SUPREME COURT

OF THE

STATE OF CONNECTICUT

No. S.C. 19954

Judicial District of Hartford

STATE OF CONNECTICUT

v.

TAUREN WILLIAMS-BEY

REPLY BRIEF OF THE DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

I. "Under the Connecticut Constitution, Article First, §§ 8-9, are all juveniles entitled to a sentencing proceeding at which the court expressly considers the youth related factors required by the United States Constitution for cases involving juveniles who have been sentenced to life imprisonment without possibility of release? See Miller v. Alabama, 567 U.S. 460 (2012)."

II. "If the answer to question one is in the affirmative and a sentencing court does not comply with the sentencing requirements under the Connecticut Constitution, does parole eligibility under General Statutes § 54-125a(f) adequately remedy any state constitutional violation?"

See State v. Williams-Bey, 326 Conn. 920, 169 A.3d 793 (2017) (granting the defendant's petitions for certification to appeal the Appellate Court decisions in State v. Williams-Bey, 167 Conn. App. 744, 164 A.3d 9 (2016) and State v. Williams-Bey, 173 Conn. App. 64, 164 A.3d 131 (2017) "limited to the following questions," quoted verbatim supra.).

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ARGUMENT

I. ALL JUVENILES ARE ENTITLED TO A SENTENCING PROCEEDING AT WHICH THE COURT CONSIDERS YOUTH RELATED FACTORS.

The state did not dispute the standard of review, the recited Geisler[1] factors, or that "our state constitution…should not be interpreted too narrowly or too literally," see State v. Ross, 230 Conn. 183, 248, 646 A.2d 1318, 1355 (1994). See Br. 15.[2] Important, the Court:

> "must *interpret* the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning."…"In short, the [state] constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness."

Kerrigan v. Comm'r of Public Health, 289 Conn. 135, 156, 957 A.2d 407, 420-21 (2008). The state's distinction with defendants sentenced to life without parole, the functional equivalent of life, and all juveniles, see Br. 12-14, however, ignored the limited question on which certification was granted. See Williams-Bey, 326 Conn. 920; Conn. Practice Book § 84-9.

A. The textual approach.

The state addressed the textual approach in a single paragraph in a footnote. See Br. 15 n. 12. Explained in State v. Santiago, 318 Conn. 1, 38, 122 A.3d 1, 27 (2015): "That our history reveals a particular sensitivity to…[significant freedoms from cruel and unusual punishment] warrants…scrupulous and independent review of allegedly cruel and unusual practices and punishments, and informs…analysis thereof." Importantly, though the text of our constitutions distinguished between juveniles and adults in one context, i.e., voting, the text did not afford any lesser rights or protections against cruel and unusual punishment to juveniles. Scrupulous, independent review under the Connecticut Constitution is warranted.

B. Federal precedent.

While the state did not dispute that Miller combined two strands of Eighth Amendment precedent, it narrowly construed United States Supreme Court precedent, contrary to

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1 State v. Geisler, 222 Conn. 672, 610 A.2d 1225 (1993).

2 The defendant's appendix is "A;" the state's brief is "Br.;" the amicus curiae brief of the Connecticut Board of Pardons and Paroles (Conn. BOPP) is "Am."

the articulation of that precedent by our Supreme Court, see e.g. State v. Riley, 315 Conn. 637, 653-54, 110 A.3d 1205, 1213-14 (2015). See Br. 1-2, 16. Significantly, nothing about a juvenile's "distinctive (and transitory) mental traits and environmental vulnerabilities…is crime-specific." "'[A]n offender's juvenile status can play a central role' in considering a sentence's proportionality," and thus, "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." See Miller, 567 U.S. at 473-74.

As Justice Sotomayor recently articulated on the denial of certiorari in Campbell v. Ohio, -- S.Ct. --, 2017 WL 4409905, No. 17-6232 (3/19/2018): "the Court imported the Eighth Amendment requirement 'demanding individualized sentencing when imposing the death penalty' into the juvenile conviction context, holding that 'a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.'" Id. at *1.[3] The Justice noted the potentially broad interpretation of Miller, which "might…require reconsideration of other sentencing practices in the life-without-parole context." Id. at *2.[4]

One such context recently addressed by the Third Circuit Court of Appeals was a de facto life sentence. That court held: "A term-of-years sentence without parole that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform is inherently disproportionate and…violates the Eighth Amendment under…Miller and Graham."[5] United States v. Grant, --- F.3d ---, 2018 WL 1702359, *8, *13-*14 (3d Cir. 2018) (calculating a de facto "life" sentence using life expectancy, based on individualized facts, and the national retirement age). To so hold, the court relied on the "weight of [federal] authority [which] supports our conclusion that the Eighth Amendment prohibits de facto LWOP sentences for juvenile offenders that are not incorrigible." See Id. at *11.[6] A national trend to

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[3] See Riley, 315 Conn. at 658, 110 A.3d at 1216 (if "sentencing scheme permits…[life without parole] on a juvenile…trial court *must* consider" the Miller factors "as mitigating").

[4] "Campbell failed…to present his constitutional arguments to…state courts." Id. at *1.

[5] Graham v. Florida, 560 U.S. 48 (2010).

