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COURT OF APPEALS, STATE OF COLORADO
101 W. Colfax Avenue # 800
Denver, CO 80202

Denver County District Court
Hon. Sheila Rapapport
No. 05CR 4700

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff - Appellee,
v.
TENARRO BANKS,
Defendant - Appellant.

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For the Defendant - Appellant
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Case Number: 08CA105

PETITION FOR REHEARING
of Opinion by Judge Graham, Casebolt and Furman, JJ concurring
Published opinion issued September 27, 2012

This Court's decision to impose a sentence of life imprisonment with the possibility of parole after forty calendar years is premised on a misunderstanding of the Supreme Court's holding in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), as well as a misinterpretation and misapplication of the law of severance.

1. This Court's imposition of a sentence of mandatory life sentence with the potential for parole after forty years, violates the Eighth Amendment to the United States Constitution.

Miller v. Alabama does not stand for the proposition that mandatory life imprisonment sentences that deprive trial courts of discretion can be constitutional so long as the possibility of parole is provided. Rather, the United States Supreme Court has made "clear that a judge or jury must have the opportunity to consider mitigating circumstances ***before imposing the harshest possible penalty for juveniles***." 132 S.Ct. at 2475 (emphasis added). *See id.*, at 2464, *citing Roper v. Simmons,* 543 U.S. 551 (2005); *Graham v. Florida,* 130 S.Ct. 2011 (2010). While it is true that *Miller* invalidated state laws that mandate a sentence of life without parole ("LWOP") for children under the age of eighteen, the holding of the case is not that narrow. The Court made clear that because of the diminished culpability of juvenile offenders, "children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. Therefore, in order to ensure that the sentence imposed

does not violate the Eighth Amendment, juvenile sentencing decisions must be individualized.

In *Miller*, the Court emphatically stated that

> 'An offender's age,' we made clear in *Graham*, "is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.*, at ——, 130 S.Ct., at 2031.

Miller, 132 Sct, at 2466. The Court further noted that in *Graham*, even the Chief Justice, concurring in judgment

> acknowledged '*Roper* 's conclusion that juveniles are typically less culpable than adults,' and accordingly wrote that 'an offender's juvenile status can play a central role' in considering a sentence's proportionality. *Id.*, at ——, 130 S.Ct., at 2039; see *id.*, at ——, 130 S.Ct., at 2042 (Graham's 'youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive')

Miller, 132 Sct, at 2466.

This Court's remedy was to simply impose upon Mr. Banks what it deemed to be "the most serious penalty that is constitutionally permissible for such offenders" – life with the possibility of parole after forty calendar years. Substituting one mandatory life sentence for another does not address the Court's underlying concern that all juveniles should not be treated identically for sentencing purposes. Individualized sentencing is still constitutionally required, even if the new "harshest

penalty" is life imprisonment with the possibility of parole after forty years.

The Court's holding in *Miller* was based upon two lines of precedent: one which applies categorical bans on sentencing for certain populations, and the second which requires individualized consideration of each defendant's characteristics in sentencing. *Miller v. Alabama*, 132 S.Ct. at 2463-64. In the first line of cases, the Court cited *Roper* and *Graham*, which "establish that children are constitutionally different from adults for purposes of sentencing." 132 S.Ct. at 2464. While *Graham*'s categorical ban on LWOP sentences for children arose in a non-homicide case, the *Miller* Court expressly rejected limitations on *Graham's* applicability to non-homicide cases: "none of what [*Graham*] said about children—about their distinctive (and transitory) mental states and environmental vulnerabilities is crime-specific." 132 S.Ct. at 2465. The Court reasoned that because "youth matters … criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.* at 2466.

In the second line of cases, the Court requires individualized sentencing for youth facing a **state's most serious punishments**. 132 S.Ct. at 2467. These decisions call for trial court discretion to consider "the mitigating qualities of youth." *Id.*, *citing*, *Johnson v. Texas,* 509 U.S. 350 (1993). The Court emphasizes that

"everything we said in *Roper* and *Graham* about [adolescence] also appears in these decisions." *Id.* Decisions such as *Johnson*, *supra,* and *Eddings v. Oklahoma,* 455 U.S. 104 (1982), show the flaws of imposing mandatory life sentences on juvenile offenders because they "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." 132 S.Ct. at 2467-68. *Graham* establishes a rule categorically banning LWOP for juveniles who do not kill or intend to kill; *Miller* establishes a rule for individualized sentencing in homicide cases. 132 S.Ct. at 2466, n. 6.[1] Treating the fourteen-year-old exactly the same as one who is two weeks shy of his 18th birthday completely fails to take into account the offender's youth. Yet that is precisely what this court has done.

