To be argued by
NATALIE REA
(10 minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Ind. 1832/92
AD1: 2020-03839

JOSE MATIAS,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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-against- :

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PRELIMINARY STATEMENT

This is an appeal from a decision and order of the Supreme Court, Bronx County, rendered April 23, 2020, under Indictment No. 1832/92, entered August 24, 2020, denying appellant's motion, pursuant to C.P.L. §440.20, to vacate his sentence of 50 years to life (Barrett, J., at trial, sentencing, and motion to vacate the sentence). Notice of appeal of the decision and order was timely filed on December 18, 2020. Appellant's application for leave to appeal and assignment of counsel was granted on November 12, 2020 (Gonzalez, J.). Appellant remains incarcerated pursuant to the judgment.

QUESTIONS PRESENTED

1. Whether because appellant was 16 at the time of the crime, the imposition of a 50-years-to-life sentence -- de facto life without parole -- without a prior hearing taking into account his youth and its attendant characteristics violated the prohibition against cruel and unusual punishment under both the federal and state constitutions.

2. Whether counsel's failure to present any mitigating evidence at sentencing where appellant, at age 16, faced a de facto life sentence constituted ineffective assistance of counsel at sentencing.

SUMMARY OF ARGUMENTS

In 1992, appellant, then 16 years old, was charged, along with Robert Chaves Morales, with the murders of Osvaldo and Jacinto Lucero, 17 and 21 years old, respectively. The cases were severed; Morales went to trial and was acquitted. Appellant also went to trial, was convicted and sentenced to 50 years to life. In 1997, this Court affirmed the judgment.

In 2019, appellant moved to vacate his de facto life sentence and sought a resentencing preceded by a hearing where his youth and its attendant characteristics would be taken into account as required by U.S. Const., Amends. VIII and XIV, N.Y. Const., Art. 1, §5, and Miller v.

Alabama, 567 U.S. 460, 480 (2012). In addition, appellant argued that counsel, who had conducted no presentencing investigation and presented no substantive mitigation at sentencing, had been ineffective under the federal and state constitutions. The court denied the motion without ordering a hearing.

That decision must be reversed and a hearing ordered for the following reasons: First, appellant's sentence of 50 years to life is a de facto life without the possibility of parole ("LWOP") sentence and under the Eighth Amendment and its New York equivalent, such a sentence may not be imposed on a juvenile without a prior hearing where youth and its attendant characteristics of impulsivity, susceptibility to peer pressure, recklessness, and ability to rehabilitate are taken into account. No such hearing was ever held in this case.

Second, should this Court – the first appellate court in the State to address the issue - find that the current sentencing process in New York satisfies the Eighth Amendment and its New York equivalent, the process in place in 1994 did not because juveniles were considered adults, and youth and its attendant characteristics were not, then, factors a court considered in sentencing an adult. The sentencing court did not consider them, even

ordering the sentences to run consecutively as was its "general practice" when two crimes are involved.

Third, even if this Court finds that no specialized hearing is necessary and the 1994 adult sentencing process in place satisfied the Eighth Amendment and its New York equivalent, the imposition of the maximum adult permissible sentence of 50 years to life on a 16-year-old, with no prior record, and a tragic family background was disproportionate, amounting to cruel and unusual punishment.

Finally, and at the very least, the order denying the motion to vacate the judgment must be reversed because counsel was ineffective at sentencing, conducting no prior investigation and making no substantive argument when appellant, at 16, faced a sentence that would virtually guarantee that he would die in prison.

STATEMENT OF FACTS

THE TRIAL

On February 22, 1992, Lizette Torres gave her roommate, Melissa Del Moral, a sixteenth birthday party at their apartment (Respondent's Brief 1996 ("RB") at 4; [1] Appellant's Motion to Vacate the Sentence pursuant to

[1] Because the trial transcripts are unavailable, the facts are based on the briefs to

C.P.L. §440.20, ("App. Motion"), with exhibits attached as Exhibit A to Appellant's Motion for Leave to Appeal, Exh. I (Presentence Report) at 2). There were about 15 people, including a D.J., and everybody was dancing, drinking, smoking marijuana and taking mescaline (RB at 4-6; Appellant's Brief 1996 ("AB") at 3-6). Appellant arrived around 11:00 p.m. with his friend Hector. At some point, they went out with Melissa to buy pizza, beer, and mescaline (RB at 5; AB at 4). When they came back, they ate, drank, took mescaline, smoked marijuana, and danced (RB at 5; AB at 4).

At some point, Lizette heard a shot fired in the living room. She asked appellant and Hector to leave and called them a cab (RB at 5-6). Hector was carrying a .22 caliber weapon and appellant a .25 caliber weapon, as they waited for the taxi in the hallway outside the kitchen curtain (RB at 6). Appellant lifted the curtain and saw Melissa, his ex-girlfriend, sitting on Osvaldo's lap (AB at 10; RB at 7). He asked her to come over, she refused, and she screamed at him to leave (RB at 7).

According to Melissa and Lizette, appellant walked up to Jacinto – who had a knife - and shot him (RB at 7). He fell to the ground, and when Melissa tried to help him, she realized that Osvaldo had also been shot (RB

(...continued)
this Court, People v. Matias, 235 A.D.2d 298 (1st Dept. 1997).

at 7). One witness testified that Melissa threw a hammer at appellant before he fired (AB at 8). A hammer was recovered from the kitchen floor, and a second hammer was recovered from the top of a partition in the kitchen (RB at 8). In his statement to the police a few days after the shooting, appellant said that Jacinto came at him with a knife (AB at 15-16; RB at 10). An open knife was found beneath Jacinto's body (AB at 12), a bullet was recovered by Osvaldo's face, and spent rounds from a .25 caliber automatic were found in the hallway (RB at 8). A .22 caliber bullet was recovered in the floor later (RB at 11). In his statement to the police, appellant remembered going to the party, taking mescaline and dancing. He also remembered Hector and Melissa arguing, Melissa getting a hammer, and Jacinto lunging at him with a knife (RB at 10; AB at 15-16). He acknowledged that he pulled his .25 caliber gun and fired. He did not know who was shot, because the curtain to the kitchen blocked the view (AB at 15; RB at 10).

The defenses at trial were justification and intoxication. The court refused to give a justification charge, admitting that it was "as close a claim as I have ever seen" (AB at 16-17). The court felt that appellant's statement was "relatively vague" as to an imminent threat and that, in any event, he could have retreated (AB at 17). The court also refused to give an

intoxication charge. Appellant was convicted of two counts of second-degree murder and one count of criminal possession of a weapon in the second degree.

THE SENTENCE

Counsel did not submit a presentencing memorandum, and the presentence report prepared by the Department of Probation ("Probation") had minimal information about appellant (App. Motion, Exh. I (Presentence Report) at 3-4)). It contained his mother's phone number, appellant's age, and his lack of criminal record (Id. at 1, 3). Probation explained that because appellant had refused to be interviewed, "no other source was available" (Id. at 3-4). Probation had spoken on the phone with the mother and sister of the victims (Id. at 4). They had been kind hearts and productive. The younger, 17, had been in high school and had enlisted in the Marines and the older, 22, hoped to go to college (Id. at 4).

