No. 122327

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- DIMITRI BUFFER Petitioner-Appellee	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-2931. There on appeal from the Circuit Court of Cook County, Illinois , No. 09 CR 10493. Honorable Thaddeus L. Wilson, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

CHRISTOPHER L. GEHRKE
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLEE

ORAL ARGUMENT REQUESTED

E-FILED
11/2/2018 2:41 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES Page

ISSUE PRESENTED

Does imposing a 50-year sentence on a juvenile offender like Dimitri Buffer, without considering how his youth diminished his culpability and enhanced his prospects for reform, violate the Eighth Amendment? More specifically, does a five-decade sentence afford juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"?

STATEMENT OF FACTS

On May 6, 2010, Mark Matthews, 16-year-old Dimitri Buffer, and other Black P Stones were playing basketball near 82nd Street and Brandon Avenue in Chicago (R. S66, 164, U16). Around 9:00 p.m., a group of Latin Kings drove up in a red car and flashed gang signs at them (R. S166-67). Matthews had been jumped and beaten up by Latin Kings just a few days earlier (R. S105-106, 157-59).

Less than an hour later, a 23-year-old Black P Stone named Sammy Trice picked up Matthews, Buffer and the other boys in his car (R. S67, 167–68, T155). Trice drove them to an alley on 83rd Street, where Black P Stones stored guns and drugs in a vacant house (R. S71–76, 169-70, 194, 196). Buffer went into the house, and returned to the car (R. S72-74, 76, 171, T159).

Trice then drove back over to Brandon Avenue and stopped at a stop sign (R. S.77). The older gang member claimed he stopped to roll a marijuana blunt (R. S77), but the person sitting next to Trice did not see this happen (R. T170). While they were stopped at the intersection, a red Chevrolet Caprice sedan drove by, and turned south on Brandon Avenue (R. S79, T159–60). Someone said, "There go them guys right there" (R. S78, T159). Buffer jumped out of the car, walked toward the vehicle, fired a gun at it, and then got back in the car as Trice drove away (R. S29-50, 78-81, 172-73, T159).

Buffer later told other persons, including his older brother Melvin Buffer (who was also a Black P Stone), that he "shot a King" (R. T9-11, 17, 73, 88). No one present believed that he actually shot anyone, because Buffer often joked around and was a "playful person" (R. T74). Melvin later told Buffer something about

a lady, to which Buffer replied that he "didn't shoot no lady" (R. T78–79). However, the driver of the red vehicle was not a Latin King, but Jessica Bazan; she had been shot in the leg, and died from her injury (R. S148–49).

A jury found that Dimitri Buffer committed first degree murder, and had personally discharged a firearm that proximately caused Bazan's death (C. 120–21; R. U148–49).

Sentencing

The State called several police officers in aggravation to testify about Buffer's arrests when he was just 14 and 15 years old. The officers said that Buffer had previously been arrested for allegedly committing robbery and armed robbery; for "being in the back seat of a vehicle" that was reported stolen; for "interfering" with the arrest of narcotics suspects; and for "flashing gang signs" (R. X35, 38, 39, 40, 46-47). Buffer's pre-sentence investigation report reflects only a single adjudication of delinquency for theft (C. 126).

The prosecutor nonetheless argued that Buffer's arrests as a minor showed "the making of a gang member," and contended that Buffer "had choices at the age of 14 and yet continued again and again to commit crimes" (R. X60). She claimed that Buffer "chose to be a Black P Stone," and that he "chose to have that life" (R. X60-61). The prosecutor further argued for an extended sentence in order "to deter others from committing the same crime" and "to send a message" to the community and to gang members; she contended that "these sentences are necessary to deter others from that conduct" (R. X62). In allocution, Buffer apologized for what happened to Bazan's family, and expressed that he was "really sorry" (R.

X63).

Illinois law at the time required a sentence of at least 45 years: 20 for the first degree murder, plus a mandatory 25-year firearm enhancement. 730 ILCS 5/5-8-1(a)(1)(a), (a)(1)(d)(iii)(West 2010). The judge stated that he "considered all of the relevant statutory requirements[,]" and sentenced Buffer to 50 years in prison (C. 158; R. X64).

Direct Appeal

Buffer's conviction and sentence were affirmed on direct appeal. *People v. Buffer*, 2012 IL App (1st) 102411-U. During the pendency of that appeal, the U.S. Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), but the appellate court denied appellate counsel leave to file a supplemental brief addressing the impact of *Miller* on his 50-year sentence.

Post-conviction Petition

Buffer filed a post-conviction petition on May 23, 2014 (C. 86). He argued that his 50-year sentence violated the Eighth Amendment of the U.S. Constitution (C. 90), as well as the proportionate penalties clause of the Illinois Constitution (C. 92). Buffer's petition cited *Miller* and related Illinois cases, and emphasized the diminished culpability of juveniles and their enhanced rehabilitative capacity (C. 90-93). He asked the court to vacate his sentence and remand for a new sentencing hearing in light of *Miller* and the other authorities he cited, to give him a chance to "re-enter society as a productive and useful citizen" (C. 94). The trial judge summarily dismissed his petition on August 8, 2014 (C. 104).

Appeal from Post-conviction Petition

On appeal, Buffer again challenged his sentence under both the Eighth Amendment of the U.S. Constitution and the proportionate penalties clause of the Illinois Constitution. *See People v. Buffer*, 2017 IL App (1st) 142931, ¶ 1. The appellate court found that Buffer's sentence violated the Eighth Amendment, and remanded for a new sentencing hearing. *Id.* at ¶ 66.

In arriving at that decision, the *Buffer* court relied on recent U.S. Supreme Court case law, and recognized that after *People v. Reyes*, 2016 IL 119271, mandatory sentences that are "the functional equivalent of life without parole" are unconstitutional. *Id.* at ¶55 (citing *Reyes*, 2016 IL 119271, ¶ 9 [quoting *Bear Cloud v. State*, 334 P.3d 132 (Wyo 2014)]). *Reyes*, however, "left open the question of what age constitutes a 'lifetime,' and who gets to make that decision." *Buffer*, 2017 IL App (1st) 142931, ¶ 57. It acknowledged that other Illinois courts were split on this issue, and that they "disagree[d] as to whether it is even appropriate for a court of review to reflect on questions of biology and statistics." *Id.* Despite this "dilemma in grappling with such complex questions," the court found that it could "not see how justice is better served by avoiding them." *Id.* at ¶ 58.

The *Buffer* court therefore looked to *People v. Sanders*, 2016 IL App (1st) 121732-B, which held that a prisoner's life expectancy was about 64 years, based on studies and cases holding that minors committed to long prison terms would have shorter life expectancies. *Buffer*, 2017 IL App (1st) 142931, ¶ 59. It also recognized that the Wyoming Supreme Court held that an aggregate 45-year sentence was unconstitutional in *Bear Cloud*, 334 P.3d at 142, and that the Iowa

Supreme Court similarly overturned a 52.5 year sentence in *State v. Null*, 836 N.W. 2d 41, 71 (Iowa 2013). *Id*. at ¶¶ 61-62.

The appellate court thus concluded that, "as a practical matter, the petitioner, whose average life expectancy is at best 64 years, will not have a meaningful opportunity for release." *Id*. at ¶ 62. Since "nothing in the record" showed that the trial judge's reasoning "comported with the juvenile sentencing factors recited" by the U.S. Supreme Court, it concluded that Buffer's 50-year sentence violated the Eighth Amendment. *Id*. at ¶¶ 63, 64. This Court allowed the State's petition for leave to appeal.

ARGUMENT

I. Dimitri Buffer's 50-year sentence for a crime he committed as a 16-year old minor violated the Eighth Amendment's ban on cruel and unusual punishment. This harsh penalty does not afford him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and the sentencing judge imposed it without considering the mitigating characteristics of his youth.

Dimitri Buffer was sentenced to 50 years in prison for a homicide offense he committed when he was just 16 years old, after a hearing where the trial judge did not consider how his youth affected his culpability or prospects for rehabilitation. The appellate court found that imposing this harsh penalty without considering the mitigating characteristics of Buffer's youth as described in *Miller v. Alabama*, 567 U.S. 460 (2012) violated his Eighth Amendment right to be free from cruel and unusual punishment. *People v. Buffer*, 2017 IL App (1st) 142931, ¶ 64.

The State believes that this ruling should be overturned (St. Br. 20-21). It contends that *Miller*'s rationale applies exclusively to sentences that are

"unsurvivable" – *i.e.*, that "guarantee" that a juvenile offender will die in prison – and invites this Court to rule that as a matter of law, juvenile offenders can be imprisoned until their mid-seventies without giving any consideration to their youth at sentencing (St. Br. 8, 22). This Court should reject the State's argument, which runs contrary to the juvenile sentencing rationale of the U.S. Supreme Court, this Court, and state high courts around the country.

Miller's Eighth Amendment protections apply when a juvenile offender receives a lengthy term of years that is functionally equivalent to life without parole, *see People v. Reyes*, 2016 IL 119271, ¶¶ 8-10, which is a sentence that denies "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See Miller*, 567 U.S. at 479 (citing *Graham v. Florida*, 560 U.S. 48, 59, 74, 79 (2010)). This means that a juvenile offender's sentence must do more than merely allow a chance for physical release; it must instead provide a meaningful opportunity to actually rejoin society and become a productive citizen. *Id*. State high courts around the country agree that incarcerating juvenile offenders for 50 years without any possibility of parole does not provide this opportunity, and that it is therefore unconstitutional to impose this sentence on a juvenile offender without considering his youth. *See e.g., People v. Contreras*, 411 P. 3d 445, 452, 454 (Cal. 2018).

Indeed, even if Buffer survives his sentence, he will at best enter a world he left as a teenaged boy as a man in his late sixties, after a half-century of incarceration. His family and friends will likely be estranged or deceased; he will have effectively lost his chance to establish a career, marry, or raise a family;

and he will not have any education, job training or employment prospects. This sentence dooms Buffer to spend the last few years of his life impoverished, homeless, and alone.

Since this devastating penalty deprives Buffer of a meaningful "chance for fulfillment outside prison walls," or "for reconciliation with society," it is functionally equivalent to life without parole. *See Graham*, 560 U.S. at 74, 79; *Reyes*, 2016 IL 119271, ¶¶ 8-10; *Contreras*, 411 P. 3d at 452, 454. The trial judge therefore violated the Eighth Amendment when he imposed a 50-year sentence without properly considering Buffer's youth. *See Miller*, 567 U.S. at 479; *People v. Holman*, 2017 IL 120655, ¶¶ 44-45. This Court should reject the State's unworkable (and unconstitutional) "survivability" standard, and affirm the appellate court's ruling. *See Buffer*, 2017 IL App (1st) 142931, ¶¶ 64, 66.

