To be argued by
NATALIE REA
(10 minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

Ind. No 1832/92
AD1:2020-3839

-against-

JOSE MATIAS,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

JOSE MATIAS, :

Defendant-Appellant. :

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PRELIMINARY STATEMENT

The facts of the case are set forth in appellant's opening brief ("AB"). The purpose of this reply is to respond to the People's erroneous arguments that appellant's discretionary sentence of 50 years to life imposed, without a prior hearing pursuant to Miller v. Alabama, 567 U.S. 460 (2012), for crimes committed when he was 16 did not violate the prohibition against cruel and unusual punishment under the Federal and State constitutions (Respondent Brief ("RB") at 21-41) and that counsel, almost silent at sentencing, provided effective assistance (Id. at 42-50).

ARGUMENT

POINT I

CONTRARY TO THE PEOPLE'S ARGUMENT, APPELLANT'S DE FACTO LIFE SENTENCE OF 50 YEARS TO LIFE FOR A CRIME COMMITTED WHEN HE WAS 16, IMPOSED WITHOUT A MILLER HEARING, VIOLATES THE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES AGAINST CRUEL AND UNUSUAL PUNISHMENT. U.S. CONST., AMENDS. VIII AND XIV; N.Y. CONST., ART. 1, §5.

The essence of the People's argument is that appellant's sentence of 50-years-to-life was well deserved. They seem to forget that appellant was a child at the time of the offense and because children are different, the Federal and State constitutional guarantees against cruel and unusual punishment require a more rigorous process before such a lengthy sentence can be imposed. Under Miller, a court may not impose a de facto life without parole ("LWOP") sentence of 50-years-to-life without considering youth and its attendant characteristics including diminished culpability, immaturity, recklessness, impulsivity, and prospects for rehabilitation. The Court noted that "Graham established one rule (a flat ban) for nonhomicide offenses, while

we set out a different one (individualized sentencing) for homicide offenses." Miller, 567 U.S. at 474 n. 6, citing Graham v. Florida, 560 U.S. 48 (2010). At appellant's 1994 sentencing, the court never employed the process set forth in Miller and never took into consideration those characteristics when it imposed sentence. This Court should, therefore, vacate appellant's sentence and order resentencing. Because the sentencing/motion judge admitted that no evidence could convince him to change the sentence, resentencing should be ordered before a different judge.

1. Contrary to the People's request, this Court should follow the majority of states and apply Miller to appellant's de facto LWOP sentence (Reply to RB at 21-33).

The People take the position that Miller applies only to the mandatory imposition of LWOP on a juvenile. They argue that the rationale adopted by the majority of out-of-state courts that have applied Miller to de facto LWOP sentences is "unpersuasive," the decisions "not binding," and, in any event, appellant's sentence is not de facto LWOP because he will go before the Parole Board within his "natural lifetime." This Court should reject these arguments.

(a) Miller applies to de facto LWOP

Since a lengthy sentence of a term of years can effectively be a life

sentence, a majority of courts around the country has refused to look at labels, refused to place form over substance, and applied Miller to de facto life sentences (AB at 24-25). This Court should do the same.

The People do not provide a reason for characterizing these decisions as "unpersuasive," strangely relying on cases applying Miller to de facto life sentence (RB at 31 fn. 12). However, since the rationale for applying Miller to de facto LWOP sentences is the refusal to place form over substance, presumably the People are asking this Court to place form over substance and rely on labels. The Court should decline the invitation.[1]

(b) Appellant's sentence is a de facto LWOP sentence

The People argue, in the alternative, that a sentence of 50-years-to-life is not de facto LWOP. Adopting the motion court's approach, they argue that based on the life expectancy of non-incarcerated individuals, appellant has a life expectancy of 72. Under their position, he will go before the parole board at 67, during his "natural lifetime," and, therefore, his sentence is not de facto LWOP (RB at 29-30; People v. Matias, 68 Misc. 3d 352, 365, fn 17 (Bx. Sup.

