6 ("[b]ecause petitioner was entitled to a meaningful opportunity for release . . . , we agree with Supreme court that petitioner is entitled to a *de novo* parole release hearing").

I attach copies of both cases with the request that you convey those cases and this letter to the panel.

Sincerely,

Amy E. Breihan

Attorney for Appellees/Cross-Appellants

EBrechan

cc: Counsel of record (via ECF)

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> Henry HILL, et al., Plaintiffs, v. Gretchen WHITMER, et al., Defendants.

> > Case No. 10-14568 | Signed 06/02/2020

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OPINION & ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COUNT VI (Dkt. 292)

MARK A. GOLDSMITH, United States District Judge

*1 The Supreme Court has held that statutorily mandated sentences of life without parole for juvenile offenders are unconstitutional. Montgomery v. Louisiana, — U.S. —, 136 S. Ct. 718, 736, 193 L.Ed.2d 599 (2016); Miller v. Alabama, 567 U.S. 460, 470, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). A sentencing scheme must instead permit courts to consider the hallmark features of youth when sentencing juveniles. Miller, 567 U.S. at 477, 132 S.Ct. 2455. Moreover, all but the most incorrigible juvenile offenders are entitled to "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 479, 132 S.Ct. 2455 (quoting Graham v. Florida, 560 U.S. 48, 75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)); Montgomery, 136 U.S. at 736.

In this class action, the named Plaintiffs and class members are juvenile homicide offenders who, prior to the Supreme Court's decisions, were sentenced to mandatory life without parole. Now, in light of Montgomery and Miller, they are being resentenced and will, in all likelihood, have the opportunity to appear before the Michigan Parole Board. In Count VI, Plaintiffs claim that they are being deprived of a meaningful opportunity to obtain release because of policies denying them access to certain rehabilitative programs. Defendants have filed a second motion for summary judgment with respect to Count VI (Dkt. 292). They argue that summary judgment is warranted on the grounds that class members are not prevented from accessing rehabilitative programming and that, in any event, unfulfilled programming recommendations have not deterred class members from obtaining parole.

Defendants are Gretchen Whitmer, Governor of the State of Michigan; Dana Nessel, Attorney General of the State of Michigan; Heidi E. Washington, Director of the Michigan Department of Corrections ("MDOC"); and Michael Eagen, Chair of the Michigan Parole Board.

As more fully described below, the Court denies Defendants' second motion for summary judgment. All but the most irredeemable juvenile offenders are entitled to a meaningful opportunity to obtain release based on their demonstrated maturity and rehabilitation. Access to the very programming that enables juvenile offenders to make such a showing of rehabilitation—and that can play a significant role in parole hearings—is an important component of a meaningful opportunity. Here, the evidence demonstrates that class members are being denied timely access to programming and that noncompletion of programming has served as a basis for denying or deferring parole for some class members. The fact that some class members are thereafter provided a later opportunity to obtain parole is of no moment, as states must ensure that <u>all</u> opportunities to obtain release are meaningful.²

Because oral argument will not assist in the decisional process, the motion will be decided based on the parties' briefing. <u>See</u> E.D. Mich. LR 7.1(f)(2); Fed. R. Civ. P. 78(b).

I. BACKGROUND

In response to the Supreme Court's decisions in <u>Miller</u> and <u>Montgomery</u>, the Michigan state legislature amended its statutory scheme that previously excluded juvenile offenders convicted of first-degree murder from the jurisdiction of the Michigan Parole Board. <u>See Mich. Comp. Laws §§ 750.316, 791.234(6)(a)</u>. The amended statute mandates resentencing for all juveniles who were convicted of first-degree homicide offenses before <u>Miller</u> and who received mandatory life-without-parole sentences. <u>Mich. Comp. Laws § 769.25a</u>. The statute requires these individuals to be resentenced either to life without parole or to a term of years. <u>Id. § 769.25a(2)</u>. Prosecutors seeking imposition of a life-without-parole sentence must file a motion specifying the grounds for imposing such a punishment, <u>id. § 769.25a(4)(b)</u>, and the sentencing court must hold a hearing on the motion to consider the factors set forth in <u>Miller</u> and other relevant criteria such as the individual's institutional record, <u>id. § 769.25(6)</u>.

- *2 At the time the present motion was filed, 178 class members had been resentenced out of a total class of 373 individuals. Parole Grid, Ex. C to Defs. Mot. (Dkt. 292-4). The vast majority of these class members were resentenced to a term of years. See id. Upon being resentenced to a term of years, class members become subject to the parole board's jurisdiction and are assigned an earliest release date ("ERD"). Eagen Dep., Ex. A to Defs. Mot., at 17 (Dkt. 292-2) ("The [class members] we have jurisdiction of are the resentenced ones. We don't have jurisdiction over the ones that have not been resentenced."). Some resentenced class members have been immediately eligible for parole consideration based on their ERDs, while others have not yet reached their ERDs. See Parole Grid. All class members who have reached their ERDs have had parole hearings. Id.
- Although the parole grid is not completely unambiguous, it appears that only eight class members have been resentenced to life without parole. Parole Grid. An additional eight resentenced class members appear to be serving life sentences, but the parole grid indicates that seven of them will become eligible for parole on a future date and that one of them will require commutation. <u>Id.</u>

In Count VI of the second amended complaint ("SAC"), Plaintiffs contend that Defendants have deprived them of a meaningful opportunity to obtain release in violation of the Eighth and Fourteenth Amendments by failing to provide "programming, education, training, and rehabilitation opportunities necessary for Plaintiffs to demonstrate their suitability for release" during resentencing and parole board hearings. SAC ¶¶ 224, 226 (Dkt. 130). Specifically at issue is the allegation that class members who are awaiting resentencing are being denied access to "core" programming. See Hill v. Whitmer, No. 10-14568, 2019 WL 3067977, at *2 (E.D. Mich. July 12, 2019). Core programming for inmates consists of thirteen rehabilitative programs and is recommended for individuals meeting certain criteria upon entry into a prison. Id. MDOC policies provide that priority for enrollment in core programming is given to prisoners in closest proximity to their ERD. Id. Prisoners serving life sentences do not have ERDs, and, therefore, are generally not placed in core programs. Id.

At the time Defendants filed the present motion, Count VI was the sole remaining claim. The SAC has since been superseded by the fourth amended complaint, which asserts a new procedural due process claim challenging the allegedly unreasonable delays in class members' resentencing hearings. See Fourth Am. Compl. at 75 (Dkt. 316). However, because Count VI remains the same in both versions of the complaint, references will be made to the SAC.

On July 12, 2019, the Court entered an opinion and order (the "July 12 Opinion") granting in part and denying in part Defendants' first motion for summary judgment with respect to Count VI. <u>Id.</u> at *8. In its opinion, the Court held that Defendants were entitled to summary judgment on Count VI to the extent that Plaintiffs alleged that the denial of access to core programming deprives them of a meaningful opportunity to obtain release at the resentencing stage. <u>Id.</u> at *5. The Court concluded that Plaintiffs had failed to proffer any evidence supporting their theory that judges take completion of core programming into account as part of the resentencing decision. <u>Id.</u> at *4-5. In fact, there was no evidence from any of the 139 resentencing hearings that had occurred as of the date of the July 12 Opinion that core programming played any role in those resentencing decisions. <u>Id.</u>

But the Court also held that lingering factual uncertainties precluded summary judgment as to whether a denial of access to core programming results in deprivation of a meaningful opportunity to obtain release at the parole hearing stage. <u>Id.</u> at *7. Specifically, the Court noted that it was unclear how Defendants' policy has impacted parole decisions for class members who were granted parole and for class members who were denied parole. <u>Id.</u> at *6 n.5, 7.

*3 In their second motion for summary judgment, Defendants provide additional argument and evidence addressing the concerns identified in the Court's July 12 Opinion. Specifically, Defendants contend that MDOC's policies do not exclude class members from accessing core programming. Additionally, Defendants claim to proffer evidence demonstrating that unfulfilled programming recommendations have not prevented class members from obtaining parole. For the reasons discussed below, the Court finds these arguments unpersuasive and concludes that it cannot find, as a matter of law, that Defendants' denial of access to core programming does not deprive class members of a meaningful opportunity to obtain release.

II. STANDARD OF REVIEW

A motion for summary judgment under Federal Rule of Civil Procedure 56 shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists when there are "disputes over facts that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[F]acts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Once the movant satisfies its initial burden of demonstrating the absence of any genuine issue of material fact, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact. Scott, 550 U.S. at 380, 127 S.Ct. 1769;

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," Scott, 550 U.S. at 380, 127 S.Ct. 1769 (quoting Matsushita, 475 U.S. at 586, 106 S.Ct. 1348), as the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," id. (quoting Anderson, 477 U.S. at 247-248, 106 S.Ct. 2505) (emphasis in original); see also Babcock & Wilcox Co. v. Cormetech, Inc., 848 F.3d 754, 758 (6th Cir. 2017) ("A mere scintilla of evidence or some metaphysical doubt as to a material fact is insufficient to forestall summary judgment.").

III. ANALYSIS

In their motion, Defendants offer two central arguments in support of their position that MDOC's core programming policies do not deprive class members of a meaningful opportunity to obtain release. First, Defendants contend that class members are not excluded from participating in core programming under MDOC's policies. Defs. Reply at 4-5 (Dkt. 295). Second, Defendants maintain that unfulfilled core programming recommendations have not prevented class members from obtaining parole. Defs. Mot. at 4-12.