[6] Though not explicitly precedent, amendment to the American Law Institute, Model Penal Code: Sentencing § 6.14 (2017) available at: https://www.ali.org/smedia/filer_private/10/ae/10ae4ff0-0a7c-4f9d-b328-440f4a9516e7/mpc_bl_of_pfd_-_nasc_-_aug_17_2017_-

more broadly interpret Miller weighs in favor expansion under our state constitution.

C. Connecticut precedent.

The state did not dispute that Casiano v. Comm'r of Corr., 317 Conn. 52, 78, 115 A.3d 1031, 1046 (2015) defined a sentence to which the Eighth Amendment applied under Miller as one where a juvenile offender "will have irreparably lost the opportunity to engage meaningfully in many…activities [establishing a career, marrying, raising a family, or voting] and will be left with seriously diminished prospects for his quality of life." See Br. 16-17.

The state, however, emphasized State v. Logan, 160 Conn. App. 282, 125 A.3d 581 (2015), summarily concluding that Logan provided "an accurate application of this Court's controlling precedent." See Br. 17. Problematic, the Logan court did not conduct any analysis under the definition set forth in Casiano, but instead relied exclusively on State v. Taylor G., 315 Conn. 734, 110 A.3d 338 (2015), decided two months before Casiano.[7] 160 Conn. App. at 293-94, 125 A.3d at 588. A lower court decision that ignored controlling precedent should not inform the Geisler analysis.

The state also did not offer counter-analysis to the Taylor G. dissent, applying Miller to all juveniles: "neither the characteristics of juveniles nor the eighth amendment's protections differ on the basis of the crime charged, it follows that **the eighth amendment's protections *with respect to juvenile offenders* do not differ on the basis of the *punishment* imposed**." Taylor G., 315 Conn. at 796, 110 A.3d at 374 (dissent, Eveleigh, J.).[8]

To this end, it is noteworthy that the judicial and legislative trend in Connecticut is to

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_online.pdf, for offenders under 18 years is telling. E.g. sub. (1) provides: "the offender's age shall be a mitigating factor;" sub. (6) authorizes sentences below mandatory minimum.

[7] In Williams-Bey, the Appellate Court held that the defendant's sentence, longer than that in Logan, presented "no legally meaningful distinction." 167 Conn. App. at 62 n. 11, 144 A.3d at 478 n. 11. In a footnote, the Williams-Bey court noted that the defendant cited "several statistics," but rather than address the undisputed statistics, merely countered that "those being released from extended periods of incarceration will likely face greater obstacles in establishing a career, marrying, raising a family, or voting than those who have not been incarcerated." See Id. That, however, was not the analysis articulated in Casiano.

[8] Emphasis added.

interpret Miller broadly. By legislation, that trend extends to those exposed to sentences of less than 50 years, addressed in Casiano. See Conn. Gen. Stat. § 54-91g (child convicted of a class A or B felony); Conn. Gen. Stat. § 53a-35a(4) (class A felony other than (2) and (3), not less than 10 or more than 25 years); Conn. Gen. Stat. § 53a-35a(5) (class B felony, manslaughter, first degree, with a firearm, not less than 10 or more than 25 years); Conn. Gen. Stat. § 53a-35a(6) (class B felony other than (5), not less than one or more than 20 years).[9] The third Geisler factor weighs in favor of expansion under our state constitution.

D. The sibling approach.

"[A] proper Geisler analysis does not require [the Court] simply to tally and follow the decisions favoring one party's state constitutional claim;…deeper review of those decisions' underpinnings is required because [the Court] follow[s] only 'persuasive' decisions." State v. Jenkins, 298 Conn. 209, 262, A.3d 806, 840 (2010) (citing Kerrigan, supra.). Because this Court has interpreted Miller broadly, see e.g. Riley, 315 Conn. at 654, 110 A.3d 1214 ("Miller…logically reaches beyond its core holding"), state court decisions interpreting Miller more broadly are more persuasive. See Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 435, 119 A.3d 462, 513 (2015) (decisions "most consistent with our own body of case law in this area" found more persuasive).[10]

The state took umbrage with the persuasive Washington and Iowa decisions cited by the defendant because "at issue was whether a juvenile defendant could be mandatorily

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[9] While Public Act 15-84 did not apply that broad interpretation retroactively, a judicial decision "that a statute is unconstitutional…does not mean…such a declaration expresses lack of due respect to the legislative branch. Performing such a task simply exemplifies the fundamental judicial burden of determining whether a statute meets constitutional standards." See Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 295 Conn. 240, 266, 990 A.2d 206, 225 (2010); see also fn. 12, infra.

[10] Of import, the state decisions cited by this Court in State v. Delgado, 323 Conn. 801, 811-12 n. 7, 151 A.3d 345, 352 n. 7 (2016) were so cited because "the reasoning in these cases is consistent with…United States Supreme Court's…Montgomery [v. Louisiana, 136 S.Ct. 718 (2016)], in which the court clarified that the rights delineated in Graham and Miller apply retroactively to individuals…sentenced to life…without parole." Delgado explicitly did not analyze state decisions "most consistent with our…body of case law." See Doe, supra.

sentenced under a mandatory minimum sentencing scheme." See Br. 17-18. The state, however, ignored the underpinnings of each decision, which broadly interpreted Miller.

