No. 122327

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GOPI KASHYAP
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-4684
eserve.criminalappeals@atg.state.il.us

Counsel for Respondent-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
1/8/2019 1:08 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

I. This Court Has Already Defined *De Facto* Life Without Parole as a Sentence that "Cannot be Served in One Lifetime."

The United States Supreme Court defines the Eighth Amendment's categorical rules. *See Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (State may not interpret federal constitution to provide greater protection than that provided by Supreme Court precedent); *In re Karas' Estate*, 61 Ill. 2d 40, 53 (1975) (same); *cf., e.g.*, *People v. Harris*, 2018 IL 121932, ¶¶ 56-61 (*Miller v. Alabama*, 567 U.S. 460 (2012), does not extend to young adults because it draws line at age 18); *People v. Holman*, 2017 IL 120655, ¶ 51 (no categorical ban on life imprisonment for juveniles because Supreme Court precedent permits it).[1] Currently, those rules prohibit only "life without parole" for juvenile offenders whose crimes reflect the characteristics of youth. *Montgomery*, 136 S. Ct. at 734; *Miller*, 567 U.S. at 479; *Graham v. Florida*, 560 U.S. 48 (2010). In *People v. Reyes*, this Court held that *Miller* applies to "*de facto* life without parole," defined as a prison term that "cannot be served in one lifetime." 2016 IL 119271, ¶¶ 5-10. The appellate court — although reaching different conclusions — has uniformly applied this definition in

[1] *Holman*'s holding that *Miller* applies to discretionary life without parole is not an extension of *Miller*, but rather the only interpretation that comports with *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (*Miller* bars life without parole for juveniles whose crimes reflect transient immaturity). *See Holman*, 2017 IL 120655, ¶¶ 34, 38-40.

determining whether a sentence constitutes *de facto* life without parole. A11; Peo. Br. 6-8.[2]

Despite the consensus on this standard, defendant asks this Court to depart from *Reyes* and redefine "*de facto* life without parole" as a sentence that does not afford the offender "a meaningful life outside of prison." Def. Br. 14, 18. But the narrow, federal constitutional question here is not whether this Court should extend *Miller* to sentences of less than life without parole — it cannot, *see Sullivan*, 532 U.S. at 772 — but whether a determinate 50-year prison term for a juvenile offender is in fact equivalent to life without parole, thereby falling within *Miller*'s rule.

A. This Court's definition of *de facto* life without parole is consistent with Supreme Court precedent.

The Eighth Amendment's categorical rules prohibit specific types of punishment, and whether a punishment is "cruel and unusual" entails an analysis of the "particular penalty" at issue. *Miller*, 567 U.S. at 483. Like *Graham* before it, *Miller* analyzed and prohibited only a single sentence: life without parole. *Id.*; *Graham*, 560 U.S. at 74. Given this limited holding, some courts have concluded that *Miller* does not apply to any sentence not labeled "life without parole." *See, e.g.*, *Veal v. State*, 810 S.E.2d 127, 128-29 (Ga. 2018); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017); *cf. Lockyer v.*

[2] Citations to the People's opening brief and defendant's brief appear as "Peo. Br. __," and "Def. Br. __," respectively. Remaining citations appear as they did in the People's opening brief.

Andrade, 538 U.S. 63, 74 (2003) (37-year-old's sentence of 50 years to life "materially []distinguishable" from life without parole because offender retains parole opportunity). But recognizing that the Eighth Amendment's categorical rules do not depend on "semantic classifications" or "linguistic distinction[s]," *Budder v. Addison*, 851 F.3d 1047, 1055-56 (10th Cir. 2017), this Court has held that certain sentences, although not labeled "life without parole," are nevertheless barred because they mean "the juvenile will die in prison," *Reyes*, 2016 IL 119271, ¶ 9. Thus, the question is whether a sentence not labeled "life without parole" is in fact so long that it "cannot be served in one lifetime." *Id.*; *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66 (question is whether "term of years is a natural life sentence in disguise").

Supreme Court precedent confirms *Reyes*'s definition. *Graham* imposed a ban on a noncapital sentence (life without parole) for an entire class of offenders (juvenile nonhomicide offenders). *Miller*, 567 U.S. at 475. *Graham* explained that, like a death row inmate, a juvenile offender sentenced to life without parole has "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope," even if maturity "lead[s] to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." 560 U.S. at 79. And "[a] young person who knows that he or she has no chance to leave prison *before life's end* has little incentive to become a responsible individual." *Id.* (emphasis added). Graham's life-without-parole sentence was cruel and unusual because it

"guarantee[d] [that] he w[ould] die in prison without any meaningful opportunity to obtain release, . . . even if he spen[t] the next half century attempting to atone for his crimes and learn from his mistakes." *Id.* *Graham* emphasized that a "State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 82. *Graham* did not mention term-of-years sentences that are not "life imprisonment without the possibility of parole." *Id.* at 52-53, 57, 61-84; *id.* at 113 & n.11 (Thomas, J., dissenting); *id.* at 124 (Alito, J., dissenting).