The Eighth Amendment, made applicable to the states via the Fourteenth Amendment (*Robinson v. California*, 370 U.S. 660, 666–67 (1962)), prohibits governments from imposing "cruel and unusual punishments" for criminal offenses. U.S. CONST., AMEND. VIII, XIV. This prohibition flows from the basic principal that punishment should be "graduated and proportioned to both the offender and the offense." *People v. Davis*, 2014 IL 115595, ¶ 18 (citing *Miller*, 567 U.S. at 469). "This concept of proportionality is central to the Eighth Amendment." *Miller*, 567 U.S. at 469 (quoting *Graham*, 560 U.S. at 59). "When the offender is a juvenile and the offense is serious, there is a genuine risk of disproportionate punishment." *Holman*, 2017 IL 120655, ¶ 33. To determine whether a punishment is so disproportionate that it violates the Eighth Amendment, courts look "beyond history

to 'the evolving standards of decency that mark the progress of a maturing society.'" *People v. Davis*, 2014 IL 115595, ¶ 18 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); *see Miller*, 567 U.S. at 469-70.

The U.S. Supreme Court has "unmistakenly instructed that youth matters in sentencing." *Holman*, 2017 IL 120655, ¶ 33. In a series of recent decisions, the Court has repeatedly emphasized the special characteristics of juvenile offenders, particularly that

- they have "a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking";
- they "are more vulnerable to negative influences and outside pressures, including from their family and peers," and "have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings"; and
- their "character is not as well formed as an adult's"; their "traits are less fixed and [their] actions less likely to be evidence of irretrievable depravity."

Montgomery v. Louisiana, 136 S. Ct. 718, 733, 736 (2016)(internal citations and quotations omitted).

In recognition of these unique characteristics, the U.S. Supreme Court categorically barred judges from imposing the death penalty on juveniles. *See Roper v. Simmons*, 543 U.S. 551 (2005).

The Court then held that juveniles cannot receive a life-without-parole sentence for a non-homicide crime. *Graham*, 560 U.S. at 79. It recognized that a life sentence is antithetical to a juvenile offender's "capacity for change and limited moral culpability[,]" as it "forswears altogether the rehabilitative ideal," denies the defendant "the right to reenter the community," makes an "irrevocable judgment

about that person's value and place in society," and "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 74, 79. Juvenile non-homicide offenders must therefore receive a sentence that affords them "some meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Id*. at 75, 79, 82.

The *Miller* Court extended *Graham*'s reasoning to homicide offenses, holding that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474, 479, *see* 470, n. 4 (*Graham* is "the foundation stone of our analysis"), 473 ("none of what *Graham* said about children—about their distinctive [and transitory] mental traits and environmental vulnerabilities—is crime-specific"). A trial judge must instead take into account a minor offender's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences," in addition to the juvenile offender's home life, peer pressure, family history, and circumstances of the offense. *Id*. at 477-478. The Court recognized that a mandatory sentence of life without parole improperly precluded sentencing judges from taking any of these factors into consideration, while nonetheless denying a juvenile offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 479 (quoting *Graham,* 560 U.S. at 75). *Miller* therefore barred life-without-parole sentences for all juvenile offenders except for the "rarest" of them, "whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734.

The "central intuition" of these U.S. Supreme Court opinions is "that children

who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736. This Court has since acknowledged that "*Miller* contains language that is significantly broader than its core holding"; "[n]one of what the [U.S. Supreme] Court said is specific to only mandatory life sentences"; and that "the Supreme Court's far-reaching commentary about the diminished culpability of juvenile defendants ... is neither crime- nor sentence-specific." *Holman*, 2017 IL 120655, ¶¶ 38, 40.

Accordingly, this Court recently held that *Miller*'s protections are implicated by discretionary sentences of life without parole, *Holman*, 2017 IL 120655, ¶¶ 44-45, as well as long terms-of-years sentences that are "the functional equivalent" of life without parole, *Reyes*, 2016 IL 119271, ¶¶ 8-10. Imposing these sentences on juvenile offenders is therefore unconstitutional unless the trial judge "consider[ed] specifically the characteristics [of youth] mentioned by the Supreme Court," or "some variant of the *Miller* factors," at sentencing. *Holman*, 2017 IL 120655, ¶¶ 44-45. And even then, a life or *de facto* life sentence only comports with the Eighth Amendment if "the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id.* at ¶ 46.

This Court should find that like a sentence of life without parole, imposing a sentence of 50 years without parole on a juvenile offender, without considering their youth as *Miller* describes, violates the Eighth Amendment. More specifically: (A) a term-of-years sentence is functionally equivalent to life if it denies a juvenile offender a "meaningful opportunity to obtain release based on demonstrated maturity

and rehabilitation"; (B) a 50-year sentence does not afford a meaningful opportunity for release and implicates the same substantive concerns discussed in *Graham*, *Miller*, and *Montgomery*; and thus (C) Buffer's 50-year sentence, which was imposed without proper consideration of his youth, was unconstitutional. This Court should therefore (D) reject the State's argument that *Miller*'s considerations apply exclusively to sentences that "guarantee" a juvenile offender's death in prison, and affirm the appellate court's opinion.

A. A term-of-years sentence is functionally equivalent to life without parole when it denies a juvenile offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

A term-of-years sentence "that is the functional equivalent of life without the possibility of parole" violates the Eighth Amendment if it is imposed on a juvenile offender without appropriate consideration of their youth. *See Holman*, 2017 IL 120655, ¶¶ 44-45; *Reyes*, 2016 IL 119271, ¶¶ 9-10. In *Reyes*, both parties agreed that a mandatory 97-year sentence exceeded the juvenile offender's life expectancy, and was thus functionally equivalent to life without parole. *Id*. at ¶ 9-10. But the issue of functional equivalence in this context should not be limited a determination of whether a sentence is *actuarially* equivalent to life without parole, nor whether it "guarantee[s]" that the juvenile offender will die in prison (St. Br. 8).

Rather, the U.S. Supreme Court has signaled that imposing a lengthy term of years on a juvenile offender can impinge on the same substantive concerns that made the imposition of life without parole impermissible under the Eighth Amendment, regardless of whether the offender might potentially survive that sentence. *See Holman*, 2017 IL 120655, ¶¶ 38, 40 (*Miller*'s language "is significantly

broader than its core holding"; "the Supreme Court's far-reaching commentary about the diminished culpability of juvenile defendants ... is neither crime- nor sentence-specific").

Central to the U.S. Supreme Court's analysis was its finding that the particular characteristics of youth make juveniles far less culpable than adults for the same crimes, and far more capable of rehabilitation. *See Montgomery*, 136 S. Ct. at 733-34. A sentencing judge must therefore consider the mitigating characteristics of a juvenile offender's youth, and conclude that a juvenile offender is permanently incorrigible, *Id*., before it can impose a sentence that denies him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75); *People v. Patterson*, 2014 IL 115102, ¶ 108 ("in *Miller* the Court reiterated the *Graham* rationale").

Despite the State's argument, a "meaningful opportunity to obtain release" means much more than simply "the mere act of release[,]" or the prospect of "a de minimus quantum of time outside prison." *Contreras*, 411 P. 3d at 452, 454 (rejecting state argument that the *Graham / Miller* rationale applies exclusively to sentences that exceed a person's actuarial lifespan); *see Casiano v. Comm'r of Corr.*, 115 A. 3d 1031, 1045, 1047 (Conn. 2015)("reject[ing] the notion that, in order for a sentence to be deemed 'life imprisonment,' it must continue until the literal end of one's life"), *accord State v. Moore,* 76 N.E. 3d 1127, 1137 (Ohio 2016); *State v. Null*, 836 N.W. 2d 41, 71 (Iowa 2013).

Indeed, the U.S. Supreme Court's language contemplates "a sufficient period

to achieve integration as a productive and respected member of the citizenry." *Contreras*, 411 P. 3d at 454. The Court referred to juvenile offenders' opportunity to re-enter society and become productive citizens in *qualitative* terms: "the rehabilitative ideal." *See Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75). It discussed a juvenile offender's "right to reenter the community" (*Graham*, 560 U.S. at 74), as well as their chance for "fulfillment outside prison walls" (*Id.* at 79), for "reconciliation with society" (*Id.*), "to achieve maturity of judgment and self-recognition of human worth and potential" (*Id.*), and to reclaim their "value and place in society" (*Miller*, 567 U.S. at 473 [citing *Graham*, 560 U.S. at 74]). These principles "indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement." *Contreras*, 411 P. 3d at 454.

Put simply, "[t]he United States Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Casiano*, 115 A. 3d at 1045. Accordingly, "for purposes of applying Eighth Amendment protections discussed in *Graham* and *Miller*, there is no distinction between life-without-parole sentences for juveniles and term-of-years sentences that leave a juvenile offender without a meaningful opportunity to demonstrate rehabilitation and growth leading to possible early release." *Moore*, 76 N.E. 3d at 1140-41.

This Court should therefore find that regardless of whether a juvenile offender might conceivably survive a lengthy term-of-years sentence, a term that fails to

afford a "meaningful opportunity to obtain release" – *i.e.*, that gives "a realistic hope of release and genuine opportunity to reintegrate into society," *Contreras*, 411 P. 3d at 457 – is functionally equivalent to life without parole, and implicates *Graham*, *Miller*, and *Montgomery*.

B. A 50-year sentence does not give a juvenile offender "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and implicates the same substantive concerns that animated *Graham* and *Miller*.

A 50-year sentence does not give juvenile offenders a meaningful chance to successfully re-enter their community, especially when served in Illinois prisons, which have few rehabilitative programs and dangerously poor health care. Imposing this harsh sentence on juvenile offenders also has a tenuous relationship to legitimate penological goals, particularly considering that brain and social sciences demonstrate that minors will generally reform their conduct decades before they reach their late sixties. Accordingly, a number of state high courts have found juvenile offenders' 50-year sentences to be unconstitutional, and no state high court that shares this Court's analysis of *Miller* has held otherwise. And notably, the overwhelming majority of post-*Miller* legislation shows that state governments believe that juveniles convicted of homicide offenses should have an opportunity for release at about 25 years, or much less. This Court should therefore find that a 50-year sentence does not afford a juvenile offender a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and is functionally equivalent to a life sentence.

(1) A 50-year sentence does not afford juveniles a meaningful opportunity to reintegrate into society and become productive citizens.

As explained, *Graham* and *Miller* discuss "the rehabilitative ideal," a juvenile offender's chance for "fulfillment outside prison walls[,]" for "reconciliation with society," and to reclaim their "value and place in society." *See Miller*, 567 U.S. at 479; *Graham*, 560 U.S. at 75, 79. But a 50-year sentence guarantees that a juvenile offender will be incarcerated for the remainder of his teenage years, as well as the entirety of his twenties, thirties, forties, and fifties, and nearly all of his sixties. For the juvenile offenders who survive that sentence, "the chance for release would come near the end of their lives" after they have "spent the vast majority of adulthood in prison." *Contreras*, 411 P. 3d at 452. This does not provide a meaningful opportunity reintegrate into society, nor to become a productive member of the citizenry. *Id*. at 454.