The Washington court explained that: "the Supreme Court has not applied the rule that children are different to require individualized sentencing consideration of mitigating factors in exactly this situation, i.e., with sentences of 26 and 31 years…But we see no way to avoid the Eighth Amendment requirement to treat children differently, with discretion, and with consideration of mitigating factors." State v. Houston-Sconiers, 391 P.3d 409, 419 (Wash. 2017). Regardless of the punishment faced, "[t]rial courts must consider mitigating qualities of youth and sentencing and must have discretion to impose any sentence below the otherwise applicable [guideline] range and/or sentence enhancements." Id. at 420.[11]

Under the Iowa constitution, the Iowa court similarly expanded upon Miller, holding that science "painted a compelling picture of a juvenile's diminished culpability in the context of the death penalty and life-without-parole sentences,…[I]t also applies, perhaps more so, in the context of lesser penalties as well." State v. Lyle, 854 N.W.2d 378, 396 (Iowa 2014).[12] "[T]he Supreme Court has emphasized that nothing it has said is 'crime-

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[11] Definition of "life" was not relevant to the decision. Of note, the trial court sentenced defendants to "zero months' confinement for the crimes…and imposed confinement for only the mandatory firearm enhancements," i.e., 26 and 31 years. See e.g. State v. Houston-Sconiers, 365 P.3d 177, 181 (Wash. App. 2015) overruled 391 P.3d 409 (Wash. 2017).

[12] While the Iowa court "follow[ed] the federal analytical framework," that court also, more akin to Connecticut, "ultimately use[d] [its] judgment in giving meaning to [the state] prohibition against cruel and unusual punishment." See Lyle, 854 N.W.2d at 384. The court

> would abdicate [its] duty to interpret the Iowa Constitution if [it] relied exclusively on the presence or absence of a national consensus regarding a certain punishment. Iowans have generally enjoyed a greater degree of liberty and equality because [the court] do[es] not rely on a national consensus regarding fundamental rights without also examining any new understanding. Nevertheless, the absence of caselaw does not necessary support the presence of a consensus contrary to the challenge...

Id. at 387-88 (owing deference to penalties established by the legislature, but also owing "equal deference to the legislature when it expands the discretion of the court in juvenile sentencing" by "back[ing] away from mandatory sentencing for most crimes" of juveniles). To this end, noteworthy is that a national consensus banning juvenile life without parole sentences developed after Miller. When Miller was decided, only seven states banned that punishment. See The Sentencing Project, Slow to Act: State Responses to 2012 Supreme

specific,' suggesting the natural concomitant that what it said is **not punishment-specific either**." Id. at 399, 401 (emphasis added) (protection under the Iowa constitution "applies across the board to all crimes").

The state also attempted to differentiate another Iowa decision, which afforded state constitutional protection to a sentence of 50 years in prison with parole eligibility, but did so without any research or statistics to support a distinction.[13] See Br. 18; State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013) ("[t]hough Miller involved sentences of life without parole for juvenile homicide offenders, its" "core teachings" and "reasoning appl[y] equally to…[a] sentence of [35] years" under the Iowa constitution; to wit, defendant sentenced to 50 years with parole eligibility after 35 years).[14] The state could not cite any research or statistics to support its contention because the science "neither depend[] on the crime charged,… nor the…penalty." See Taylor G., 315 Conn. at 787, 110 A.3d at 369 (dissent, Eveleigh, J.).

The lack of scientific support is key. Persuasive authority cited by the defendant, not all addressed herein by the state, weigh in favor of expansion under our state constitution.

E. The historical approach.

The state addressed the historical approach in a single footnote; however, reliance on State v. Angel C., 245 Conn. 93, 715 A.2d 652 (1998), is flawed. See Br. 15-16 n. 12. First, in Angel C., "the defendants concede[d] that their liberty interest in juvenile status," for which they argued procedural due process protection under the Fourteenth Amendment to the United States Constitution, did "not emanate directly from the state or federal constitu-

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Court Mandate on Life Without Parole 2 (June. 2014) available at: http://sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf. More currently, 20 states ban that punishment and five do not use that punishment. See The Campaign for the Fair Sentencing of Youth, States that Ban Life without Parole for Children (2018) available at: https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/.

[13] The state did not dispute the persuasive authority in Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014). See Br. 18.

[14] Conn. Gen. Stat. § 54-125a(f)(1) similarly grants parole eligibility on a 55 year sentence after 30 years. The state offered no statistics or research why parole eligibility after 30 years, only five years shorter than Pearson, does not violate our state constitution when parole eligibility after 35 years was unconstitutional in Iowa. See Br. 18. It could not.

tions." Id. at 104, 715 A.2d at 660. To the contrary, the sentencing proceeding articulated in Miller derives from constitutional protection, not statutory authority.

Second, "once a state provides its citizens with certain statutory rights beyond those secured by the constitution itself, the constitution forbids the state from depriving individuals of those statutory rights without due process of law." Angel C., 245 Conn. at 105, 715 A.2d at 660. The Angel C. defendants never held a juvenile status because subject to automatic transfer to the criminal docket. Id. at 97, 106, 715 A.2d at 656, 660-61. Under the discretionary transfer statute, however, "the right to juvenile status vests…and the discretionary transfer to criminal court, which is a revocation of juvenile status, constitutes a deprivation of a liberty interest cognizable under the due process clause." See State v. Fernandes, 300 Conn. 104, 126-27, 12 A.3d 925, 939 (2011).