There is no purpose in differentiating degrees of culpability unless a court can in fact imposed an individualized sentence. In rejecting a claim that transfer proceedings provide a court with sufficient discretion to consider youth, the *Miller* Court stated:

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[1]*See also United States v. C.R.*, 792 F. Supp. 2d 343 (E.D.N.Y. 2011) where the Court found that under *Roper, Johnson v. Texas,* 509 U.S. 350, 367 (1993), and *Eddings v. Oklahoma,* 455 U.S. 104 (1982), imposition of a five-year statutory minimum sentence for distribution of child pornography was cruel and unusual because it failed to provide for individualized sentencing; the defendant was a developmentally immature adult and the crime occurred when he was between the age of 15 and 19.

> Discretionary sentencing in adult court would provide different options: There a judge or jury could choose rather than a life-without-parole sentence, life with the possibility of parole or a lengthy term of years.

Miller, 132 S. Ct. at 2474. This language is consistent with *Miller's* basic premise – because children are "constitutionally different for sentencing purposes," juveniles must be given individualized sentences that give effect to the judge's consideration of the mitigating factors of "youth and its attendant circumstances" and to "take into account the differences among defendants and crimes." *Miller*, at 2469, n.8.[2] Failure to do so runs afoul of the Eighth amendment.

Miller establishes particular factors the court must consider in determining the appropriate sentence. Simply eliminating the prohibition on parole suggests that the parole process will serve *Miller*'s requirement for individualized consideration in lieu of re-sentencing. However the differences between the rules of the process demonstrate that only judicial re-sentencing – not the possibility of executive

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[2]The need to consider particular factors unique to an individual before imposing a sentence is not a new development. In *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) the Supreme Court recognized that

> evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

clemency or parole -- comports with *Miller*.

CRS §17-22.5-404 sets forth specific factors that the parole board must consider in determining whether to grant parole. Those factors are not co-extensive with the factors that *Miller* explicitly states the Court must consider before sentencing a juvenile to a State's harshest penalty. A defendant has a constitutional right to counsel at sentencing, *McConnell v. Rhay,* 393 U.S. 2, 4 (1968), but not before the parole board. Judicial review of a parole board's decision is limited to whether the board considered the statutory factors. *Fraser v. Colorado Bd. of Parole,* 931 P.2d 560 (Colo. App. 1996). The board's actual decision is beyond judicial review.

At least one state court has already recognized that the right to individualized sentencing cannot be satisfied by a non-individualized, automatic sentence of life imprisonment with the right to apply for parole:

> In *Bonilla v. State,* 791 N.W.2d 697, 703 (Iowa 2010), our supreme court applied *Graham* to set aside as unconstitutional juvenile offender Julio Bonilla's sentence of life without parole. This sentence was based on Bonilla's conviction for kidnapping in the first degree—a non-homicide crime—committed when he was sixteen years old. *Bonilla,* 791 N.W.2d at 699. Bonilla was sentenced pursuant to Iowa Code section 902.1, which precluded the possibility of parole other than by commutation by the governor; the court found this violative of the federal constitution. *Id.* at 701. The remedy crafted by the court ordered

> that Bonilla continue to serve a life sentence, but the court struck the provision that had foreclosed the possibility of parole. *Id.* at 702. While that remedy was appropriate in accordance with the prevailing case law under *Graham* for non-homicide offenders, under the broader holding of *Miller,* severance of 'without parole' is merely a suggested option. *Miller*, 132 S. Ct. at 2474.

State v. Lockheart, 820 N.W.2d 769 (Iowa Ct. App. 2012) (unpublished); see also *State v. Bennett,* 11-0061, 2012 WL 2816806 (Iowa Ct. App. July 11, 2012) (unpublished disposition).

The holding of *Miller*– the requirement of individualized sentencing before a court can sentence a juvenile to the state's harshest penalty – means this Court cannot simply convert Mr. Banks' LWOP sentence to a sentence of life with the possibility of parole after forty calendar years. Under the Eighth Amendment, he has the right to present his mitigation to a judge, who has the power to impose an individualized sentence.

2. This Court exceeded its judicial authority by re-writing the criminal sentencing statutes in a way not authorized or compelled by Colorado statutes or sound "severability" analysis.

Relying on CRS §2-4-204, the Court holds that the portions of CRS §18-1.3-401(4)(a) and CRS §17-22.5-104(2)(d)(1) under which Mr. Banks was sentenced can be severed. This "severance" occurs by restricting the application of the above two provisions.

Pursuant to 18-1.3-401(4)(a):

> [A]ny person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, and before July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.

Pursuant to CRS §17-22.5-104(d)(I), no inmate imprisoned under a life imprisonment sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. There is not a separate provision in the statutes that specifically apply to juveniles. To the contrary, the provisions in question apply to both adults and juveniles. Had this Court severed the last sentence of CRS §18-1.3-401(4)(a) and the first sentence of CRS §17-22.5-104(d)(I), it would be severing a provision that, while unconstitutional as applied to juveniles, was not

unconstitutional as it applied to adults.

Rather than actually severing the provisions, the Court uses the severance statute to "sever" its *application* to a particular group of individuals, namely those who were under the age of 18 at the time they committed the offense. It then applies CRS §17-22.5-104(c) to Mr. Banks because it had "severed" the first sentence of §17-22.5-104(d)(1). This unique interpretation and application of the severance statute finds no support in the law.