"Long sentences prevent or inhibit educational attainment, the development of job skills, age-appropriate sexual development, personal responsibility, practice in making good choices, and development of an identity and self-preservation that is appropriate for life outside of prison." *See* Adele Cummings and Stacie Nelson Colling, *There is No Meaningful Opportunity in Meaningless Data*: *Why it is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J. JUV. L. & POL'Y 267, 291 (Summer 2014)("Cummings and Colling").

A juvenile offender with a 50-year sentence has no "chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting." *Casiano*, 115 A. 3d at 1046. And even if he "does live

to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left." *Id*.

A juvenile offender's release in his "late sixties [also] comes at an age when the law presumes that he no longer has productive employment prospects[,]" as he "will be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment." *Casiano*, 115 A. 3d at 1046 (citing 42 U.S.C. § 416(l)); *see* Social Security, Benefits Planner, Social Security Credits, *available at* https://www.ssa.gov/planners/credits.html (social security benefits are generally contingent on "10 years of work").[1] In addition to the obvious difficulties a juvenile offender will face when trying to enter the work force for the first time in his late sixties (without any job experience and a criminal record), his future work prospects will be further "diminished by the increased risk for certain diseases and disorders that arise with more advanced age." *Casiano*, 115 A. 3d at 1046.

Also, a "young person who knows he or she has no chance to leave prison for 50 years 'has little incentive to become a responsible individual.'" *Contreras*, 411 P. 3d at 454 (quoting *Graham*, 560 U.S. at 79); *see Casiano*, 115 A. 3d at 1045 (same); *see also Reyes*, 2016 IL 119271, ¶ 8 (a "lengthy sentence" will violate *Miller* if it "'means denial of hope" and that "good behavior and character improvement

---

[1] All web pages cited in this brief were last visited on November 1, 2018.

are immaterial") (quoting *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo 2014)[quoting *Graham*, 560 U.S. at 70]). And even if a juvenile offender was inclined to work on their education and rehabilitation, prisons often deny this programming to prisoners with lengthy sentences. *See Graham*, 560 U.S. at 79 (recognizing that the prison system is often "complicit in the lack of development" juvenile offenders, because they "withhold counseling, education, and rehabilitation programs.").

A "juvenile's potential future release in his or her late sixties after a half century of incarceration" therefore "does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society[,]" and is thus not "sufficient to escape the rationales of *Graham* or *Miller*." *Null*, 836 N.W.2d at 71; *see Carter v. State*, 192 A. 3d 695, 735 (Md. 2018) (to allow "a meaningful opportunity to obtain release" a sentence must grant "parole eligibility significantly short of the 50-year mark"); *Contreras*, 411 P. 3d at 452 (a 50-year sentence suggests a juvenile is "irretrievably incorrigible"); *Casiano*, 115 A. 3d at 1045 (a "fifty year term" does not provide a "chance of fulfillment outside prison walls," nor of "reconciliation with society") (quotation omitted); *Bear Cloud*, 334 P.3d at 142 ("a juvenile offender sentenced to a lengthy term-of-years sentence will not have a meaningful opportunity for release").

Incarcerating a juvenile offender for a half-century with no opportunity for earlier release therefore does not afford a meaningful chance to truly reenter society, nor to have any meaningful life outside of prison. A 50-year sentence therefore implicates the *Graham/Miller* rationale.

(2) Juvenile offenders serving sentences of 50 years or more in Illinois prisons are particularly denied a meaningful opportunity for release.

The U.S. Supreme Court (and other state high courts) recognize that part of a juvenile offender's meaningful opportunity for release, and their ability to reintegrate into society in the future, will depend on opportunities to mature, reform, and educate themselves in prison. *See e.g.*, *Contreras*, 411 P. 3d at 453 (citing *Graham*, 560 U.S. at 79). However, the conditions of Illinois's prisons, particularly when experienced over five decades of incarceration, create significant and possibly insurmountable hurdles to a juvenile offender's chance to successfully re-enter society and become a productive citizen.

Illinois's prisons suffer from deteriorating infrastructure, and a lack of inmate supplies. In several facilities, the John Howard Association of Illinois (JHA) has "observed roof leaks as well as lower level water leaks that are continuously damaging facility structure, causing damp, mold, and need for repainting, and at times damaging equipment, affecting inmate living, classroom, or library areas, and precluding productive use of space." *See* John Howard Association of Illinois, *JHA 2016 Prison Monitoring Project Summary and Recommendations – Part II: Living & Working Conditions*, p. 2 (April 2017)("JHA Report").[2] JHA commonly

[2] *Available at*: http://www.thejha.org/sites/default/files/JHA%202016%20Adult%20Prison%20Monitoring%20Report%20Part%20II%20Final.pdf. This Court can take judicial notice of the prison studies, scientific articles, court records, public filings in other courts, and government statistics cited in this brief. *See Miller*, 567 U.S. at 471-72 (citing to scientific studies); *In re N.G.*, 2018 IL 121939, ¶ 32 (judicial notice of records in other courts); *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 290, 396, n. 3 (2006) (proceedings in federal district court); *Friddle v. Industrial Com'n*, 92 Ill. 2d 39,

receives reports of "pests, particularly in dietary areas, and concerns regarding mold, in damp areas including dietary, showers, and areas where there are roof or other leaks." *Id*. at 3. Dishwashers are often broken, "and inmates have increased concerns regarding the sanitation of eating utensils." *Id*. Facilities are also often "too cold, too hot, or lack ventilation," and the "vast majority of IDOC facilities do not have air conditioning outside of healthcare units." *Id*., at 3. "At some facilities, lack of winter appropriate or worker appropriate supplies…have been reported." *Id*. at 4.

Illinois prisons have also "become complicit in the lack of development" of juvenile offenders by "withhold[ing] counseling, education, and rehabilitation programs" to minors with lengthy sentences. *See Graham*, 560 U.S. at 79. "Educational opportunities for inmates generally remain extremely limited" in Illinois prisons. JHA Report, at 15-16; *see also* Illinois Department of Corrections, Quarterly Report, p. 3, 22 (October 1, 2018)(between June and August of 2018, an average of just 6,221 of Illinois' 40,721 inmates – 15 percent – were enrolled in some kind of educational or vocational class)("IDOC Quarterly Report").[3] There are "many educator vacancies[,]" and about 2,800 inmates are wait-listed for Adult Basic Education classes alone. JHA Report, at 15-16.

Even when prisoners get into the classroom, they lack "basic items, like dictionaries and erasers," and their books and other materials "are literally falling

---

47 (1984) (federal records; census); *Gadlin v. Auditor of Public Accounts*, 414 Ill. 89, 94 (1954) (published public reports).

[3] *Available at*: https://www2.illinois.gov/idoc/reportsandstatistics/Documents/IDOC_Quarterly%20Report_October_%202018.pdf

apart." *Id.*; *see also* Lee Gaines, *Illinois prison system spent less than $300 on books last year,* CU-CitizenAccess (April 16, 2018)(over the last five years, there has been a "96 percent decrease from what was spent on books between 2000 and 2005").[4] Moreover, because "inmates are prioritized for school by outdate," a juvenile offender "with a long sentence may spend years in prison without getting into a classroom." JHA Report, at 15-16. Juvenile offenders with long sentences will also generally not qualify for other rehabilitative programming or training opportunities. *Id.* at 14 (IDOC staff reported that they "do not have enough inmates meeting the low-level participant requirements, such as for workers, set by the Agency"). So while they are the "most in need of and receptive to rehabilitation[,]" *Graham*, 560 U.S. at 74, "the legislature has not taken sufficient steps to achieve any real rehabilitation of those juveniles tried in adult criminal court," *Buffer*, 2017 IL App (1st) 142931, ¶ 70, n. 2 (recommending parole, work, and education opportunities for juvenile offenders).

Illinois's truth-in-sentencing law, and the absence of parole opportunities for juvenile offenders prosecuted in criminal court, also offers little incentive to participate in rehabilitative programming, even if it was available. Indeed, a 16 or 17 year old juvenile offender convicted of murder in Illinois must, like an adult, serve every day of their sentence. 730 ILCS 5/3-6-3(a)(2)(i) (West 2018). No amount of prison tickets for bad behavior, nor plaudits for good behavior or participation in rehabilitative programs, can change that out-date. *Id.* A 50-year sentence under

---

[4] *Available at*: http://www.cu-citizenaccess.org/2018/04/16/illinois-prison-system-spent-less-than-300-on-books-last-year/

these circumstances means that "good behavior and character improvement are immaterial"; it is a "denial of hope." *See Reyes*, 2016 IL 119271, ¶ 8 (citations omitted); *Buffer*, 2017 IL App (1st) 142931, ¶¶ 81-82 (Pucinski, J., specially concurring)(complaining that Buffer "cannot, under any circumstance, demonstrate his potential for rehabilitation at any time prior to the completion of his sentence").

Dangerously poor health care in Illinois prisons is another barrier to a juvenile offender's ability to successfully reenter society. The American Civil Liberties Union (ACLU) has filed a class-action lawsuit challenging the Illinois's Department of Corrections (IDOC) health care practices as cruel and unusual punishment. *See* ACLU of Illinois Website, Lippert v. Baldwin.[5] A medical expert's report in that case concluded that IDOC "has been unable to meet minimal constitutional standards with regards to the adequacy of its health care program." *See* Ron Shanksy, M.D. et al., *Final Report of the Court Appointed Expert – Lippert v. Godinez* (December 2014) ("Shanksy Report").[6]

IDOC has not retained enough qualified physicians or medical professionals in leadership positions; physician quality is "highly variable"; and physicians are even treating patients outside of their practice area, to disastrous results (including one case of an avoidable foot amputation). *Id*. Of the nonviolent deaths in IDOC that were reviewed between January 1, 2013 and June 1, 2014, 60 percent involved "significant lapses of care," and of those, 89 percent had *more than one* "significant

---

[5] *Available at*: https://www.aclu-il.org/en/cases/lippert-v-godinez.

[6] *Available at*: https://www.aclu-il.org/sites/default/files/wysiwyg/lippert_v_godinez_expert_report.pdf.

lapse of care." *Id*. at 42. The Shanksy Report identified a number of other problems as well, including backlogs of hundreds of patients awaiting physical exams, *Id*. at 13, inadequate procedures resulting in significant medical issues not being recognized or addressed, *Id*. at 12-15, a failure to identify serious health instabilities, and inadequate responses to medical emergencies, *Id*. at 24-27.

