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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 08CA0105	
TENARRO BANKS, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	▲ **COURT USE ONLY** ▲ Case No. 12SC1022
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 6593 words.

The brief complies with C.A.R. 28(k).

The opponent did not address standard of review or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal.

s/ Elizabeth Rohrbough

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

RULES

OTHER AUTHORITIES

ISSUES PRESENTED FOR REVIEW

This Court granted certiorari on the following issues:

> Whether, after *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the Eighth Amendment to the U.S. Constitution is violated by the imposition on a juvenile of a sentence of mandatory life sentence with the potential for parole after forty years.
>
> Whether the court of appeals exceeded its judicial authority by re-writing the criminal sentence statutes in a way not authorized or compelled by Colorado statutes or sound "severability" analysis.

STATEMENT OF THE CASE

On or about October 18, 2005, the prosecution charged Tenarro Banks – who was 15 at the time of the shooting on December 11, 2004 – as an adult with first degree murder (v. 1, pp. 1-2).

The case was first tried August 27-29, 2007, but that trial ended in a mistrial (8/29/07, pp. 24-25, 31-35). The case was tried again from November 26 to December 3, 2007. On December 4, 2007, the jury returned a verdict finding the then eighteen-year-old Banks guilty of first degree murder, and he was sentenced to life in prison without parole (12/4/07, pp. 3, 9-10). Banks directly appealed his conviction,

arguing, *inter alia,* that his mandatory sentence to life without parole was unconstitutional.

While the direct appeal was pending, the United States Supreme Court announced, in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that mandatory life without parole sentences for juveniles convicted of homicide violated the Eighth Amendment's prohibition of cruel and unusual punishment.

After supplemental briefs were filed concerning the *Miller* decision, the Court of Appeals issued a published decision in *People v. Banks,* 08CA0105 (Colo. App. Sept. 27, 2012), 2012 COA 157. With regard to Banks's sentencing claim, the court concluded that, after *Miller,* the no-parole provisions contained in sections 18-1.3-401(4)(a) and 17-22.5-104(2)(d)(I), C.R.S. are unconstitutional as applied to juvenile offenders convicted as adults. *Id.* at ¶ 123. However, applying Colorado's statutory general severability clause, the court concluded that the statutorily authorized penalty for juvenile offenders convicted as adults of class 1 felonies, is life imprisonment with the possibility of parole after 40 calendar years. *Id.* at ¶¶ 124-31.

On June 24, 2013, this Court granted Banks's petition for certiorari with regard to the legality of his life sentence.

STATEMENT OF THE FACTS

On December 11, 2004, at a party in the basement of a home in a neighborhood dominated by sets of the Crips gang, fifteen-year-old Banks, a Tre Tre Crips member known as "Baby Loc," criticized sixteen-year-old Byris Williams for wearing a red sports jersey, red being a color favored by the rival Bloods gang (8/28/07, pp. 140-44,161; 11/27/07, pp. 153, 55, 191-92, 197-99, 215, 248-50; 11/29/07, pp. 29-30; Exhibit 1). After the woman who owned the home had shooed the partygoers outside, Banks pulled out a gun and pointed it at Williams (11/27/07, pp. 159-61, 253-55; 11/30/07, pp. 15-17). Williams tried to knock the gun out of Banks's hand, and Banks shot Williams at least three times (8/28/07, pp. 158-62; 11/27/07, pp. 161, 207-209, 253-55; 11/28/07, pp. 170, 175; 11/30/07, pp. 16-17, 21). Williams died of multiple gunshot wounds (11/28/07, p. 141).

Several witnesses who identified Banks as the shooter identified another Tre Tre Crips gang member, Terrence Duckworth, also known as G.T., as the shooter at other points in time (8/28/07, pp. 187-88; 11/27/07, pp. 230-31, 275; 11/30/07, pp. 25-26, 60, 69). One of those witnesses indicated that he had been reluctant to name Banks as the shooter because Banks was protected by a powerful senior gang member (11/30/07, pp. 26-29, 76-77, 140-41). That senior gang member disposed of Banks's gun and supported Banks financially while Banks was in jail (11/29/07, pp. 64-66, 147-51; 11/30/07, pp. 40-41, 127). From jail, Banks made numerous phone calls stating he had received discovery or "paperwork" on the witnesses who would be testifying against him, trying to recruit individuals to testify and instructing them to say that he had not yet come out of the house when the shots were fired (11/30/07, pp. 127, 134, 136-37; Exhibits 52, 53, 54, 55, 56, 57, and 62).