In addressing these arguments, the Court first examines the underpinnings and scope of juvenile offenders' right to a meaningful opportunity to obtain release and concludes that access to rehabilitative programming is an important element of that right. Next, the Court considers the evidence regarding class members' access to core programming and the role programming has played in class members' parole decisions. Contrary to Defendants' arguments, the evidence demonstrates that MDOC's programming policies deny class members timely access to programming, and that programming has served as a basis for denying or deferring parole for some class members. Moreover, the fact that class members are provided multiple opportunities to obtain parole is immaterial, as states must ensure that <u>all</u> opportunities to obtain release are meaningful.

A. Meaningful Opportunity to Obtain Release

*4 The Supreme Court held in <u>Graham</u> that sentences of life without parole for juveniles convicted of nonhomicide offenses are unconstitutional. 560 U.S. at 74, 130 S.Ct. 2011. Acknowledging that juveniles are particularly receptive to rehabilitation, the Court noted that policies denying access to rehabilitative services to juveniles serving life sentences render "the disproportionality of the sentence all the more evident." <u>Id.</u> Accordingly, the Court found that while a state need not guarantee eventual freedom to juveniles convicted of nonhomicide offenses, it must provide them "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." <u>Id.</u> at 75, 130 S.Ct. 2011.

The Supreme Court extended <u>Graham</u>'s reasoning to "any life-without-parole sentence imposed on a juvenile," when it held in <u>Miller</u> that statutorily mandated life-without-parole sentences for juvenile homicide offenders are unconstitutional. 567 U.S. at 472, 132 S.Ct. 2455. Although <u>Miller</u> did not categorically bar sentencing juvenile homicide offenders to life without parole, the Supreme Court held that the occasions for imposing this harsh penalty would be rare. <u>Id.</u> In <u>Montgomery</u>, the Supreme Court made the <u>Miller</u> holding retroactive, and reaffirmed that sentences of life without parole—while not foreclosed for juvenile homicide offenders—are to be reserved only for those "rarest of children, those whose crimes reflect irreparable corruption." 136 S. Ct. at 734. Thus, while those juveniles who have demonstrated an inability to reform will continue to serve life sentences, "[t]he opportunity for release will be afforded to those who demonstrate the truth of <u>Miller</u>'s central intuition—that children who commit even heinous crimes are capable of change." <u>Id.</u> at 736.

Read together, <u>Graham</u>, <u>Miller</u>, and <u>Montgomery</u> stand for the proposition that, except for those rare instances where sentences of life without parole are appropriate, juvenile homicide offenders are entitled to a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Other courts have similarly concluded that the right to a meaningful opportunity to obtain release extends to all but the most incorrigible juvenile homicide offenders. <u>See, e.g., Brown v. Precythe</u>, No. 17-04082, 2018 WL 4956519, at *6-7 (W.D. Mo. Oct. 12, 2018) (holding that juvenile homicide offenders were entitled to a meaningful opportunity for release); Md. Restorative Justice Initiative v. Hogan, No. ELH-16-1021, 2017 WL 467731, at *21 (D. Md. Feb.

- 3, 2017) (noting the "promise in <u>Graham</u> and <u>Montgomery</u> that a meaningful opportunity for release extends to all juvenile offenders, except for those whose crimes reflect permanent incorrigibility" (internal marks omitted)).⁵
- Defendants advanced this very position on appeal before the Sixth Circuit. Br. for Defs.-Appellees at 41, Hill v. Snyder, Sixth Circuit Case No. 17-1252 (Dkt. 24) ("And, while the state is not required to guarantee eventual freedom, in those cases for which a life without parole sentence is not appropriate it must provide some meaningful opportunity for release based on demonstrated maturity and rehabilitation."). Thus, there is no dispute regarding this issue.

Additionally, because the holdings in <u>Graham</u> and <u>Miller</u> were limited to juvenile offenders, the entitlement to a meaningful opportunity for release is unique to juveniles and does not extend to adult offenders. <u>See Miller</u>, 567 U.S. at 479, 132 S.Ct. 2455; <u>Graham</u>, 560 U.S. at 74-75, 130 S.Ct. 2011. Indeed, Defendant Eagen acknowledged during his deposition that class members are entitled to a meaningful opportunity to obtain parole, a different standard than that which applies to adult offenders. Eagen Dep. at 212. This distinction is premised on the diminished moral culpability of juveniles—based on their lack of maturity, underdeveloped sense of responsibility, and susceptibility to negative influence and outside pressures, as compared with adults. <u>Graham</u>, 560 U.S. at 68, 130 S.Ct. 2011. Moreover, it has been recognized that juvenile offenders have greater prospects for reform and rehabilitation. <u>Id.</u> at 74, 130 S.Ct. 2011; <u>Miller</u>, 567 U.S. at 471, 132 S.Ct. 2455.

*5 As juvenile homicide offenders, class members in the present action are entitled to a meaningful opportunity to obtain release, unless they are determined upon resentencing to be so incapable of reform that a sentence of life without parole is warranted. Thus, there is no doubt that those class members who have been resentenced to a term of years are entitled to a meaningful opportunity to obtain release. For those 195 class members still awaiting resentencing, it is uncertain whether they will be resentenced to life without parole or to a term of years. However, because the Supreme Court has repeatedly emphasized that life-without-parole sentences are appropriate only in the rarest of juvenile cases, it may be compellingly inferred that the overwhelming majority of class members will be resentenced to a term of years and, consequently, are entitled to a meaningful opportunity for release.

What is the scope of this right in the context of rehabilitative programming? There is limited authority examining the issue in the context of juvenile offenders' access to rehabilitative programming. Two courts have addressed juvenile offenders' claims alleging deprivation of the right to a meaningful opportunity to obtain release based on their exclusion from rehabilitative programming. In Greiman v. Hodges, 79 F. Supp. 3d 933, 935 (S.D. Iowa 2015), the plaintiff was a juvenile offender resentenced to life with the possibility of parole. A prison policy allegedly required the plaintiff to complete a sex offender program before he could be released on parole; however, because the plaintiff did not have a defined discharge date due to his life sentence, he was ineligible for the program—prompting his suit that the policy violated the Eighth Amendment. <u>Id.</u> at 936. In denying the defendants' motion to dismiss this claim, the court found that because the department of corrections and parole board "require sex offender treatment as a condition of parole eligibility, Plaintiff is, in effect, denied not just of a meaningful opportunity for parole; he is denied any opportunity for parole." <u>Id.</u> at 944 (emphasis in original).

In <u>Bonilla v. Iowa Board of Parole</u>, 930 N.W.2d 751, 760 (Iowa 2019), the Supreme Court of Iowa considered a petition for judicial review of a ruling by the parole board, in which the petitioner advanced procedural challenges to certain aspects of the parole process. One of these challenges involved the petitioner's claim that the parole board deprived him of a meaningful opportunity to obtain release insofar as he was denied access to rehabilitative programming recommended by the board. <u>Id.</u> at 785. Specifically, the petitioner alleged that he could not be considered seriously for parole until he completed the programming, but that he could not gain access to the program until he was being seriously considered for parole. <u>Id.</u> at 785. In evaluating this claim, the court stated:

If the state, through the Board, wishes to condition release upon successful completion of certain programing such as [sex offender programming], the department of corrections cannot unreasonably withhold such programming from a juvenile offender. Otherwise, the state could effectively deprive a juvenile offender of a meaningful opportunity to show maturity and rehabilitation by establishing release criteria that the state prevents the juvenile offender from meeting. The department of

corrections does not have a pocket veto over the release of a juvenile offender through the withholding of services required by the Board for the release of a juvenile offender.

<u>Id.</u> at 786. The court affirmed the district court's dismissal of the claim on the merits, recognizing that the parole board had only limited authority over the department of corrections. <u>Id.</u> However, the court further stated that juvenile offenders may file claims against the department of corrections if it fails to act reasonably regarding programming. <u>Id.</u> Thus, where a favorable parole decision is conditioned on completion of programming, a state is constitutionally obligated to provide the juvenile offender access to such programming. <u>See id.</u>

- Although the court held that the petitioner failed to preserve his as-applied challenges to the parole process, it appears to have construed this claim as a facial challenge. <u>Id.</u> at 766, 785-786.
- *6 <u>Greiman</u> and <u>Bonilla</u> both underscore the significant role programming plays in parole decisions and, consequently, the impact access to programming can have on a juvenile offender's meaningful opportunity to obtain release. This impact was confirmed in a thorough study of the California parole system, which found that noncompletion of rehabilitative programming frequently served as a basis for denying parole, even where the parole board expressly recognized that the juveniles were ineligible for these programs.⁷
- See Beth Caldwell, Creating Meaningful Opportunities for Release: Graham, Miller, and California's Youth Offender Parole Hearings, 40 N.Y.U. Rev. L. & Soc. Change 245, 248 (2016). The study examined the transcripts of parole proceedings for juvenile offenders. Id. at 299-289. Based on its findings, the study concluded that "[o]ffering opportunities for young offenders to rehabilitate while they are in prison is fundamental to providing a meaningful opportunity for release," as it would be impossible for them to demonstrate rehabilitation to the parole board without such access. Id. at 286.

Accordingly, access to the very programming that enables juvenile offenders to demonstrate their rehabilitation can be a fundamental component of a meaningful opportunity to obtain release. Therefore, in evaluating whether class members in the present case are being denied a meaningful opportunity to obtain release, the Court must examine (i) whether class members are denied access to core programming, and (ii) the evidence submitted regarding the role core programming plays in the Michigan Parole Board's decisions.