The prosecutor asked the court to impose the maximum permissible sentence of 50 years to life (App. Motion Exh. J (Sentencing Minutes) at 4). He did not know if appellant was "capable of rehabilitation" and felt that his refusal to talk to Probation was a bad sign (Id. at 5). Defense counsel said that he would be "very brief" (Id. at 6). He noted, mistakenly, that appellant

had been 17 at the time of the crime, that his life was ruined, but that he had no criminal history (Id. at 6). He asked for a "reasonable sentence under the circumstances" (Id. at 7).

The court never mentioned appellant's age. It focused on the victims. The court found the effect on the victims' family to be "particularly poignant because of the character of the victims." Noting the struggles of people of "Hispanic origin" to enter "mainstream society," the court said that the victims were "truly the hope of the generation" (Id. at 8). They had no criminal record, and "they were clean cut, honorable men" (Id. at 8). The court had to consider the terrible tragedy of this loss and measure the appropriate punishment taking into account "the information that we have concerning the individual responsible for that killing" (Id. at 8).

The court found that the crime was striking in its violence and its "casualness" (Id. at 8). The victims had been shot for no reason, simply because defendant had been "dissed" (Id. at 9). The court found nothing in appellant's action since the murders, "the callousness, and the lack of contrition, to recommend that [he] be regarded as somebody who can rejoin society or has any true hope for returning to us as a contributing member." The court stated that "it is my general practice that when separate crimes are

committed, consecutive sentences are imposed, and I'm satisfied that in this case that separate crimes were committed as to each murder" (Id. at 9). According to the court, "[t]he prognosis is so awful that given all the circumstances of this case, I think that there is really no choice" but to impose the maximum term of 25 years to life on each murder count to run consecutively for a term of 50 years to life (Id. at 9-10). This Court affirmed the conviction. People v. Matias, 235 A.D.2d 298 (1st Dept. 1997).

MOTION TO VACATE THE SENTENCE

In 2019, appellant, 44 years old, incarcerated since the age of 16, having served 28 years of his 50 years to life sentence, filed a motion to vacate the sentence, pursuant C.P.L. §440.20, arguing that (1) his sentence, amounting to a de facto LWOP sentence, for a crime committed when he was 16, imposed without a prior individualized hearing required by Miller v. Alabama, 567 U.S. 460 (2012), violated his Federal and State constitutional protections against cruel and unusual punishment (App. Motion Memorandum of law ("Memo") at 1-11) and (2) counsel's failure to conduct any investigation into his family and educational background prior to sentencing deprived him of his State and Federal constitutional right to the effective assistance of counsel at sentencing (App. Memo at 11- 18).

(1) The sentence violated the prohibition against cruel and unusual punishment (App. Memo at 1-11)

In arguing that his sentence violated the Federal and State constitutional prohibition against cruel and unusual punishment, appellant relied on Miller v. Alabama, 567 U.S. 460 (2012)(prohibiting the mandatory imposition of LWOP on a juvenile), Roper v. Simmons, 543 U.S. 551, 572 (2005)(prohibiting the death penalty for children under 18), and Graham v. Florida, 560 U.S. 48 (2010)(prohibiting life without parole for juveniles in non-homicide cases), which all recognize that children are different for purposes of sentencing. They "lack [] maturity" and have "an underdeveloped sense of responsibility," leading to "recklessness, impulsivity, and heedless risk-taking." Graham, 560 U.S. at 67. Children are also more vulnerable and susceptible to negative influences and outside pressures, including from families and peers. They have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. Id. Their traits are less fixed and actions less likely to be evidence of "irretrievable depravity." Roper, 543 U.S. at 570. A child's character is simply not "well formed," and juveniles are capable of change more than adults. Graham, 560 U.S. at 68. While a

"juvenile is not absolved of responsibility for his actions," "his transgression 'is not as morally reprehensible as that of an adult'." Graham, 560 U.S. at 68.

In Miller v. Alabama, 567 U.S. 460, the Court held that a juvenile could not be sentenced to LWOP without a prior hearing at which the sentencing judge must consider that "children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Such a sentence may be imposed only on the permanently incorrigible and it will be the "rare juvenile" whose crime reflects irreparable corruption. Graham, 560 U.S. at 73. Although Miller involved the mandatory imposition of actual LWOP sentences, appellant argued that the motion court should follow the majority of courts that have required a Miller hearing before the discretionary imposition of a de facto LWOP (App. Memo at 6-8, citations omitted).

Appellant argued that courts have looked at different factors in determining whether a sentence amounted to de facto LWOP: several courts have used 50 years to life as a benchmark; others have looked at life expectancy and retirement age; and others at actuarial tables (App. Memo at 8-10, citations omitted).

Here, appellant's sentence of 50 years to life met the 50-year threshold adopted by most courts in drawing the line defining a de facto LWOP sentence. It rendered appellant eligible for parole in 2042, when he will be 67, two years after the New York retirement age of 65, and ten years after the life expectancy of inmates in New York. There was little chance that appellant will have "some years of life outside prison walls." (App. Memo at 10-11, citations omitted). The sentencing court had not considered the relevant Miller factors of appellant's age and its attendant characteristics before imposing the sentence and therefore, the sentence violated the constitutional prohibition against cruel and unusual punishment under both the state and federal constitutions.

In opposing the motion, the People argued that Miller applied only to cases involving the mandatory imposition of a literal LWOP sentence on a juvenile (People's Memorandum in Opposition ("Opp. Memo") , attached as Exhibit C to App. Motion, at 4-8). In any event, since appellant would be eligible for parole in his lifetime, his sentence was not a life sentence (Opp. Memo at 9). The People argued that even if Miller applied, the New York sentencing scheme was discretionary and the court, in 1994, considered the relevant Miller factors, i.e. age and the nature of the offense (Opp. Memo at

11-13). Submitting records underlying nine violations incurred by appellant in the last 28 years, the People argued that his actions at 16 were not the result of "transient immaturity."[2]

(2) Appellant was denied the effective assistance of counsel at sentencing (App. Memo at 11-18)

In his motion to vacate the sentence, appellant also argued that he had been denied his constitutional right to the effective assistance of counsel because counsel had failed to conduct the most minimal investigation into his background before sentencing. While courts agree that in representing an adolescent in a serious adult prosecution, counsel should, at least, obtain school and institutional records, counsel did neither.