[1] The decisions are not binding because this appeal presents a case of first impression in this Court and in this state. However, the rationale followed by the majority of jurisdictions is sound, and appellate courts in this state have applied the logic of Miller to Parole Board hearings. and one judge of the Court of Appeals has already equated LWOP and its functional equivalent (AB at 26-27).

Ct. 2020). The argument is without merit.

Indeed, courts have questioned the reliance on actuarial tables in determining whether a lengthy sentence is de facto LWOP because of the unaccounted for impact of incarceration, race and gender on those statistics. See People v. Contreras, 411 P.3d 445, 450-51 (Cal. 2018). While actuarial charts of incarcerated persons may be relevant to the analysis, actuarial charts of non-incarcerated persons are irrelevant and particularly irrelevant to juveniles serving lengthy sentences because their life expectancy is much lower than the public at large. See Michigan life expectancy data for youths serving natural life sentences, https://www.lb7.uscourts.gov/documents/17-12441.pdf.

According to this study, the life expectancy for Michigan adults incarcerated for natural life – defined as over 470 months (or 39 years) – is 58.1 years. When adjusted for race, the life expectancy for Black adults, sentenced to natural life, is 56.0 years. For those who began their natural life sentences as children, life expectancy drops to 50.6 years. Since the life expectancy of incarcerated adults in New York is similar to Michigan (AB at 15, fn. 3), the life expectancy of children sentenced to natural life in New York would be similar, and appellant's life expectancy would be around 50.

Contrary to the motion court's finding and the People's argument, appellant is unlikely to go before the Parole Board during his natural lifetime.

Even if appellant beat the odds and were released before death, his sentence would still appropriately be treated as a de facto life sentence. Indeed, the prospect of geriatric release "does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by Graham," 560 U.S. 48, 74 (2010). State v. Null, 836 N.W.2d 41, 71 (Iowa 2013).

While there is no consensus bright-line rule on what term of years amounts to a de facto LWOP sentence, there is considerable support for a finding that 50-years-to-life is de facto LWOP (AB at 27, citing cases); see State v. Haag, 495 P.3d 241 (Wa. 2021)(where the Supreme Court of Washington held that a juvenile's sentence of 47 years to life after a Miller hearing was a de facto life sentence and ordered resentencing). And even the People cite Casiano v. Commissioner of Corrections, 115 A.3d 1031 (Conn. 2015), which agrees with that conclusion (RB at 31 fn. 12). In that case, the court remanded for a Miller hearing finding the juvenile's 50-to-life sentence to be a de facto LWOP sentence. For all the reasons above and in appellant's main brief, appellant's 50-to-life sentence should be considered de facto

LWOP. Since it was imposed without a Miller hearing, it violated the Eighth Amendment and its New York equivalent.

2. Jones did not, as the People claim, eliminate the need for a Miller hearing where the sentencing scheme was discretionary (Reply to RB at 21-25).

The People argue that even if appellant's sentence is a de facto LWOP sentence, this Court should not order resentencing preceded by a Miller hearing because Jones v. Mississippi, 141 S. Ct. 1307 (2021), they claim, eliminated the need for such a hearing where the court had discretion in imposing the sentence (RB at 22 ["Jones' holding disposes of this appeal"], 25). They are simply wrong.

Jones reaffirmed Miller. 141 S. Ct. at 1321 ("The Court's decision today carefully follows both Miller and Montgomery," Montgomery v. Louisiana, 577 U.S. 190 (2016)). In Jones, the Court wrote that in sentencing a person under 18 who committed a homicide the "State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient" (RB at 21, quoting Jones). The Court did not hold that a Miller hearing is no longer necessary. It did not hold that the mere existence of a discretionary sentencing scheme is enough to satisfy the Eighth Amendment. On the contrary, it held that a discretionary sentencing scheme is

constitutional when the sentencing hearing meets the core requirements of Miller. While the Court found that a separate finding of permanent incorrigibility was unnecessary, it reaffirmed that the purpose of discretionary sentencing of juveniles under Miller and Montgomery was to "ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age," Jones, 141 S. Ct. at 1318. The Court repeated that under Miller, the sentencing process must afford "individualized 'consideration' to, among other things, the defendant's chronological age and its hallmark features." Jones, 141 S. Ct. at 1315 (emphasis added). Jones reaffirmed Miller, holding that a sentencing court must consider "youth and its attendant characteristics" "to separate those juveniles who may be sentenced to life without parole from those who may not." Jones, 141 S. Ct. at 1317; State v. Haag, 495 P.3d 241, 246 (Wa. 2021).