The state ignored this important distinction to gloss over Connecticut's historical trend to provide greater protections to children than adults, some garnering constitutional magnitude.[15] See Br. 15-16 n. 12; see e.g. Public Act 73-137, § 4 (abolishing the death penalty for defendants under eighteen years of age, 32 years before Roper).[16] Further, some of the legislation cited by the defendant, rather than afford greater rights to children than adults, restricted their rights based on continually evolving science and psychology that children are less mature, less responsible and have less competence, less experience than adults. The restrictions do not fit within the liberty interest analysis under Angel C.

To reiterate, between the 1780's and 1850's, the historical trend in our state shifted

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[15] That gloss further may run afoul of ex post facto protections for "[s]ubstantial personal rights [secured] against arbitrary and oppressive legislation," including "legislative control of remedies and modes of procedure which…affect matters of substance." See e.g. Beazell v. Ohio, 269 U.S. 167, 171 (1925) ("[j]ust what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula"); cf. Hill v. Snyder, Docket No. 2:10-cv-14568 (E.D. Mich. 4/9/2018) (Doc. 203) (statute that provided resentencing to juveniles sentenced to life without parole before Miller, but revoked good time or disciplinary credit earned on the illegal sentences, violated the ex post facto clause).

[16] See Lawrence Goodheart, Solemn Sentence of Death: Capital Punishment in Connecticut 135-39, 142 (2011) (Conn. last executed juvenile offender 90 years pre-Roper).

away from the "common law doctrine that malice could supply want of age" to the understanding that the "lack of a moral upbringing and education rather than malice lay behind many criminal acts by children." See e.g. Nancy Hathaway Steenberg, Children and the Criminal Law in Connecticut, 1635-1855: Changing Perceptions of Childhood 185 (2005). That positive trend, recognizing that children are different than adults, continues to date.

F. Economic and sociological considerations.

The state's citation to Santiago's Eighth Amendment analysis of "society's evolving standards of decency" is apropos for two reasons. See Br. 18. First, "confluence" of the two strands of Eighth Amendment precedent adopted in Graham did not necessitate a new analysis of the evolving standards of decency in Miller. Miller, 567 U.S. at 470-75. A separate Eighth Amendment analysis is not required on the question whether Miller applies to "all juveniles" under our state constitution; state agreed and did not present one. See Br. 18-19.

Second, Santiago made clear that "[a]lthough legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values…legislative judgments alone cannot be determinative of [e]ighth [a]mendment standards since that [a]mendment was intended to safeguard individuals from…abuse of legislative power." 318 Conn. at 22, 122 A.3d at 17.

The Supreme Court similarly explained in Kelo v. City of New London, Conn., 545 U.S. 469, 517-18 (2005) that: "[t]here is no justification…for affording almost insurmountable deference…[and] a court owes no deference to a legislature's judgment concerning [a] quintessentially legal question."[17] The same must hold true on the legal question of Miller's application; "[i]n determining that our state constitution in some instances provides greater protection than…provided by the federal constitution," this Court "sit[s] as a court of last resort, subject only to the qualification that…interpretations may not restrict the guarantees

[17] It was "most implausible that the Framers intended to defer to legislatures as to what satisfies…the Bill of Rights," e.g., the Court "would not defer to a legislature's determination of…circumstances that establish…whether a search of a home would be reasonable." Id.

accorded to the national citizenry." See Kerrigan, 289 Conn. at 155-56, 957 A.2d at 420.

Next, the state did not dispute the conclusions of minority overrepresentation by the Connecticut Juvenile Justice Advisory Committee of the Office of Policy and Management. See Br. 18-19. As the Santiago concurrence "strongly emphasized" on the death penalty:

> the fact that a charging or sentencing decision may be based in part on impermissible racial factors does not imply that the prosecutor, judge, or juror making that decision is "racist"…It likely is the case that many, if not most, of the documented disparities in capital charging and sentencing arise not from purposeful, hateful racism or racial animus, but rather from…subtle, imperceptible biases on the part of generally well-meaning decision makers.

318 Conn. at 140-41, 159-60, 122 A.3d at 85, 95-96 (concur, Norcott, McDonald, Js.) (addressing racial discrimination allegations "[b]ecause…a powerful undercurrent…through virtually all of our death penalty" law). The concurrence expressed "grave doubts" based on historical and statistical records "whether a capital punishment system so tainted by racial …bias ever could pass muster under our state constitution." Id. at 161, 122 A.3d at 96.

The same should hold true on juvenile sentencing, where racial disparity is evidenced in the research conducted by our Juvenile Justice Committee. A subset category of that Connecticut research, supplemented by national research, shows that "racial and other biases taint adult perceptions of juvenile behaviors, especially expression of remorse."[18]

> judges frequently use a perceived lack of remorse as an aggravating sentencing factor. Its absence supposedly indicates…an offender is not ready for rehabilitation or is not capable of expressing the appropriate moral response to her wrongdoing …Despite…consideration of remorselessness as a sentencing factor, very little empirical information exists on the relation between recidivism and remorse. Not only is the connection tenuous, but remorselessness itself may not be so easily ascertained in juvenile offenders…[A] legal scholar suggests, "[C]ourts interpret lack of remorse in subjective and psychologically naïve ways, without regard for defense mechanisms, developmental stages, or…ambiguity that inheres in human behavior."