The defense theory of the case was that Duckworth had shot the victim, the individuals who had accused Banks had done so at the behest of Duckworth, and the prosecution had not proven Banks's guilt

beyond a reasonable doubt (*see, e.g.,* 11/27/07, pp. 151-52; 12/3/07, pp. 40-41, 43, 48-49, 51-52, 58-59).

SUMMARY OF THE ARGUMENT

1. The Court of Appeals correctly concluded that Banks's sentence should be modified to life in prison with the possibility of parole after 40 calendar years.

2. Applying a mandatory sentence of life with the possibility of parole after 40 years to a juvenile defendant convicted of homicide does not constitute cruel and unusual punishment.

ARGUMENT

I. The Court of Appeals correctly concluded that Banks's sentence should be modified to life in prison with the possibility of parole after 40 calendar years.

Banks argues that the Court of Appeals erred in concluding that the statutorily authorized penalty for juvenile offenders convicted as adults of class 1 felonies, is life imprisonment with the possibility of parole after 40 calendar years (opening brief at 37-49). While this is the second issue in Banks's brief, the People respond to it first because if

this Court does not agree that the proper remedy is to impose a sentence of life with the possibility of parole after 40 years, then there is no need to consider whether such a sentence is constitutional.

Standard of review/preservation of claim. The opening brief does not contain a statement concerning standard of review. Issues of statutory construction are reviewed de novo. *People v. Hernandez*, 250 P.3d 568, 570-71 (Colo. 2011).

The opening brief also does not contain a statement concerning preservation. While the issue was not raised in the trial court, it was the subject of supplemental briefing on appeal and determined by the Court of Appeals.

As a threshold matter, the People note that *Miller* applies to the present case because Banks's conviction is not yet final. *See Griffith v. Kentucky,* 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."); *cf. Lopez v. People,* 113 P.3d 713, 716 (Colo. 2005) (applying *Blakely v. Washington,* 542

U.S. 296 (2004), to defendant because his case was pending on direct appeal when *Blakely* was announced).

The People also note, however, that in those cases where such a conviction is already final, as a matter of policy, the People have chosen not to argue that *Miller* should not be applied retroactively; rather, as discussed below, it is the People's position that a fair and just result would be achieved by modifying the sentences of juveniles similarly situated to life in prison with the possibility of parole after 40 calendar years.

A. In *Miller,* the United States Supreme Court unambiguously held that mandatory sentences to *life without parole* for juveniles are unconstitutional.

In *Miller,* a six Justice majority invalidated Ala. Code §§13A-5-40(9), 13A-6-2(c) (1982), and Ark. Code Ann. §5-4-104(b) (1997), statutes providing for mandatory life without parole sentences for juveniles convicted of different forms of homicide (murder in the course of arson and capital murder, respectively). *Miller,* 132 S. Ct. at 2461. The Court held that "mandatory *life without parole* for those under the age of 18 at

the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Id.* at 2460 (emphasis added). The Court reasoned that laws mandating life without parole for juvenile homicide offenders "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 2466.

However, the majority clarified that its decision *did not categorically ban* life without parole sentences for all juvenile homicide offenders. *Id.* at 2471. Rather, it simply required the sentencer to "follow a certain process – considering an offender's youth and attendant characteristics – before imposing [a sentence of life without parole]." *Id.*

B. *Miller* does not require this Court to vacate the life sentence because an applicable Colorado statute provides for the possibility of parole after 40 calendar years.

Here, the prosecution charged Banks – who was 15 at the time of the shooting on December 11, 2004 – as an adult. A jury convicted Banks of first degree murder – after deliberation, a class 1 felony, which

is punishable by life in prison or death. *See* §§ 18-3-102 (1)(a) and (3), C.R.S. (2013); 18-1.3-401(1)(a)(V)(A), C.R.S. (2013). However, regardless of whether they were tried as adults, pursuant to Colorado statute, juvenile offenders shall not receive the death penalty. § 18-1.3-1201(1)(a), C.R.S. (2013).

For most felony offenses, section 18-1.3-401 (1)(a)(V) A) proscribes a mandatory period of parole to be served after an offender has completed the incarceration portion of his or her sentence. The same section designates no mandatory period of parole for class 1 felonies. Instead, the parole component of a sentence to life imprisonment is governed by a separate section which states, "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." §18-1.3-401(4)(a), C.R.S. (2013). The same mandate appears within section 17-22.5-104, C.R.S. (2013) which states, "No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole." § 17-22.5-104 (2)(d)(I), C.R.S. (2013).