JHA has recognized similar problems. *See* JHA Report, at 5-7 (describing a lack of healthcare staff, "archaic and woefully inadequate technology," "substantial backlogs" for physical and mental health care, and "slow or nonresponsive" staff in cases of "emergency need"). And other lawsuits persist. *See Rasho v. Walker*, 2018 WL 2392847, at *2, 5, 19 (C.D. Ill. 2018) (IDOC has "been constitutionally deficient in the delivery of care" of mental health services; its psychiatric services are "grossly insufficient" and of "extremely poor quality"; and its conduct amounted to "deliberate indifference"); *Rasho v. Elyea*, 856 F. 3d 469, 466-67 (7th Cir. 2017)(allowing lawsuit alleging mistreatment by IDOC-contracted medical staff to move forward).

The extreme length of a 50-year prison sentence in and of itself deprives juvenile offenders of a meaningful opportunity to reintegrate into society and become a productive citizen. *See* Section B(1). But for Illinois's juvenile offenders, decrepit prison facilities, the absence of educational and rehabilitative programs, lack of a parole system, and constitutionally-deficient healthcare all raise serious roadblocks to their ability to successfully reenter their communities. *See Casiano*, 115 A. 3d at 1046 (juvenile offender's health when released affects their ability to reenter society and join the workforce); Cummings and Colling, at 291 (long sentences

harm "educational attainment" and "the development of job skills"; poor health care has "implications for health and mortality both during incarceration and after release").

(3) A 50-year sentence does not further legitimate penological goals when applied to a juvenile.

The U.S. Supreme Court's analyses in *Graham, Miller* and *Montgomery* rested in large part on the fact that the fundamental differences between juveniles and adults "diminish[ed] the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *See Miller*, 567 U.S. at 472-73. While less harsh than a life term, 50 years is still "an especially harsh punishment for a juvenile," who will on average "serve more years and a greater percentage of his life in prison than an adult offender." *See Miller*, 567 U.S. at 475 (quoting *Graham*, 560 U.S. at 70). The retributive case for a 50-year sentence is also diminished, because "the case for retribution is not as strong with a minor as with an adult." *See Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 71). As for deterrence, juveniles' impulsivity, impetuosity, and limited ability to consider consequences when making decisions applies to a 50-year sentence, just as it does to a life sentence. *See Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 73).

Incapacitation also cannot justify a 50-year sentence, as a judgment that a juvenile will be incorrigible for the next 50 years is no less questionable than a judgment that the juvenile will be incorrigible "forever." *See Miller*, 567 U.S. at 472 -73 (quoting *Graham*, 560 U.S. at 72-73). Indeed, "*Miller*'s central intuition" is "that children who commit even heinous crimes are capable of change." *See*

Montgomery, 136 S. Ct. at 736. Accordingly, a 50-year sentence also cannot be justified by the goal of rehabilitation, as it is "at odds with a child's capacity for change[,]" *Miller*, 567 U.S. at 473, and offers a juvenile offender "little incentive to become a responsible individual," *Graham*, 560 U.S. at 74, 79.

Therefore, like a sentence of life without parole, a sentence of 50 years without parole bears an attenuated relationship to legitimate penological goals when imposed on a juvenile offender. *See Contreras*, 411 P. 3d at 369 (so holding); *Holman*, 2017 IL 120655, ¶¶ 38, 40 (*Miller*'s "far-reaching commentary about the diminished culpability of juvenile defendants" is not "sentence-specific").

(4) Juvenile offenders' brains will finish developing, and their behavior will likely be reformed, decades before they reach their late sixties.

The U.S. Supreme Court's holdings also relied on "psychology and brain science[,]" as well as "social science." *See Miller*, 567 U.S. at 471-72. These sciences show that juvenile offenders will generally be reformed long before they complete a 50-year sentence. Indeed, juveniles' "transient rashness, proclivity for risk, and inability to assess consequences" only "enhance[ ] the prospect that, as years go by and neurological development occurs, a [juvenile offender's] deficiencies will be reformed." *Miller*, 567 U.S. at 471-72 (citing *Graham*, 560 U.S. 68; *Roper*, 543 U.S. at 570). Studies show that "'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior.'" *Miller*, 567 U.S. at 472 (citing *Roper*, 543 U.S. at 570 [citation omitted]).

Recent "[s]ocial science research has shown that most criminals, including violent ones, mature out of lawbreaking before reaching middle age." *People v.*

Brown, 2015 IL App (1st) 130048, ¶ 46 (citing Dana Goldstein, *Too Old to Commit Crime?*, N.Y. TIMES, 4SR (March 22, 2015) ("Goldstein").[7] The Bureau of Justice Statistics estimates that homicide rates "peak at age 19," and that even violent criminals only tend to continue lawbreaking "into their early 30s." *See* Goldstein.

Lawbreaking generally "drops off" after age 25, which coincides with the time at which "[n]euroscience suggests that the parts of the brain that govern risk and reward are [ ] fully developed." *See* Goldstein; *see also Graham*, 560 U.S. at 68 ("parts of the brain involved in behavior control" are maturing until "late adolescence"); Vincent Schiraldi & Bruce Western, *Why 21 year-old offenders should be tried in family court*, WASH. POST (Oct. 2, 2015) ("Research in neurobiology and developmental psychology has shown that the brain doesn't finish developing until the mid-20s");[8] Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatr. Dis. Treat. 449, 459 (2013) ("The development and maturation of the prefrontal cortex occurs primarily during adolescence and is fully accomplished at the age of 25 years"); Ruben C. Gur, *Declaration of Ruben C. Gur, Ph.D., Patterson v. Texas, Petition for Writ of Certiorari to the United States Supreme Court* (2002)("[t]he evidence now is strong" that the brain ceases the maturation process in a person's "early 20s" with respect to "those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other

---

[7] *Similar version available at*: http://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html

[8] *Available at*: www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html

characteristics that make people morally culpable").

So even if one were to *double* the maximum "typical [criminal] career length" estimated by these studies from ten years to twenty years, juvenile offenders who commit crimes at age 16 or 17 would tend to "mature out of lawbreaking" in their mid-to-late thirties. *See* Goldstein. A 50-year sentence, however, precludes a juvenile offender's release until their mid-to-late sixties, thereby guaranteeing that they will be incarcerated for an additional *three decades* – or more – after their brains are fully developed, and thus after they would be expected to age out of lawbreaking. Such a sentence therefore does not afford minors a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation[.]" *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75).

(5) State high courts that apply the *Graham/Miller* analysis to aggregate and terms-of-years sentences agree that imposing a 50-year sentence on a juvenile offender is unconstitutional.

A number of state high courts across the country have ruled that imposing sentences of 50 years or longer on juvenile offenders, without considering the mitigating characteristics of their youth, violates the Eighth Amendment. *See People v. Boeckmann*, 238 Ill. 2d 1, 11-12 (2010) (the constitutional analyses of "courts from other jurisdictions" can be "persuasive authority"). Maryland's high court recently called this the "50-year threshold." *See Carter*, 192 A. 3d at 728 (parole eligibility at 50 years violated the Eighth Amendment; Maryland); *Contreras*, 411 P. 3d at 462 (same; California); *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 60-61 (Mo. 2017) (same; Missouri); *State v. Zuber*, 152 A. 3d 197, 212 (N.J. 2017)(parole eligibility at 55 years; New Jersey); *Sam v. State*, 401 P.3d 834, 860

(Wyo. 2017) (parole eligibility at 52 years; holding any sentence over 45 years is unconstitutional; Wyoming); *Kelsey v. State*, 206 So. 3d 5, 10 (Fla. 2016) (45-year sentence; Florida); *Casiano*, 115 A.3d at 1048 (50-year sentence; Connecticut); *Null*, 836 N.W.2d at 71 (parole eligibility at 52.5 years; Iowa);[9] *see also State v. Ronquillo*, 361 P.3d 779, 784 (Ct. App. Wash. 2015) (aggregate 51.3 year sentence unconstitutional; Washington); *cf. Ira v. Janecka*, 419 P. 3d 161, 170, 171 (N.M. 2018)(upholding parole eligibility after 46 years, but finding it "the outer limit of what is constitutionally acceptable"; New Mexico).

The only state high courts that have allowed judges to impose effective sentences of 50 years or more on juvenile offenders without considering their youth are those that, unlike this Court, refuse to apply *Miller* to aggregate terms-of-years sentences. *Compare Reyes,* 2016 IL 119271, ¶¶ 8-10 (aggregate 97-year sentence unconstitutional), *with Flowers v. State*, 907 N. W. 2d 901, 906 (Minn. 2018) (refusing to "extend the *Miller / Montgomery* rule to multiple consecutive sentences"); *Veal v. State*, 810 S.E. 2d127, 128 (Ga. 2018)(refusing to extend *Miller* to "a sentence other than [life without parole]"); *Vasquez v. Com.*, 781 S.E.2d 920, 924, 928 (Va. 2016) (*Graham* "does not apply to aggregate terms-of-years sentences"); *State v. Brown*, 118 So. 3d 332, 341-42 (La. 2013) (*Graham* does not apply to "consecutive term of year sentences for multiple offenses...even if they might exceed a defendant's lifetime"); *see also Lucero v. People*, 394 P. 3d 1128, 1129-30, 1133-34 (Colo. 2017) (refusing to extend *Miller* to aggregate consecutive sentences).

---

[9] Iowa's Supreme Court found the sentence violated the Iowa Constitution, the language of which mirrors the Eighth Amendment: "cruel and unusual punishment shall not be inflicted." *Null*, 836 N.W.2d at 56-68, 70-75.

Apart from the courts that disagree with this Court's *Miller* analysis, appellate counsel is unaware of *any* state high court "holding that a sentence that precludes release for 50 years or more is *not* equivalent to life without parole for a juvenile offender." *See Carter*, 192 A. 3d at 728, n. 40 (emphasis in original); *Contreras*, 411 P. 3d at 455 (making the same point).[10]

This Court should follow the state high courts that agree with its *Miller* analysis, and which conclude that a sentence of 50 years or more violates the Eighth Amendment when imposed on a juvenile offender without considering their youth as *Miller* and *Montgomery* require.

(6) Recent sentencing reforms show an emerging national consensus that a 50-year sentence does not afford juvenile offenders a meaningful opportunity for release.