Adam Saper, Juvenile Remorselessness: An Unconstitutional Sentencing Consideration, 38 N.Y.U. Rev. L. & Soc. Change 99, 113, 124 (2014) (43 p.) (noting that "both Graham

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[18] "[G]enerally, adults tend to retain negative impressions of juvenile defendants, feeling particularly threatened by them." The media is a contributing factor; "[i]n the mid-1990s, a news article by John Dilulio forged the image of a juvenile super-predator;" though refuted, "fears of youthful offenders remain entrenched in the public psyche." Saper, infra., 128.

and Roper 'establish that children are constitutionally different'…[Miller] did not…temper this observation to a particular range of sentences or types of offenses...Miller reaffirmed Graham's insistence that age…be considered at all stages of criminal proceedings.").[19]

The sixth Geisler factor weighs in favor of expansion under our state constitution.

G. Application.

The state cited no authority that age at sentencing had any bearing on the certified questions. See Br. 19. The defendant was 16 years old when he committed the offense. See A 1, 4. The state further did not dispute that the trial court did not consider the Miller factors. See Br. at 19-20. In sum, the Geisler factors weigh in favor of a state constitutional prohibition, as cruel and unusual, on sentencing proceedings for all juvenile offenders when the trial court does not consider on the record (as required in Riley) the Miller youth related factors. That did not occur; the defendant's sentence was imposed in an illegal manner.[20]

II. PAROLE ELIGIBILITY UNDER CONN. GEN. STAT. § 54-125A(F) DOES NOT ADEQUATELY REMEDY THE STATE CONSTITUTIONAL VIOLATION.

The underlying error of the state's argument on whether parole eligibility remedies a state constitutional violation of the sentencing proceeding articulated under Miller, broadly interpreted in Riley, is exemplified by its assertion that "[o]nce this Court has identified the parameters of what constitutes a cruel and unusual **sentence**, it is for the legislature to create and define our state's **sentencing scheme**." See Br. 38 (emphasis added). To the contrary, "the rule in Miller requiring that a sentencing authority conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before sentencing a juvenile offender to a life sentence" is a "watershed rule of criminal procedure;" the "individualized sentencing prescribed by Miller…[is] 'central to an accurate determination.'" Thus, in Connecticut, the Eighth Amendment under Miller guarantees a "process" (a "sentencing scheme") not a "sentence." See Casiano, 317 Conn. at 67-70, 115 A.3d at 1040-42.

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[19] Available at: https://socialchangenyu.com/review/juvenile-remorselessness-an-unconstitutional-sentencing-consideration/.

[20] See Conn. Practice Book § 43-22.

The state's error also is evidenced by its second Geisler analysis on the remedy for a state constitutional violation, despite the lack of authority for such analysis. See Br. 20-39. In our caselaw, the scope of the state constitutional violation consistently has defined the remedy. See e.g. Kerrigan, 289 Conn. at 262-63, 957 A.2d at 482 ("Interpreting our state constitutional provisions…leads…to the conclusion that gay persons are entitled to marry…[S]ame sex couples cannot be denied the freedom to marry," warranting injunctive relief); Santiago, 318 Conn. at 139-40, 122 A.3d at 84-85 ("capital punishment, as currently applied, violates the constitution of Connecticut. The judgment is reversed…and the case is remanded with direction to impose a sentence of life imprisonment without…release").

Next, the state's claim that the question whether parole eligibility under Conn. Gen. Stat. § 54-125a(f) affords a "meaningful opportunity" for release was "premature" because the defendant "has not yet had a parole hearing" defied precedent on ripeness. See Br. 35-36; Chapman Lumber Inc. v. Tager, 288 Conn. 69, 86-87, 952 A.2d 1, 15 (2008) (ripeness). Nothing about that statute is "abstract" or "present[s] a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire," see Id., unless the state concedes that § 54-125a(f) does not guarantee juvenile offenders a parole hearing; if conceded, parole eligibility under that statute cannot remedy a state constitutional violation.

Much of the state's purported authority to support its interpretation of Public Act 15-84 parole hearings, similarly, ran afoul of caselaw. See Br. 36-38. "It is well established that this court does not find facts." While "[l]egislative facts," which "help determine the content of law and policy," "may be judicially noticed without affording the parties an opportunity to be heard," "adjudicative facts," which concern "the parties and events of a particular case," may not. State v. Edwards, 314 Conn. 465, 478-79, 102 A.3d 52, 64 (2014); Santiago, 318 Conn. at 127, 122 A.3d at 78 ("courts…determining the content of law and policy may take notice of…legislative facts, such as historical sources...scientific and sociological studies").

> Appellate courts frequently are called on to make quasi-legislative policy judgments, whether crafting state common law, construing open-ended constitutional and statutory mandates…[P]olicy judgments often hinge on facts about the world in which we

live,…the study of which is in the domain of natural and social scientists. Id. at 128-29, 122 A.3d at 78-79. The content of a report commissioned by a party, even if publicly available, for example, "is not subject to judicial notice without an opportunity for hearing, because it would constitute adjudicative, rather than legislative facts." See Conn. Coal. for Justice in Educ. Funding, 295 Conn. at 262 n. 20, 990 A.2d at 222 n. 20.

Both the state and the Conn. BOPP improperly asked this Court to find adjudicative facts based on the videos of specific juvenile offenders' parole hearings under Public Act 15-84. See Br. 37-38; Am. 5-7; Moore v. Moore, 173 Conn. 120, 122-24, 376 A.2d 1085, 1086-87 (1977).[21] It is well-settled that this Court cannot do so.