Two years later, emphasizing that for juveniles "life without parole" is "the harshest possible penalty" and "akin to the death penalty," *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 474-75, 479, 489. Again, the Court did not consider the constitutionality of other term-of-years sentences, but cited "life *with* the possibility of parole" and "a lengthy term of years" as examples of sentences that are less than "lifetime incarceration without possibility of parole." *Id.* at 465, 482-89 & nn.9-11.

Montgomery held that *Miller* announced a new substantive rule that applies retroactively to cases on collateral review. *Montgomery*, 136 S. Ct. at 732. "Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects

irreparable corruption, it rendered *life without parole an unconstitutional penalty* for . . . juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at 734 (emphasis added; quotation marks and citations omitted). There, then 69-year-old Montgomery had been sentenced to mandatory life without parole for a murder he committed more than 52 years earlier at age 17; since being sentenced, he had spent "46 years knowing he was *condemned to die in prison*." *Id.* at 725-27, 736 (emphasis added). The Supreme Court directed that prisoners sentenced to mandatory life without parole "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their *hope for some years of life outside prison walls* must be restored." *Id.* at 736-37 (emphasis added).

This Court considered this controlling precedent when it correctly defined *de facto* life without parole as a prison term that "cannot be served in one lifetime," *Reyes*, 2016 IL 119271, ¶¶ 5, 9, or in other words, a sentence that is "unsurvivable," *id.* ¶ 9; ensures that "the juvenile will die in prison," *id.*; "is the functional equivalent of life without the possibility of parole," *id.*; and means that the offender "will most certainly not live long enough to ever become eligible for release," *id.* ¶ 10. *See Sumner v. Shuman*, 483 U.S. 66, 83 (1987) (life without parole indistinguishable from sentence that exceeds normal life expectancy); *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (sentences "highly likely to result in imprisonment for life" are equivalent to life without parole); *State v. Moore*, 76 N.E.3d 1127, 1137-38 (Ohio 2016)

(*Graham* applies to terms that "extend[] beyond" life expectancy). The Supreme Court has issued no decision since *Reyes* that would undermine this definition. The appellate court — although reaching different conclusions in particular cases based on erroneous and/or unreliable data — has uniformly applied this definition in determining whether a sentence falls within *Miller*. A11; Peo. Br. 5-19; *see also People v. Rodriguez*, 2018 IL App (1st) 141379-B, ¶¶ 73-74 (after opening brief filed, holding that 50 years is "objectively survivable" and not *de facto* life). And the definition is consistent with common sense and experience. *See, e.g.*, *State v. Charles*, 892 N.W.2d 915, 921 (S.D. 2017) (life sentence "commonly understood" as spending "rest of one's life in prison"); *Black's Law Dictionary* (10th ed. 2009) ("life imprisonment" means confinement in prison for the remaining years of a person's "natural life," *i.e.*, his "physical life span"). Accordingly, this Court should reject defendant's request to redefine *de facto* life without parole.

B. No Supreme Court decision supports defendant's sweeping definition of *de facto* life without parole.

As discussed, the pertinent Supreme Court decisions do not address sentences less than life without parole. Yet defendant construes these decisions as mandating that a juvenile offender receive a sentence that provides both a realistic opportunity to obtain freedom from confinement *and* an opportunity for a meaningful life after release from prison. Def. Br. 14. To justify this conclusion, defendant cherry-picks phrases from *Graham* and claims that the "Court referred to juvenile offenders' opportunity to re-enter

society and become productive citizens in *qualitative* terms." *Id.* But the quoted language provides no support for defendant's sweeping definition; it merely underscores *Reyes*'s holding.

Defendant asserts that *Graham* referred to "'the rehabilitative ideal,'" and "discussed a juvenile offender's 'right to reenter the community'" and "to reclaim [his] 'value and place in society.'" *Id.* (quoting *Graham*, 560 U.S. at 74). He further characterizes *Graham* as "discuss[ing]" an offender's "chance for 'fulfillment outside prison walls,' for 'reconciliation with society,' [and] 'to achieve maturity of judgment and self-recognition of human worth and potential.'" *Id.* (quoting *Graham*, 560 U.S. at 79).