Proportionality for Eighth Amendment purposes is measured "according to the evolving standards of decency that mark the progress of a maturing society." *See Miller*, 567 U.S. at 469. "[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *See Graham*, 560 U.S. at 62; *cf. Solem v. Helm*, 463 U.S. 277, 292 (1983) ("proportionality analysis under the Eighth Amendment should be guided by objective criteria, including ... the sentences imposed for commission of the same

---

[10] The Nebraska Supreme Court upheld a sentence of life with parole eligibility after 55 years in *State v. Russell*, 908 N.W. 2d 669 (Neb. 2018). But it is not clear whether it did so because the trial judge found that the juvenile offender deserved a life sentence after properly considering his youth at sentencing, or because it believed a 55-year term gives a meaningful opportunity for release. *See Carter*, 192 A. 3d at 728, n. 40 (making the same point).

crime in other jurisdictions"). And the overwhelming majority of state legislatures that have changed their homicide sentencing laws in some way after *Graham*, *Miller*, and *Montgomery* afford juveniles an opportunity for release at significantly less than 50 years. *Id.*; *see Carter*, 192 A. 3d at 729-30 (courts can evaluate whether a lengthy term of years is functionally equivalent to a life sentence by comparing it to legislative reforms in other states).

In 2016, for example, Illinois passed legislation to ensure that the vast majority of 16- and 17-year-old juveniles convicted of murder with a firearm will now face the 20-year minimum sentence for murder, instead of the previous effective 45-year minimum term (which included a mandatory 25-year firearm enhancement). *See* 730 ILCS 5/5-4.5-105 (b) (West 2018) (the 25-year firearm enhancement is now discretionary for juvenile offenders), *see also* 5-4.5-105 (c) (minimum of 40 years for certain aggravated types of murder, such as killing a police officer). And before a sentencing judge can impose a sentence longer than the minimum on a juvenile offender, he or she must first consider nine statutory mitigating factors related to the minor's youth. *See* 730 ILCS 5/5-4.5-105 (a); *Holman*, 2017 IL 120655, ¶ 45 (this statute is "consistent with" *Miller*). Buffer's 50-year sentence is therefore three decades longer than the term Illinois's legislature has determined may be imposed on a juvenile offender without considering his youth, for the same offense.

At least 28 other states and the District of Columbia have also changed their sentencing or parole laws for homicide offenses after *Graham*, *Miller*, or *Montgomery*, and all of those jurisdictions similarly give juvenile offenders an opportunity for release at substantially less than 50 years. *See* Appendix (listing

statutes); *Carter*, 192 A. 3d at 730 ("one thing is clear: precluding eligibility for parole for 50 years is not part of the legislative effort to comply with *Graham* and *Miller*").

Indeed, even for aggravated types of murder that require proof of additional elements to impose a longer sentence (*e.g.*, killing a police officer, "premeditation," "poisoning," etc.), 25 of these 30 jurisdictions permit release after 30 years or less (83%), and nearly three-quarters permit release after 25 years or less (22 of 30, 73%). *See* Appendix. And for homicide offenses that do *not* require proof of these additional "aggravating" elements, virtually *all* of these jurisdictions permit release after 25 years or less (28 of 30, 93%), and more than half permit release after just 15 years or less (16 of 30, 53%). *Id.*[11] The overwhelming majority of these jurisdictions have therefore concluded that giving juvenile offenders about 25 years in prison without considering their youth – even for aggravated murder offenses – comports with *Graham*, *Miller* and *Montgomery*.

To be clear, Buffer is not arguing that every sentence longer than 25 years is unconstitutional if imposed on a juvenile offender. *Cf. Patterson*, 2014 IL 115102, ¶ 110 (upholding a 36-year sentence). But the fact that these post-*Miller* legislatures overwhelmingly give juvenile offenders an opportunity for release at about *half* of a 50-year sentence (or far less), shows that our nation's "evolving standards of decency" do not consider a five-decade prison term to afford a meaningful

---

[11] Notably, it appears that in several jurisdictions – such as District of Columbia, Hawaii, Iowa, and North and South Dakota – there is no mandatory minimum release or parole eligibility for juveniles convicted of murder, and judges have full sentencing discretion. *See* Appendix A.

opportunity for release. *See Carter*, 192 A. 3d at 734 (parole eligibility at 50 years "exceeds the threshold duration recognized by most courts and legislatures in reform legislation (significantly less than 50 years)") (ellipses in original).

This Court should therefore join the other state high courts that share its *Miller* analysis, and conclude that a sentence of 50 years without parole is functionally equivalent to a life sentence, because it does not afford a meaningful opportunity for release. *See Carter*, 192 A. 3d at 734 (a 50-year sentence "would be treated as a sentence of life without parole for purposes of Eighth Amendment analysis under most of the benchmarks applied by the courts").

C. Dimitri Buffer's 50-year sentence violated the Eighth Amendment.

Buffer's 50-year sentence does not afford a meaningful opportunity for release, and the State does not dispute that the trial judge did not appropriately consider the mitigating qualities of his youth when he imposed this term of years (*see* St. Br. 23-24). Buffer's sentence therefore violated the Eighth Amendment, and this Court should remand for a new sentencing hearing. *See Holman*, 2017 IL 120655, ¶¶ 43-46 (life sentence unconstitutional if imposed without consideration of *Miller* factors).

(1) Buffer's 50-year sentence does not afford a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Buffer has been in prison since he was 16 years old. He will not be released until 2059, at age 66, should he live that long. For the reasons discussed above, Buffer's 50-year sentence denies him a meaningful opportunity for release based on demonstrated maturity and rehabilitation, because

- he will not have a meaningful chance to truly re-enter society and become a productive citizen;
- he has no opportunity to earn early release; he will have little to no access to rehabilitative or educational programming; and he will be subject to dangerously deficient health care during his five decades in Illinois prisons;
- his lengthy prison term has little relation to legitimate penological justifications, since he was a juvenile at the time of the offense; and
- his brain will be fully developed and he will age out of lawbreaking several decades before he is scheduled for release.

See Section B(1)-(4), at 16-27, *supra*. Moreover, the evolving standard of decency demonstrated by Illinois's legislature, as well as the high courts and legislatures in other states, establishes that imposing a 50-year sentence on a juvenile offender like Buffer is constitutionally suspect. *See* Section B(5)-(6), at 27-32, *supra*. The length of Buffer's 50-year sentence in and of itself therefore denies him a meaningful opportunity for release.

But Buffer's particular circumstances cement this conclusion. Buffer's expected age upon his release – 66 years old – either exceeds or falls just a few years short of a general estimate of his expected life span. *See* Nat'l Ctr. for Health Statistics, *Nat'l Vital Statistics Rpts.*, Vol. 66, No. 4, at 45 (Aug. 14, 2017) (2014 CDC

Report)(life expectancy at birth for black male born in 1993 is 64.6 years);[12] Nat'l Ctr. for Health Statistics, *Nat'l Vital Statistics Rpts*., Vol. 63, No. 7, at 23 (Nov. 6, 2014) (life expectancy for 17 year old black male in 2010 – the age and year Buffer was sentenced – is 73.1 years).[13] The likelihood that Buffer will live long enough to be released from prison is therefore "roughly the same as a coin toss." *Contreras*, 411 P. 3d at 451; *see* Cummings and Colling at 283 ("[p]rison sentences that prevent people from being released until shortly before they reach average life expectancy ensures that almost one-half of them will have died before they reach that age"). This cannot be considered a "meaningful" or "realistic" opportunity for release, under any standard.

Buffer is also currently incarcerated in Menard Correctional Center, where "[t]here are virtually no [educational or rehabilitative] program opportunities." *See* John Howard Association of Illinois, *Monitoring Visit to Menard Correctional Center 2012* ("JHA Menard Report").[14] Indeed, in August of 2018, approximately 2% Menard inmates were respectively enrolled in basic and advanced basic education classes, only 2.5% were in secondary education classes, and zero college or vocational courses were even available. *See* IDOC Quarterly Report, at 4, 15.

And Menard's healthcare, like the rest of IDOC, is dismal. *See* Ron Shanksy,

---

[12] *Available at*: https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_04.pdf.

[13] *Available at*: https://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_07.pdf.

[14] *Available at:* http://thejha.org/sites/default/files/Menard%20Correctional%20Center%20Report%202012.pdf

M.D. et al., *Menard Correctional Center (MCC) Report* (June 17-20, 2014) (no Menard doctors were trained in primary care; one doctor's "lack of basic understanding" of a "common ... condition" caused an unnecessary amputation).[15] Notably, three of the nine non-violent deaths in Menard over a recent six-month period involved "serious lapses in care that likely contributed to the timing of the patients' demise." *Id*. at 38-39. Those three inmates died at ages 63, 62, and 66 – either the same age or younger than Buffer's age upon his expected release. *Id*.

In short, Buffer will not have a "genuine opportunity to reintegrate into society" at this late stage in his life, after serving five decades in prison. *Contreras*, 411 P. 3d at 457. If he survives that term, Buffer will instead enter the world essentially for the first time in his late sixties, after spending 50 years in crumbling Illinois prisons, without an opportunity to educate or rehabilitate himself, and without adequate heath care. So while there should be no doubt that Buffer's 50-year sentence in and of itself deprives him of a meaningful chance to reenter society and become a productive citizen, his particular circumstances make that conclusion inescapable.

(2) The sentencing judge did not take Buffer's youth and its attendant circumstances into account as *Miller* and *Montgomery* require.

The appellate court in this case concluded that while "the trial court exercised discretion in imposing the petitioner's sentence, nothing in the record" showed that "the court's reasoning comported with the juvenile sentencing factors recited in *Roper*, *Graham*, *Miller*, and *Montgomery*." *Buffer*, 2017 IL App (1st) 142931,

---

[15] *See* footnote 6.

¶ 53; *see Holman*, 2017 IL 120655, ¶ 43 ("trial courts must consider specifically the characteristics mentioned by the Supreme Court," or "some variant of the *Miller* factors[,]" before imposing a life sentence). The State's brief correctly does not challenge that finding, and therefore forfeits any such argument (*see* St. Br. 23-24)(asserting that this Court should remand for further proceedings if it finds Buffer's sentence was functionally equivalent to life). *See* Ill. Sup. Ct. R. 341(h)(7) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"); *People v. Lucas*, 231 Ill. 2d 169, 175 (2008)("The doctrine of forfeiture applies to the State as well as to the defendant").

Indeed, at the time Buffer was sentenced, Illinois law mandated that minors aged 15 years or older serve no fewer than 45 years in prison for first degree murder with a firearm. *See* 705 ILCS 405/5-130(1)(a), (c)(i) (West 2010) (all 15- and 16-year-old juveniles charged with murder were automatically prosecuted and sentenced as adults); 730 ILCS 5/5-8-1 (minimum adult sentence for first degree murder is 20 years) (West 2010); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (mandatory additional 25-year firearm enhancement) (West 2010); 730 ILCS 5/3-6-3(a)(2)(i) (those convicted of first-degree murder must serve every day of their sentence) (West 2010). The trial judge in this case therefore had to impose a 45-year term *before* he could consider Buffer's youth. *But see Graham*, 560 U.S. at 76 ("criminal procedure laws that fail to take defendants' youthfulness into account at all [are] flawed").