Regarding mandatory parole, this Court has stated that while "parole is part of the overall 'sentencing regime,' it is a distinct element of sentencing, separate from the terms of imprisonment or length of sentence imposed by the trial court." *People v. Johnson,* 13 P.3d 309, 313 (Colo. 2000). Regarding discretionary parole, this Court has stated that "the sentencing judge should not play any role in setting a period of parole." *Martin v. People,* 27 P.3d 846, 856 (Colo. 2001) (citing § 17-2-201(5)(a), C.R.S.). Indeed, in section 18-1.3-401(4)(a), an offender's term of imprisonment and his or her parole eligibility are addressed in separate sentences.

Thus, after *Miller,* it is not the sentence to life imprisonment that violates the Eighth Amendment. Nor is it the mandatory nature of the sentence to life imprisonment. Indeed, Justice Kagan expressly recognized that, after *Miller*, "a judge or jury could choose . . . *a lifetime prison term with the possibility of parole* or a lengthy term of years." *Miller,* 132 S. Ct. at 2474-2475 (emphasis added). Here, the violation results only when the third sentence of section 18-1.3-401(4)(a) is

applied to Banks, a juvenile offender convicted as an adult of a class 1 felony committed between July 1, 1990, and June 30, 2006.[1]

The pertinent question is whether the third sentence of section 18-1.3-401(4)(a) may be deemed inapplicable to Banks without invalidating the entire provision or contravening the felony sentencing scheme, including the statutes governing parole. The answer is yes, and this is the solution reached by the Court of Appeals in this case.

Although the severability clause in the felony sentencing scheme only refers to the death penalty, *see* section 18-1.3-401(5), C.R.S. (2013), Colorado has a longstanding general severability clause that has been found applicable to "any legislative act not containing a specific severability provision." *People v. Vinnola,* 494 P.2d 826, 830 (Colo. 1972) (applying § 135-1-5, C.R.S. (1963), a predecessor to the present statute).

Colorado's general severability clause provides:

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[1] Juveniles convicted as adults of class 1 felonies committed on or after July 1, 2006 receive life imprisonment with the possibility of parole after 40 calendar years under section 18-1.3-401 (4) (b) (I) and (II), C.R.S. (2013).

> 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.

§ 2-4-204, C.R.S. (2013).

The question of "[w]hether unconstitutional provisions [may be] excised from an otherwise sound law depends on two factors: (1) the autonomy of the portions remaining after the defective provisions have been deleted, and (2) the intent of the enacting legislative body." *Montezuma Well Serv. v. I.C.A.O.*, 928 P.2d 796, 798 (Colo. App. 1996) (citing *Lakewood v. Colfax Unlimited Ass'n,* 634 P.2d 52 (Colo. 1981)).

Here, restricting the applicability of the third sentence of section 18-1.3-401(4)(a) to adult offenders does not affect the viability of the remainder of the provision, statute, or felony sentencing scheme. Because the offending provision is a separate sentence, addressing a

separate subject – parole, not the term of imprisonment – the provision that is now inapplicable to juvenile offenders such as Banks is neither dependent upon nor inseparable from the remaining provisions in section 18-1.3-401(4)(a).

Although "[r]esolution of a severability issue is limited to the four corners of the statute under consideration," *see People v. District Court,* 834 P.2d 181, 190 (Colo. 1992), the reviewing court also must avoid a construction at odds with the clear legislative scheme. *Klinger v. Adams County Sch. Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006). The scheme at issue here, section 18-1.3-401, *et seq*., addresses the parole component of all felony sentences except those requiring sentences under the Colorado Sex Offender Lifetime Supervision Act of 1998. However, the periods of parole for class 1 felonies are also set forth in section 17-22.5-104(2).

As noted above, section 17-22.5-104(2)(d)(I) mirrors the third sentence of section 18-1.3-401(4)(a), and is thus inapplicable to Banks after *Miller*. The preceding subsection, however, remains applicable to

juveniles convicted as adults of class 1 felonies committed on or after July 1, 1985:

> 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.

§ 17-22.5-104 (2)(c), C.R.S. (2013).

This Court gives words and phrases their ordinary meaning and construes the provision as a whole in the context of the entire statute. *City & County of Denver v. Casados*, 862 P.2d 908, 914 (Colo. 1993). Section 17-22.5-104 (2) (c) contains no "end date" which means that it applies to all life sentences imposed for crimes committed after July 1, 1985, including those that were previously covered by section 17-22.5-104(2)(d)(I), such as Banks's life sentence. *Compare* § 17-22.5-104(2)(b), C.R.S. (2013) ("No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1977, but before July 1, 1985, shall be paroled until . . .").