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[2] The People's documentation shows that over the past 28 years, appellant had 22 Tier III violations – 2 in the past 5 years. The underlying documentation of his nine presumably worst violations include 10- to 15-year old violations involving fights and drug possession (Exh. D [Exhibits] 5 to 9]); a 2013 ticket arising out of a brawl between inmates where appellant was not the instigator (Exh. D [Exhibit 4]); a 2015 violation for engaging in sexual activity with his wife in the visiting room (Exh. D [Exhibit 3]); a 2015 violation for possession handwritten gang related papers consisting of two letters from a friend giving an update of friends that were former gang members; and the most recent 2018 ticket arising out of a drug overdose around his birthday (Exh. D [Exhibit 1]). The People also relied on a conviction in 1997, when appellant was 19, still a teenager and in prison, for promoting contraband. At a Miller hearing, an expert would testify to the meaning of appellant's prison record given that he entered the prison system at 16 with little education, scarred by his upbringing, subjected to now illegal solitary confinement, and opine as to his rehabilitation. Appellant was recently transferred from Wende Correctional Facility, near Buffalo, to Greenhaven Correctional Facility, closer to New York City and his wife, showing that his conduct is considered satisfactory.

Counsel did not even know his client's age at the time of the crime, telling the court he was 17 when he had been 16. Counsel did not need to conduct a complex investigation to learn about appellant. He could have talked to appellant and his mother. As the affidavits from both explain, he never did. Had counsel conducted the most minimal investigation, he would have learned that appellant was the 9th of 10 children, that his family had moved from Puerto Rico to the Bronx when he was 7, and that it had been difficult. Appellant had been bullied for not speaking English and bullied for being poor. Counsel would have learned that appellant's father drank heavily and became violent, and that he beat appellant, his siblings, and his mother. He would have learned that appellant was also "slow" in school, graduating from Elementary School at 13 when most graduate at 9, and that he was placed in special education before dropping out entirely in 6th grade. Counsel candidly admitted that he did not remember anything about this case.

The People rejected the affidavits in support of the motion as "unsubstantiated, incredible, and meritless" (Opp. Memo at 14). They attributed trial counsel's lack of recollection to the delays in bringing this motion. In their view, the evidence provided in support of the motion did not

establish the necessary prejudice to establish ineffective assistance of counsel at sentencing (Opp. Memo at 15-22).

(3) The Court denied the motion without a hearing

The court summarily denied the motion. The court refused to apply Miller to the discretionary imposition of de facto LWOP, limiting it to the mandatory imposition of an LWOP sentence to a juvenile. People v. Matias, 68 Misc. 3d 352 (Bx Sup. Ct. 2020)("[d]efendant's sentence falls outside the ambit of Miller"). Relying on the 72-year life-expectancy of non-incarcerated black men, the court found that appellant would be eligible for parole at 66 or within "his expected natural lifetime," and that was all Roper, Graham, Miller and the Eighth Amendment require. Matias, 68 Misc. 3d at 362, n. 13; at 364, n. 17.[3]

Even if Miller did apply and a particularized hearing before sentencing was required, the court found that its sentencing satisfied Miller. It explained that it had considered all the mitigating factors, age and lack of criminal history, and all aggravating factors including the severity of the crime, the severity of the loss, the lack of remorse, and the penological

[3] New York Department of Corrections and Community Services, Inmate Mortality 2009-12 at 2 [81% of the 404 deaths in prison during that year died of natural causes at an average age of 57]).

purposes of sentencing. Matias, 68 Misc. 3d at 364. Although the court did not mention appellant's age at sentencing, it avowed that it was aware of it. Id. at 364, n 16. Vacatur was not required because the evidence submitted regarding his childhood and abuse would not alter the court's view of the appropriate sentence. Id. at 365. In the court's view, appellant was "permanently incorrigible," his crimes reflected "irreparable corruption," and he would have the opportunity to appear before the parole board within his lifetime.

The court also rejected appellant's claim of ineffective assistance of counsel. It found that counsel had provided "exemplary representation" during the pretrial phase and at trial where he "ably" cross-examined witnesses, presented defenses, asked for jury instructions applicable to the defenses, and gave a "cogent" summation. It was "implausible" to find that he had not investigated appellant's background. The court faulted appellant for not presenting evidence showing that he had gained insight into the pain he had caused, accepted responsibility, showed remorse, or that he transformed while in prison. After looking at the disciplinary reports submitted by the People and at appellant's drug related conviction at the beginning of his sentence in 1997, no conceivable evidence could be

presented to change the court's belief that the maximum sentence was not warranted.[4] Therefore, appellant was not denied the effective assistance of counsel at sentencing.

ARGUMENT

POINT I

BECAUSE APPELLANT WAS 16 AT THE TIME OF THE CRIME, THE IMPOSITION OF A 50 YEARS TO LIFE SENTENCE – A DE FACTO LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE – WITHOUT A PRIOR HEARING TAKING INTO ACCOUNT HIS YOUTH AND ITS ATTENDANT CHARACTERISTICS VIOLATED THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS. U.S. CONST., AMENDS. VIII N.Y. CONST., ART. 1, §5. AND XIV.

Starting in 2005 with Roper v. Simmons, 543 U.S. 551 (2005) and continuing with Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, 567 U.S. 460 (2012), the Supreme Court has recognized that scientific research on adolescent brain development establishes that children

[4] Such a harmless error analysis does not apply in an Eighth Amendment challenge. Counsel was gathering information when the court denied the motion. The Department of Corrections and Community Services had not yet finished producing appellant's 28-year record in prison. His record and interpretation of his record by experts would have been presented at the Miller hearing. The evidence presented by the People certainly does not establish that appellant is "permanently incorrigible."

are different. Children are not small adults. Children are impulsive, lack maturity, are susceptible to negative influences and outside pressures, and are reckless. They are less culpable than adults. Rare will be the juvenile whose crime reflects irreparable corruption, justifying an LWOP sentence. Therefore, before imposing such a sentence, a court must conduct a hearing, known as a Miller hearing, where youth and its attendant characteristics are taken into consideration. Consistent with this understanding of child development and refusing to place form over substance, a majority of courts have required a Miller hearing before the discretionary imposition of a de facto LWOP sentence. The court below refused to extend Miller beyond the mandatory imposition of a literal LWOP sentence and found that, in any event, the New York sentencing process in 1994 satisfied Miller. This Court should reverse.

First, this Court should not place form over substance and should extend Miller to appellant's sentence of 50 years to life, a de facto LWOP sentence. Second, the sentencing process in New York in 1994 did not satisfy Miller. At the time, 16-year-old offenders in New York were considered adults, not children, not different, and the critical factors of youth and its attendant characteristics were not yet relevant required legal factors

to be considered. At no time did the sentencing court expressly consider these factors. It never even mentioned appellant's age, let alone his susceptibility to peer pressure or other characteristics of children. It ordered the sentences to run consecutively because it was its general practice to do so when there are two crimes without consideration of whether that blanket policy should be applied differently, and more flexibly, to children. Finally, even if this Court were to limit the Miller hearing requirement to de jure LWOP sentences, appellant should be resentenced because under a cruel and unusual punishment as-applied analysis, the maximum permissible consecutive terms for an adult, imposed on a 16-year-old, who had been abused, with no criminal record, in a case presenting a close question of self-defense, is unconstitutionally disproportionate. U.S. Const., Amends. VIII and XIV; N.Y. Const., Art. 1 §5.