B. Class Members' Access to Programming

Turning next to the question of class members' access to programming, Defendants dispute Plaintiffs' allegation that MDOC has a policy of excluding prisoners serving life sentences from core programming. Defs. Reply at 4-5. According to Defendants, none of MDOC's Policy Directives ("PDs") expressly excludes prisoners serving life sentences from participating in core programming. Rather, PD 05.01.100 provides that "[p]risoner placement into these Core programs shall be prioritized by [ERD]," while MDOC Operating Procedure 05.01.100 specifically provides that "[p]risoners serving a term of life can receive program recommendations but will not be enrolled in ... [core] program enrollment unless approved by the Program Development Unit, OSAS, or MHS," Operating Procedure 5.01.100, Ex. F to Defs. Reply (Dkt. 295-7). Thus, Defendants maintain, these policies specifically set forth an avenue for prisoners serving life sentences to participate in core programming. Defs. Reply at 5.

8 See https://www.michigan.gov/corrections/0,4551,7-119-1441 44369---,00.html (last visited May 5, 2020).

Defendants' argument is unconvincing. Perhaps none of MDOC's policies expressly prohibits prisoners serving life sentences from participating in core programming. But Defendants prioritize prisoners with the earliest ERDs for placement of programming, while declining to assign ERDs to prisoners serving life sentences. In combination, these practices have the effect of denying timely access to programming to class members awaiting resentencing.

As noted in the July 12 Opinion, the evidence demonstrates that class members "who have yet to be resentenced are denied 'core' rehabilitative programming." Hill, 2019 WL 3067977, at *2. For example, in response to a programming inquiry from one class member approaching his resentencing date, an MDOC official stated, "You are currently a lifer and are unable to

participate in these programs." McNeal Dep., Ex. 5 to Pls. Resp., at 63 (Dkt. 274-5). Likewise, MDOC official Kyle Kaminski acknowledged that because core programming is made available to prisoners based on proximity to their ERDs, "lifers were not at the top of the list to go to programming." Kaminski Dep., Ex. D to Defs. Mot. for Summ. J., at 41 (Dkt. 267-1).

This exhibit does not appear on the docket, as it was filed in the traditional manner.

*7 Although class members may eventually gain access to core programming after they have been resentenced and receive ERDs, this access may not be timely for those individuals whose parole hearings take place shortly after resentencing. Indeed, as acknowledged by Defendants, those individuals may be unable to complete core programming in advance of parole hearings. See Defs. Mot. at 15-16. Therefore, they would be deprived of a meaningful opportunity to demonstrate their maturity and rehabilitation. Defendants' argument that all prisoners ultimately have the ability to receive programming with appropriate approvals does not address the priority barrier that Defendants have erected.

C. The Role of Programming in Parole Decisions

Next, the Court turns to the issue of whether programming considerations play a role in parole decisions. Defendants argue that class members are not being deprived of a meaningful opportunity to obtain release because unsatisfied core programming recommendations have not served as a barrier preventing class members from obtaining parole. In support of this argument, Defendants present evidence (i) demonstrating that many class members have been granted parole despite not having satisfied programming requirements, and (ii) illustrating the circumstances leading to parole denials for four individual class members. Defs. Mot. at 4-12. Plaintiffs, in turn, highlight evidence demonstrating that programming does play a significant role in parole determinations. Pls. Resp. at 5-7 (Dkt. 294).

The Court considers evidence regarding the role core programming plays in parole determinations generally, as well as its impact on both class members who have been granted parole and those who have been denied parole.

1. General Impact

Under PD 06.05.100, satisfactory participation in programming results in the addition of one to two points to a prisoner's parole guidelines score. Deposition testimony from Defendant Washington and MDOC official Robert Kosinski confirms that participation in core programming generally increases the likelihood that parole will be granted, and that programming helps prisoners to avoid misconduct which would weigh against their parole. Washington Dep., Ex. 4 to Pls. Resp. to Mot. for Summ. J., at 82-83 (Dkt. 274-4); Kosinski Dep., Ex. B. to Defs. Mot., at 52-56 (Dkt. 292-3). Washington acknowledged the importance of completing programming in advance of a parole hearing, as it decreases an inmate's chances of deferral or denial. Washington Dep. at 82-83. And Richard Stapleton, a former MDOC administrator, stated that the parole board often denies release to prisoners who have not completed recommended programming. Stapleton Aff., Ex. 3 to Pls. Supp. Br., ¶ 22 (Dkt. 67-4). Defendant Eagan, however, noted that the parole board may, in its discretion, waive programming recommendations for long-term prisoners if that programming appears unnecessary. See Eagen Dep. at 107-110, 133. For example, if a prisoner has served ten years without a substance abuse misconduct ticket, the parole board might waive a recommendation for substance abuse programming. Id.

Defendants contend that Stapleton has no personal knowledge regarding the parole board's current treatment of class members, as MDOC has "updated its policies" since Stapleton's retirement in 2011. Defs. Reply at 5. But Defendants' brief does not explain what updating has taken place or how that would undermine Stapleton's affidavit; nor is the statement in Defendants' brief substantiated by any affidavit or other supporting documentation. At this stage, his affidavit remains unrebutted.

This evidence demonstrates that, overall, programming plays a significant role in parole decisions. Certainly the parole board has the authority to waive programming recommendations as appropriate in individual cases. Nevertheless, Washington and

Stapleton confirm that noncompletion of core programming recommendations can—and often does—negatively impact parole decisions.

2. Class Members Granted Parole

*8 At the time Defendants filed their motion, 178 class members had been resentenced out of a total class of 373 individuals. Parole Grid. Of those 178 resentenced class members, 97 were eligible for parole. See id. Of those 97 class members eligible for parole, 93 (or 95.8%) were released on parole. Id. Only four class members have been denied parole following their first hearing. Id.

Of the 93 class members who were granted parole, the evidence submitted does not indicate the total number who had core programming recommendations. But the evidence does show that fifteen had core programming recommendations that were designated as not completed for one of three reasons: (i) the program was designated "waived" by the parole board, (ii) the program was designated "does not meet criteria," meaning the class member was ineligible for the program based on his or her life sentence, or (iii) the class members were "transferred" (meaning paroled) before completing the program. Relevant Paroled Class Members' CSX-175s, Ex. U to Defs. Mot. (Dkt. 292-22). The parole board thus granted these class members parole despite their unfulfilled programming recommendations. Accordingly, for these class members, an inability to access core programming did not result in a bar to release.

3. Class Members Denied Parole

As described above, four of the 97 class members eligible for parole following resentencing were denied parole. Parole Grid. These four class members were Ronald Williams, Marcus Walker, Terrence Kelly, and Willie Servant. <u>Id.</u> Defendants contend that none of these four class members was denied parole on the basis of unfulfilled core programming requirements and that, consequently, these class members were not deprived of a meaningful opportunity to obtain release based on a lack of access to such programming. Defs. Mot. at 6-10.

In the Court's view, however, this evidence demonstrates the opposite conclusion—that programming served, at least in part, as a basis for three of these class members' unfavorable parole decisions, with Ronald Williams as the exception.

a. Ronald Williams

Ronald Williams was resentenced on December 2, 2016, to 25 to 60 years' imprisonment for his conviction of first-degree murder. <u>Id.</u> Williams was considered for parole in early 2017, and he received a "no interest" vote on July 26, 2017. Williams Review Log, Ex. E to Defs. Mot. (Dkt. 292-6). The notice of this decision does not indicate the reasons for the no interest vote. <u>See</u> Notice of Decision, Ex. F to Defs. Mot. (Dkt. 292-7). However, as argued by Defendants, it is unlikely that the decision was premised on a failure to complete programming requirements, as Williams completed his only core programming recommendation, for substance abuse, in 1994. <u>See</u> Williams CSX-175, Ex. G to Defs. Mot. (Dkt. 292-8).

That is, the parole board denied parole by indicating "no interest" in paroling Williams. See Eagen Dep. at 44.

Williams had a second parole hearing on June 27, 2019—at the time the present briefing was completed, Williams was still awaiting a decision. See Parole Grid.

b. Marcus Walker

Marcus Walker was resentenced on March 10, 2017, to 30 to 60 years' imprisonment, and was immediately parole eligible. Parole Grid. Walker had a parole hearing in June 2017 as part of his regular review schedule and another hearing in August 2018 as a result of his resentencing. Walker Review Log, Ex. I to Defs. Mot. (Dkt. 292-10). After each review, Walker received a vote of no interest. Id.

*9 The summary interview notes made in connection with Walker's August 2018 parole hearing indicate that he completed his core program recommendation for substance abuse in September 2017. See Walker Summ. Report at 11, Ex. L to Defs. Mot. (Dkt. 292-13); see also Walker CSX-175, Ex. K to Defs. Mot. (Dkt. 292-12). The parole board also noted that Walker "has never tried to get in self help programs and quit GED because he never thought he would be released," "has not really made [an] effort to get ready for parole," and had received a misconduct ticket for being involved in a fight the day after his resentencing. Walker Summ. Report at 7. The board denied parole "to give [Walker] time to seriously prepare himself for re-entry [into] the community." Id. The report also indicates that the board would reconsider Walker for parole early, in two to three years. Id.

Defendants argue that Walker's parole denial was linked to his recent misconduct ticket, not to programming. Defs. Mot. at 7-8. But the parole board additionally noted Walker's failure to participate in programming and his lack of effort in preparing for parole, concluding that he required additional time to prepare himself for reentry into the community. These comments indicate that Walker was denied parole, at least in part, to afford him additional time to complete rehabilitative programming. Although the parole board did not specify that they wished to see Walker complete core programming in particular, core programs such as Employment Readiness/Resume Workshop or Thinking for Change are designed to address the parole board's stated concerns and to prepare prisoners for reentry into the community. Thus, programming of some kind played a role in Walker's parole denial.