In addition to being wholly consistent with *Miller* by providing for the possibility of parole after 40 calendar years, application of section

17-22.5-104(2)(c) would cover not only Banks and others similarly situated, but potentially all juvenile offenders convicted of class 1 felonies between 1990 and 2006. The result of such an application would be that all juveniles convicted as adults of class 1 felonies over the past 27 years would receive *identical sentences*.

Of course, the touchstone of all statutory interpretation is legislative intent. "A court's primary task in statutory construction is to ascertain and give effect to the legislative purpose underlying a statutory enactment." *Woodsmall v. Reg'l Transp. Dist.,* 800 P.2d 63, 67 (Colo. 1990). Where a statutory provision is ambiguous, and might reasonably be construed in more than one way, a court should construe it in accordance with the objective sought to be achieved by the legislature. *See* § 2-4-203(1)(a), C.R.S. (2013). Further, a court may properly consider the consequences of a particular construction. *See* § 2-4-203(1)(e), C.R.S. (2013).

Here, the legislative intent with respect to the penalty for juvenile offenders convicted as adults of class 1 felonies, including parole eligibility, is easily ascertained by reading the plain language of

sections 18-1.3-401(4)(a), and 17-22.5-104(2)(d)(I). Together, those provisions demonstrate the general assembly's intent to impose *the most serious penalty that is constitutionally permissible* for such offenders. After *Miller*, the only statutorily authorized penalty fitting that description is life imprisonment with the possibility of parole after 40 calendar years. Thus, applying the life imprisonment provision of section 18-1.3-401(4)(a), in conjunction the parole component described in section 17-22.5-104(2)(c), not only eliminates all constitutional concerns under *Miller,* it effectuates the legislature's intent to impose the most severe constitutionally permissible punishment for such offenders.

Moreover, in 2006, the legislature added section 18-1.3-401(4)(b), C.R.S. (2013) which requires the identical penalty – life imprisonment with the possibility of parole after 40 calendar years – for all juveniles convicted as adults of class one felonies committed after July 1, 2006. Thus, the best expression of legislative intent available to this Court suggests that it would want Banks to receive a sentence of life

imprisonment with the possibility of parole after 40 calendar years, as provided in section 17-22.5-104 (2)(c).

As an alternative to the above analysis, this Court could invoke the doctrine of revival to achieve the same result. Under this doctrine, a prior statute that has been replaced by an invalid act can be reactivated:

> An unconstitutional statute which purports to repeal a prior statute by specific provision does not do so where, under standard rules governing separability, a hiatus in the law would result from the impossibility of substituting the invalid provisions for the legislation that was to be repealed, or when the repeal is the sole purpose of the enactment.

People v. District Court, 834 P.2d 181, 189 (Colo. 1992) (citing 1A Norman J. Singer, *Sutherland Statutory Construction* § 23.24, at 396 (4th ed. 1985)).

The doctrine exists because, to presume that the legislature intended the repeal to be effective even if the newer statute were declared unconstitutional, one must presume that the legislature intended to create a void in the law governing sentences for juveniles

convicted as adults of class 1 felonies committed between 1990 and 2006. *See White v. District Court,* 503 P.2d 340, 341 (Colo. 1972). Such a presumption is irrational given the continuous existence of a penalty for class 1 felonies since at least 1868. *See* Colo. Terr. Laws. R.S. 1868, ch. XXII, § 20; *cf. White,* 503 P.2d at 341 ("Such a presumption would seem to be without merit, particularly since this state has had some law in the 'bad check' area since at least 1885.").

Rather, it is presumed that a newer statute is intended as a substitute for the older statute, which supports the logical presumption that "the legislature did not intend the repeal of the older statute to be operative if the newer one were held to be unconstitutional." *Id.* Applying the doctrine to the instant case, this Court should presume that in enacting sections 18-1.3-401(4)(a) and 17-22.5-104(2)(d)(I), the legislature intended to replace the previous versions of those statutes. Since part of section 18-1.3-401(4)(a) and all of section 17-22.5-104 (2)(d)(I) are now unconstitutional as to juvenile offenders, the doctrine of revival permits this Court to substitute section 18-1-105(4), C.R.S. (1985) and section 17-22.5-104(2)(c).

As set forth above, in addition to being wholly consistent with *Miller* by providing for the possibility of parole after 40 calendar years, this interpretation of the applicable statutes covers not only Banks but others similarly situated – all juvenile offenders convicted of class 1 felonies between 1990 and 2006. The fair and just result is that all juveniles convicted as adults of class 1 felonies from 1990 to the present receive identical sentences.