The Eighth Amendment and Article 1 Section 5 of the New York Constitution state that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Emphasis added). At the core of the ban against cruel and unusual punishment is the concept that "punishment should be graduated and proportioned to the offense." Graham v. Florida, 560 U.S. 48, 58 (2010), quoting Weems v.

United States, 217 U.S. 349, 367 (1910). The Supreme Court now prohibits (1) the death penalty for children who have committed their crimes before the age of 18, Roper, 543 U.S. at 572, (2) LWOP sentences for juveniles in non-homicide cases, Graham, 560 U.S. at 79, and (3) LWOP sentences without a prior hearing for juveniles in homicide cases, Miller, 567 U.S. at 480. Montgomery v. Louisiana, 577 U.S. 190, 206-07 (2016); Jones v. Mississippi, __ U.S. __, 141 S. Ct. 1307, 1314 (2021); see People v. Contreras, 411 P.3d 445, 447-48 (Cal. 2018).

In Roper, Graham, and Miller, the Supreme Court recognized that "children are constitutionally different from adults for purposes of sentencing." Miller, 567 U.S. at 471. There are fundamental differences in parts of their brain related to "behavior control." Graham, 560 U.S. at 68. Children display "lack of maturity" and have an "underdeveloped sense of responsibility," leading to "recklessness, impulsivity, and heedless risk-taking." Graham, 560 U.S. at 67. Children are also more vulnerable and susceptible to negative influences and outside pressures, including from families and peers. They have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. Id. The Court found that a child's character is simply not "well

formed," and, as a result, juveniles are capable of change more than adults. Graham, 560 U.S. at 68. Their traits are less fixed and actions less likely to be evidence of "irretrievable depravity." Roper, 543 U.S. at 570.

The differences make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Roper, 543 U.S. 573. "Juvenile offenders cannot with reliability be classified among the worst offenders." Roper, 543 U.S. at 569; Graham 560 U.S. at 68. "A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult'." Graham, 560 U.S. at 68. In other words, from a moral standpoint it is misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Graham 560 U.S. at 68.

In Graham, the Court explained that the attributes of youth also diminish the penological justifications - retribution, deterrence, incapacitation, and rehabilitation - for imposing the harshest sentence on juveniles even when they commit terrible crimes. Retribution is related to the personal culpability of the offender. The Court in Graham stressed that

the case for retribution is not as strong with minors, because they are less culpable. "Deterrence does not suffice to justify the sentence either." Graham, 560 U.S. at 72. The traits that render juveniles less culpable, i.e. immaturity, recklessness, and impetuosity, make them "less likely to take a possible punishment into consideration when making a decision." Graham, 560 U.S. at 72. Finally, while incapacitation is an important penological goal, it is "inadequate" to justify an LWOP sentence for a child. "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." Graham, 560 U.S. at 72 (emphasis added). Even experts cannot determine if a juvenile is incorrigible, and certainly "that judgment cannot be made at the outset." Graham 560 U.S. at 73; Contreras, 411 P.3d at 453. An LWOP sentence erroneously denies the juvenile "a chance to demonstrate growth and maturity." Graham 560 U.S. at 73. While a State need not guarantee the eventual freedom of juveniles, it must give them "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75.

Building on scientific findings about adolescent brain developments recognized in Roper and Graham, the Court, in Miller, 567 U.S. 460 (2012),

barred the mandatory imposition of an LWOP sentence on a juvenile. Montgomery, 577 U.S. 190, 195 (2016). To make that determination, courts must conduct a Miller hearing where the juvenile's youth and its attendant characteristics, described above, will be taken into account. See Carter v. State, 192 A.3d 695, 702-08 (Md. 2018)(for a discussion about Roper, Graham, Miller, and Montgomery). Given the special constitutional considerations raised by juvenile offenders, a majority of courts have also required a Miller hearing before the imposition of a de facto LWOP sentence. While the motion court disagreed, this Court should follow these jurisdictions by applying Miller to de facto LWOP sentences.

A. A Miller hearing should be required before imposing a de facto LWOP sentence on a juvenile and a sentence of 50 years to life is a de facto LWOP life sentence.

This Court should follow most other jurisdictions and require a Miller hearing with its mandatory consideration of youth and its attendant characteristics before the discretionary imposition of a de facto LWOP sentence on a juvenile. A sentence of 50 years to life is a de facto LWOP sentence.

1. Miller should apply to de facto LWOP sentences.

A majority of jurisdictions that have considered the issue have applied Miller to de facto LWOP sentences. State v. Kelliher, 849 S.E.2d 333, 345, n. 11 and 13 (N.C. 2020); see State v. Slocumb, 426 S.C. 297 (2019)(Appendix); Carter v. State, 192 A.3d 695, 727 n. 35 (Md. 2018)(for a list of the decisions); see People v. Lora, 70 Misc. 3d 181 (N.Y. Sup Ct. 2020). They have done so based on the language and logic of Miller. Children are different. There is no question that a lengthy term-of-years can effectively be a life sentence. Carter v. State, 192 A.3d at 727. To find otherwise would elevate form over substance. Id. at 727-28 (100 years – with a mandatory minimum of 50 years - was de facto LWOP sentence); People v. Caballero, 282 P.3d 291, 295 (Cal. 2012)(110 years to life was de facto LWOP sentence); Casiamo v. Comm'r of Corrections, 115 A.3d 1031, 1044 (Conn. 2015)(50 years to life was a de facto LWOP sentence); State v. Null, 836 N.W. 2d 41, 71(Iowa 2013)(52.5 years was de facto LWOP sentence).

In State v. Kelliher, the court "decline[d] to stand behind the simple formalism that a sufficiently lengthy terms of years sentence cannot be a

sentence of LWOP because it does not bear the name and terminate at a date certain." 849 S.E.2d at 346. The court found that the proscription against cruel and unusual punishment in cases of juveniles may not be circumvented simply by stating the sentence in terms of years, or setting parole eligibility after any reasonable life expectancy, rather than labeling it a life without parole sentence. Id. at 725, 731-32.

Rehabilitation cannot justify a sentence that "forswears altogether the rehabilitative ideal," whether the sentence is "life without parole," or its equivalent, de facto life. Carter (McCullough), 192 A.3d at 726-27. A juvenile whose offense is the result of transient immaturity must be given a "meaningful opportunity for release based on demonstrated maturity and rehabilitation," which the Supreme Court has equated with a "hope for some years of life outside prison walls." Montgomery, 577 U.S. at 213; Carter, 192 A. 3d at 730.