The first set of quoted phrases appears in *Graham*'s discussion of why no penological goal justifies life without parole for juvenile nonhomicide offenders. 560 U.S. at 74. The second set of phrases appears in *Graham*'s explanation for why a categorical rule, rather than a case-by-case approach, was necessary. *Id*. at 79. Viewed in context, the selectively quoted phrases merely confirm *Reyes*'s definition. Unlike life without parole, a sentence that can be served in one lifetime does not, to use *Graham*'s words, "forswear[] altogether the rehabilitative ideal," or "give[] no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope," or "no chance to leave prison before life's end." *Id.* at 74, 79. To the contrary, such a sentence contemplates that the offender will be released, thus providing, rather than denying, "the right to reenter the community" and the

opportunity and incentive "to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* Thus, a sentence that falls outside *Reyes*'s definition is not an "irrevocable judgment" that the offender will *never* be valued by or have a place in society outside prison, even if rehabilitated. *Id.*

Defendant further relies on *Graham*'s language — repeated in *Miller*, 567 U.S. at 479 — requiring that most juvenile offenders have a "'meaningful opportunity for release based on demonstrated maturity and rehabilitation.'" Def. Br. 13 (quoting *Graham*, 560 U.S. at 75). Specifically, the Court stated: "A State is not required to guarantee *eventual freedom* to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham *some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*." *Graham*, 560 U.S. at 75 (emphases added). And in conclusion, *Graham* repeated, "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 82. Viewed in context, this language imposes no greater an obligation on States than to provide a juvenile offender a "meaningful" (or "realistic") "opportunity" to obtain *release from prison* before the end of his "natural life." *Id.* at 75, 82. States, moreover, may choose *not* to release an offender if he does not "demonstrate[] maturity and rehabilitation" under state law. *Id.* at 75.

Thus, contrary to defendant's position, the Supreme Court has not defined life without parole by referencing the quality of life an offender may have *after* release from prison. *See People v. Pearson*, 2018 IL App (1st) 142819, ¶ 51 (neither this Court nor the Supreme Court "refer[red] to the defendant's quality of life after release as a factor courts must consider"); *People v. Evans*, 2017 IL App (1st) 143562, ¶ 17 (same); *State v. Cardeilhac*, 876 N.W.2d 876, 889 (Neb. 2016) (*Montgomery* "characterized the period after release on parole not in terms of the quality of life but of consisting merely of 'some years of life outside prison walls'"). Indeed, *Graham* and *Miller* contemplate that a juvenile offender may live the rest of his life on parole, subject to the severe liberty restrictions attendant to parole release. *See generally Samson v. California*, 547 U.S. 843, 850-52 (2006); Nat'l Conference of State Legislatures, *Felon Voting Rights* (Dec. 21, 2018), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx (unlike Illinois, most states prohibit felons from voting while on parole).[3] *Miller* addressed only "lifetime incarceration without possibility of parole," 567 U.S. at 465, 489, *i.e.*, prison terms that "condemn" juvenile offenders "to die in prison," *Montgomery*, 136 S. Ct. at 726-27, 734, 736; *see Reyes*, 2016 IL 119271, ¶ 9 (same). A lesser term that provides the offender "hope for some years of life outside prison walls" is not life without parole and falls outside *Miller*. *Montgomery*, 136 S. Ct. at 737.

[3] All websites cited in this brief were last accessed on January 7, 2019.

C. Defendant's definition has no limiting principle, raises more questions than it answers, and encompasses sentences that he concedes are not *de facto* life without parole.

Although determining when a sentence is survivable under *Reyes* poses a difficult question, it may be answered based on biology, common sense, and ordinary experience. Defendant's position requires this Court to answer an exceedingly more difficult, if not unanswerable, question that has plagued humanity for millennia: What qualities make life meaningful and fulfilling? *See* Def. Br. 14. And even after venturing an answer, the Court must speculate about the impact of the prison experience on the offender's post-release life, and determine how many years of post-release life will afford the offender a realistic opportunity to "truly" reenter and "reintegrate" into society, become a "productive citizen," "have a meaningful life," and be "fulfilled." *Id.* at 7-8, 13-15.