A discretionary sentencing scheme that does not necessarily consider youth and it attendant circumstances violates Miller.[2] In 1994, the court had

[2] Although the People argue that Miller does not apply when sentencing was based on a discretionary sentencing scheme, they rely on cases involving discretionary sentencing schemes. See State v. Long, 8 N.E.3d 890, 898-99 (Ohio 2014)(pre-Miller discretionary life without parole sentence imposed on a juvenile homicide offender violated Miller's framework because there was no evidence that the trial court considered the defendant's youth); People v. Gutierrez, 324 P.3d 245, 270 (Cal. 2014)(where the court struck down juvenile life without parole sentences under a discretionary sentencing scheme in which life without parole was the presumptive sentence); Veal v. State, 784 S.E.2d 403,

discretion to impose the maximum 50-year-to-life sentence but it never considered the Miller factors and therefore, the sentence must be vacated, and resentencing ordered.

3. Appellant's 1994 sentencing was not, as the People argue, an individualized Miller hearing (Reply to RB at 33-40).

The People argue that the sentencing court in 1994 and motion court in 2020 gave appellant the "individualized sentence" required by Miller because the court, they claim, considered appellant's age and counsel asked for a lower sentence based on age (RB at 33)(emphasis added). As explained above, Miller requires more than a court be aware of a defendant's chronological age. Miller requires that a court consider "youth and its attendant characteristics," "chronological age and its hallmark features." See Miller, 567 U.S. at 477.

In this case, the court never did. There is simply no evidence that the court even considered appellant a child or that children are different. The court never considered appellant's immaturity, lesser culpability, underdeveloped sense of responsibility, heedless risk taking, peer pressure, or

412 (Ga. 2016)(Miller applies to juvenile discretionary sentencing schemes); Windom v. State, 398 P.3d 150 (Idaho 2017)(Miller factors must be considered when evaluating a life sentence that is not mandatory); " Luna v. State, 387 P.3d 956, 961 (Okla. Crim. App. 2016)(Miller "rendered a life without parole sentence constitutionally impermissible, notwithstanding the sentencer's discretion to impose a lesser term, unless the sentence `take[s] into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

impulsivity. In New York, in 1994, a sixteen-year-old was treated as an adult. See Amici Curiae at 4-10, NYSCEF Doc. 16 at pdf 18-25 ("In New York 16- and 17-year-old youths were automatically required to be treated as adults"). Treating appellant as an adult, the sentencing court focused on retribution, underscoring the quality of the victims, the "enormous loss," the "violence," the "callousness" and the "lack of contrition" (RB at 10, 36). The maximum sentence was imposed because these "were two horrendous crimes." Because appellant was a child, the court should have focused on mitigation, see Miller, 567 U.S. at 476. Instead, it focused on retribution. The court knew appellant's chronological age but that is not enough to satisfy Miller.[3]

The People's focus on the limited prison records submitted to the motion court as evidence of appellant's incorrigibility is a diversion (RB at 13, 14; 37).[4] His entire disciplinary record must be placed in context. For

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[3] In denying a Miller hearing in 2020, the court confirmed its misunderstanding of the crucial factors to consider in sentencing a child. In stating that it had considered "all" mitigating factors, it listed two: chronological age and lack of prior record. People v. Matias, 68 Misc. 3d 352, 364 (Bx Sup. Ct. 2020). It added that it would impose the same sentence even after taking "judicial notice" of scientific brain developments. The statement confirms the court's misunderstanding. The point is not to take "judicial notice" of the fact of scientific research about adolescent brain development. The point is to understand how brain development comes into play and affects the actions of the child being sentenced, here, appellant.