According to MDOC's website, Thinking for Change "is a behavior change program that includes cognitive restructuring, social skills development and the development of problem solving skills." See https://www.michigan.gov/corrections/0,4551,7-119--140900--,00.html (last visited May 19, 2020).

c. Terrence Kelly

Terrence Kelly was resentenced on December 18, 2017, to 35 to 60 years' imprisonment. Parole Grid. Due to an error in his judgment of sentence, Kelly was considered to be eligible for parole in July 2017; however, he does not become eligible until September 2025. <u>Id.</u> Due to the error, Kelly had a parole hearing on May 14, 2018, during which the board denied parole and indicated it would reconsider him in eighteen months. <u>Id.</u>

Although Kelly was considered for parole in error, the circumstances of his denial nevertheless illustrate the board's considerations in rendering parole determinations. The parole board's summary interview notes reference Kelly's serious misconduct for an assault that occurred ten months previously, for which Kelly minimized his culpability. Kelly Summ. Report, Ex. P to Defs. Mot., at 7 (Dkt. 292-17). While the parole board acknowledged that Kelly participated in many self-help programs, it also noted that he was on the waitlist to complete violence prevention programming ("VPP"), a recommendation that had recently been reinstated. Id. at 7, 12.

In Defendants' view, Kelly's noncompletion of VPP played no role in his parole denial. Defs. Mot. at 9. But the parole board's notes reflect that Kelly's denial was premised both on his misconduct for assault—the sort of behavior the VPP is designed to prevent—and on his need to complete VPP. Programming, therefore, played a role in Kelly's parole decision in two respects. First, Kelly was denied parole on the basis of the very behavior VPP is designed to mitigate. Second, the parole board expressly noted that Kelly was waiting to complete VPP, a recommendation that had been reinstated.

d. Willie Servant

*10 Willie Servant was resentenced on May 14, 2018, to 31 to 60 years' imprisonment, and was immediately parole eligible. Parole Grid. Servant had a parole hearing on July 30, 2018, and the board determined that it would reconsider him after twenty-four months. <u>Id.</u> Servant had a second parole hearing on July 11, 2019, and was awaiting the board's decision at the time briefing of this matter was completed. Servant Notice of Intent, Ex. T to Defs. Mot. (Dkt. 292-21).

In connection with Servant's first parole hearing, the parole board noted that after denying his guilt for years, Servant now admits his role but "minimizes his responsibility and shifts blame for his choices onto his codefendant." Servant Notice of Decision, Ex. S to Defs. Mot. (Dkt. 292-20). Thus, the board determined that Servant's "level of insight and accountability are not commensurate with the gravity of his crime." <u>Id.</u> Servant had no programming recommendations prior to his first parole hearing, but the board recommended that he participate in VPP during his continuance period. <u>See</u> Servant CSX-175, Ex. R to Defs. Mot. (Dkt. 292-19). He completed this program on July 25, 2019. Id.

Defendants contend that Servant was denied parole following his first hearing, not because of programming, but because he failed to demonstrate the level of accountability appropriate for his crime. Defs. Mot. at 10. However, the parole board also recommended that Servant complete VPP, indicating that the board's decision was motivated, at least in part, by an intent to afford Servant time to complete that core programming and a belief that the program was capable of addressing the deficiencies that drove the board's decision. The Court previously noted in its July 12 Opinion that there was no indication "that any failure by Servant to complete core programming led to his denial of release." Hill, 2019 WL 3067977, at *6. However, at the time the Court rendered that decision, it had not yet received the evidence that the parole board, in fact, recommended that Servant complete VPP.

4. Legal Significance of the Evidence

The evidence in the present case confirms that core programming plays a significant role in parole determinations. MDOC policies provide that satisfactory participation in programming results in the addition of points to an inmate's parole guidelines score, thereby increasing the likelihood that parole will be granted. Further, deposition testimony confirmed that the parole board frequently denies parole to inmates who have not completed programming recommendations. See Stapleton Aff. ¶ 22.

The evidence also demonstrates that although an inability to complete core programming recommendations does not necessarily preclude class members from obtaining favorable parole decisions, it has served as a basis for denying or deferring parole for some class members. Fifteen class members were granted parole despite not having satisfied programming recommendations. However, programming served, at least in part, as a basis for Walker's, Kelly's, and Servant's unfavorable parole decisions. And as discussed in the July 12 Opinion, Plaintiffs have adduced evidence demonstrating that Christopher Wiley's and Lorenzo Harrell's parole determinations were deferred for six months pending their completion of VPP, although they were both ultimately released. Hill, 2019 WL 3067977, at *7.

Given that a lack of core programming has resulted in denials or deferrals of parole, Defendants have not proved that the lack of access to programming will not serve as a barrier preventing at least some of the 195 class members awaiting resentencing from obtaining parole. Because Defendants have failed to present evidence demonstrating that noncompletion of core programming never influences parole decisions, they have not established as a matter of law that denying class members access to programming does not deprive them of a meaningful opportunity to obtain release. While it is true that some class members may not need core programming to win parole, that is also irrelevant. All are constitutionally entitled to be equipped to win their parole, even if all do not need to utilize all of the equipment—much like the right of every person charged with a crime to effective counsel, even if certain defendants could prevail with incompetent counsel.

*11 Defendants argue that even if some class members are initially denied parole on the basis of programming, they are thereafter able to complete the required programming and are reconsidered for parole. Defs. Mot. at 13-15. Generally, class members serving term-of-years sentences are eligible for parole reconsideration every one to two years, but may be reconsidered for parole before that time. Eagen Dep. at 158, 160-161. Class members serving life sentences with the possibility of parole must serve a minimum of ten to twenty years before being considered for parole; if they are denied parole, they are reconsidered every five years. Mich. Comp. Laws § 791.234(7)-(8); Eagen Dep. at 27.

To illustrate, Defendants note that Walker's next parole hearing is scheduled for December 2022, Walker Notice of Decision, Ex. J to Defs. Mot. (Dkt. 292-11), but the parole board indicated a willingness to reconsider him early, in two to three years, Walker Summ. Report at 7. Kelly, in fact, is not eligible for parole until 2025. See Parole Grid. Servant is awaiting a decision following his second parole hearing, which occurred a year after his first. Id. And Wiley and Harrell were both released on parole less than a year after their parole hearings took place. Id. Thus, Defendants maintain that class members who are denied the earliest opportunity to obtain release are not denied their only opportunity. Defs. Mot. at 15.

But no court has held that a state satisfies its Eighth Amendment obligations so long as <u>some</u> parole hearing is meaningful. The only logical rule—the only one consistent with the constitutional principle at stake—is that a state must ensure that <u>all</u> opportunities to obtain release are meaningful. To hold otherwise would condone parole practices amounting to illusory opportunities for release or "repeated incantations of ritualistic denial." <u>See Bonilla</u>, 930 N.W.2d 772-773. It would also create uncertainty in the minds of state officials as to exactly when their obligation to satisfy the constitutional standard should commence—creating budgeting, staffing, and other planning challenges.

A rule requiring that all opportunities for release be meaningful recognizes that delay can mean no opportunity at all. An opportunity for release must be "timely realized," as " '[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a meaningful opportunity to demonstrate the maturity and rehabilitation." <u>Id.</u> (quoting <u>State v. Null</u>, 836 N.W.2d 41, 71 (Iowa 2013)) (some quotation marks omitted). Indeed, one commentator has noted that for an opportunity for release to be meaningful, parole review should come not late in life but rather "at a point in time that provides the prisoner with the chance to live a meaningful life outside of prison." Sarah French Russell, <u>Review for Release: Juvenile Offenders, State Parole Practices & the Eighth Amendment</u>, 89 Ind. L. J. 373, 407-408 (2014).

- Null acknowledged this principle in concluding that lengthy term-of-years sentences are the functional equivalent of life sentences and are, therefore, subject to the protections set forth in Miller. 836 N.W.2d at 71.
- Professor Russell reasons that "review must occur at a point in time that will give a prisoner a sense of hope about the future and that reflects society's hope that the prisoner can rejoin society in a meaningful way." <u>Id.</u> Creating this sense of hope, in turn, motivates rehabilitation efforts and good behavior, whereas "'[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.' "<u>Id.</u> (quoting <u>Graham</u>, 560 U.S. at 79, 130 S.Ct. 2011).
- *12 Because lifespan is a precarious and wasting asset, the failure to provide meaningful review at a first parole hearing could render future review of limited utility—or preclude meaningful review entirely. If a class member is denied parole based on a failure to complete core programming to which he was denied access, he would be deprived of his <u>first</u> opportunity to obtain release and possibly his <u>only</u> opportunity.

This risk is all the more apparent for class members resentenced later in life. Indeed, Plaintiffs maintain that there are ten class members between the ages of fifty-five and sixty who have yet to be resentenced and who have unfulfilled programming requirements. Pls. Resp. at 22-23. These ten class members have already exceeded the average lifespan of a prisoner incarcerated in Michigan. See, e.g., Kelly v. Brown, 851 F.3d 686, 688 (7th Cir. 2017) (Posner, J., dissenting) (noting that the life expectancy for a juvenile offender serving a life sentence in a Michigan correctional facility is 50.5 years). Thus, it is critical that class members be afforded a meaningful opportunity to obtain release during their first parole hearing.

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All opportunities to obtain release provided by Defendants, therefore, must be meaningful. As a result, Defendants are not entitled to summary judgment on their theory that class members initially denied parole on the basis of unsatisfied programming recommendations may be provided a meaningful opportunity for release thereafter.