Moreover, the statics cited by the Conn. BOPP on the grants and denials of parole to juvenile offenders under Public Act 15-84 are unhelpful because lacking any context. See Am. 6-7. The statistics, for example, did not indicate the length of the sentence remaining for those juveniles granted parole. The Court cannot assess whether parole was granted more frequently to those juvenile offenders with impending maximum release dates whose release otherwise was not subject to any length of supervision.

The statistics also did not indicate the reason for the denials of parole, and relatedly, the reason for the length of time before a second hearing under Public Act 15-84. See Am. 6-7. The Court cannot discern the offenses of conviction for those juveniles granted and denied parole and cannot assess the frequency with which parole was denied based solely or primarily on seriousness of the offense. Relatedly, the Court cannot assess the degree that the seriousness of the offense factored into the Conn. BOPP decisions on the length of time before a second hearing after denying parole under Public Act 15-84.

Finally, the statistics did not indicate what weight, if any, the Conn. BOPP afforded: the "evidence that Miller deemed constitutionally significant;" see Riley, 315 Conn. at 653, 110 A.3d at 1213;[22] remorse of the juvenile offender, see Conn. Gen. Stat. § 54-125a(f)(4);

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[21] E.g. "Whether there has been inflation…is not open to argument. The extent of that inflation and its effect on the necessary expenses of the parties…is open to dispute." Id.

[22] Cf. Davis v. State, 2018 Wy. 40, *40 (Wyo. 4/13/2018) (slip opinion) (a district court

or the juvenile offender's Statewide Collaborative Offender Risk Evaluation System assessment, implemented by the Conn. BOPP well before Public Act 15-84, see Am. A-0009 (last modified 2012). In sum, the statistics lack analytical framework and have no practical value.

Of further difficulty to the state, see e.g. Br. 28, 36, Am. 3-6, a Conn. BOPP policy, not even publicly available on the Conn. BOPP website, cannot confer a constitutional entitlement on a juvenile offender when Conn. Gen. Stat. § 54-125a itself "does not vest an inmate with the right to demand parole" and does not "even permit[] an inmate to apply for parole." See Perez v. Comm'r of Corr., 326 Conn. 357, 371, 163 A.3d 597, 607 (2017); cf. BOPP v. Freedom of Info. Comm'n, 19 Conn. App. 539, 547, 563 A.2d 314, 318 (1989) (the "process by which the board conducts its affairs, together with the…volatile subject matter …discussed in deliberations, require that…confidentiality provided by [Conn. Gen. Stat.] § 1-19(b)(2) protect the records of prisoner-applicants for pardons").[23]

In similar vein, the Conn. BOPP citation to an annual report that is not authoritative to the decision-making of the Conn. BOPP is unavailing. See Am. 4; Conn. Gen. Stat. § 54-124a(d) (chairperson shall adopt policies, separate from the annual report submitted to the Governor and General Assembly only, under sub. (o)); cf. Missionary Soc. of Conn. v. BOPP, 278 Conn. 197, 201, 896 A.2d 809, 812 (2006) (Conn. BOPP argued that its policy "does not affect private rights and, therefore, there is no statutory or constitutional requirement that it be implemented through a regulation").

A parole hearing under Conn. Gen. Stat. § 54-125a(f), which does not afford juvenile

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abuses its discretion "by weighing…youth as an aggravating instead of mitigating factor).

[23] The state's reliance on Conn. Gen. Stat. § 54-300(c), last amended in 2011, before Miller, Riley and Casiano, is confusing at best. See Br. 37. Similarly, reliance on a sentencing transcript, which did not address the Miller factors, at a parole hearing is problematic:

> juveniles…incarcerated prior to their adjudication may have been encouraged or forced by…circumstances to adopt a hardened demeanor, unlikely to be reflective of their true emotion. Juveniles may boast about their crimes, not because they are inherently callous and coldhearted, but because bragging seems like a reasonable manner by which to gain…peer acceptance…vital for…developing identities. Youth facing…incarceration may be especially likely to adopt an outward expression of toughness because…a hardened character [is] a necessary survival technique…

See Saper, supra., 130-31.

offenders the same procedures and protections afforded at a judicial sentencing, and which does not mandate that the Conn. BOPP consider all of the factors articulated in Miller, nor "give due weight to the evidence that Miller deemed constitutionally significant," see Riley, 315 Conn. at 653, 110 A.3d at 1213, cannot remedy a state constitutional violation. Further, counter to the state's apparent contention, see Br. 33, trial courts routinely conduct resentencing hearings, whether after appellate remand or the grant of a post-conviction petition or motion, to such degree that a body of case law evolved on resentencing. See e.g. Pepper v. United States, 562 U.S. 76 (2011) (post-sentencing rehabilitation); fn. 26. infra. Hearing and weighing post-sentencing evidence clearly is not unique to the Conn. BOPP.

Turning to the state decisions cited in Delgado, and by the state, see Br. 22, 25-26:

- Unlike Connecticut, California affords a youthful offender parole hearing, where the board "shall give **great weight** to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increase maturity of the prisoner in accordance with relevant case law" to "any prisoner who was **25 years of age or younger** at the time of his…controlling offense." See Cal. Penal Code § 4801(c), § 3051(a)(1) (amended 10/11/2017 by Assembly Bill No. 1308) (emphasis added).