[4] At this point, it is worth noting that the crime took place at a drug and alcohol fueled sweet sixteen party in the Bronx in 1992. See Matias, 235 A.D.3d 298 (1st Dept. 1997).

example, in 1996, when he was only 20, he was placed in solitary confinement for twelve months. It is documented that such lengthy solitary confinement at that young age has led to increase violent behavior. Lonely too long: Redefining and Reforming Juvenile Solitary Confinement, 85 Fordham L. Rev. 845, 853,872 (2006)(side effects of solitary confinement include "panic attacks, illusions and hallucinations, obsessional thought, random violence and self-harm and paranoia." Juveniles placed in solitary confinement are "more prone to unstable and violent behavior").[5] The impact of appellant's conditions of incarceration would be explored at a hearing. At a Miller hearing, witnesses, including appellant's wife, as well as possible experts, would be able to testify to appellant's childhood described in affidavits submitted to the court but dismissed by the People as "uncorroborated" and

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Attendees were armed. Appellant had a .25 caliber weapon, another person had a .22 caliber weapon, another had a hammer, and one victim may have had a knife. Id. Appellant is not claiming justification as the People argue. Appellant is simply noting that the trial/sentencing/motion court in denying the defense's justification charge admitted that it was "as close a claim as I have ever seen" (AB at 6) In other words, it was not a calculated premeditated attack but one consistent with impulsive action that arose out of a volatile situation.

[5] If his solitary confinement follows the usual pattern, it is likely that appellant was held in "a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone." Davis v. Ayala, 576 U.S. 257, 286–87 (2015)(Kennedy, J., concurring)

"unsupported." Evidence of appellant's health problems, school challenges, and the negative influences in his life would be presented. Appellant has never had a Miller hearing. His de facto LWOP sentence violates the Eighth Amendment and thus, must be vacated and resentencing ordered.[6]

Because the sentencing/motion court has expressed its firmly held opinion that appellant is "permanently incorrigible," and that no evidence "conceivably" obtained would have altered its "view of the propriety of a maximum sentence," the matter should be remanded to a different judge who can fairly consider the relevant circumstances. See Matter of Murphy, 82 N.Y.2d 491, 495 (1993)("Judges should strive to avoid even the appearance of partiality, and the 'better practice' would be to err on the side of recusal in close cases"); People v. Jenkins, 84 A.D.3d 1403, 1408 (2d Dept. 2011)(recusal and remand to a different judge is particularly appropriate

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[6] Should this Court decide that appellant's sentencing did not violate the Eighth Amendment of the Federal Constitution, it should find that appellant's sentence violates the State Constitutional prohibition against cruel and unusual punishment. N.Y. Const., art. I, sec. 5. Indeed, New York courts may interpret state constitutional provisions – even if identically worded to the federal constitution – to provide broader protection than their federal counterparts. See People v. P.J. Video, Inc., 68 N.Y.2d 296, 302-06 (1986); see also People v. Lavalle, 3 N.Y.2d 88, 127 (2004); People v. Harris, 77 N.Y.2d 434 (1991). While New York previously lagged behind other states in protecting juveniles in the criminal justice system, such as considering 16-year-olds adults, it has changed course. It recently reformed its parole regulations to explicitly take youth into account. 9 NYCRR § 8002.2(c)(2). Pursuant to the Raise the Age legislation, when adolescents are sentenced in the adult criminal court, the judge must "consider the age of the defendant in exercising its discretion at sentencing". P.L. §60.10-a. .

where the judge "evinced a predisposition to reject or discredit the defendant's evidence").

POINT II

COUNSEL'S FAILURE TO FOCUS ON APPELLANT'S YOUTH AND MITIGATING FACTORS AT THE ORIGINAL SENTENCE AMOUNTS TO INEFFECTIVE ASSISTANCE OF COUNSEL. U.S. CONST., AMENDS. VI AND XIV; N.Y. CONST., ART. 1, §6. (Reply to RB at 42-50).