Next, Defendants contend that they are unable to enroll class members awaiting resentencing in core programs based on presumptive ERDs, as county prosecutors are seeking life without parole in the vast majority of these cases. Defs. Reply at 6 (citing List of Class Members Not Resentenced, Ex. G to Defs. Reply (Dkt. 295-8)). Though not expressly stated, Defendants imply that core programming would be unnecessary for those class members who ultimately become ineligible for parole following resentencing.

But at the present stage, 195 class members await resentencing after their statutorily mandated sentences of life without parole were rendered unconstitutional under Miller and Montgomery. Given the resentencing delays acknowledged in recent briefing, see Defs. Mot. to Dismiss Count VIII at 10-11 (Dkt. 320); Pls. Resp. to Mot. to Dismiss Count VIII at 2 (Dkt. 322), it is unlikely that these class members are to be resentenced imminently. In the meantime, it would be inequitable to deprive all class members awaiting resentencing access to core programming simply because some may become ineligible for parole—particularly in light of the Supreme Court's ruling that sentences of life without parole must be reserved for only those rare juvenile offenders "whose crimes reflect permanent incorrigibility." See Montgomery, 136 S. Ct. at 734. The Court, therefore, rejects Defendants' argument.

Finally, Defendants argue that, in light of the limited enrollment capacity for core programming, prioritizing enrollment of class members awaiting resentencing would harm other prisoners who may be placed lower on the waiting list. Defs. Reply at 6-7. This argument, however, concerns the structure of any remedy that might ultimately be ordered, and not whether relief is unjustified as a matter of law. That is, the question of which prisoners are entitled to the greatest priority for enrollment in core programming may well present competing equities, but it does not undermine the validity of the class members' claim.

*13 Defendants, therefore, have not established that, as a matter of law, their policy of denying class members access to core programming does not result in a deprivation of their right to a meaningful opportunity to obtain release.

IV. CONCLUSION

For the reasons stated above, Defendants' second motion for summary judgment with respect to Count VI is denied (Dkt. 292).

SO ORDERED.

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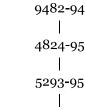
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2020 WL 5824162 Supreme Court, New York County, New York.

The PEOPLE of the State of New York,

v.

Jose LORA, Defendant.



Decided September 30, 2020

Synopsis

Background: After juvenile defendant's conviction by jury trial of three counts of murder in the second degree and one count of conspiracy in the second degree were upheld on appeal, 298 A.D.2d 149, 748 N.Y.S.2d 8, and several other postconviction pleadings were denied, defendant filed motion to set aside his sentences, that in the aggregate amounted to 83 and ½ years to life, seeking to have his sentences vacated or that a hearing should be held.

Holdings: The Supreme Court, Juan M. Merchan, J., held that:

- [1] juvenile's aggregate sentence was a de facto life sentence for purposes of determining whether sentence violated Eighth Amendment's ban on cruel and unusual punishment, and
- [2] Court was required to conduct a hearing to determine whether juvenile was sentenced with deliberate reference to his youth and its attendant circumstances, as required to satisfy the Eighth Amendment.

Ordered accordingly.

West Headnotes (9)

[1] Sentencing and Punishment 🕪

The party challenging the validity of the sentence bears the burden of coming forward with supporting allegations sufficient to create an issue of fact. N.Y. CPL §§ 440.20, 440.30(1)(a).

[2] Sentencing and Punishment 🦫

In order to avoid violating the Eighth Amendment's ban on cruel and unusual punishment, a juvenile convicted of a homicide offense cannot be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing. U.S. Const. Amend. 8.

[3] Sentencing and Punishment 🦫

Juvenile defendant's combined sentences, that in the aggregate amounted to 83 and ½ years to life for three counts of murder in the second degree and one count of conspiracy in the second degree, were a de facto life sentence, supporting claim that sentence violated Eighth Amendment's ban on cruel and unusual punishment if sentencing court did not consider juvenile's youth and its attendant circumstances when imposing sentence, even though sentences were all statutory minimums; mandatory minimum periods of juvenile's sentences could prevent him from ever reaching parole status before his natural life expectancy. U.S. Const. Amend. 8.

[4] Sentencing and Punishment 🦫

Juvenile defendant's consecutive sentences for three counts of murder in the second degree and one count of conspiracy in the second degree would be treated in the aggregate, for purposes of determining, on juvenile's motion to set aside sentences, whether juvenile was given a de facto life sentence in violation of Eighth Amendment's ban on cruel and unusual punishment, even though one conviction was obtained after being retried; sentences were consecutive, and all were product of charges contained in a single indictment which was consolidated for trial with an indictment for drug and weapons charges. U.S. Const. Amend. 8; N.Y. CPL § 440.20.

[5] Sentencing and Punishment 🕪

On juvenile defendant's motion to set aside his aggregate sentence of 83 and ½ years to life for three counts of second-degree murder and one count of second-degree conspiracy, trial court was required to conduct a hearing to determine whether juvenile was sentenced with deliberate reference to his youth and its attendant circumstances, at the time he committed the murders, for purposes of determining whether the sentence violated Eighth Amendment's ban on cruel and unusual punishment; although sentencing judges were aware that juvenile was 17 at the time of the offenses, it was not clear that juvenile received the individualized sentencing hearing required by *Miller v. Alabama*. U.S. Const. Amend. 8; N.Y. CPL § 440.20.

[6] Sentencing and Punishment 🤛

Although a sentence of imprisonment which is within the limits of a valid statute is not a cruel and unusual punishment in the constitutional sense regardless of its severity, it is not to say that in some rare case on its particular facts it may not be found that the statutes have been unconstitutionally applied. U.S. Const. Amend. 8.

[7] Sentencing and Punishment 🐎

When considering if a statutory minimum sentence is unconstitutional as cruel and unusual punishment as applied to a case's particular facts, a court must apply an objective analysis, considering: (1) the gravity of the offense, primarily in terms of the harm it causes society, but also in comparison with punishments imposed for other crimes in this State as well as with punishments for the same or similar crimes in other jurisdictions; and (2) the character of the offender and the gravity of the threat he poses to society. U.S. Const. Amend. 8.

[8] Sentencing and Punishment 🕽

Miller v. Alabama bars life without parole, as cruel and unusual punishment, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility prisoners who have shown an inability to reform will continue to serve life sentences. U.S. Const. Amend. 8.

[9] Sentencing and Punishment 🦫

The opportunity for release will be afforded to those juvenile offenders who demonstrate the truth of the central intuition of *Miller v. Alabama*, which bars life without parole, as cruel and unusual punishment, for all but the rarest of juvenile offenders, namely, that children who commit even heinous crimes are capable of change. U.S. Const. Amend. 8.

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Opinion

Juan M. Merchan, J.

*1 HON. JUAN M. MERCHAN, A.J.S.C.:

On December 12, 1996, Defendant Jose Lora was convicted after a jury trial of two counts of Murder in the Second Degree [Penal Law (hereinafter "P.L.") § 125.25(1)] and one count of Conspiracy in the Second Degree [P.L. § 105.15]. The jury failed to reach a verdict on a third count of murder. He was sentenced on January 17, 1997 to three consecutive terms of imprisonment: two terms of twenty-five years to life on the murder convictions, and one term of eight and one-third to twenty-five years on the conspiracy conviction. Defendant was re-tried on the third murder count and convicted on March 6, 1998. He was sentenced on April 6, 1998 to a term of twenty-five years to life imprisonment, to be served consecutively to the previously-imposed sentences, for an aggregate sentence of eighty-three and one-third years to life imprisonment.

Defendant now moves to set aside the sentences pursuant to Criminal Procedure Law (hereinafter "C.P.L.") § 440.20 on the grounds that the sentences are invalid as a matter of law because they violate the United States Constitution's Eighth Amendment prohibition on cruel and inhuman punishment. He maintains that the sentences should be vacated, or that a hearing should be held.

Defendant moved *pro se*, however, due to the complexity and seriousness of the issues presented, this Court ordered that motion counsel be appointed on August 1, 2019.

Procedural History

The convictions stem from allegations that Defendant, when seventeen years of age, fatally shot several rivals of his alleged drug-trafficking gang, as well as an individual alleged to have been responsible for the death of his girlfriend's brother. Defendant and several other co-defendants were indicted for the murders. Defendant and the co-defendants were also charged in a separate indictment with multiple drug and weapons offenses. The indictments were consolidated for trial. The co-defendants pled guilty and testified against Defendant, who stood trial alone and was convicted as set forth above.

Defendant perfected an appeal, in which he claimed that he received ineffective assistance of counsel at a pre-trial lineup from his attorney, who had previously represented several prosecution witnesses in an unrelated matter. He challenged the admission

of certain evidence of his criminal activity at his first trial and claimed that the trial court's jury instruction on reasonable doubt shifted the burden of proof. Defendant further argued that the trial court's instruction to the jury, that he would not face the death penalty if convicted, violated his due process rights. He made the same arguments regarding his second trial, with the additional claim that irrelevant and unduly prejudicial evidence of crimes committed by his alleged gang and other associates had been improperly admitted.

The Appellate Division, First Department, rejected Defendant's ineffective assistance of counsel claim, and held that Defendant had failed to establish that counsel's potential conflict affected his limited representation at the lineup (new counsel was assigned thereafter), and that the trial court was not obligated to conduct an inquiry as to whether Defendant waived his right to conflict-free representation. The Court further held that the reasonable doubt instruction was proper, the *voir dire* issue regarding the death penalty was without merit, and the evidence of Defendant's criminal activity was properly admitted. All other issues were determined to be unpreserved. *People v. Lora*, 298 A.D.2d 149, 748 N.Y.S.2d 8 (1st Dept. 2002). The Court of Appeals denied leave to appeal the decision of the Appellate Division. *People v. Lora*, 99 N.Y.2d 560, 754 N.Y.S.2d 213, 784 N.E.2d 86 (2002).