Defendant's framework has no limiting principle, raises more questions than it answers, presents the same constitutional and practical concerns as using individualized life expectancy tables, and would treat any long sentence — including those endorsed by this Court (36 years) and the legislature (40 years) — as *de facto* life without parole. *See* Peo. Br. 6-7. To illustrate the inconsistency in defendant's argument, assuming that "establishing a career" and "raising a family" are "qualities" that make life "meaningful" and "fulfilling," Def. Br. 7-8, 16-17, defendant nevertheless agrees that a determinate 36-year sentence (release at age 53 for the oldest

juvenile) is not *de facto* life without parole. But will a 53-year old homicide offender released after 36 years really be able to establish a career, given that prison potentially "create[s] significant and possibly insurmountable hurdles to" reintegration? Def. Br. 14, 19; *see, e.g.*, Adam Looney & Nicholas Turner, *Work and opportunity before and after incarceration*, The Brookings Institution (March 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf, at 7 ("the incarcerated fare poorly in the formal labor market after they are released," with "49 percent of ex-prisoners earn[ing] less than $500" in first year after release). And given human biology and adoption and foster-care restrictions for homicide offenders, does a female homicide offender released in her early fifties have a chance to raise a family? *See, e.g.*, 225 ILCS 10/4.2 (2018); 750 ILCS 50/1, *et seq*. (2018); Adele Cummings & 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 (2014). Because the answer to both questions is probably no, a 36-year sentence fails defendant's definition. But this Court has held, based on common sense and experience, that a 36-year sentence is not *de facto* life. *People v. Patterson*, 2014 IL 115102, ¶ 110.

At a minimum, defendant's definition suffers from the same flaws he identifies in *Reyes*'s definition. *See* Def. Br. 39. But defendant's approach is even more arbitrary because it asks the Court to answer not just whether a

sentence can be served in one lifetime, but also a multitude of other questions whose answers are unknowable, variable, and/or depend on demographic and cultural factors. Clear constitutional standards are necessary, and given the lack of controlling precedent supporting defendant's position, this Court should reject his request to inject greater variability and confusion into an already difficult task. *See supra*, Parts I.A–B.[4]

II. A Determinate 50-Year Prison Term Can Be Served in One Lifetime and Is Not *De Facto* Life Without Parole.

A. The appellate court's decision is unsound.

As the People's opening brief established, the two appellate court decisions holding that a sentence of less than 54 years in prison is *de facto* life without parole, A11-12; *People v. Sanders*, 2016 IL App (1st) 121732-B, *PLA pending*, No. 121275 (Ill.), improperly rest on (1) the erroneous factual premise that a federal offender's life expectancy is 64 years; and (2) unreliable prisoner life expectancy measurements. Peo. Br. 8-15.[5]

---

[4] *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1047 (Conn. 2015), the likely source of the "meaningful life" definition, is unpersuasive because it was decided before *Montgomery* and *Reyes*, relied on the same flawed prisoner life expectancy studies as the appellate court here, Peo. Br. 8-15, rejected the Connecticut legislature's definition of life without parole as 60 years in prison, and reviewed a different sentencing practice, *see infra*, Part II.B.

[5] Defendant cites Rule 23 orders and dissenting opinions (authored by the same appellate court justice) to support an alleged "lack of a consensus on this issue." Def. Br. 40-41 & n.16. But no order holds that a sentence of less than 54 years is *de facto* life, and the dissenting justice relies on the same erroneous and unreliable life expectancy measurements as the appellate court here, *see, e.g.*, *Rodriguez*, 2018 IL App (1st) 141379-B, ¶¶ 99-104

Defendant does not dispute the first error. As to the second, defendant appears to concede that no reliable prisoner life expectancy measurement exists. *See* Def. Br. 44; Peo. Br. 10-14. Yet he speculates that prison conditions will negatively affect his expected life span. But because prison conditions vary considerably, there is no reliable way to predict the impact of incarceration on a juvenile offender's life expectancy. Peo. Br. 10-14.[6] In the absence of such evidence, this Court should not abandon common sense and ordinary experience, which confirm that a 50-year term for a juvenile offender can be served in one lifetime and does not fall within *Miller*'s rule. *Cf. generally People v. Housby*, 84 Ill. 2d 415, 424-25 (1981) (in absence of empirical evidence, common sense and experience provide answer).