Banks asserts that, after *Miller,* there is no "statute that sets forth a constitutional sentence" and that the case should be remanded for resentencing with the trial court "free to impose any sentence it deems appropriate" (opening brief at 5). However, any such sentence would necessarily be an "illegal sentence," one that is not authorized by state law. *See, e.g., People v. Rockwell,* 125 P.3d 410, 414 (Colo. 2005) (a sentence is "illegal" under Crim. P. 35(a) if it is "inconsistent with the statutory scheme outlined by the legislature").

C. The appropriate remedy is to remand the case to the trial court with instructions to correct the mittimus by striking the words "without the possibility of parole."

It is unnecessary to vacate Banks's sentence to life imprisonment, as that provision is not at odds with *Miller*. Instead, this Court should remand the case with instructions for the trial court to correct the mittimus by striking the words "without the possibility of parole. Because the law provides only one sentencing option, a new sentencing hearing is unnecessary, as the trial court would have no opportunity to exercise its discretion.

II. Applying a mandatory sentence of life with the possibility of parole after 40 years to a juvenile defendant convicted of homicide does not constitute cruel and unusual punishment.

Banks also argues that, pursuant to *Miller,* a mandatory sentence of life with the possibility of parole after 40 years is unconstitutional (opening brief at 4-37).

Standard of review/preservation of claim. The opening brief does not contain a statement concerning standard of review. The "review of constitutional challenges to sentencing determinations is *de novo*." *Lopez,* 113 P.3d at 720. The brief also does not contain a statement concerning preservation.

To the extent that Banks's claim constitutes a constitutional challenge to the relevant Colorado statutes, such unpreserved claims are generally not reviewable. *See People v. Cagle*, 751 P.2d 614, 619 (Colo. 1988) ("It is axiomatic that this court will not consider constitutional issues raised for the first time on appeal"); *People v. Veren,* 140 P.3d 131, 140 (Colo. App. 2005) ("The constitutionality of a statute cannot be decided on appeal if it has not been fairly presented to the trial court").

In addition, the claim appears to be not yet ripe because a sentence of life imprisonment with the possibility of parole has not yet been imposed upon Banks. However, as the Court of Appeals concluded below, addressing the constitutional challenge here will promote efficiency and judicial economy. *Banks*, ¶ 117.

Banks's claims. In his opening brief, Banks argues that *Miller* mandates individualized sentencing for juveniles (discussed below in Section A) and that a sentence requiring him to remain incarcerated for 40 years is unconstitutional (discussed below in Section B).

A. Amending Banks's life sentence to include the possibility of parole makes his sentence constitutional under *Miller*.

1. *Miller's* categorical ban on mandatory sentences to *life without parole* derives from the recognition that such sentences for juveniles are akin to the death penalty.

Banks argues that a mandatory sentence to life with the possibility of parole after 40 years "does not satisfy the overarching constitutional requirements of the evolving Eighth Amendment jurisprudence regarding the sentencing of juveniles as set forth in *Roper, Graham,* and *Miller*" (opening brief at 6). His argument stretches *Miller* well beyond the precedent it established.

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to

excessive sanctions." *Miller,* 132 S. Ct. at 2463 (quoting *Roper v. Simmons,* 543 U.S. 551, 560 (2005)). Rather, "punishment for [the] crime should be graduated and proportioned" to both the offender and the offense. *Id.* (internal quotation omitted); *accord Banks,* ¶120.

In 2005, in *Roper,* the United States Supreme Court set forth a categorical rule that the Eighth Amendment forbids the imposition of the death penalty on offenders who commit murder before age 18. *Roper,* 543 U.S. at 578. In doing so, the Court reasoned, "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573-74.

Subsequently, in *Graham v. Florida,* 130 S. Ct. 2011 (2010), the Court categorically ruled that a juvenile sentence of life without the possibility of parole violates the Eighth Amendment for a single conviction in non-homicide cases. *Id.* at 2030. The *Graham* Court viewed a sentence of life-imprisonment without the opportunity for parole of comparable severity and magnitude as a sentence of death,

reasoning that such a sentence "alters the offender's life by a forfeiture that is irrevocable." *Id.* at 2027. The Court held that the Constitution requires the State to give juvenile non-homicide offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030. The Court, however, explicitly stated that "while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life." *Id.*

Two years later, in *Miller,* the Court pronounced another categorical rule, barring the mandatory application of sentences of life without parole to juvenile offenders convicted of homicide crimes. *Miller,* 132 S. Ct. at 2471. The *Miller* court echoed *Graham* in asserting that "youth matters in determining the appropriateness of a lifetime of incarceration *without the possibility of parole*." *Id.* at 2465 (emphasis added). Nonetheless, the Court made clear, "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how

those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. Accordingly, the holding of *Miller* is narrow and clear in forbidding mandatory sentences to life without parole for juveniles.