*2 In 2005, Defendant filed a writ of habeas corpus with the United States District Court, Southern District of New York, in which he relied upon the same arguments raised in his state appeal. A magistrate reported and recommended that the writ be denied in its entirety [Report and Recommendation of Magistrate Gabriel Gorenstein, J., *Lora v. West*, 2005 WL 372295 (U.S.D.C. Southern Dist. N.Y. 2005)], which the District Court ostensibly adopted in an unpublished decision. Defendant subsequently moved for reconsideration of the denial of his petition. Magistrate Gorenstein recommended that the motion be denied as untimely. The United States District Court, per Hon. Richard Howell, J., District Judge, held that the four-year delay in filing was due to Defendant's own neglect, not the attorney misconduct he claimed. The District Court adopted the magistrate's report and recommendation, denying the motion for reconsideration. *See Lora v. West*, 2010 WL 3632506 (U.S.D.C. Southern Dist. N.Y. 2010).

In 2011, Defendant filed a motion to vacate the judgment in New York County Supreme Court, pursuant to C.P.L. § 440.10, on the grounds that the indictment was jurisdictionally defective, the crimes and the defendants charged were improperly joined, the People had engaged in prosecutorial misconduct during the presentation to the grand jury, the trial court's legal instructions were erroneous, and trial counsel's representation was ineffective. In a decision dated June 18, 2012, the Court, (Hon. A. Kirke Bartley, J.), denied the motion based on Defendant's failure to raise the issues on direct appeal, although sufficient facts appeared on the record to have permitted adequate review of his claims. Defendant moved for reconsideration under Civil Practice Laws and Rules § 2221. In a decision dated December 7, 2012, Judge Bartley deemed that Defendant's papers constituted a motion to reargue, as they contained no new facts for the Court to consider. The Court ruled that it had neither misapprehended nor overlooked the facts or the law when it denied Defendant's motion to vacate for failure to raise the record-based issues on direct appeal.

The instant motion to set aside the sentences was filed on December 10, 2018, pursuant to C.P.L. § 440.20, on the specific grounds that Defendant's sentences amount to a *de facto* sentence of life imprisonment without parole, and that sentences of life without parole are prohibited for certain offenders who were under the age of eighteen when they committed their crimes.

On March 26, 2019, prior to filing their response to this motion, the People informed this Court that the United States Supreme Court (hereinafter "U.S. Supreme Court") had granted a writ of certiorari on March 18, 2019 in *Mathena v. Malvo*, — U.S. —, 139 S.Ct. 1317, 203 L.Ed.2d 563 (2019). In that case, the U.S. Supreme Court was to decide whether the *Miller/Montgomery* rule (discussed below) applies only to juvenile defendants who received *mandatory* sentences of life without parole, or to all (mandatory and discretionary) juvenile defendants who receive sentences of life without parole. The People suggested that the *Mathena v. Malvo* appeal was potentially dispositive of the instant motion, because the appellant in that case was seeking resentencing in Virginia because of his youth at the time of his crime. This Court agreed to hold this matter in abeyance, pending a ruling by the U.S. Supreme Court. When the U.S. Supreme Court did not hear oral argument by the end of its 2018-2019 term, this Court directed the People to file a response. The People did so on September 6, 2019. On September 13, 2019, the U.S. Supreme Court announced that oral argument on *Mathena v. Malvo* was scheduled for October 16, 2019. This Court notified

the parties that it would hold its decision in abeyance again, until the U.S. Supreme Court had rendered its decision. Assigned motion counsel filed a reply brief on September 30, 2019,

This Court anticipated that a decision would be handed down at some point during the U.S. Supreme Court's 2019-2020 term. However, in February 2020, the news media reported that Mr. Malvo had withdrawn his request for resentencing, after the Governor of Virginia signed legislation allowing for the possibility of parole for juvenile offenders serving sentences of twenty years to life imprisonment. On July 9, 2020, the U.S. Supreme Court formally announced that *Mathena v. Malvo* had been dismissed.

- *3 In the interim, on March 16, 2020, due to the pandemic, the instant matter was administratively adjourned to May 22nd, July 10th, August 21st and September 30th, 2020.²
- Prior to the court closure, motion counsel requested that he be permitted to view the prosecutor's file in order to determine whether he would file a motion to set aside the conviction. In a letter dated March 12, 2020, the People opposed the request. Motion counsel indicated his decision not to file a 440.10 motion during a virtual conference conducted on August 14, 2020.

Contentions of the Parties

Defendant argues that his sentences are invalid as a matter of law because they violate the Eighth Amendment's prohibition against cruel and unusual punishment. He relies on *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) and *Montgomery v. Louisiana*, — U.S. —, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) to support his claim that his sentences amount to a *de facto* sentence of life imprisonment without parole, and that sentences of life without parole are prohibited for certain offenders who were under the age of eighteen when they committed their crimes. Defendant stresses that he was seventeen years of age when he allegedly committed the murders, and that he will likely die before he is eligible for parole.

The People argue that the aggregate term of eighty-three and one-third years imposed in these cases does not amount to life without parole, but rather, is a minimum sentence that Defendant must serve before he is eligible for parole. They contend that his sentences are not prohibited under *Miller/Montgomery* because he has not been, nor was he required to be, sentenced to life without parole, and that there are no federal or state cases holding that such sentences when imposed on a juvenile violate the Constitutions of the United States or New York.

The People also argue that while *Miller/Montgomery* require a hearing in which the sentencing court considers the youth of defendants facing both, mandatory or discretionary life-without-parole sentences, Defendant is not entitled to such a hearing because he was sentenced to consecutive terms of imprisonment for three separate murders committed on three separate dates. Notwithstanding, the People contend that Defendant's youth was in fact considered by the sentencing courts, in compliance with *Miller*'s requirement that a sentencing court must consider a juvenile offender's youth and attendant characteristics before determining whether life-without-parole is an appropriate sentence. They claim that Defendant's youth was addressed at both trials and that the sentencing courts were aware that he was seventeen years of age when he committed the murders. The People argue that since the characteristics of his youth were raised and argued before both sentencing courts, Defendant has already received the consideration he would be entitled to under *Miller* and that consequently, his request for resentencing, or a hearing, should be denied.

Assigned motion counsel filed a reply brief, in which he argued that the constitutional scruple against sentencing a youth to life imprisonment without the possibility of parole applies to discretionary sentences which are longer than a defendant could possibly live. Motion counsel argues that a juvenile should not be sentenced to lifetime imprisonment simply because that juvenile committed depraved and heinous crimes, and that such a sentence may not be imposed without considering the *Miller* factors. The reply further argues that the sentencing courts here did not examine or resolve the *Miller* factors and, therefore, Defendant's "lifetime sentence" is unconstitutional.

*4 Discussion

C.P.L. § 440.20 provides, in pertinent part, that at any time after the entry of a judgment, the court may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. A defendant's motion to set aside a sentence must allege a legal basis and essential facts which support or tend to support the claim, whether from the personal knowledge of the defendant or another person, or upon information and belief, in which case the affiant must state the source of the information and the grounds for such belief. C.P.L. § 440.30(1)(a). The motion impacts only the sentence, and, if granted, does not affect the underlying conviction. C.P.L. § 440.20 (4).

- [1] A court may deny a motion to set aside a sentence, without a hearing, where the moving papers do not contain allegations of fact tending to substantiate the claim being raised. *See* C.P.L. § 440.30(4)(b); *People v. Ozuna*, 7 N.Y.3d 913, 828 N.Y.S.2d 275, 861 N.E.2d 90 (2006). "The party challenging the validity of the sentence bears the burden of coming forward with supporting allegations sufficient to create an issue of fact." *People v. Session*, 34 N.Y.2d 254, 255-56, 357 N.Y.S.2d 409, 313 N.E.2d 728 (1974).
- [2] In Miller v. Alabama, supra, upon which Defendant relies, two defendants were convicted of capital murder in Alabama, and capital felony murder and aggravated robbery in Arkansas, respectively. Both convictions stemmed from crimes committed when the defendants were fourteen years of age, and both defendants were sentenced to life imprisonment without the possibility of parole. The sentences were upheld by the highest courts in each respective state. Certiorari was granted and the U.S. Supreme Court held that the Eighth Amendment's prohibition on cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. The Court further held that, based on the principle that children are "different," sentencing laws must allow judges to take a defendant's youth into account. The Court held that those differences attendant to a defendant's youth counsel against irrevocably sentencing them to a lifetime of imprisonment without the possibility of parole. The Court did not bar sentencing of a juvenile convicted of homicide to life in prison, but stressed that "[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes [before us] violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." Miller at 489, 132 S.Ct. 2455. Thus, "a juvenile convicted of a homicide offense cannot be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Montgomery v. Louisiana* ³, *supra* at 725.
- After *Miller*, various courts reached different conclusions on the issue of whether its holding was retroactive to juvenile offenders whose convictions and sentences were already final when *Miller* was decided. The U.S. Supreme Court in *Montgomery* reasoned that "*Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution." *Montgomery* at 736. Thus, following *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the *Montgomery* Court held that *Miller*'s prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that, under the United States Constitution, is retroactive in cases on state collateral review. *Montgomery* also firmly held that *Miller* required judges to consider "youth and its attendant characteristics" when sentencing juvenile offenders. *Montgomery* at 735.
- *5 Those principles and purposes were previously articulated in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), in which the U.S. Supreme Court held that a capital sentence is prohibited in cases involving juvenile offenders who were under eighteen years of age at the time they committed a capital offense. The Supreme Court expanded its ruling in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), holding that the United States Constitution prohibits the imposition of life without parole in cases involving juveniles convicted of crimes other than homicide, and that the juvenile must have a meaningful opportunity to receive parole.