(Mikva, J., dissenting). If relevant, unpublished orders are consistent with the consensus that sentences of less than 54 years are not *de facto* life. *See, e.g.*, *People v. Helgesen*, 2018 IL App (2d) 160823-U, ¶¶ 47-48 (90-year sentence, release after 45 years with day-for-day credit); *People v. Early*, 2018 IL App (1st) 160642-U, ¶ 39 (51-year sentence for 20-year-old, release at age 71), *PLA pending*, No. 123992; *People v. Jordan*, 2018 IL App (1st) 160004-U, ¶¶ 23-24 (86-year sentence, release after 43 years with day-for-day credit), *PLA pending*, No. 124017; *People v. Tolliver*, 2018 IL App (1st) 151517-U, ¶¶ 33-35 (52-year sentence, release at age 69), *PLA pending*, No. 123712; *People v. Kuykendoll*, 2017 IL App (1st) 153504-U, ¶¶ 15-16 (90-year sentence, release after 45 years with day-for-day credit; anticipated release at age 65).

[6] Illinois prisoners have lower average annual mortality rates than federal and most other state prisoners. Bureau of Justice Statistics, *Mortality in State Prisons, 2001-2014 - Statistical Tables* (Dec. 2016), https://www.bjs.gov/content/pub/pdf/msp0114st.pdf, at Table 14.

B. Defendant's 50-year sentence is not comparable to sentences imposed in other states under materially different parole systems.

Defendant insists that out-of-state decisions are more persuasive than Illinois decisions concluding that sentences of up to 54 years are not *de facto* life. But the Supreme Court requires each state to review its sentencing scheme and determine appropriate ways to ensure compliance with the Eighth Amendment. *Montgomery*, 136 S. Ct. at 735; *Graham*, 560 U.S. at 75. The penalty here is a survivable, determinate 50-year term that mandates release upon completion. It places *no* burden on the offender to prove eligibility for release. Instead, it *presumes* that defendant will be "fit to rejoin society," after he spends the term "attempting to atone for his crime[] and learn from his mistakes." *Graham*, 560 U.S. at 79. This sentence is not *de facto* life without parole. *See United States v. Mathurin*, 868 F.3d 921, 933-35 (11th Cir. 2017) (57-year sentence allowing defendant to earn enough credit for release at age 67 satisfies *Graham*); *Hart v. State*, 255 So. 3d 921, 927 (Fla. Dist. Ct. App. 2018) (determinate 50-year sentence satisfies *Graham*); *Mason v. State*, 235 So. 3d 129, 135 (Miss. Ct. App. 2017) (en banc) (50-year sentence with mandatory release at age 65 not *de facto* life).[7]

[7] In calculating minimum prison time, courts sometimes include credit that may be earned through completion of prison programs. *See, e.g.*, *Mathurin*, 868 F.3d at 934-35; *Starks v. Easterling*, 659 F. App'x 277, 281-82 (6th Cir. 2016) (White, J., concurring). But because such credit is purely discretionary, *Reyes* properly did not include it in calculating a juvenile's minimum sentence. 2016 IL 119271, ¶¶ 2, 10 (including only credit to which

Unlike Illinois, most states employ a discretionary parole system for homicide offenders. *See generally* Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, Nat'l Conference of State Legislatures (June 2015), http://www.ncsl.org/documents/cj/sentencing.pdf. In these systems, (1) prisoners must establish eligibility for release, sometimes after receiving minimal rehabilitative services; (2) the likelihood of being granted parole depends on the "attitudes, cultures, and norms of individual parole boards and individual board members," and in a few states, the governor may deny parole even where the board recommends it; and (3) when denied parole, a homicide offender usually must wait years for another chance, if one is given at all.[8] Each of these barriers to release necessarily diminishes an offender's "hope for some years of life outside

---

offender is entitled, 730 ILCS 5/3-6-3(a)(1), (2), (2.1), (2.3)−(2.6)), not those that may be awarded, 730 ILCS 5/3-6-3(a)(1.5), (a)(3)).

[8] *See* Mariel E. Alper, *By the Numbers: Parole Release and Revocation Across 50 States*, Robina Institute, at p. i (Univ. of Minn. 2016), https://robinainstitute.umn.edu/publications/numbers-parole-release-and-revocation-across-50-states; Alexis Watts, *Parole Release Reconsideration in States with Discretionary Release*, Robina Institute (Blog Apr. 7, 2017), https://robinainstitute.umn.edu/news-views/parole-release-reconsideration-states-discretionary-release; American Civil Liberties Union, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences* (Nov. 2016), https://www.aclu.org/sites/default/files/field_document/121416-aclu-paroleреportonlinesingle.pdf; *see, e.g.*, Katie Rose Quandt, *The False Hope of Parole*, The Outline (Mar. 8, 2018), https://theoutline.com/post/3625/the-false-hope-of-parole; Juliet Linderman, *High court juvenile lifer ban spurs wider review of cases*, Associated Press (Aug. 2, 2017), https://apnews.com/bd9c32221b2d45e0979c24bddb428e10.