- Unlike Connecticut, the United States District Court for the Western District of Washington and the Hawaii Court of Appeals applied a strict interpretation of Miller and Graham in Fisher v. Haynes, 2016 WL 5719398 (W.D. Wash. 2016) and State v. Tran, 378 P.3d 1014 (Haw. Ct. App. 2016). The Nebraska Supreme Court also narrowly interpreted Miller, declining to decide whether Miller applied to a lengthy term of years sentence, and instead held that the trial court did "take into account the considerations required by Miller before it [imposed] sentence" in State v. Cardeilhac, 876 N.W.2d 876, 890 (Neb. 2016).

- After the Ohio Court of Appeals decided State v. Terrell, No. CR-13-581323-A (Ohio Ct. App. 6/23/2016), the Ohio Supreme Court concluded that the intent of Graham "was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society;" thus, the Ohio court held that "pursuant to Graham,

a sentence that results in a juvenile defendant serving 77 years before a court could for the first time consider based on demonstrated maturity and rehabilitation whether that defendant could obtain release does not provide the defendant a meaningful opportunity to reenter society and is…unconstitutional." State v. Moore, 76 N.E.3d 1127, 1133, 1137, 1140 (Ohio 2116) (112 year sentence eligible for judicial release motion after 77 years)(citing Casiano).

- After the New Jersey Superior Court Appellate Division decided State v. Lasane, No. 06-02-00365 (N.J. Super. Ct. App. Div. 9/28/2016) (unpublished), the New Jersey Supreme Court held that the same concerns in Miller "apply to sentences that are the practical equivalent of life without parole." Post-Montgomery, the New Jersey court concluded: "[t]o satisfy the Eighth Amendment and…the State Constitution, which both prohibit cruel and unusual punishment…defendants [must] be resentenced and…the Miller factors…addressed at that time." State v. Zuber, 152 A.3d 197 (N.J. 2017) (sentences of 110 years and 75 years, eligible for parole after 55 years and 68 years) (citing Casiano).

The broad interpretation of Miller by some states post-Delgado, contrasted to a strict interpretation of Miller by other states, contrary to Riley and Casiano, render the former persuasive authority.[24] Other state decisions that run counter to that cited by the state, see Br. 26, are: Windom v. State, 398 P.3d 150, 156-58 (Idaho 2017) ("Montgomery declared that Miller was retroactive…for those for whom the sentencing court imposed a fixed-life sentence without considering the distinctive attributes of youth;" a "retrospective analysis does not comply with Miller…where the evidence of the required characteristic and factors was not presented…[at] sentencing;" vacating dismissal of post-conviction petition); Comm.

[24] In similar vein, the Appellate Court reliance in State v. Rivera, 17 Conn. App. 242, 172 A.3d 260 (2017) on state decisions cited in State v. Allen, 289 Conn. 550, 958 A.2d 1214 (2008), overruled by Miller, is not persuasive. Of note, Rivera relied heavily on the decisions in Taylor G., Logan, Williams-Bey (under review here) and Delgado to analyze the state constitutional claim. A petition for a writ of certification to appeal is pending in Rivera, Petition Nos. SC 170328, SC 170342. Of final note, contrary to the state's apparent assertion, see Br. 24, Haughey v. Comm'r of Corr., 173 Conn. App. 559, 572, 173 Conn. App. 559, 857 (2017) and State v. Mukhtaar, 179 Conn. App. 1, 177 A.3d 1185 (2017) did not address state constitutional claims.

v. Perez, 80 N.E.3d 967, 975-76 (Mass. 2017) (under state constitution, "a juvenile defendant's aggregate sentence for nonmurder offenses with parole eligibility exceeding that applicable to a juvenile…convicted of murder is presumptively disproportionate;" resentencing because trial court did not give "appropriate consideration to…age as a mitigating factor").[25]

Next, the state's characterization of Washington precedent is disingenuous. See Br. 28-30. In State v. Bassett, 394 P.3d 430 (Wash. App. 2017), the Washington court continued to apply "Miller's reasoning beyond its holding," and, under a categorical ban analysis, held that a sentence of life without parole under the state's Miller-fix statue (which provided that a "minimum term of life may be imposed, in which case the person will be ineligible for parole") violated the state constitution. See State v. Gilbert, No. 33794-4-III (Wash. App. 4/3/2018) (unpublished) (sentence of life with parole eligibility is imposed only after a Miller-compliant sentencing, unlike in Connecticut). Washington has not held that a trial court is incapable of analyzing the Miller factors at sentencing, as the state claims. See Br. 29-30.[26]

Of final import, the state cited no authority for the apparent proposition that the legislature may predicate a constitutional remedy on maintenance of the underlying unconstitutionality, i.e., parole eligibility under Conn. Gen. Stat. § 54-125a(f)(1) determined based solely on the length of the unconstitutional sentence imposed. See Br. 38. There is none.

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[25] Also of import, the state mischaracterized some state decisions, conflating determination that a sentence did not violate Miller with decision, not rendered, that parole remedied a Miller violation. See Br. 26-29; People v. Aponte, 42 Misc.3d 868 (N.Y. Sup. Ct. 2013) (lengthy aggregate sentence with parole eligibility did not violate Miller); Lewis v. State, 428 S.W.3d 860, 864 (Tex. Crim. App. 2014) (sentences of life with parole "do not fall within the scope of the narrow holding in Miller"); State v. Jefferson, 798 S.E.2d 121, 126 (N.C. App. 2017) (neither the federal or state "Supreme Court has yet held that the Eighth Amendment requires…court to consider…mitigating factors before applying [life with parole] sentence").