Courts that have limited Miller to its facts and to the mandatory imposition of a sentence labeled "life without parole" have done so "based more on caution than conviction." Carter (McCullough), 192 A.3d at 726-27, n. 35, citing State v. Ali, 895 N.W.2d 237, 244-46 (Minn. 2017). Several courts rely on language from Justice Alito's dissent in Graham. See

Lucero v. People, 394 P.3d 1128, 1133(Colo. 2017)(citing to the dissent by Justice Alito in Graham, noting that the majority had said nothing about aggregate or consecutive terms of years); see Wilbanks v. Mo. Dept. of Corr., 522 S.W.3d 238, 243 (Mo. 2017)(same also citing to the dissent by Justice Thomas in Graham noting that the majority had excluded from its analysis aggregate terms of years). To limit Miller to mandatory de jure LWOP, courts must ignore the core principles of Roper, Graham, and Miller that "children are different," and that there is no legitimate penological justification for sentencing a juvenile to a lifetime in prison.

While no appellate court in New York has decided whether Miller applies to the imposition of de facto LWOP sentences to juveniles, appellate courts have applied Miller in the context of Parole Board decisions, requiring consideration of the offenders' youth and attendant characteristics at the time of the offense. Matter of Hawkins v. N.Y.S. Dept. of Corr. & Comm. Supervision, 140 A.D.3d 34 (3d Dept. 2016); Matter of Rivera v. Stanford, 172 A.D.3d 872 (2d Dept. 2019). In a different context, Judge Wilson dissenting in People v. Alvarez, 33 N.Y.3d 286, 312 (2019), explicitly equated LWOP to "its functional equivalent," i.e. de facto LWOP. In that case, Judge Wilson would have found appellate counsel ineffective

for his failure to argue that an aggregate term of 66 2/3 years – a de facto life sentence - imposed on a defendant who had been 19 at the time of the crime was excessive. In his view, studies on adolescent brain developments, sentencing standards for juveniles in European countries, the United Nations' Convention on the Rights of the Child, and Miller provided persuasive authority to support his position.

2. A sentence of 50 years to life is a de facto LWOP sentence

In determining whether a sentence is a de facto life without parole sentence, courts consider different factors. A number of courts have used 50 years to life as a benchmark. Carter (McCullough), 192 A.3d at 727-28; see People v. Contreras, 411 P.3d 445, 455 (Cal. 2018)("we are not aware of any state high court that has found incarceration of a juvenile for 50 years or more before parole eligibility to fall outside the strictures of Graham and Miller"). The number is supported by the Court's observation in Graham that the defendant would not be released "even if he spends the next half-century attempting to atone for his crimes and learn from his mistakes" 560 U.S. at 79; Carter, 461 Md. at 353. Courts have also considered natural life expectancy and retirement age. Id.; see Contreras, 411 P.3d at 450-51 (disagreeing with the use of actuarial tables because of the possible

discriminatory impact based on gender and race). In Carter (McCullough), McCullough was sentenced to a total of 100 years. He would be parole eligible after 50 years, at 67. That sentence was a de facto LWOP sentence. Carter (McCullough), 192 A.3d at 734-35.

Appellant's sentence of 50 years to life is a de facto LWOP sentence. It meets the 50-year threshold adopted by most courts in drawing the line defining de facto sentence of life without parole. It renders appellant eligible for parole in 2042, when he will be 67, two years after the New York retirement age of 65, and ten years after the life expectancy of inmates in New York. Department of Corrections and Community Services, Inmate Mortality 2009-12 at 2 [81% of the 404 deaths in prison during that year died of natural causes at an average age of 57]).[5] There is little chance that appellant will, as Graham requires, have "some years of life outside prison walls." See Carter (McCullough), 192 A.3d at 721; Contreras, 411 P.3d at 454 (Graham envisioned "more than a de minimis quantum of time outside of prison").

In this case, the motion court erred in summarily denying a Miller hearing. Appellant's sentence of 50 years to life is a de facto LWOP

[5] The motion court erroneously looked at the life expectancy of non-incarcerated men.

sentence that could not be imposed without a hearing where his youth and its attendant characteristics were taken into account to determine whether his actions were the result of transient immaturity.

B. The sentencing process for 16-year-old juveniles in New York in 1994 was not the equivalent of a Miller hearing.

In 1994, in New York, 16-year-old offenders were considered adults. They were not considered children; they were not viewed as different than adults. Youth and its particular attendant characteristics were not legally mandated factors at sentencing and were not uniformly taken into account. Contrary to the motion court's conclusion, appellant's sentencing did not satisfy Miller.

Miller prohibited the imposition of an LWOP sentence on a juvenile whose crimes reflected transient immaturity rather than permanent incorrigibility. Montgomery v. Louisiana, 577 U.S. 190, 136 S. Ct. 718, 733 (2016). To separate those who can be punished by life in prison from those who cannot, Miller requires courts at sentencing to consider "youth and its attendant characteristics." Miller, 567 U.S. at 467. Courts must consider immaturity, failure to appreciate risks and consequences, susceptibility to family and peer pressures, and the greater possibility of rehabilitation.

Miller, 567 U.S. at 479. In Jones v. Mississippi, the Court held that there was no federal requirement for the sentencing court to make an explicit or implicit finding of incorrigibility at a Miller hearing. __ U.S. __, 141 S. Ct. 1307, 1319 (2021). However, Jones was appealing an LWOP sentence imposed after an actual Miller hearing. 141 S. Ct. 1307, 1316 n. 4 ("[b]y now, most offenders who could seek collateral review as a result of Montgomery have done so"). Defense counsel had argued that Jones's "'chronological age and its hallmark features' diminished the 'penological justifications for imposing the harshest sentence'." Id. at 1313. Counsel also argued that nothing in the record "would support a finding that the offense reflects irreparable corruption.'" Id. In such a situation, where the purpose of the hearing is to consider youth and its attendant circumstances and where defense counsel has set forth an argument as to why youth justified a non LWOP sentence, it can be inferred that the court necessarily take youth into account. Indeed,

> Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentence to avoid considering that mitigating factor.

Id. at 1319. Miller mandates "only that a sentence follow certain process – considering an offender's youth and attendant characteristics – before imposing LWOP." Jones, at 1311. The Court left it up to the states to set the specific parameters of the required process. However, it warned that while Miller "does not impose a formal fact-finding requirement," "it does not leave States free to sentence a child whose crimes reflect transient immaturity to life without parole." Id. at 1315, n. 2.[6]

The process in New York in 1994 did exactly what Jones warned against—it left a New York court "free to sentence a child whose crimes reflect transient immaturity to life without parole." Id. at 1315, n. 2. In 1994, New York courts could sentence a 16-year-old offender to a de facto LWOP sentence without ever considering his youth, let alone youth's attendant characteristics. At the time, a 16-year-old child was an adult in the

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> [States] may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States.

Id. at 1323.

eyes of the law. P.L. §30.00. Sixteen-year olds were not children, they were not different, and sentencing them did not raise any "special constitutional considerations" Jones, 141 S. Ct. 1314. Youth and its attendant circumstances were not yet legally required factors. Indeed, scientific research on adolescent brain development would not be given legal significance until ten years later in Roper.