prison walls," *Montgomery*, 136 S. Ct. at 737, thus making imprisonment for a minimum number of years under a discretionary parole system materially different from the same number of years under Illinois's mandatory system.[9]

Moreover, courts in discretionary systems are divided on the question. Some courts have concluded that lengthy sentences that provide the first chance for parole after 50 years fall within *Graham* and/or *Miller*.[10] Others have held the opposite.[11] Ultimately, "reasonable jurists can disagree

---

[9] *Montgomery* exemplifies the crucial distinction. After the Supreme Court's decision, Montgomery was denied parole at age 71, after serving 54 years in prison. Grace Toohey, *Board denies parole to man who served more than 50 years after killing deputy when he was juvenile*, The Advocate (Feb. 19, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_acca953e-1579-11e8-aa66-1b036f45b902.html; *cf.* Mike Riopell & Christy Gutowski, *Starved Rock killer falls one vote short of parole after nearly 60 years in prison*, Chicago Tribune (Nov. 30, 2018), https://www.chicagotribune.com/news/ct-met-starved-rock-murder-chester-weger-parole-20181127-story.html (convicted at age 21).

[10] *See, e.g.*, *People v. Contreras*, 411 P.3d 445, 453-54 (Cal. 2018) (4-3 decision; parole-eligible after 50 years); *Casiano*, 115 A.3d at 1047 (5-2 decision; same); *Carter v. State*, 192 A.3d 695, 736 (Md. 2018) (same); *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 59-61 (Mo. 2017) (en banc) (5-1 decision; same); *Bear Cloud v. State*, 334 P.3d 132, 136, 142-43 (Wyo. 2014) (5-0 decision; parole-eligible after 45 years); *cf. State v. Null*, 836 N.W. 2d 41, 70-71 (Iowa 2013) (4-3 decision under Iowa Constitution; parole-eligible after 52.5 years); *id.* at 78 (Mansfield, J., dissenting) ("close call" that 52.5 years is *de facto* life).

[11] *See, e.g.*, *Demirdjian v. Gipson*, 832 F.3d 1060, 1076-77 (9th Cir. 2016) (two judges hold *Miller* not triggered by sentence with parole eligibility after 50 years; one judge dissents on other grounds); *People v. Lehmkuhl*, 369 P.3d 635, 635-37 (Colo. App. 2013) (two justices apply *Graham* to aggregate sentences and find parole eligibility after 50 years not *de facto* life; one justice limits *Graham* to single sentence); *State v. Redmon*, 380 P.3d 718, at **5-6 (Kan. Ct. App. Sep. 23, 2016) (unpublished) (relying on *Ellmaker v. State*, 329 P.3d 1253, at **8-10 (Kan. Ct. App. Aug. 1, 2014) (unpublished)) (both 3-0

whether [eligibility for parole] release after 51 to 60 years is" *de facto* life without parole. *Starks*, 659 F. App'x at 284 (White, J., concurring) (upholding Tennessee's rejection of *Miller* claim because juvenile could earn enough credit to be parole-eligible after 51 years). But because defendant's 50-year sentence guarantees him release upon completion of that term, as the appellate court consensus reveals, it can be served within one lifetime and falls outside *Miller*'s rule. *See Mathurin*, 868 F.3d at 935; *Hart*, 255 So. 2d at 927; *Mason*, 235 So. 3d at 135;[12] *cf. United States v. Tocco*, 135 F.3d 116, 131-

---

decisions; parole-eligible after 50 years); *State v. Steele*, 915 N.W.2d 560, 567 (Neb. 2018) (7-0 decision; same); *Commonwealth v. Baldwin*, 2018 WL 5306716, at *2-3 (Pa. Super. Ct. Oct. 26, 2018) (3-0 decision; same) (nonprecedential); *Charles*, 892 N.W.2d at 921 (5-0 decision; citing federal court decision finding release at age 65 not *de facto* life and concluding same for 92-year sentence with parole eligibility at age 60); *State v. Collins*, 2018 WL 1876333, at *19-20 (Tenn. Crim. App. Apr. 18, 2018) (3-0 decision; parole-eligible after 51 years; citing eight Tennessee decisions holding same) (nonprecedential); *State v. Frison*, 915 N.W.2d 729 (Wis. Ct. App. Apr. 11, 2018) (3-0 per curiam decision; parole-eligible after 50 years) (nonprecedential); *cf. Ira v. Janecka*, 419 P.3d 161, 169-71 (N.M. 2018) (all five justices agree that aggregate 91.5-year sentence, with parole eligibility after 46 years if credit awarded, gives "constitutionally meaningful" opportunity for release; three justices find term "the outer limit").