And while the trial judge in this case exercised some discretion in imposing a 50-year term (at a sentencing hearing that predated *Miller* and *Montgomery*), the record shows that Buffer's youth was improperly argued as an *aggravating*

factor. *But see Holman*, 2017 IL 120655, ¶¶ 36, 43 (courts must consider the characteristics of juveniles' youth in accordance with *Miller*, which held that they are "mitigating circumstances"). The prosecutor asserted that Buffer "chose" to join a gang at a young age (although his brother was a member), and claimed that Buffer made the "choice" to commit other crimes as a 14- or 15-year-old (although his arrests were for mostly minor offenses like "flashing gang signs," and his actual criminal record consists of just a single finding of delinquency for theft) (R. X35, 38, 39, 40, 46-47, 60-61). *But see Miller*, 567 U.S. at 471-72 (minors vulnerable to "negative influence and outside pressures," particularly from peers and family members; they "lack the ability to extricate themselves from horrific, crime-producing settings"; and they are immature and prone to reckless, impulsive and risky behavior). The prosecutor also contended that a lengthy prison term was necessary "to deter others from committing the same crime." *But see Montgomery*, 136 S. Ct. at 733 (the deterrence rationale is greatly diminished in juvenile sentencing).

Since Buffer's 50-year sentence deprived him of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and the State does not dispute that the trial judge failed to consider Buffer's youth as *Miller* and *Montgomery* require, this Court should affirm the appellate court's finding that his Eighth Amendment rights were violated.

D. This Court should reject the State's argument that *Miller* applies exclusively to "unsurvivable" sentences.

The State argues that the U.S. Supreme Court's reasoning applies only to "unsurvivable" sentences that "guarantee that the juvenile offender will die in prison," and that Buffer's 50-year sentence does not qualify (*see* St. Br. 5, 7, 8, 19). It invites this Court to choose any sentence between 54 and 59 years as the point at which a sentence becomes functionally equivalent to life, and thus advocates that trial judges should be allowed to imprison juvenile offenders until their mid-seventies without ever taking youth into consideration at sentencing (St. Br. 22). This argument is not supported by *Reyes*, runs contrary to the reasoning and spirit of *Miller*, *Graham*, and *Montgomery*, has been rejected by other State high courts, and is incompatible with recent legislative reforms.

The State's argument is predicated on *Reyes*, where this Court held that an indisputably "unsurvivable" mandatory 97-year sentence ran afoul of *Miller*. *See Reyes*, 2016 IL 119271, ¶¶ 9-10. But *Reyes* did not hold that the U.S. Supreme Court's *Miller* analysis *only* applies if a juvenile offender's sentence will exceed their life expectancy; that question was simply not at issue. *Id.*; *see Buffer*, 2017 IL App (1st) 142931, ¶ 61, n. 1("We note that in *Reyes*, the court did not have to grapple with the concerns facing us here, because the State conceded that the sentence imposed...was a lifetime sentence"). *Reyes* therefore does not support the State's argument that *Miller* applies exclusively to "unsurvivable" sentences, nor that Buffer's 50-year sentence comports with the Eighth Amendment. *See In re N.G.*, 2018 IL 121939, ¶ 67 ("a judicial opinion ... is authority only for what is actually decided in the case"); *cf. Contreras,* 411 P. 3d at 449 (rejecting a nearly

identical argument that *Miller* was limited to sentences that exceed life expectancy, simply because a prior case found that precluding parole eligibility for 100 years was unconstitutional).

The State's argument is also contrary to federal and state authority. As discussed, the U.S. "Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival," *see Casiano*, 115 A. 3d at 1045, 1047, and a number of state high courts have rejected the notion that these cases only apply to sentences that actuarially exceed a person's life expectancy. *See* Section A. Rather, the *Graham / Miller* rationale applies to any long sentence that denies a meaningful chance to re-enter society and become a productive citizen. *Id*. And a number of state high courts have specifically overturned sentences of 50 years or more as unconstitutional under *Miller*. *See* Section A, B(5). The State's "guarantee[d]"-death rule is therefore not justified by authority from this Court, from other state high courts, or from the U.S. Supreme Court. And while the State finds no problem with imprisoning juvenile offenders until their seventies without considering their youth, most state legislatures now give minors a chance for release around just 25 or 30 years. *See* Section (B)(6).

This Court should also recognize that the State's "survivability" rule is unexplained, unworkable, and arbitrary. The State provides no principled basis for determining exactly when a particular sentence becomes "unsurvivable" (St. Br. 7-18). To the contrary, it asks this Court to decide the functional equivalent of life without parole simply by choosing "some point" or "[a]ny term" between 54 and 59 years, with little explanation (St. Br. 22).

The State's initial justification for its argument boils down to what it contends is "common sense," or "experience" (St. Br. 6, 22). But the State's proposed 54- to 59-year range is hardly "common sense," as a number of state high courts around the country have found that sentences of 50 years – and lower – are functionally equivalent to a life sentence. *See* Sections A, B (citing cases); *see also*, *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (contention that parole eligibility after 40 years was unconstitutional for a juvenile offender was a "reasonable argument," although denying relief because this is was not "clearly established" law under the strict AEPDA standard).

The State also points to Illinois appellate court decisions, but they hardly provide a consensus opinion that a 50-year term is functionally equivalent to a life sentence (St. Br. 7, 22) (citing cases). *Cf. People v. Johnson*, 2018 IL App (1st) 153266, ¶ 24 (assuming *arguendo* that a 40-year term was functionally equivalent to life, before finding youth was properly considered); *People v. Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 73 (Mikva, J., dissenting) (50-year sentence is functional equivalent of life); *Buffer*, 2017 IL App (1st) 142931, ¶ 64 (50-year sentence is functional equivalent of life); *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶¶ 25, 27 (approximately 49-year sentence is functional equivalent of life); *see also People v. Logan*, 2018 IL App (5th) 150098-U, ¶ 10 ("arguable" that 53.5 years is functional equivalent of life, under post-conviction framework); *People v. Tolliver*, 2018 IL App (1st) 151517-U, ¶ 48 (Mikva, J., dissenting) (52-year sentence is functional equivalent of life); *People v. Gomez*, 2017 IL App (1st) 143269-U, ¶ 30 (refusing to address whether a 48-year sentence was functionally equivalent to

life in light of disagreement on this subject).[16]

In fact, the majority of the appellate court cases the State cites in its brief upheld effective sentences of *less than* 50 years, including one sentence of just 34 years (*see* St. Br. 7, n. 3) (citing *Evans*, *Applewhite*, *Aikens,* and *Gipson*).[17] And of the Illinois courts that upheld sentences of 50 or more years, none provide much by way of analysis to support their rulings. Those courts instead almost uniformly conclude that the sentence at issue was "survivable" based on nothing more than the fact that it was shorter than indisputably unconstitutional terms in other cases (*see* St. Br. 7, n. 3) (citing cases). *See e.g. People v. Perez*, 2018 IL App (1st) 153629, ¶ 38 (refusing to consider life expectancy, but finding 53-year term "survivable" because it was "not as long" as other overturned sentences of 97, 100, 78, and 105 years). These cases do not offer any principled analysis or rule that this Court can apply to determine the line at which a term of years is functionally equivalent to life under the State's "survivability" standard.

The State finally grounds its argument in "current life expectancy tables," which it says "confirm[s]" that a sentence between 54 and 59 years is not

---

[16] The latter unpublished cases are not cited as precedent, but to show the lack of appellate court consensus on this issue, contrary to the State's argument. *Cf. N.G.*, 2018 IL 121939, ¶ 75 (citing unpublished cases to illustrate consensus in the appellate court).

[17] The court in *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 58, refused to decide whether a 50-year term was a "*de facto* life sentence," but affirmed because the 50-year sentence was "discretionary," explaining that "*Miller* permits a juvenile sentence of natural life without parole so long as the sentence is discretionary." *Id.*; *but see Holman*, 2017 IL 120655, ¶¶ 44-45 (holding, after *Jackson*, that a discretionary life without parole sentence is unconstitutional unless the *Miller* factors are actually considered).

"unsurvivable" (St. Br. 22). Indeed, the only logical way to decide whether a particular offender's sentence "guarantee[s]" death in prison under the State's mistaken rule is to ascertain how long that offender is expected to live (St. Br. 7-8, 22).

To that end, the State disputes that juvenile offenders who spend decades in prison will have shorter life expectancies, and challenges the studies and authorities the appellate court cited for that proposition (St. Br. 8-18). *See Buffer*, 2017 IL App (1st) 142931, ¶¶ 59-62. But other state high courts have referenced the same authorities. *See e.g. Casiano*, 115 A. 3d at 1046 (citing some of the same sources; noting the possible "reduction in life expectancy due to the impact of spending the vast majority of one's life in prison"); *Bear Cloud*, 334 P. 3d at 142 (also citing the same sources); *Null*, 836 N.W. 2d at 71 (same). And additional authority (that the appellate court did not cite) supports the same point. *See e.g.*, Ronald H. Aday and Jennifer J. Krabill, *Older and Geriatric Offenders*: *Critical Issues for the 21st Century*, SPECIAL NEEDS OFFENDERS IN CORRECTIONAL INSTITUTIONS, 206 (Lior Gordon ed. 2013)(prisoners suffer from "accelerated aging," and are "10 to 15 years older physiologically than their chronological age");[18] Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health–Care Planning*, 173 Am. J. Epidemiology 479, 484 (2011)(currently and formerly incarcerated individuals in Georgia have "overall heightened mortality"). Like other state high courts, this Court may rely on such authority,

[18] *Copy available at*: https://in.sagepub.com/sites/default/files/upm-binaries/49941_ch_7.pdf.

if it so chooses.

But even if the "legal and practical concerns" of this analysis makes it "impossible" to ascertain juvenile offenders' life expectancies, those difficulties cut *against* the State's argument that this Court should measure *Miller*'s application by whether a term of years is "unsurvivable" (St. Br. 17, *see* 8-18). *See Contreras*, 411 P. 3d at 449 (discussing the difficulties in determining juvenile offenders' life expectancies in finding a 50-year sentence was unconstitutional).

Again, the only logical way to apply the State's standard is to ascertain a juvenile offender's expected life span. But the fact that life expectancy varies significantly depending on gender and race means that sentencing juveniles based solely on mortality tables "would unquestionably lead to [equal protection] challenges from defendants from longer-living ethnic groups who would be subject to longer sentences based on that ethnicity." *U.S. v. Mathurin*, 868 F.3d 921, 932 (11th Cir. 2017); *see* CDC Report, at 3, 23, 25, 29, 31, 35, 37 (life expectancy for persons born in 2014 is 84.5 for Hispanic females, but just 72.2 for black males); *Contreras*, 411 P. 3d at 450 ("it seems doubtful that considering such differences in juvenile sentencing would pass constitutional muster"); *see also* Cummings and Colling, at 282 (apart from gender and race, life expectancy is also affected by a number of "variables that have long been studied by social scientists but are not included in U.S. Census or vital statistics reports – income, education, region, type of community, [and] access to regular health care[.]").