Roper and Graham, and their progeny⁴, establish that:

The Court decided *Virginia v. LeBlanc*, — U.S. —, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017), *rehearing denied* — U.S. —, 138 S.Ct. 35, 198 L.Ed.2d 762 (2017), in which the defendant sought to vacate his life sentence for a rape committed when he was sixteen, based on *Graham*. The Court held that a geriatric release program in the State of Virginia reasonably provided juvenile non-homicide offenders with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, as required by the Eighth Amendment. Under the legislation, any person serving a sentence imposed upon a conviction for a felony offense who has reached sixty-five years of age or older and has served at least five years of the sentence imposed, or has reached sixty years of age or older and has served at least ten years of the sentence imposed, may petition the Virginia Parole Board for conditional release.

[C]hildren are constitutionally different from adults for sentencing purposes. Their lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking They are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings And because a child's character is not as well formed as an adult's, his traits are less fixed and his actions are less likely to be evidence of irretrievable depravity. *Miller*, *supra* at 2458.

Roper and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, *supra* at 2458 (internal quotations and citations omitted).

New York Appellate Courts have addressed *Miller/Montgomery* in the context of parole board determinations. In *Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision*, 140 A.D.3d 34, 30 N.Y.S.3d 397 (3rd Dept. 2016), the Appellate Division, Third Department held that:

[A]s a person serving a sentence [twenty-two years to life imprisonment] for a crime committed as a juvenile [murder in the second degree committed when he was sixteen years of age and who was denied parole release nine times since becoming eligible], petitioner has a substantive constitutional right not to be punished with a life sentence if the crime reflects transient immaturity, and that petitioner was denied his constitutional right to a meaningful opportunity for release when the Board failed to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime. The Board, as the entity charged with determining whether petitioner will serve a life sentence, was required to onsider the significance of petitioner's youth and its attendant circumstances at the time of the ommission of the crime before making a parole determination. That consideration is the minimal procedural requirement necessary to ensure the substantive Eighth Amendment protections set forth in *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana* (citations omitted) A parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court [N]either the hearing transcript nor the Board's written determination reflects that the Board met its constitutional obligation to consider petitioner's youth and its attendant characteristics in relationship to the commission of the crime.

*6 [Under *Montgomery*], [t]he Eighth Amendment *requires* a sentencer to consider a juvenile offender's youth and attendant characteristics before punishing an offender with a life in prison...Because petitioner was entitled to a meaningful opportunity for release in which his youth, and its attendant characteristics, were considered by the Board, we agree with Supreme court that petitioner is entitled to a *de novo* parole release hearing. *Hawkins*, *supra* at 36, 38, and 39-40.

See also Matter of Rivera v. Stanford, 172 A.D.3d 872, 100 N.Y.S.3d 72 (2nd Dept. 2019), in which the Parole Board's determination to deny petitioner's fourth application:

appears to have been solely based on the seriousness of the crimes he committed...Parole Board as required to consider he fact that the petitioner was 16 years old when he committed the subject crimes [of robbery in the first degree and criminal use of a firearm in the first degree] and the attendant characteristics of his age in relationship to the commission of the crime at issue...Neither the transcript of the 2016 interview nor the Board's determination shows that the Board considered the petitioner's youth at the time and its attendant characteristics in relationship to the crime he committed. Instead, the record reflects that the Parole Board did not factor in the petitioner's age at the time and the impact that his age had on his decisions

and actions during the commission of these crimes when it decided to deny him parole release based on the serious nature of the instant offenses...While the Parole Board mentioned in passing that it noted the petitioner's young age at the time the crimes were committed, it failed to set forth any meaningful discussion of that issue. Instead, the Parole Board simply discounted the petitioner's youth at the time because it was concerned that [his] poor behavior shows limited maturity and self-control, referring back to the petitioner's disciplinary history in prison. *Rivera*, *supra* at 876, 100 N.Y.S.3d 72.

Matter of Campbell v. Stanford, 173 A.D.3d 1012, 1014-1016, 105 N.Y.S.3d 461 (2nd Dept. 2019) ("[A]lthough majority of the decision denying parole focuses on the crimes of conviction [two counts of murder in the second degree], the Parole Board also considered the petitioner's age at the time of the crimes the Parole Board considered the petitioner's youth and its attendant characteristics in relationship to the commission of the crime[s] at issue and did not base its determination solely upon the seriousness of the offenses."); Matter of Allen v. Stanford, 161 A.D.3d 1503, 1507-1508, 78 N.Y.S.3d 445 (3rd Dept. 2018) ("Board properly considered the necessary statutory factors, as well as petitioner's youth and its attendant circumstances."); Matter of Putland v. New York State Department of Corrections and Community Supervision, 158 A.D.3d 633, 634, 72 N.Y.S.3d 93 (2nd Dept. 2018) ("The petitioner is entitled to a meaningful opportunity for release in which the Parole Board considers, inter alia, his youth at the time of the commission of the crimes and its attendant circumstances."); Matter of Martin v. Stanford, 58 Misc. 3d 345, 347, 66 N.Y.S.3d 94 (Sup. Ct. Cayuga Co. 2017) ("For petitioners who were under the age of eighteen at the time of the commission of the crime, the Board must also consider the youth and its attendant characteristics in relationship to the commission of the crime at issue.").

Several Courts of coordinate jurisdiction have denied motions to set aside a sentence on facts similar to the case at bar. In *People v. Aponte*, 42 Misc. 3d 868, 981 N.Y.S.2d 902 (Sup. Ct. Bx. Co. 2013), Hon. Richard Lee Price, J. decided the C.P.L. § 440.20 motion of a defendant who was convicted of murder in the second degree, two counts of robbery in the first degree, assault in the first degree, and criminal possession of a weapon in the second degree. The crimes were committed when the defendant was seventeen years of age. In 1983, the defendant was sentenced to twenty five years to life imprisonment on the murder conviction, a consecutive term of five to fifteen years of imprisonment on the assault conviction, concurrent terms of twelve and one-half to twenty five years of imprisonment on each robbery conviction, and a concurrent term of eight and one-third years to twenty five years of imprisonment on the weapon conviction. On the same date, the defendant was sentenced under a separate indictment to an aggregate term of twelve and one-half to twenty five years of imprisonment, to run consecutively to the sentence on the murder conviction. Several months later, he was sentenced to eight and one-third to twenty-five years of imprisonment on a conviction for attempted murder under yet another indictment. In sum, this defendant faced a minimum period of forty-two and one-half years of incarceration, before consideration by the Parole Board.

- The Appellate Division, First Department modified his unauthorized sentence on the weapons conviction to five to fifteen years of imprisonment.
- The *Aponte* opinion does not indicate whether the final sentence of eight and one-third to twenty-five years of imprisonment on a conviction for attempted murder was imposed to run consecutively or concurrently with the previously-imposed sentences.
- *7 The defendant in *Aponte* argued that his sentence violated the Eighth Amendment ban against cruel and unusual punishment, because he was only seventeen years of age when the crimes were committed. The Court held that although *Miller v. Alabama*, and *Graham v. Florida* held it unconstitutional to impose life without parole on a person under the age of eighteen, *Aponte* had received no such sentence. "No doubt he is unhappy over the prospect that the aggregate mandatory minimum periods of imprisonment may preclude him from ever being paroled, he nevertheless remains eligible for [parole]." *People v. Aponte*, *supra* at 872, 981 N.Y.S.2d 902.

In *People v. Matias*, 68 Misc.3d 352, 123 N.Y.S.3d 792 (Sup. Ct. Bx. Co. 2020), Hon. Steven L. Barrett, J. decided a C.P.L. § 440.20 motion based upon a claim that the defendant's imposed sentence in 1994 of consecutive terms of twenty five years to life imprisonment for two murder convictions, and a concurrent term of five to fifteen years of imprisonment on a related weapons conviction, violated the Eighth Amendment's prohibition on cruel and unusual punishments as applied to juvenile offenders. The defendant claimed that, in contravention of *Miller/Montgomery*, the sentencing Court did not properly consider his youth (16 years of age at the time of commission). The motion Court held that after reviewing the pre-sentence report

and hearing from counsel, it was satisfied the sentencing court was made aware and properly considered all mitigating and aggravating factors, including the defendant's age, and "imposed the type of individual sentence required by *Miller* and the Eighth Amendment." *Matias* at 802.