Compare Taylor v. State, 86 N.E.3d 157, 167 (Ind. 2017) (all seven justices agree that aggregate 80-year sentence, with parole eligibility after 58 years if credit awarded, Ind. Code §§ 35-50-6-4(a), 35-50-6-3.3(j)(1), not "death behind bars"); *State v. Russell*, 908 N.W.2d 669, 677 (Neb. 2018) (5-0 decision; parole-eligible after 55 years not *de facto* life), *with State v. Zuber*, 152 A.3d 197, 212-13 (N.J. 2017) (7-0 decision; parole-eligible after 55 years is *de facto* life; "potential release" when offender in "seventies and eighties" "implicates" *Graham* and *Miller*).

[12] Defendant cites one decision from a mandatory parole state, *State v. Ronquillo*, 361 P.3d 779, 784 (Wash. Ct. App. 2015) (51.3-year sentence providing release at age 68 falls within *Miller*). But this intermediate court decision cannot be deemed more persuasive than Illinois opinions holding

32 (2d Cir. 1998) (sentence allowing offender to earn enough credit for release one month before life expectancy not life imprisonment); *United States v. Gullett*, 75 F.3d 941, 950 (4th Cir. 1996) (similar).

III. This Court Should Decide as a Matter of Law When a Term of Years Is *De Facto* Life Without Parole.

In this unique circumstance, principles of judicial restraint should give way to the need for uniformity, consistency, and fairness in the application of the Eighth Amendment. *See* Peo. Br. 5; *cf. generally In re G.O.*, 191 Ill. 2d 37, 48-49 (2000) (constitutional standards of adjudication present "'a very definite need for uniformity of meaning[,] consistency of application,'" and "'unification of [appellate court] precedent'"). Clear constitutional limits are necessary to ensure that courts fairly, consistently, and efficiently adjudicate cases, and to allow parties to effectively negotiate their resolution. Thus, this Court should end the ongoing litigation, *see, e.g.*, Peo. Br. 6-8 & *supra* n.5 (collecting appellate cases), and determine when a prison term is long enough to be considered *de facto* life without parole.

Defendant's proposed line of 41 years does not satisfy his own definition of *de facto* life. *See supra*, Part I.C. Nor has it been adopted by any court. And contrary to defendant's assertion, the fact that our legislature has

---

otherwise, especially because it relied on cases employing the "meaningful life" definition of *de facto* life, and was decided before *Montgomery* and a later Washington Supreme Court decision holding that "[r]egardless of labeling," *Miller* prohibits sentencing a juvenile "to die in prison," *State v. Ramos*, 387 P.3d 650, 661 (Wash. 2017).

set the *minimum* punishment for certain murders at 40 years strongly suggests that a sentence just one year longer cannot constitute *de facto* life without parole. Under defendant's position, regardless of the number of offenses a juvenile commits during a single course of conduct, the maximum constitutional sentence would be 40 years unless the crimes reflect irreparable corruption. *Montgomery*, 136 S. Ct. at 734; *Reyes*, 2016 IL 119271, ¶¶ 8, 10. Significantly, an Illinois offender would be released after that term, not merely be given an opportunity for parole. *Cf. Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728-29 (2017) (providing juvenile release opportunity at age 60 not contrary to *Graham*); *McCardle v. State*, 550 S.W.3d 265, 268-70 (Tex. App. 2018) (sentence with parole eligibility after 40 years not *de facto* life without parole). Nothing in Eighth Amendment jurisprudence supports the extraordinary conclusion that a 41-year sentence contravenes its categorical rules.[13]

To the contrary, that a juvenile "deserve[s] severe punishment for killing [another person] is beyond question." *Miller*, 567 U.S. at 479. There is a "wide gap" between "stiff punishment" for youthful offenders and sentences that "fate them to die in prison." Ashley Nellis, *The Lives of Juvenile Lifers: Findings From a National Survey*, THE SENTENCING PROJECT (2012), https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-

[13] Notwithstanding defendant's position, out-of-state legislative policy choices as to minimum prison terms do not reflect a judgment as to the maximum punishment prohibited by *Graham* and *Miller*.

of-Juvenile-Lifers.pdf, at 35 (recommending elimination of life without parole for juveniles). The Eighth Amendment is concerned with only the latter. *Miller*, 567 U.S. at 479. Ordinary experience, common sense, the appellate court consensus, a national survey of juveniles serving life without parole, and life expectancy measurements confirm that somewhere between 54 and 59 years in prison, the likelihood of survival diminishes and the risk of disproportionate punishment increases to a point where a determinate sentence "cannot be served in one lifetime." *Reyes*, 2016 IL 119271, ¶¶ 5, 9; *see* Peo. Br. 7-8, 21-23. In the absence of Supreme Court precedent on this question, this Court should set the constitutional limit for Illinois.