CRS §2-4-204 states as follows:

> If any **provision** of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining **provisions** of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the **void provision** that it cannot be presumed the legislature would have enacted the **valid provisions without the void one**; or unless the court determines that **the valid provisions, standing alone,** are incomplete and are incapable of being executed in accordance with the legislative intent.

The case law is clear – CRS §2-4-204 is concerned with the severance from a statute of specific language that offends the constitution:

> Our authority and duty extends to determining whether severance of unconstitutional portions of the statute is viable. When we can, we sever any provision that we hold to be unconstitutional from those provisions that stand despite the severance. *See* § 2-4-204, 1 C.R.S. (2000); *Rodriguez v. Schutt,* 914 P.2d 921, 929 (Colo.1996). Accordingly, we

> sever those unconstitutional portions of the statute, *see* sections 39-1-106 (final sentence) and 39-3-136, and leave in place section 39-1-103(17), the valuation provisions of the statute that the General Assembly intended to apply if we disagreed with its interpretations of law.

Bd. of County Com'rs v. Vail Associates, Inc., 19 P.3d 1263, 1280 (Colo. 2001); *See also Rodriguez v. Schutt, supra*, (Court may sever and strike any portion of statute that is unconstitutional and may limit the portion stricken to single words or phrases where appropriate); *High Gear and Toke Shop v. Beacom*, 689 P.2d 624. (Colo. 1984)(General severability provision can be used not only to sever separate sections, subsections, or sentences of statutes, but may also be used to sever words and phrases.). *See also Williams v. City and County of Denver*, 198 Colo. 573, 607 P.2d 981 (1979); *Shroyer v. Sokol*, 191 Colo. 32, 550 P.2d 309 (1976); *Covell v. Douglas,* 179 Colo 443, 501 P.2d 1047 (1972), all of which speak in terms of the severing of the specific offending language in the statute.

The legislature included a severance provision which gave courts authority to strike unconstitutional provisions and the authority to uphold the statute if there remained a valid and operative statute. The legislature, however, did not contemplate – and the constitution does not allow – judicial re-writing of statutes. This is precisely what this Court did. After "severing" the first sentence of §17-22.5-

104(d)(1), applied §17-22.5-104©, which states that "No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years." The Court reasoned that this provision can apply because Mr. Banks' offense was committed after 1985. However, this Court's application of §17-22.5-104© is in direct conflict with the "unsevered" portion of §18-1.3-401(d)(1) which specifically limits the application of a sentence of life with the possibility of parole after forty years to crimes committed in a specific time frame – between 1985 and 1990. Furthermore, §17-22.5-104(d)(IV) and §18-1.3-401(b) are by their language applicable only to offenses committed on or after July 1, 2006.[3] Thus in order to apply §17-22.5-104© to Mr. Banks in the manner that it did, this Court must either completely ignore §18-1.3-401(d)(1) or rewrite it by severing the phrase "and before July 1, 1990" only as it to applies to juveniles. This goes well beyond simply severing the offending language -- it is actual rewriting the statute, something that goes well beyond the power of the Court. Moreover, it presents even further problems regarding what the length of the

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[3]Mr. Banks questions the constitutionality of these provisions as well after *Miller* as it is his position that *Miller* requires individualized consideration before the imposition of a life sentence with no guarantee of release.

period of parole should be. CRS 17-22.5-403(5) provides that the length of the period of parole for a person who commits any level of offense prior to 1993 is to be determined by the parole board. CRS 18-1.3-401(4)(b), which this Court uses as "guidance" to establish a new mandatory sentence for Juveniles provides that "regardless of whether the state board of parole releases the person on parole, the person shall remain in the legal custody of the department of corrections for the remainder of the person's life and shall not be discharged." It is clear that commencing in 1990 the legislature intended for juveniles convicted of an F1 not be eligible for parole at all. Even when the legislature in 2006 provided that a juvenile offender wold be eligible for parole after forty calendar years, they specifically provided that the individual shall not be discharged from parole. Thus again in order to reconcile these conflicting provisions, the Court would need to rewrite the statutes so they coincide.

Not only does the Court's solution result in a judicially re-written statute, it is also in direct conflict with the underlying rationale of *Miller*. *Miller* made clear that because of the different levels of development of juveniles of differing ages, and even of juveniles the same age, individualized sentencing hearings must be held to determine whether it is appropriate to sentence that juvenile to a state's harshest

penalties. Failure to do so could result in a sentence that is disproportionate to the culpability of the offender and therefore violative of the Eighth Amendment.

WHEREFORE, Mr. Banks respectfully requests that this Court withdraw its previous opinion, vacate Mr. Banks' sentence and remand this matter to the district court for a sentencing hearing consistent with the dictates set forth by the Supreme Court in *Miller v. Alabama*.

Respectfully submitted this 13th day of November, 2012.

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CERTIFICATE OF MAILING

I certify that on the 13th day of November, 2012 I dispatched, by first-class mail, the foregoing Petition for Rehearing to:

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