In his opening brief, appellant argued that counsel was ineffective at sentencing for failure to investigate. Had he made the most minor effort, counsel would have learned of appellant's difficult background including a violent father, problems at school, bullying, early drug use, and negative sibling pressures (AB at 46-49).

The People ask this Court not to credit these claims "raised for the first time in thirty years" because they are unsupported, uncorroborated and "[t]here is no evidence of that anywhere" (RB at 38, 44, 46, 48). If anything, the absence of any of this evidence in the record strengthens appellant's argument. Indeed, there is no evidence in the record because counsel was ineffective. Had he conducted the most minimal investigation, he would have

learned about appellant's background. Had he only asked about appellant's siblings, he would have learned about the gang activities of his brother, Julio Matias. See United States v. Muyet, 945 F. Supp. 586, 589 (S.D.N.Y. 1996)(defendants, including Julio Matias, accused of participating in the illegal activities of a violent narcotics trafficking organization known as the "Nasty Boys," operating primarily in the Bronx); 31 Members of 3 Bronx Gangs Indicted on Murder Charges, New York Times, November 1, 1995)("the men indicted yesterday [including Julio Matias] were charged with killing at least 10 other drug dealers and 5 bystanders between May 1990 and October 1994)(www.nytimes.com/1995/11/01/nyregion/31-members-of-3-bronx-gangs-indicted-on-murder-charges.html). Counsel did nothing. At sentencing, he told the court he would be "brief," and, as the motion court acknowledged, he was. He said that appellant had been 17 and had no record and relied on the court's fairness.

The People cannot have it both ways. If, as they claim, the 1994 sentencing was a Miller hearing and appellant's sentence did not violate the Eighth Amendment or its New York counterpart, counsel was clearly ineffective under the Sixth Amendment and its New York counterpart for his failure to argue that appellant's youth and its attendant characteristics

supported a lesser sentence.[7] The sentence must be vacated, and resentencing ordered before another judge. See supra at 14.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE AND IN APPELLANT'S OPENING BRIEF, THE SENTENCE SHOULD BE VACATED AND A RESENTENCING ORDERED.

Respectfully submitted,

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Attorney for Defendant-Appellant

NATALIE REA
Of Counsel
March 2022

[7] In Jones, the Court noted that where defense counsel failed to make a court aware at sentencing that a defendant was a child, the defendant may have an "ineffective-assistance-of-counsel claim." 141 S. Ct. 1319, fn. 6.

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

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOSE MATIAS,

Defendant-Appellant.

AFFIRMATION OF SERVICE

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

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

That on March 31, 2022, the within Brief was served upon the Bronx Assistant District Attorney, Attention: John Komondorea via email at KomondoreaJ@Bronxda.nyc.gov, and upon Mr. Jose Matias at Sullivan Correctional Facility, DIN:94-A-4381, 325 Riverside Drive, P.O. Box 116, Fallsburg, NY 12733-0116, by depositing a true copy of same in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York. The District Attorney's Office has consented to be served exclusively by electronic mail.

Dated: New York, New York
March 31, 2022

Natalie Rea (rw)
NATALIE REA

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

Respondent,

- against -

STIPULATION
Appellate Case No. 2020-03839
Indictment No. 1832/92

JOSE MATIAS,

Defendant-Appellant.
----------X

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, and subject to the approval of this Court, that the above-captioned appeal hereby is adjourned from the **April 2022 Term** of this Court, to the **May 2022 Term** of this Court.

Dated: Bronx, New York
March 3, 2022

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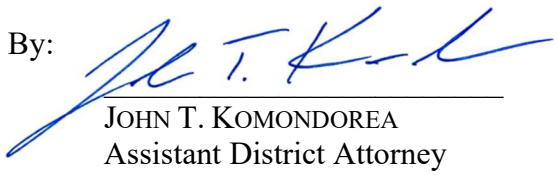
By: 
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