IV. If the Court Holds that 50 Years Is *De Facto* Life Without Parole, It Should Remand to the Circuit Court for Second-Stage Postconviction Proceedings.

If this Court holds that defendant's sentence is *de facto* life without parole, the case should be remanded to the circuit court for second-stage postconviction proceedings. There are three stages for reviewing constitutional claims under Illinois's Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1, *et seq.*; *People v. Allen*, 2015 IL 113135, ¶¶ 33-34. At the first stage, the circuit court independently reviews the petition to determine whether it states the gist of a constitutional claim; the State has no role at this stage and the court cannot dismiss the petition based on nonjurisdictional procedural defects. *Allen*, 2015 IL 113135, ¶¶ 33, 42, 45. It is not until the second stage that counsel is appointed for defendant and the

State has an opportunity to assert procedural defenses and subject the petition to adversarial testing. *Id.*

Here, the circuit court dismissed defendant's petition at the first stage, finding that because (1) he was not sentenced to *de facto* life without parole, and (2) his sentence was not mandatory, he failed to state the gist of an Eighth Amendment claim. PC6. The second basis for dismissal is no longer valid because this Court has since held that *Miller* applies to discretionary life-without-parole sentences. *Holman*, 2017 IL 120655, ¶¶ 44-51. But if the Court concludes that defendant's 50-year sentence is *de facto* life, then his allegation that he received a life sentence in violation of *Miller* states the gist of an Eighth Amendment claim. *See Allen*, 2015 IL 113135, ¶¶ 41-42, 45 (at first stage, allegations taken as true and dismissal proper only if petition "presents 'no arguable basis either in law or fact'"). Thus, the proper remedy is to remand the case for second-stage proceedings. *Id.*

Defendant's position denies the State any opportunity to raise procedural defenses, in contravention of the Act. The substantive nature of *Miller*'s constitutional rule does not vitiate the State's statutory authority to raise such defenses and respond to the petition's merits at second-stage proceedings in the circuit court. Under *Montgomery*, a State's obligation to enforce a substantive constitutional right arises only if "the claim is properly presented" and the State's collateral proceeding is "open" for relief. 136 S. Ct. at 731-32; *cf., e.g.*, 725 ILCS 5/122-2.2 (180-day limitations period for filing

postconviction petition challenging capital sentence under *Atkins v. Virginia*, 536 U.S. 304 (2002)). Indeed, federal habeas courts refuse to consider untimely *Miller* claims. *See, e.g.*, *Gray v. Dorethy*, 2017 WL 4263985, at *2-3 (N.D. Ill. Sep. 26, 2017); *see generally Dodd v. United States*, 545 U.S. 353, 356-60 (2005) (one-year limitations period begins on date constitutional right recognized, not when its made retroactive). Thus, as this Court has previously held, the proper remedy for an erroneous first-stage dismissal is a remand for second-stage proceedings. *Allen*, 2015 IL 113135, ¶¶ 33-35, 41-42, 45. This case does not warrant a different remedy.

CONCLUSION

This Court should reverse the appellate court's judgment.

January 8, 2019

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GOPI KASHYAP
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-4684
eserve.criminalappeals@atg.state.il.us

Counsel for Respondent-Appellant
People of the State of Illinois

RULE 341(c) CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the 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 5,800.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

PROOF OF SERVICE

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 January 8, 2019, the **Reply Brief of Respondent-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email addresses:

Patricia Mysza
Christopher L. Gehrke
Office of the State Appellate Defender
First Judicial District
203 North LaSalle Street, 24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us
Counsel for Defendant-Appellee

Scott F. Main
Children & Family Justice Center
Bluhm Legal Clinic
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
scott.main@law.northwestern.edu
Counsel for Amicus Curiae

J. Damian Ortiz, Director
Pro Bono Program & Clinic
John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604
6ortiz@jmls.edu
Counsel for Amicus Curiae

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail 13 copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General