In arguing for a more expansive reading of *Miller,* Banks relies upon *Miller*'s reference to *Roper* and *Graham* in stating that those cases establish "that children are constitutionally different from adults for purposes of sentencing" (opening brief at 10 (citing *Miller,* 132 S.Ct. at 2464)). However, read in context, that concern arises with regard to the most serious punishment that can be imposed, a sentence to life without parole. It does not extend to the imposition of mandatory sentences for juveniles other than life without parole. *See Atwell v. State,* 2013 Fla. App. LEXIS 18019 *3 (Fla. Dist. Ct. App. 4th Nov. 13, 2013) ("Without deciding the issue of whether *Miller* applies retroactively, we conclude that *Miller* is inapplicable because *Miller* applies only to a mandatory sentence of life *without the possibility of parole*") (emphasis in original).

2. *Miller* requires individualized sentencing before a sentence to *life without parole* can be imposed. *Miller* imposes no such requirement for a sentence to life with the possibility of parole.

Banks argues that, after *Miller,* all mandatory sentences for juveniles violate the Eighth Amendment (opening brief at 11-22). As discussed above, *Miller* does not support that argument, and the legal authorities cited by Banks from other jurisdictions are similarly unavailing.

Banks places great reliance on a case decided by the Iowa Supreme Court, *State v. Null,* 836 N.W.2d 41 (Iowa 2013) (opening brief at 6, 8, 9, 12, 32). However, that case, and another, *State v. Pearson,* 836 N.W.2d 88 (Iowa 2013), involve juvenile defendants sentenced to terms of years, not to life sentences, and the holdings in both cases are based on the Iowa court's interpretation of Iowa's state constitution. *Null,* 836 N.W.2d at 75; *Pearson,* 836 N.W. at 96. Accordingly, his reliance on those cases is misplaced. In a third case, *State v. Ragland,* 836 N.W.2d 107 (Iowa 2013), the Iowa court held that "*Miller* applies to

sentences that are the functional equivalent of life without parole." *Id.* at 121-22. That holding is discussed below in Section B.

Banks also relies upon language from *State v. Riley,* 58 A.3d 304 (Conn. App. 2013), *appeal granted by* 61 A.3d 531 (Conn. Feb. 20, 2013) (opening brief at 13, 14, 18), but, as he admits, in that case, the juvenile in that case was discretionarily sentenced to 100 years imprisonment, and the appellate court upheld that sentence as constitutional. *Riley,* 58 A.3d at 316.

Banks further relies upon the federal district court decision refusing to impose a five-year mandatory sentence in *United States v. C.R.,* 792 F. Supp.2d 343 (E.D.N.Y. 2011) (opening brief at 15-16). However, after his opening brief was filed, that decision was vacated and remanded by the Second Circuit Court of Appeals. *United States v. Reingold,* 731 F.3d 204 (2d Cir. 2013); *see also United States v. Szeto,* 2013 U.S. Dist. LEXIS 155082 (D. Conn. Oct. 24, 2013) ("*United States v. C.R.* is also unpersuasive, as it was recently vacated and remanded by the Second Circuit").

Other decisions cited by Banks as instances where homicide cases have been remanded for resentencing (opening brief at 20-21)[2] appear to involve giving trial courts the option of reconsidering whether to impose sentences to life without parole. *See People v. Moffert,* 209 Cal. App. 4th 1465, 1477 (Cal. App. 2012) (remanding for reconsideration of life without parole sentence), *review granted* and *depublished* by 270 P.3d 1171 (Cal. Jan. 2, 2013); *Daugherty v. State*, 96 So.3d 1075, 1080 (Fla. Dist. Ct. App. 4th 2013) ("Our decision does not preclude the trial court from again imposing a life term without possibility of parole should the court upon reconsideration deem such sentence justified"); *Washington v. State,* 103 So.3d 917, 9210 (Fla. Dist. Ct. App. 1st 2012) ("Under *Miller*, a sentence of life without the possibility of parole remains a constitutionally permissible sentencing option"); *Commonwealth v. Knox,* 50 A.3d 749, 267-68 (Pa. Super. Ct. 2012) (remanding for reconsideration of life without parole sentence for juvenile convicted of second degree murder); *see also People v. Carp,* 828

[2] Banks's inclusion of *State v. Bonner,* 735 S.E.2d 525 (S.C. App. 2012) appears to be mistaken, as that case concerned a juvenile defendant sentenced to life without parole for burglary.