It also does not make sense to use life expectancy tables for the *general* population, as this would increase the chance that persons from groups with lower

life expectancies will die in prison without a meaningful opportunity for release, even under the State's "survivability" rule. *See* Cummings and Colling, at 283 (since life expectancy is an average, when people "serving prison terms that approach the life expectancy of the general population actually have a lower life expectancy, [ ] fewer than one-half will have any opportunity for release, because they will have died").

Using life expectancy estimates for the general population also disregards the fact that juvenile offenders are *removed* from the general population. As noted, significant authority exists to show that incarceration accelerates the aging process and results in life expectancies that are significantly lower than those for the general population. *See* Cummings and Colling, at 278 (if juvenile offenders "survive in prison to middle or old age, their lives and life expectancy will have been profoundly affected by the years they spent in a stressful, severely restrictive, punitive environment, with other involuntarily cloistered people"); *see also Contreras*, 411 P. 3d at 450 (citing other studies).

But as the State points out, there is also authority indicating that prisons in some communities might shield certain inmates from other stresses that would afflict them outside of prison, and reduce their mortality rate (St. Br. 14). *See also Contreras*, 411 P. 3d at 450 (recognizing the same); *but see* Sections (B)(2), (C)(1) (IDOC's constitutionally-deficient health care contributed to the deaths of three people aged 66 or younger in Buffer's current prison). Regardless, there is no clear standard for a prisoner's life expectancy, either generally or in Illinois. *See* Cummings and Colling, at 289 ("the data are simply not available").

Since the only logical way to implement the State's "survivability" standard is to determine how long juvenile offenders are going to live, the foregoing constitutional and empirical difficulties in ascertaining their life expectancy – which the State itself acknowledges – only further establishes that its standard is unworkable, if not unconstitutional, in practice. *See Contreras*, 411 P. 3d 445, 448-451 (rejecting state argument that *Miller*'s application should be limited to sentences that exceed a juvenile offender's lifespan, as measured by life tables); Cummings and Colling, at 287-88 (using life expectancy as a sentencing guideline "focuses on exacting maximum punishment and retribution," which runs counter to the U.S. Supreme Court's juvenile sentencing precedent).

Additionally, even if there *was* a sound approach to estimating life expectancy for particular groups of juvenile offenders, the fact remains that this estimate is nothing more than an average. *See* 2014 CDC Report, at 2; Cummings and Colling, at 282. So even assuming "the estimate of average life expectancy for [a] group is perfectly accurate and precise," sentences that purport to release offenders shortly before they reach that number "ensures that almost one-half of them will have died before they reach that age." *See* Cummings and Colling, at 283.

Notably, the State's suggested 54- to 59-year range for the functional equivalent of life without parole will release juvenile offenders between the ages of 71 and 76, which is just a few years short of the 78.6-year life expectancy estimate for the general population that it cites in its brief (for persons born in 2016)(St. Br. 22). The likelihood that a juvenile offender will survive a sentence within the State's own range is therefore "roughly the same as a coin toss." *See Contreras*,

411 P. 3d at 451. And as discussed, the chance that Buffer will survive his 50-year sentence is similarly dire, as his scheduled release at age 66 closely approaches even the State's estimate of his life expectancy, at 73 years (St. Br. 20). *See* Section C(1). Again, an approximately fifty-fifty chance of surviving a sentence does not constitute a "meaningful" or "realistic" opportunity for release, even under the State's "survivability" rule. *See Contreras*, 411 P. 3d at 451 ("we do not believe the outer boundary of a lawful sentence can be fixed by a concept that *by definition* would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders")(emphasis in original).

And regardless, as discussed, the State's interpretation is "misguided at a more fundamental level," because a long sentence is functionally equivalent to life without parole when it fails to provide "a realistic hope of release and a genuine opportunity to reintegrate into society," even if the defendant might be released within his lifetime. *Contreras*, 411 P.3d at 451, 457-58 (an rule based on life expectancy is "not more 'objective, more 'workable,' or more conducive to drawing a 'clear line'" than this analysis); *see* Section A.

This Court should therefore reject the State's arguments, join the other state high courts that have found that imposing a five-decade sentence on a juvenile offender is unconstitutional, and affirm the appellate court's finding that Buffer's 50-year sentence violated the Eighth Amendment in this case. *See* Sections A-C.

II. This Court need not decide precisely when a term of years is functionally equivalent to life without parole, as a matter of law.

The State asks this Court to choose "[a]ny term within th[e] range" of 54 to 59 years as the functional equivalent of life without parole (St. Br. 23). But the State's "survivability" standard is arbitrary, unjustified, and unworkable, and this Court should find that Dimitri Buffer's 50-year term is unconstitutional. *See* Argument I. If this Court agrees that Buffer's 50-year sentence is unconstitutional, it need not decide anything more. *See People v. Contreras*, 411 P. 3d 445, 463 (Cal. 2018)(precluding a juvenile offender's release for 50 years was unconstitutional; refusing to decide exactly which sentence below 50 years would be constitutional); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1047 (Conn. 2015) (same); *see also PDK Laboratories Inc. v. U.S. Drug Enforcement Admin*, 362 F. 3d 786, 799 (D.C. Cir. 2004)(Roberts, J., concurring) ("if it is not necessary to decide more, it is necessary not to decide more"; this is a "cardinal principle of judicial restraint").

Illinois's recently-enacted juvenile sentencing laws will ensure that *Miller* issues like this one will arise rarely. Indeed, if Buffer were convicted of the same crime today, his sentence would start at 20 years instead of 45 years, and the judge would be required to consider statutory youth-related factors in mitigation before imposing a higher sentence. *See* 730 ILCS 5/5-4.5-105 (a), (b) (requiring consideration of *Miller*-like factors for every juvenile offender; firearm enhancements are discretionary, not mandatory); *People v. Holman*, 2017 IL 120655, ¶ 45 (this statute is "consistent with" *Miller*). Illinois's legislature may also enact further juvenile sentencing legislation in the future, such as a juvenile parole system, particularly

in light of this Court's decision in this case. *Cf. Contreras*, 411 P. 3d at 463 (explaining that its refusal to set a "precise timeframe" in an earlier opinion was "well-advised," because the legislature resolved the issue in response to the Court's opinion); *Casiano*, 115 A.3d at 1047 (refusing to answer similar questions, because its decisions "will prompt [the] legislature to renew earlier efforts to address the implications of ... *Graham* and *Miller*").

If this Court nonetheless decides to choose a particular sentence as the functional equivalent of life without parole as a matter of law, Buffer respectfully submits that it be no longer than 41 years, meaning that a sentence of 40 years or less would not implicate *Miller*. As the State recognizes, our legislature recently determined that the maximum sentence that can be imposed on a juvenile offender without considering his youth is 40 years (for aggravated types of murder), and that youth must be considered before a higher sentence can be imposed (St. Br. 7). *See* 730 ILCS 5/5-4.5-105 (a), (c); *but see Miller*, 567 U.S. at 473 (nothing about juveniles' "mental traits and environmental vulnerabilities...is crime-specific").

Forty years is also the longest term at which *any* of the post-*Miller* sentencing reforms in other jurisdictions permits juvenile offenders' release for comparable murder offenses (although most set it at 25 years or lower). *See* Argument I(B)(6), Appendix. Capping the number at 40 years is also consistent with this Court's other *Graham*/*Miller* precedent. *See Reyes*, 2016 IL 119271, ¶ 12 (approving a 32-year minimum on remand); *Patterson*, 2014 IL 115102, ¶ 110 (upholding a 36-year sentence). Most importantly, juveniles sentenced to 40 years or less will be released in their fifties or earlier, which dramatically increases their ability

to successfully re-enter their community, reconnect with friends and family, find work, and lead a productive life. *See* Cummings and Colling, at 288 (parole eligibility after a person's "mid-fifties" may implicate *Miller* and *Graham*).

Again, if this Court finds that Buffer's 50-year sentence violates the Eighth Amendment, it need not decide anything more. But if it decides to choose the sentence at which a term of years is the functional equivalent of life without parole, it should choose 41 years.

III. If this Court finds that Dimitri Buffer's 50-year sentence is unconstitutional, it should remand for a new sentencing hearing.

The State argues that this Court should remand for second-stage post-conviction proceedings, so that the State can "file responsive pleadings" and "assert procedural defenses" (St. Br. 23). But if this Court finds that Buffer's sentence violates the Eighth Amendment, no post-conviction court has the authority to uphold this sentence, and these pleadings would be pointless. *See Montgomery*, 136 S. Ct. at 731 ("state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution"); *see also People v. Davis*, 2014 IL 115595, ¶ 1 (remanding for a new sentencing hearing due to a *Miller* violation, while on appeal from the denial of leave to file a successive petition).

The State nonetheless suggests that the parties should litigate whether Buffer's crime "reflects irreparable corruption" at a third-stage evidentiary hearing (St. Br. 23-24). But the trial judge in this case made no such finding, and the State does not dispute that he failed to properly consider the *Miller* factors at Buffer's sentencing hearing. *See Buffer,* 2017 IL App (1st) 142931, ¶ 63 ("nothing in the

record" shows "that the court's reasoning comported with the juvenile sentencing factors recited" by the U.S. Supreme Court). Since Buffer's 50-year sentence is functionally equivalent to a life sentence, and it was imposed without proper consideration of the *Miller* factors, a new sentencing hearing is required. *See Holman*, 2017 IL 120655, ¶¶44-45 (life sentence imposed without considering *Miller* factors is unconstitutional); *see also Montgomery*, 136 S. Ct. at 731 (courts have no power to keep an unconstitutional sentence in place).

Regardless, the record in this case does not otherwise show, and the State does not even argue, that Buffer is one of the "rare juvenile offender[s] whose crime reflects irreparable corruption." *Miller*, 567 U.S. at 474. Buffer's prior criminal record is limited to a single juvenile adjudication for theft. His offense, while undeniably tragic, was the product of an impulsive, gang-influenced decision, and a case of mistaken identity. And at sentencing, Buffer apologized to the victim's family, and expressed remorse for his conduct (R. X58-59; C. 126). These facts hardly describe "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Holman*, 2017 IL 120655, ¶ 46; *see Montgomery*, 136 S. Ct. at 733-34 (such a finding will be "rare" or "uncommon")(citations omitted).

This Court should therefore remand this case for a new sentencing hearing. The State agrees that at such a hearing, Buffer may elect to be sentenced under Illinois's new juvenile sentencing laws (St. Br. 24).