In this case, and contrary to the court's recollection, appellant's youth and its attendant characteristics were never taken into account. The court completely ignored appellant's age when it ordered the sentences to run consecutively. It was the court's "general practice" to impose consecutive sentences when "separate crimes are committed." It was the court's "general practice" for children and adults alike. The court may have been aware of appellant's age, but it did not act in any way to indicate that it considered it when it imposed the maximum permissible terms to run consecutively.

The court may have been aware of appellant's age, but it did not consider him a child. In New York, he was an adult. The prosecutor did not mention his age, the court did not mention his age, and counsel mistakenly told the court appellant had been 17 at the time. At no time were the attendant characteristics of youth, immaturity, susceptibility, the transitory

adolescent character, and dependence considered. See United States v. Ramsay, __ F. Supp. __, 2021WL1877963 (S.D.N.Y. 2021). Immaturity in adolescents is now better understood as a "maturity gap," resulting from different phases of brain development. Id., *11. In high-pressured, emotional situations, adolescents make riskier decisions. Therefore, "when sentencing adolescent offenders – particularly when the offense occurred quickly in a high paced emotional environment – courts should bear in mind the adolescent maturity gap." Here, the offense occurred quickly in a very emotional environment. Appellant saw his ex-girlfriend on the lap of another, someone lunged with a knife or hammer. He fired. The sentencing court never considered the role of his adolescent immaturity. Under New York rules at the time of sentencing, appellant was an adult, not an immature adolescent.

Appellant's susceptibility to pressure was never considered by the court either. Adolescents are susceptible to outside pressures, including peer pressure. Courts, "when sentencing adolescent offenders and particularly when the criminal act took place in the presence of peers, should keep in mind adolescents' temporarily enhanced susceptibility to peer influence. Id. at *11. Appellant had two brothers who were involved in criminal activity.

At the party, he was in the presence of his peers who were carrying weapons, drinking and doing drugs. The court never considered the impact of peer pressure on adolescents. To the court, appellant was an adult.

The transitory character of adolescent personality was not considered either. In sentencing adolescents, courts "must consider the chance that their youthful `character deficiencies' will be reformed." Id. Here, the court looking at appellant as an adult, finding the prognosis "so awful." Finally, the court never looked at appellant's environment and his dependence on others. Even in denying the motion to set aside the sentence, the court found his environment irrelevant.

The court's focus on appellant's lack of remorse at the time of sentencing also shows that he was being treated like an adult.[7] Indeed, while remorse is an aggravating factor for an adult, it is not for a juvenile. Sentences that rely on "a juvenile's failure to express societally appropriate responses to a situation merely punishes developmental immaturity and what often might be a natural reaction to the social pressures that inhibit youth from expressing remorse in a courtroom." Juvenile Remorselessness: An

[7] Appellant had not yet appealed. His conviction was not final. He may have had many reasons for not expressing remorse.

unconstitutional sentencing consideration, 38 N.Y.U. Rev. L. & Soc. Change, 99, 100 (2014).

The record makes it clear that the court was focused on the victims and the "enormous loss" to their family. It sentenced appellant to a de facto LWOP sentence without ever considering appellant's youth and its attendant characteristics. Appellant's sentencing did not satisfy Miller and violated federal and state prohibition against cruel and unusual punishment.

C. Appellant's de facto LWOP sentence of 50 years to life amounts to disproportionate punishment in violation of the Eighth Amendment and its New Yok equivalent.

The imposition of the legally maximum sentence of 50 years to life – de facto LWOP – on a 16-year-old juvenile with no criminal record, a sixth-grade education, and a difficult family background in a case of homicide where the court came close to submitting a justification defense constitutes disproportionate punishment in violation of the federal and state prohibition against cruel and unusual punishment. A "criminal sentence must be proportionate to the crime for which the defendant has been convicted." Solem v. Helm, 463 U.S. 277, 290 (1983); see also People v. Broadie, 37 N.Y.2d 100, 111 (1975). Assessment of proportionality focuses on objective factors about the gravity of the offense and the future danger posed by the

offender. Broadie, 37 N.Y.2d at 112. Recently in Jones v. Mississippi, the Court recognized that an LWOP sentence imposed on a juvenile could be so disproportionate as to amount to cruel and unusual punishment in violation of the Eighth Amendment. 141 S. Ct. 1307, 1315, n.2, 1322 (the Court did not address an as-applied challenge because it was not properly before it). Looking at the nature of the crime, the lesser culpability of adolescents, generally, and their ability to rehabilitate, incarcerating a person for a minimum of 50 years, starting at age 16, constitutes cruel and unusual punishment in violation of the United States and New York Constitutions. Here, the crime was murder and there is no question that murder is a very serious crime. Appellant was convicted of shooting two people at a drug and alcohol fueled party in the Bronx in 1992. One victim was armed with a knife and may have lunged at appellant before he fired. In refusing to give a justification charge, the court admitted that it was "as close a claim as I have ever seen" (AB at 16-17). Therefore, while serious, the offense in this case did not belong in the category of the most heinous crimes.

Appellant was 16 and less culpable because of his age. As discussed at length above, supra Point I (A) and (B), "children are constitutionally different." Montgomery, 577 U.S. at 206 (citations omitted). Neuroscience

and psychology have demonstrated that adolescents are immature and lack of a sense of responsibility, but their brain evolves with age to enable individuals to curb such impulsive behavior. See Roper v. Simmons, 543 U.S. at 569. In addition, adolescents are especially vulnerable to negative influences and peer pressure; giving in to such influences, while reprehensible, lessens their level of individual culpability. Moreover, youths necessarily are dependent on adults to satisfy their basic needs, such that their lives are not within their control. Relative to adults' crimes, adolescents' crimes are less a product of their choices and more a product of their environment. Roper, 543 U.S. at 569-70. This dependence also serves to reduce their culpability. The vulnerability and lack of control over their surroundings mean "juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." Id. at 570.

Appellant was immature. He had learning issues and dropped out of school in 6th grade at 14. Early on, he fell under the influence of his older brothers who were involved in gang activities. The night of the crime, he was at a party among his peers, some older, trying to assert himself in their eyes. Because children have "diminished culpability and greater prospect of

reform," "they are less deserving of the most severe punishment." Graham, 560 U.S. at 68.

Appellant was sentenced to the most severe sentence of 50 years to life. He faced a possible minimum of 15 years to life. He had no criminal record. Even for an adult, "it is unusual for first offenders to receive the maximum permissible sentence in the absence of aggravating factors…." People v. Diaz, 118 A.D.2d 651, 652 (2d Dept. 1986). It is a sentence reserved for the most culpable, for the most heinous crime. It was upheld for a 33-year old career criminal who pled guilty to two counts of second-degree murder to satisfy an indictment including three first-degree murder counts. People v. Hayes, 60 A.D.3d 1097, 1101 (3d Dept. 2009); Brief for Respondent, 2008 WL 8736037, at *1. As an adolescent, appellant was not the most culpable and his crime was not the most heinous.