N.W.2d 685, 720 (Mich. App. 2013) ("To fulfill the strictures of *Miller* sentencing courts are required to determine, considering the factors of youth and the serious nature of the offense, whether to sentence the juvenile convicted of a homicide offense to life without the possibility of parole or to sentence such a juvenile offender to a life sentence with the potential for parole"), *appeal granted in part by* 2013 Mich. LEXIS 1795 (Mich. Nov. 6, 2013); *Bear Cloud v. State,* 294 P.3d 36, 47 (Wyo. 2013) ("To fulfill *Miller's* requirements, Wyoming's district courts must consider the factors of youth and the nature of the homicide at an individualized sentencing hearing when determining whether to sentence the juvenile offender to life without the possibility of parole or to life according to law"); *but see Jackson v. Norris,* 2013 Ark. 175 *8 (April 25, 2013) (remanding for discretionary sentencing in a "range of not less than ten years and not more than forty years, or life"). Accordingly, if the trial court in Banks's case were to reconsider imposing a sentence to life without parole, then an individualized hearing would be necessary. But no hearing is necessary in order to impose a sentence of life with the possibility of parole after 40 years.

As another court faced with a similar challenge to a mandatory sentence observed:

> Appellant extrapolates from *Graham, Roper,* and *Miller* that despite their limitation to sentences of life without parole, the considerations announced as paramount – including "immaturity, impetuosity and failure to appreciate risks and consequences," *Miller, supra,* 132 S. Ct. at 2468 – apply equally to a mandatory thirty years to life sentence. But should we follow his suggestion, it is not clear where this slope would end for it would seem that the same infirmity in thirty years would exist for a lesser but still substantial term.

James v. United States, 59 A.3d 1233, 1238 n.3 (D.C. App. 2013).

Accordingly, this Court should reject Banks's argument that, after *Miller,* all mandatory sentences for juveniles are unconstitutional.

B. Even applying *Graham,* the Eighth Amendment claim fails because Banks will have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," given that he will be eligible for parole when he is 56 years old, well within his natural life span.

Banks also argues that requiring him to remain incarcerated until he is at least 56 years old constitutes cruel and unusual punishment (opening brief at 22-30).

Initially, Banks argues that a sentence of life with the possibility of parole after 40 years is unconstitutional because "juveniles who commit first degree murder are categorically less culpable than adults who commit first degree murder" (opening brief at 23). That argument overlooks that, by Colorado statute, adults who commit first degree murder are sentenced to life in prison without parole or death, whereas juveniles who commit first degree murder are eligible for parole after 40 years. *Compare* §§ 18-3-102(1)(a) and (3); 18-1.3-401(1)(a)(V)(A), C.R.S. (2013) *with* § 18-1.3-401(4)(a) and (b)(I), C.R.S. (2013). Accordingly, juvenile offenders do receive a lesser punishment than adults similarly

charged. *See James,* 59 A.3d at 1238 ("Because the sentencing statute already takes a juvenile offender's youth into account, the mandatory nature of appellant's sentence does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment"). To the extent that Banks suggests that his sentence is cruel and unusual because the applicable sentencing range is lower for adults convicted of second degree murder (opening brief at 23-24), that suggestion should be rejected, because, as he acknowledges, those offenders are less culpable, having been convicted a lesser offense than first degree murder.

For the most part, Banks is essentially arguing that a sentence to life with the possibility of parole violates *Graham*'s requirement that a juvenile convicted of a non-homicide offense must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S.Ct. at 2030.

To begin with, the present case does not fall within the dictates of *Graham* because Banks was convicted of first degree murder – after deliberation. *See, e.g., Chambers v. State*, 831 N.W.2d 311, 320 (Minn. 2013) ("We conclude the Court's holding in *Graham* does not apply to

juvenile homicide offenders like Chambers"). And *Graham* does not apply to "de facto life sentence situations." *People v. Lehmkuhl*, 2013 COA 98, ¶ 30 (Dailey, J., specially concurring). In other words, *Graham* does not apply to cases where a juvenile received a number of consecutive individual sentences from more than one underlying conviction that resulted in a lengthy aggregate term of imprisonment. Rather, *Graham* applies only to a "single sentence of life without parole for a nonhomicide offense." *Id.* *Graham*'s holding was limited to "those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Graham,* 130 S.Ct. at 2023; *accord Walle v. State*, 99 So.3d 967, 971 (Fla. App. 2d Dist. 2012) ("Supreme Court limited the scope and breadth of its decision in *Graham* by stating that its decision 'concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense'") (quoting *Graham*, 130 S.Ct. at 2023).