- [3] [4] Here, as in *Aponte* and *Matias*, Defendant received sentences, in the aggregate, the mandatory minimum periods of which may prevent him from ever reaching parole status before his natural life expectancy. This Court holds that, under the unique facts and circumstances of this case, the combined sentence was in fact a *de facto* life sentence. Although *Miller* does not prohibit a life sentence, a juvenile may not be sentenced to an "unsurvivable" prison sentence without first considering his youth, immaturity, and potential for rehabilitation. There is no "bright line" rule for what constitutes a *de facto* life sentence in federal or state law, however, New York federal courts and courts across the United States have made individual rulings on the issue. For example, in *United States v. McCoy*, 692 Fed.Appx. 17, 22 (2nd Cir. N.Y. 2017), *cert. denied* U.S. —, 138 S.Ct. 278, 199 L.Ed.2d 179 (2017), the U.S. Court of Appeals for the Second Circuit held that a sentence of eighty years is "effectively a life sentence." The Supreme Court of Illinois extended the constitutional protections set forth in Miller to juvenile defendants sentenced to more than 40 years in prison. The Court held that "[i]n determining when a juvenile defendant's prison term is long enough to be considered *de facto* life without parole, we choose to draw a line at 40 years," See *People v. Buffer*, 434 Ill.Dec. 691, 137 N.E.3d 763, (Sup. Ct. of Illinois 2019). See also *People v. Woods*, Ill.Dec. —, N.E.3d 2020 WL 4436706 (App. Ct. of Illinois, First District, Sixth Division, July 31, 2020); *United States v. Grant*, 887 F.3d 131 (U.S.C.A. 3rd Cir. 2018); and *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013).
- The People maintain that Defendant was sentenced to consecutive terms of imprisonment for three separate murders committed on separate dates, and that each sentence should be considered separately. Where multiple sentences have been imposed, each sentence should be analyzed separately to determine whether it comports with the Eighth Amendment under *Graham/Miller/Montgomery*, so that juvenile defendants convicted of multiple offenses do not benefit from a "volume discount" on their aggregate sentence. Here, although Defendant's sentences have been aggregated, they are consecutive sentences which are each a product of charges contained in a single indictment which was consolidated for trial with an indictment for drug and weapons charges. Thus, this Court will treat the sentences in the aggregate for purposes of this analysis.
- *8 [5] The People argue that references to Defendant's age were made in both sentencings, and that both judges were aware that he was seventeen at the time he committed the murders. This Court does not doubt that the sentencing judges were aware of Defendant's youth. The question is whether the sentencing courts considered his youth, *and its attendant circumstances*, when they imposed sentence. Did he receive the individualized sentencing hearing required by *Miller*?

When Defendant was first sentenced on January 17, 1997, the prosecutor did not reference Defendant's age or its attendant characteristics. Defense counsel spoke of "two people actually that were the leaders of this organization, people older than this defendant somewhat more sophisticated than this defendant, and I think perhaps even the jury recognized that this man was being used by people older, smarter, more sophisticated, more aware of things for their own purposes, without excusing his behavior, but that somehow he was drawn into it because of these other people. I'd ask the Court to be as lenient as possible. In more specifics, I'd ask the Court to consider concurrent sentences in this case." Transcript of January 17, 1997, Page 6, Lines 14-20, Page 7, Lines 2-10.

The Court then stated:

You know, Mr. Lora's appearance, your appearance is totally inconsistent with your actions. You were perfectly gentlemanly throughout the trial, never a problem to us, and always comported yourself well, but unfortunately I can't sentence you based on that. I don't know what happened in your life. I am not a psychiatrist. Something went wrong someplace. At this point I can't examine why. I am sorry that it resulted in what can only be viewed as some of the most antisocial acts that can occur, obviously murder being the most antisocial. I deliberately had a psychiatric evaluation done because I thought perhaps something was wrong with you, and that I should know about that. But the psychiatric clinic of the Supreme Court found that there's nothing wrong with you and you don't need any psychiatric treatment. I am not suggesting that their work-up would reach the proportion I would have liked but they find no reason for any further analysis and nothing in your background to explain the fact that

you are a cold blooded killer. That's the only way I can say it. It's very sad that someone who probably had the potential to be otherwise resulted in being a cold blooded killer. You have evinced no emotion at any time during this courtroom appearance, at no time during the violent, vicious acts that you committee in furtherance as a leader of this drug gang and in furtherance of it's (sic) business. The fact that other people were also in this situation just as vicious and just as criminal is not something I can concern myself about when I sentence Mr. Lora. And there's really very little else to say. Transcript of January 17, 1997, Page 8, Lines 14-25, Page 9, Lines 2-25, Page 10, Lines 2-6.

Defendant was later sentenced on April 6, 1998, on the murder count for which he was re-tried and found guilty. The prosecutor, again, made no reference to Defendant's age and its attendant characteristics. Defense counsel stated that Defendant was under the tutelage of two individuals who were purportedly the leaders of the gang. He further stated:

I think it is also clear and somewhat saddened that this probation report is not fuller in terms of the defendant's mental capacity. There is some reference to it but it's not explored, about his mental capacity, about his educational background. I think this defendant at the time he was involved with this incident was about seventeen going on eighteen, with a limited education. I think he had some learning disorders. I think it is clear from the record and the gist of the record that this homicide was planned by [the two individuals] to some extent since they were the ones really running the spot, and they utilized Mr. Lora for their purpose. It wasn't his idea. It was something that really affected him as much as the two superior persons in this organization, either experience or age, who happened to plead guilty in this case and got the deals that they got I think the records that you have heard here does indicate that certainly Mr. Lora was the lesser of the three in terms of running this organization, making decisions, and I think was substantially used by them for their purpose because of his background and went along with them. Not as the initiator but certainly as the participant without a doubt. And I think that is a factor that is clear Otherwise as the Court knows he is already sentenced to a substantial period of time which I think would basically indicate that he will be spending the rest of his life in jail. And I would ask the Court to consider whatever sentence is imposed here to run concurrent with the previous sentence imposed." Transcript of April 6, 1998, Page 5, Lines 15- 18, 20-25, Page 6, Lines 2-11, 14-25, Page 7, Lines 2-5.

*9 The Court sentenced the Defendant finding that it could see "no mitigating factors in the overall situation in which the defendant committed these acts." Transcript of April 6, 1998, Page 7, Lines 18-20.

In reviewing these proceedings, this Court cannot unequivocally state that the trial courts considered Defendant's youth and its attendant characteristics in relationship to the commission of the crime. On the record before this Court, defense counsel merely references Defendant's age at the time the crimes were committed. There does not appear to be any meaningful discussion of that issue and how it related to the offenses in the sentencing courts' colloquy. Although Defendant had the benefit of a psychiatric evaluation prior to the first sentence, and both sentences were rendered after consideration of Pre-Sentence Investigations, this Court is not certain these documents adequately addressed the *Miller* considerations. It appears from the record, that the initial sentencing court based its determination on the Pre-Sentence Investigation, psychiatric evaluation, and counsels' arguments. The second sentencing court appeared to find nothing of value which would mitigate against the maximum sentence, but this Court is not aware whether Defendant's age and its attendant characteristics were adequately, or at all, considered. This Court does not sit in judgment of what a court of concurrent jurisdiction decided decades ago before the scientific advances which have provided much more insight into the adolescent brain and its development, and before the holdings in *Graham*, *Miller*, and *Montgomery*. In fact, both sentences could very well be appropriate, as the case law does not prohibit such sentences, only that they must be rendered with certain considerations.

One cannot understate the seriousness of the heinous and depraved crimes committed here, and the need to protect the community by removing Defendant from society. Nevertheless, New York's public policy regarding juvenile offenders has evolved over the years, as evidenced by this state's Raise the Age (hereinafter referred to as "RTA") legislation. See C.P.L. Article 722. This legislation raised the age of criminal responsibility and advanced the goal of rehabilitation for youth, in part, by creating a new category of "adolescent offenders." At the time the legislation first took effect on October 1, 2018, defendants who were sixteen years of age at the time their crime was committed were treated as "adolescent defendants." Defendants who were seventeen years of age were added in the legislation as of October 1, 2019. See C.P.L. § 1.20, subd.

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- 44. RTA provides for designated Youth Parts (with exclusive jurisdiction over adolescent offenders for initial arraignment and subsequent proceedings), removal to Family Court (under certain circumstances), specialized juvenile detention facilities, probation case-planning, and other age-appropriate services, such as parental notification and specially designed interrogation rooms. The present environment is far different from what Defendant faced over twenty years ago.
- [6] [7] Moreover, although the Court of Appeals has long held that "[r]egardless of its severity, a sentence of imprisonment which is within the limits of a valid statute is not a cruel and unusual punishment in the constitutional sense, [see *People v. Jones*, 39 N.Y.2d 694, 697, 385 N.Y.S.2d 525, 350 N.E.2d 913 (1976); see also, *People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338 (1975), and *People v. Pagnotta*, 25 N.Y.2d 333, 337, 305 N.Y.S.2d 484, 253 N.E.2d 202 (1969)], "[it] is not to say that in some rare case on its particular facts it may not be found that the statutes have been unconstitutionally applied." *People v. Broadie*, *supra* at 119, 371 N.Y.S.2d 471, 332 N.E.2d 338. In such a rare case, a court must apply an objective analysis, considering: "(1) the gravity of the offense, primarily in terms of the harm it causes society, but also in comparison with punishments imposed for other crimes in this State as well as with punishments for the same or similar crimes in other jurisdictions; and (2) the character of the offender and the gravity of the threat he poses to society (internal citations omitted)" *People v. Thompson*, 83 N.Y.2d 477, 480, 611 N.Y.S.2d 470, 633 N.E.2d 1074 (1994), *quoting People v. Broadie*, *supra* at 100, 371 N.Y.S.2d 471, 332 N.E.2d 338. The *Aponte* court relied on *People v. Thomas*, 83 N.Y.2d 477, 611 N.Y.S.2d 470, 633 N.E.2d 1074 (1994) (17 year old's sentence on an A-I drug sale conviction did not implicate the Eighth Amendment) and *People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338 (1975) (in assessing whether a sentencing structure is cruel or unusual, courts consider such factors as rehabilitation, deterrence, and recidivism).
- *10 [8] [9] Based on the foregoing, a hearing must be ordered, pursuant to C.P.L § 440.30(5), to determine whether Defendant was sentenced with deliberate reference to his youth and its attendant circumstances, at the time he committed the murders. *Graham* and *Miller* "bar life without parole for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility [P]risoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition that children who commit even heinious crimes are capable of change" If Defendant was not sentenced accordingly, this Court must then hold a resentencing hearing to consider whether Defendant's "diminished culpability" and "heightened capacity for change" merit a different sentence.

This opinion constitutes the Decision and Order of the Court.

All Citations

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