Finally, in conducting a proportionality analysis, it is useful to consider sentences imposed for the same crime in other jurisdictions. Solem, 463 U.S. at 291-92. Here, imposing the maximum permissible sentence of 50 years to life is completely disproportional when compared to sentences imposed on children in the rest of the world. See People v. Alvarez, 33 N.Y.3d 286, 312-13 (2019)(Wilson, J., dissenting). The United States is the

only country in the world that allows de jure and de facto LWOP sentences for juveniles. https://www.urban.org/urban-wire/state-bans-juvenile-life-without-parole-can-right-wrongs-jones-v-mississippi. "We are not only isolated in this practice—we are condemned by international law for it." Id. The United States is the only country that has not signed the Convention on the Right of the Child ("CRC"). Article 37(a) of the CRC provides that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment." The article stipulates "[n]either capital punishment or life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age."

In his 2015 report on life imprisonment of children, the United Nations special rapporteur on torture and other cruel, inhuman, and degrading treatment or punishment concluded that "[l]ife imprisonment and lengthy sentences, such as consecutive sentences, are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child." Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Juan E. Mendez, A/HRC/28/68, March 5, 2016. The Report explained that "life sentences or sentences of an extreme length have a disproportionate

impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment." Id. §74; see Van Zyl Smit and Appleton, Life Imprisonment: A Global Human Rights Analysis at 105-07, 114 ("*The United States as an Outlier")*(Harvard University Press 2019). Recent guidelines issued by The American Law Institute for its proposed Model Penal Code, recommend that adolescents under age 18, should not be incarcerated longer than 25 years for any offense or combination of offenses and should be eligible for sentence modification after serving ten years of incarceration. https://thealiadviser.org/sentencing/sentencing-of-juveniles/, citing§§6.14(1)(i), (7), (8). Given these realities, appellant's maximum permissible sentence of 50 years to life is disproportionate cruel and unusual punishment under the Eighth Amendment of the Federal Constitution and Article 1, section 5 of the State constitution.

POINT II

COUNSEL'S FAILURE TO PRESENT ANY MITIGATING EVIDENCE WHERE APPELLANT, AT 16, FACED A DE FACTO LIFE SENTENCE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING. U.S. CONST., AMENDS. VI AND XIV; N.Y. CONST., ART. 1 §6.

The Federal and State Constitutions guarantee the effective assistance of counsel at sentencing. Counsel must conduct a diligent investigation into the defendant's background and present any applicable mitigating evidence. The most rudimentary investigation involves requesting school, health, and other institutional records that are readily available. Appellant at 16 faced a sentence of 50 years to life, virtually ensuring that he would die in prison if he received anywhere near the maximum. Counsel did nothing before or at sentencing. He virtually never talked to appellant or his mother. He never obtained school or other institutional records. Had he made the most minimal effort; he would have learned of appellant's difficult childhood. He would have learned that he was "slow," that he had graduated from Elementary School late, at 13, that he had dropped out of school completely in 6th grade, that he had struggled with drugs and alcohol, and that his father drank and beat him, his siblings, and his mother.

At sentencing, counsel promised the court to be "brief," and he was. He misstated appellant's age and mentioned his lack of criminal record, nothing more. Almost 30 years later, the court rejected appellant's ineffective assistance of counsel claim, finding that counsel's performance pretrial and at trial satisfied an objective standard of reasonableness. The court summarily denied the motion because no evidence could have been presented to alter its sentence. Given the evidence submitted in support of the motion to vacate the sentence, the court erred in not ordering a hearing where experts could testify, and appellant's development and record could be presented and explained. Counsel's failure to investigate deprived appellant of his constitutional right to the effective assistance of counsel and requires resentencing. U.S. Const., Amends. VI and XIV; N.Y. Const., Art. 1 §6.

To establish ineffective assistance of counsel at sentencing under the Sixth Amendment, a defendant must show that counsel's performance fell below "an objective standard of reasonableness" and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). Under the New York State

Constitution, effective assistance requires "meaningful representation," a standard that focuses on the "fairness of the process as a whole," more than a specific showing of prejudice. People v. Benevento, 91 N.Y.2d 708, 713 (1998). The "meaningful representation" rule is "somewhat more favorable to defendants" than its federal counterpart. People v. Turner, 5 N.Y.3d 476, 480 (2005). Meaningful representation includes the right to assistance by a lawyer who has taken the time to review and prepare both the law and the facts relevant to the defense, see People v. Droz, 39 N.Y.2d 457, 462 (1976).

A defendant's right to effective representation entitles him "to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed." People v. Oliveras, 21 N.Y.3d 339, 346 (2013); People v. Davis, 193 A.D.3d 967 (2d Dept. 2021). "A total failure to investigate the facts of a case or review pertinent records," is not a trial strategy. Id.; see ABA standards for criminal justice, 4-4.1 (3d ed. 2013). [8] At sentencing, counsel has "an obligation to conduct a thorough

[8] ABA standards for criminal justice, 4-4.1 (3d ed. 2013):

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty

investigation of the defendant's background." Williams v. Taylor, 529 U.S. 362, 363, 415 (2000). In Williams, the defendant came from an alcoholic family, was severely beaten by his father; had dropped out of school in 6th grade, was "borderline retarded" and had a juvenile criminal record going back to the age of 11. Id. at 396. In that case, counsel did not conduct an investigation and never uncovered evidence of defendant's nightmarish childhood. Id. at 396, 415. Counsel has a duty to conduct the "'requisite diligent' investigation into his client's background", and he did not fulfill that obligation. Williams, 529 U.S. at 415 (O'Connor, J., concurring). Without conducting a reasonable investigation, counsel "cannot possibly be said to have made a reasonable decision as to what to present at sentencing." Blystone v. Horn, 664 F.3d 397, 420 (3d Cir. 2011); see People v. Washington, 96 A.D.2d 996, 998 (3rd Dept. 1983)(counsel was ineffective at sentencing where he never investigated nor consulted with defendant in advance on the possible existence of any mitigating factors); see also People

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(...continued)

> to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

The ABA standard was the same in 1994. ABA Standards for Criminal Justice, Prosecution Function and Defense Function, standard 4–4.1 at 181 (3d ed. 1993).

v. Edmond, 84 A.D.2d 938 (4th Dept. 1981)(counsel was ineffective at sentencing where he relied only on the presentence report that he had not read).