A number of state courts, including several panels of the Court of Appeals, have concluded that, under *Graham,* a juvenile's sentence to a lengthy term of years is unconstitutional if it does not offer him or her a

meaningful opportunity to obtain release before the end of his or her expected life span. *See Lehmkuhl,* ¶¶ 13-20 (affirming sentence for defendant who would be parole eligible at age 67); *People v. Lucero,* 2013 COA 53, ¶¶ 12-13 (affirming sentence for defendant who would be parole eligible at age 57); *People v. Rainer,* 2013 COA 51, ¶ 38 (vacating sentence as unconstitutional when defendant was not parole eligible until age 75). Under section 13-25-103, C.R.S. (2013), a person's life expectancy is 76.7 years. Banks will be 56 years old when he is parole eligible, meaning he will have approximately 20 years of life expectancy once he is parole eligible. Accordingly, even assuming *Graham* applies, and the Court of Appeals' reasoning is correct in those cases, Banks's sentence is constitutional because will have a "meaningful opportunity to obtain release."

In *Ragland,* the Iowa case in which the juvenile homicide defendant's life without parole case had been commuted to life with the possibility of parole after 60 years, the Iowa Supreme Court concluded that the commuted sentence was an unconstitutional "functional equivalent of life without parole" because it left the juvenile defendant

eligible for parole at 78 years old, with no remaining life expectancy. *Ragland,* 836 N.W.2d at 120-21. Even if one were to apply that logic to this case, Banks's sentence would be constitutional because he will be eligible for parole when he is more than 20 years younger.

Banks argues that a mandatory life sentence with the possibility of parole "does not satisfy the mandates of *Miller*" (opening brief at 30-32). The People disagree. "Unlike the case in *Graham,* the *Miller* court did not establish a prohibition against life imprisonment without parole for juveniles but instead required that a sentencing court consider an offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose the harshest possible penalty for juveniles." *State v. Graham,* 99 So.2d 23, 29 (La. 2012). *Miller*'s narrow holding applies only to sentences of life imprisonment without parole; a sentence with the possibility of parole is not unconstitutional pursuant to *Miller*.

Moreover, a central concern of *Graham* was that Florida had "abolished its parole system," and a "life sentence gives a defendant no possibility of release" absent executive clemency. *Graham,* 130 S.Ct. at

2020. Thus, the Court concluded, "The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the *Eighth Amendment* does not permit." *Id.* at 2034. By contrast, a life sentence with the possibility of parole after 40 years affords Banks, and others like him, *an opportunity to later demonstrate he is fit to rejoin society*.

Finally, Banks argues that the parole process is different from the judicial process and a criminal defendant has no right to conditional release on parole (opening brief at 33-37). While both of those things are true, neither makes his sentence of life with the possibility of parole after 40 years violate the Eighth Amendment following *Miller* and *Graham*.

Throughout his brief, Banks relies heavily on "[t]he great weight of academic literature" on science and social science (opening brief at 28). The United States Supreme Court's opinions have considered such research as well as common sense and what "any parent knows" in determining what constitutes cruel and unusual punishment. *Miller,*

132 S. Ct. at 2464 *citing Roper,* 543 U.S. at 569. But, as the Pennsylvania Supreme Court observed:

> All Justices of this Court and the United States Supreme Court share the sentiment that "[d]etermining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy." *Miller,* ___ U.S. at ___ , 132 S. Ct. at 2477 (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, JJ.). Our role in establishing social policy in the arena is a limited one, however.

Commonwealth v. Cunningham, 2013 Pa. LEXIS 2546 (Pa. Oct. 30, 2013) (concluding that *Miller* does not apply retroactively). Based upon the United States Supreme Court's holdings in *Roper, Graham,* and *Miller,* a sentence to life with the possibility of parole after 40 years does not violate the Eighth Amendment.

CONCLUSION

For the above reasons, this Court should affirm the decision of the Court of Appeals and remand the case to the trial court with instructions to correct the mittimus by striking the words "without the possibility of parole."

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **ERIC SAMLER** via Integrated Colorado Courts E-filing System (ICCES) on December 23, 2013.

/s/ Cortney Jones

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