IV. Alternatively, if this Court finds that Dimitri Buffer's 50-year sentence does not violate the Eighth Amendment, it should remand this case back to the appellate court.

Dimitri Buffer challenged his sentence in the appellate court under both the Eighth Amendment of the U.S. Constitution (U.S. Const., amend VIII), and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). *See Buffer*, 2017 IL App (1st) 142931, ¶ 1. Since the appellate court granted relief under the U.S. Constitution, it expressly declined to consider his challenge under the Illinois Constitution. *Id.* at ¶ 64. Accordingly, if this Court denies relief under the U.S. Constitution, it should remand this case back to the appellate court, so it can decide this state constitutional issue. *Id.*

CONCLUSION

For the foregoing reasons, Dimitri Buffer, petitioner-appellee, respectfully requests that this Court affirm the appellate court's ruling that his 50-year sentence violated the Eighth Amendment, and remand his case for a new sentencing hearing.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

CHRISTOPHER L. GEHRKE
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLEE

CERTIFICATE OF COMPLIANCE

I, Christopher L. Gehrke, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 14,960 words.

/s/Christopher L. Gehrke
CHRISTOPHER L. GEHRKE
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Minimum sentencing/parole eligibility laws impacting juvenile offenders, passed after *Graham, Miller*, and/or *Montgomery*[1]

Alabama	Life with parole eligibility after 30 years for "capital" murder. Ten year minimum for murder. *See* ALA. CODE 1975 §§ 13A-6-2(c); 13a-5-6, -43, -43.1, -43.2 (West 2018).
Arizona	Life with parole eligibility after 25 years if victim was 15 or older, or 35 years if the victim was under 15 or an unborn child, for first degree murder. Presumptive 16 years, with minimum possible 10 years, for second degree murder. ARIZ. REV. STAT. §§ 13-1105,-1104; 13-751; 13-752; 13-710 (West 2018).
Arkansas	Ten to 40 years for "first degree" murder, parole at 25 years for juveniles (if sentence exceeds 25 years). Life with parole eligibility at 30 years for "capital" murder. *See* ARK. CODE ANN. §§ 5-4-104, 5-10-102, 16-93-621 (West 2018).
California	Fifteen to life for second degree murder. Twenty-five to life for first degree murder. Juvenile-specific 15-, 20-, 25-year parole eligibility applies to anyone 25 and under. *See* CAL. PENAL CODE §§ 189, 189.1, 190, 3000.1, 3051 (West 2018).
Colorado	Juveniles can petition for release after 25 or 30 years. Reducing life sentences to give parole eligibility at 40 years. *See* COLO. REV. STAT. §§ 18-1.3-401, 17-22.5-104(2)(c),(d), 17-22.5-405(4), 17-22.5-403.7(2), 17-34-101, -102, 17-22.5-403(4.5); 17-22.5-403.7(6) (West 2018).
Connecticut	Twenty-five years with parole eligibility at 15 years for juveniles. Juveniles previously sentenced to 50 years are eligible for parole after 30. Juveniles sentenced to less than 50 years are eligible for parole after serving greater of 60% or 12 years. *See* CONN. GEN. STAT. §§54-125a(f)(1), 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54 (West 2018).
Delaware	No life with parole (LWOP). Twenty-five year minimum, parole eligible after 30 years. *See* DEL. CODE ANN. tit. 11 §§ 636(b), 4209, 4209A, 4204A (West 2018).
Distr. of Columbia	No LWOP. Courts can sentence juveniles below the statutory minimum. Sentences of over 20 years may be modified. *See* D.C. CODE §§ 24-403 et seq (West 2018).
Florida	No LWOP. Forty year minimum for capital murder, review after 25 years for first degree and capital murders. *See* FL. STAT. ANN. §§ 775.082(b), 782.04, 921.1402 (West 2018).
Hawaii	No LWOP. Life with parole for murder, but the parole board sets a parole eligibility date after making a rehabilitation plan, after which there is a parole review every 12 months. *See* HAW. REV. STAT. §§ 706-656(1), -657 (West 2018).
Illinois	Minimum 20 years for first degree murder. Minimum 40 years for certain aggravated types of murder. *See* 730 ILCS 5/5-4.5-105 (West 2018).
Iowa	Discretionary minimum sentence or parole eligibility for juveniles convicted of first or second degree murder. IOWA CODE ANN. §§ 707.1, 707.2, 707.3, 902.1, 902.9 (West 2018).
Kansas	No LWOP. Life with parole eligibility after 25 years for first degree murder. Life with presumptive parole eligibility after 50 years for premeditated murder, but judges have discretion to reduce term to 25 years if there are significant mitigating circumstances (including age). KS. STAT. ANN. §21-6618, 21-6620(b), -(c), 21-6623, 21-6625 (West 2018).

[1] These include any recent legislative changes that apply to juveniles. The sentences referenced are those that are roughly equivalent to Illinois's first degree murder, as well as sentences for "aggravated" types of murder (if applicable in that state), which require proof of additional elements.

Louisiana	No LWOP. Life with parole eligibility after 25 years for first or second degree murder for juveniles. *See* LA. REV. STAT. § 574.4 (E) (West 2018).
Massachusetts	No LWOP. Life with parole eligibility after 20 years. *See* MASS. GEN. LAWS ANN. 119 § 72B,265 § 2, 279 § 24 (West 2018).
Michigan	Minimum 25 years for first-degree murder for juveniles. Discretionary minimum for second degree murder. MICH. COMP. LAWS ANN. §§ 750.317, 769.1, 769.25a (West 2018).
Missouri	No LWOP. Life with parole eligibility after 25 years for first degree murder. *See* ANN. MO. STAT. § 558.047 (1) (West 2018).
Nebraska	Forty years for 1st degree murder. Twenty years second degree murder. *See* NEB. REV. STAT. §§ 28-105, 28-105.2, 28-303, 28-304 (West 2018).
Nevada	No LWOP. Minimum25 years with parole after 10 years for second degree murder. Minimum 50 years with parole after 20 years for first degree murder. *See* NEV. REV. STAT. §§ 200.030, 213.12135 (West 2018).
New Jersey	No LWOP. Determinate sentence of 30 years without parole. *See* N.J. STAT. ANN. § 2C:11-3(b)(1), (5) (West 2018).
North Carolina	Life with parole eligibility at 12 years for second degree murder. Life with parole eligibility at 25 years for first degree murder. *See* N.C. GEN. STAT. ANN. §§ 14-17, 15A-1340.19A, 15A (West 2018).
North Dakota	No minimum sentence. Juveniles entitled to seek sentence reduction after 20 years. *See* NDCC 12.1-16-01; 12.1-32-13.1 (West 2018).
Pennsylvania	No LWOP. Thirty-five to life for first degree murder (or 25 to life if offender was less than 15 years old). Thirty to life for second degree murder (or 20 to life if offender was less than 15 years old). SEE PENN. STAT. AND CONSOL. STAT. §§ 1102.1 (West 2018).
South Dakota	No LWOP. Discretionary term of years. *See* SD CODIFIED LAWS § 22-6-1, 22-6-1.3 (West 2018).
Texas	No LWOP. Five year minimum for murder. Life with parole after 40 years for capital murder. *See* TEX. STAT. CODES. ANN., §§ 12.31, 12.32, 19.02, 19.03 (West 2018); TEX. CODE CRIM. PROC. ANN. art. 37.071, TEX. GOV'T CODE ANN. § 508.145(b) (West 2018).
Utah	No LWOP. Fifteen to life for murder. Twenty-five to life for aggravated murder. *See* UTAH. CODE ANN. §§ 75-6-203; 76-3-203, -203.6, -206, -207, -207.5, -207.7, -209 (West 2018).
Vermont	No LWOP. Life with parole eligibility after 20 years for second degree murder. Life with parole eligibility after 35 years for first degree murder. VT. STAT. ANN. tit. 13, §§ 2303, 7045 (West 2018).
Washington	Life with parole eligibility after 20 years for second degree murder. Life with parole eligibility after 25 years for first degree murder. *See* REV. CODE WASH. ANN. §§ 9.94A.730, 10.95.020, 10.95.030 (3)(a)(i), -(ii), 9A.20.020, 9A-32-040 (West 2018).
West Virginia	No LWOP. Minimum sentence, or parole eligibility, at 10 years for second degree murder. Life with parole eligibility after 15 years for first degree murder. *See* W. VA. CODE §§ 61-2-1, -2, -3; 61-11-23, 62-12-13 (West 2018).
Wyoming	No LWOP. Life with parole eligibility after 25 years. *See* WYO. STAT. ANN. §§ 6-2-101(b), 6-10-301(c), 7-13-402(a) (West 2018).

Minimum sentence/parole eligibility for "aggravated" murder offenses, if applicable, for new sentencing legislation after post-*Graham*, *Miller*, and/or *Montgomery*[2]

40 years	Texas, Illinois, Nebraska
35 years	Pennsylvania, Vermont
30 years	Alabama, Colorado, New Jersey
25 years	Arkansas, Arizona, California, Delaware, Florida, Kansas, Louisiana, Michigan, Missouri, Nevada, North Carolina, Utah, Washington, Wyoming
20 years	Massachusetts
15 years or less	Connecticut, West Virginia (10)
Discretionary	Dist. of Columbia, Hawaii, Iowa, North Dakota, South Dakota

Minimum sentence/parole eligibility for non-aggravated murder offenses, for new sentencing legislation after post-*Graham*, *Miller*, and/or *Montgomery*[3]

40 years	None
30 years	New Jersey, Pennsylvania
25 years	Colorado, Delaware, Florida, Kansas, Louisiana, Missouri, Wyoming
20 years	Massachusetts, Illinois, Nebraska, Washington, Vermont
15 years or less	California, Connecticut, Utah, North Carolina (12), Alabama (10), Arizona (10), Arkansas (10), Nevada (10), West Virginia (10), Texas (5)
Discretionary	Dist. of Columbia, Hawaii, Iowa, Michigan, North Dakota, South Dakota

[2] Pertaining to murder offenses that require proof of additional aggravating elements, like the victim was a police officer.

[3] Roughly equivalent to Illinois's knowing, intentional, strong probability, and/or felony murder versions of first degree murder.

No. 122327

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- DIMITRI BUFFER Petitioner-Appellee	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-2931. There on appeal from the Circuit Court of Cook County, Illinois , No. 09 CR 10493. Honorable Thaddeus L. Wilson, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Ms. Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Dimitri Buffer, Register No. M15439, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Ms. Shobha L. Mahadev, Mr. Scott F. Main, Children & Family Justice Center Bluhm Legal Clinic, Northwestern Pritzker School of Law, 375 E. Chicago Ave, Chicago, IL 60611, scott.main@law.northwestern.edu

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 2, 2018, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Ms. Mahadev and Mr. Main will be served via e-mail. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Joseph Tucker
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us