A reasonable investigation consists, at the very least, of obtaining school and institutional records. See Abdul-Salaam v. Sec'y of Pennsylvania Dep't of Corr., 895 F.3d 254, 268 (3d Cir. 2018)(counsel did not even conduct a "rudimentary investigation" to obtain school, medical and other institutional records, which are readily available, to glean the background information necessary to direct the rest of an investigation); see also Morrow v. Warden, 886 F.3d 1138, 1147 (11th Cir. 2018)(reviewing the case law the court noted that counsel's performance is deficient where he fails to question his client about his childhood and background and barely talks to family members); Sanford v. State, 25 S.W.3d 414, 421 (Ark. 2000)(counsel's performance was deficient where he did not even obtain the defendant's school records, jail records, medical records, or family history); People v. Cuevas, 111 N.E.3d 159, 167 (IL. App. 2018)(in a case involving drug offenses, had counsel investigated, he would have found readily available witnesses willing to provide mitigating evidence giving a more complete picture of the defendant and contradicting the presentence report); cf. Garner

v. Comm'r of Correction, 196 A.3d 1138, 1141-42 (Conn. 2018)(in a case involving assault and burglary, counsel's performance at sentencing was not deficient where he submitted a presentencing memorandum, a memorandum in aid of sentencing from a social worker, a mental health evaluation, and letters from family and friends).[9]

Here, counsel conducted no investigation. He did not even meaningfully interview appellant and his mother. He never asked appellant's mother about the family environment or appellant's problems at school or elsewhere. Had he done so, he would have learned that appellant was the 9th of 10 children, that his family had moved from Puerto Rico to the Bronx when he was 7, and that it had been difficult. He had been bullied for not speaking English and bullied for being poor. Counsel would have learned that appellant's father drank, beat appellant, beat his siblings, and beat his wife in front of appellant. He would have learned that appellant had learning issues, that he was "slow," graduating from Elementary School at 13 when most graduate at 9, that he was placed in special education and that he dropped out entirely in 6th grade. By then, one brother was in prison, the

[9] Today, following Miller v. Alabama, 567 U.S. 460, 480 (2012), counsel's failure to make the sentencer aware of a defendant's youth raises an "ineffective-assistance-of-counsel claim." Jones v. Mississippi, 141 S. Ct. at 1319 n.6.

other in a gang, and two teenage sisters had had babies that lived with them. Counsel candidly admits that he does not remember anything about this case. Had counsel been minimally diligent, he would remember this case, even twenty-five years later, involving a double murder and a 16-year-old boy who was sentenced to die in prison.

While counsel at sentencing mentioned that appellant had no criminal record, counsel presented no case law to support a lesser sentence. At the very least, he should have stressed that absent aggravating circumstances, the maximum sentence for a first-time offender is unusual. People v. Diaz, 118 A.D.2d 651 (2d Dept. 1986). He should have stressed that the maximum sentence is reserved for particularly "heinous" crimes. See People v. Hayes, 60 A.D.3d 1097 (3rd Dept. 2009)(where the defendant strangled the victim and stabbed her 33 times in the neck and stabbed her infant multiple times, a sentence of 50 years to life was upheld).

The crime in this case did not belong in the same heinous category. One victim may have provoked appellant by approaching him with a knife. Someone threw a hammer at him. The trial court refused to give a justification charge but admitted that it was a very close question. The court refused to give an intoxication charge but agreed that drugs had been used.

Even if the provocations of others and the partial intoxication of appellant did not rise to the level of a complete defense, at the very least, they provided powerful mitigating evidence. Yet, counsel did not even mention it. What happened was a tragedy, but appellant was an adolescent and adolescents are less culpable than adults. Appellant should never have been sentenced to the maximum permissible term for an adult. The right to the effective assistance of counsel means "more than just having a person with a law degree nominally" representing the defendant. People v. Bennett, 29 N.Y. 2d 462, 466 (1972).

Counsel's performance pretrial and at trial did not – as the motion court implied – cure his lack of the most minimal effort at sentencing. An attorney's egregious failure to provide effective assistance as to a particular aspect of representation cannot be excused by reference to general competency in other respects. When a court claims that "counsel's competency in all other respects" mitigated the effect of counsel's error, it "fail[s] to apply the Strickland standard at all." Henry v. Poole, 409 F.3d 48, 72 (2d Cir. 2005). Reliance on a trial attorney's general competency "would produce an absurd result inconsistent with . . . the mandates of Strickland." Rosario v. Ercole, 601 F.3d 118, 125-26 (2d Cir. 2010) (discussing the

danger that New York state courts "might misunderstand the New York standard [for assessing ineffectiveness claims] and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial.")

While the motion court found that nothing would have affected its sentencing decision, the evidence presented established a reasonable probability that a court would have reached a different outcome. The Strickland prejudice inquiry is an objective one, not subject to the idiosyncrasies of a particular decisionmaker. Hill v. Lockhart, 474 U.S. 52, 60 (1985). See White v. Ryan, 895 F.3d 641, 670-71 (9th Cir. 2018) (state court's "prejudice determination was contrary to Strickland" because "the court determined whether it would have imposed a death penalty if it had considered the mitigation evidence that [counsel appointed for resentencing proceedings] failed to present. However, the test for prejudice is an objective one.") (Emphasis in original). At the very least, a hearing should have been granted to allow appellant to present mitigating evidence supporting a lower sentence.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE DENIAL OF THE MOTION TO VACATE THE SENTENCE SHOULD BE REVERSED AND RESENTENCING ORDERED, TO BE PRECEEDED BY A MILLER HEARING.

Respectfully submitted,

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Attorney for Defendant-Appellant

NATALIE REA
Of Counsel
August 2021

PRINTING SPECIFICATIONS STATEMENT

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ADDENDUM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

JOSE MATIAS, :

Defendant-Appellant. :

----------X

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 1832/92.

2. The full names of the original parties were The People of the State of New York against Jose Matias. There has been no change of parties on appeal.

3. This action was commenced in Supreme Court, Bronx County.

4. This appeal is from an order denying appellant's motion to vacate the sentence pursuant to C.P.L. §440.20, rendered April 23, 2020, Appellant's motion for leave to appeal was granted on November 12, 2020 (Gonzalez, J.).

5. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

JOSE MATIAS,

Defendant-Appellant.

AFFIRMATION OF SERVICE

Bronx County Ind. No. 1832/1992

Case No. 2020-03839

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Natalie Rea, an attorney duly admitted to the practice of law in this State, does hereby affirm and show:

That, on August 23, 2021, the within Brief was served upon the Bronx County District Attorney, Attention: Hon. Darcel D. Clark, 198 East 161st Street, Bronx, New York 10451, via email at: appellatebriefs@bronxda.nyc.gov and Attention: Joshua Weiss at Weissjo@bronxda.nyc.gov. The District Attorney's Office has consented to be served exclusively by electronic mail.

Dated: New York, New York
August 23, 2021

Natalie Rea (ak)
NATALIE REA

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

JOSE MATIAS,

Defendant-Appellant.

AFFIRMATION OF SERVICE

Bronx County
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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Natalie Rea, an attorney duly admitted to the practice of law in this State, does hereby affirm and show:

That, on August 23, 2021, the within Brief was served upon the defendant-appellant, Jose Matias, DIN: 94-A-4381, at Sullivan Correctional Facility, 325 Riverside Drive, Box 116, Fallsburg, New York 12733-0116, by depositing a true copy of the same in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Dated: New York, New York
August 23, 2021

Natalie Rea(ak)
NATALIE REA