[26] The state's reading of Florida law also is incorrect. See Br. 27. Florida: "Mandatory life sentences, with or without the possibility of parole for juveniles convicted of homicide and non-homicide offenses are unconstitutional…Sentences for non-homicide offenses which do not provide for a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,…imposed initially or upon a resentencing, are unconstitutional …And when juveniles are resentenced for non-homicide offenses…they must be resentenced pursuant to Chapter 2014-220," which provides for later judicial review of the sentence, even after resentencing. Vennisee v. State, No. 3D16-1604 (Fla. App. 10/11/2017).

In sum, parole eligibility under § 54-125a(f) cannot remedy a state constitutional violation.[27]

III. THE INADEQUATELY BRIEFED ALTERNATIVE GROUNDS BASED ON THE FUNCTIONAL EQUIVALENT OF LIFE AND DEFENDANT'S PLEA AGREEMENT.

"Analysis, rather than mere abstract assertion, is require to avoid abandoning an issue by failure to brief the issue properly…Where a claim is asserted in the statement of issues but…receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." See Conn. Light and Power Co. v. Dept. of Public Utility Control, 266 Conn. 108, 120, 830 A.2d 1121, 1129 (2003). The two alternative grounds were inadequately briefed, each in a single, short paragraph, and thus, should not be addressed by the Court. See Comm'n on Human Rights and Opportunities v. Forvil, 302 Conn. 263, 643-44, 25 A.3d 632, 279-80 (2011).

CONCLUSION

Our constitution should afford all juvenile offenders a sentencing proceeding under Miller, with violation not remedied by parole eligibility under Conn. Gen. Stat. § 54-125a(f).

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[27] Should the Court disagree with the analysis on adjudicative facts, supra., then the state's contention that parole eligibility remedies a Miller violation for a juvenile offender sentenced to life without parole, see Br. 20, is constitutionally infirm, e.g., violation of the equal protection clause, since two of the five juveniles so sentenced were resentenced. See e.g. Jacqueline Rabe Thomas, The CT Mirror, When 60 years isn't a life sentence… (6/26/2012) available at: https://ctmirror.org/2012/06/26/ when-60-years-isnt-life-sentence/ (five juveniles sentenced to life without parole: Ronnie Hinton, Jamaal Coltherst, Norman Gaines, Mark Edwards and Anthony Allen); David Owens, Hartford Courant, Judge Gives Second Chance to Young Man Who Was Sentenced as a Teen to Life for Murder (10/6/ 2016) available at: http://www.courant.com/news/connecticut/hc-hartford-anthony-allen-resentenced-for-murder-1005-20161004-story.html (Allen resentenced to 28 years); Daniel Tepfer, CT Post, No longer a teen, man faces 30 years for double murder (11/22/2014) available at: https://www.ctpost .com/local/article/No-longer-a-teen-man-faces-30-years-for-double-5909633.php (Gaines resentenced to 30 years); but see Am. A-010 to A-011 (Hinton not scheduled for a hearing though parole eligible in October 2019). Further, any notion that Public Act 15-84 cannot afford a parole hearing after a resentencing under Miller has been dispelled. See Daniel Tepfer, Parole denied for teen convicted of double slaying (12/12/2016) available at: https://www.ctpost.com/local/article/Parole-denied-for-teen-convicted-of-double-slaying-10791696.php (Gaines denied parole only two years after re-sentenced to 30 years in prison). The defendant reiterates that his citation to these facts have bearing only should the Court reject his argument that similar facts, cited by the state and Conn. BOPP, somehow are not adjudicative. See Kerrigan, supra. (equal protection).

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CERTIFICATION

Pursuant to Conn. Practice Book § 62-7(g), the undersigned certifies that the reply brief of the defendant-appellant was delivered electronically on the 15th day of April, 2018, to the last known e-mail address of each counsel of record, as follows: Michele Lukban, Office of the Chief State's Attorney, Email: DCJ.OCSA.Appellate@ct.gov and Michele.Lukban@ct.gov; S. Max Simmons, Email: maxsimmonslaw@gmail.com; James Sexton, Email: jsexton@taylorsexton.com; and Steven Strom, Assistant Attorney General, Email: Steven.Strom@ct.gov.

Pursuant to Conn. Practice Book § 67-2, the undersigned certifies that the reply brief of the defendant-appellant: (1) is a true and correct copy of the reply brief that was submitted electronically in accord with Conn. Practice Book § 67-2(g) and (i); (2) does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law in accord with Conn. Practice Book § 67-2(g) and (i); (3) complies with all provisions of this rule.

The undersigned further certifies that a copy of the reply brief was mailed, first class, postage prepaid on this 16th day of April, 2018, to: Hon. Joan K. Alexander, New Britain Judicial District, 20 Franklin Square, New Britain, CT 06051; Michele Lukban, Juris No. 409700, Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Tel.: (860)258-5807, Fax: (860)258-5828; S. Max Simmons, Max Simmons Law, LLC, P.O. Box 8417, New Haven, CT 06530, Tel.: (203)903-2067, Fax: (866)463-3295; James

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