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COLORADO SUPREME COURT
2 E. 14th Avenue
Denver, CO 80203

Certiorari to the Colorado Court of Appeals, 08CA105
Denver County District Court
Case Number 05CR 4700

TENARRO BANKS,
PETITIONER,
v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

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Case Number: 12SC1022

OPENING BRIEF

COLORADO SUPREME COURT 2 E. 14th Ave., Denver, CO 80203 Denver County District Court Case Number 05CR 4700 Court of Appeals Case No. 08 CA105 **TENARRO BANKS,** **PETITIONER,** **v.** **THE PEOPLE OF THE STATE OF COLORADO**, **RESPONDENT.**	Case No.12SC1022
Eric A. Samler, #32349 For the Defendant - Appellant **AS ALTERNATE DEFENSE COUNSEL** Samler & Whitson, P.C. 1127 Auraria Parkway, Suite 201B Denver, Co. 80204 303-670-0575 (phone) 303-670-0574 (fax)	

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 except as set forth below. Specifically, the undersigned certifies that:

The brief does not comply with C.A.R. 28(g). It contains 11,730 words. However, an appropriate motion has been filed with the court.

The brief complies with C.A.R. 28(k): It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

/s/ Eric A. Samler

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ISSUES BEFORE THE COURT

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 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 sentencing statutes in a way not authorized or compelled by Colorado statutes or sound "severability" analysis.

STATEMENT OF CASE AND RELEVANT FACTS

On December 11, 2004, a shooting occurred after a house party. The prosecution theory was that Mr. Banks, who was fifteen years old at the time, and who was alleged to be a member of a gang, confronted the sixteen-year-old victim about his wearing colors of a rival gang. The owner of the house ended the party and asked the party-goers to leave. The Prosecution claimed that once outside, Mr. Banks shot and killed the victim. The first trial ended in a mistrial. Following a second jury trial, he was convicted on December 4, 2007, and sentenced to life imprisonment without parole.

Mr. Banks appealed his conviction asserting numerous issues, including a claim that the mandatory sentence of life imprisonment without parole constituted

cruel and unusual punishment, violated equal protection of the laws and violated his right to due process.

While his direct appeal was pending, the United States Supreme Court issued its opinion in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), where it held, among other things, that a mandatory sentence of life in prison without the possibility of parole for persons under the age of 18 at the time of the crime violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution. After supplemental briefing, the Court of Appeals ("COA") rejected all of Mr. Banks' challenges to his conviction, held that while the sentence imposed upon Mr. Banks was unconstitutional, the proper remedy for the unconstitutional sentence was to "apply" the law of severance in a way that results in the modification of the sentence to a statutorily-mandated sentence of life imprisonment with the possibility of parole after forty years.

This Court granted certiorari on the above two issues related to the remedy crafted by the Court of Appeals for the unconstitutional sentence imposed on Mr. Banks.

SUMMARY OF THE ARGUMENT

The central precept behind the Supreme Court decisions in *Miller*, supra, *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010) is that children are constitutionally different for sentencing purposes. This principle rests on psychological and neurological studies demonstrating that children are less culpable for their actions and more amenable to change, and therefore pose a reduced risk of future dangerousness. Because Eighth Amendment jurisprudence requires that punishment be graduated to the offender and the crime, and because juveniles do not all develop physically, emotionally and psychologically at the same pace, non-individualized sentencing for juveniles violates the Eighth Amendment. Moreover, because many of the factors that contribute to juvenile crime (e.g. risk taking, failure to appreciate the consequences of their actions, lack of impulse control) are transient characteristics in adolescents, the imposition of lengthy sentences prohibiting release until these transient characteristics have long passed violates the Eighth Amendment's prohibition against cruel and unusual punishment.

The Court of Appeals, rather than construing the applicable statutes in such a way as to find them constitutionally valid, judicially rewrote the statutes in an

attempt to overcome the statutes constitutional infirmities. Not only did the Court overstep its authority, the judicially rewritten statute does not address the underlying constitutional problem– lack of individualized sentencing for juvenile offenders and a meaningful opportunity for release.

ARGUMENT

I. AFTER MILLER V. ALABAMA, THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION IS VIOLATED BY THE IMPOSITION ON A JUVENILE OF A MANDATORY LIFE SENTENCE WITH THE EARLIEST POTENTIAL FOR PAROLE AFTER FORTY YEARS

A. MR. BANKS' MANDATORY LWOP SENTENCE IS UNCONSTITUTIONAL.

At the time of his original sentencing, Mr. Banks received a mandatory sentence of Life Without Parole (LWOP) for a crime occurring when he was fifteen years old. On June 25, 2012, while his direct appeal was pending in the Court of Appeals, the United States Supreme Court, in *Miller v. Alabama*, __ U.S. ___, 132 S.Ct. 2455 (2012), held that a mandatory LWOP sentence for persons under the age of 18 at the time of their crimes constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution:

> Making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence ... poses too great a risk of

> disproportionate punishment. ... That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' *Roper,* 543 U.S., at 573; *Graham,* 560 U.S., at ——, 130 S.Ct., at 2026–2027.

There is no dispute that Mr. Bank's original sentence is unconstitutional after *Miller.* The disagreement is in the remedy. The Court of Appeals believes that the Eighth Amendment is satisfied if the sentence is simply changed from one of mandatory LWOP to one of mandatory Life with the Possibility of Parole after forty years. Mr. Banks believes that the *Miller, Roper, and Graham* trilogy mandates that the trial court hold an individual sentencing hearing where the court must consider mitigating evidence relevant to the factors that the *Miller* Court specifies in determining the appropriate sentence. Mr. Banks' further believes that because there is not a statute that sets forth a constitutional sentence for juveniles convicted of F1 felonies committed between 1990 and 2006, the court is free to impose any sentence it deems appropriate considering not only the nature and facts of the crime, but also factors and circumstances unique to Mr. Banks at the time of the commission of the offense.

1. The Imposition Upon A Juvenile Of A Mandatory Life Sentence With A Statutorily Prescribed Minimum Sentence Violates *Miller's* Central Mandate Of Individualized Sentencing.

According to the Court of Appeals, "*Miller* sets out a new rule invalidating the mandatory denial of parole for juveniles who are sentenced to life in prison." *Banks* at ¶ 122. The Court of Appeals has essentially reduced the Court's extensive discussion in *Miller*, *Roper* and *Graham* regarding the differenceS between children and adults and how those inherent differences affect the consitutionality of what sentence can be imposed upon juveniles to an afterthought. The Court believes that the constitutional infirmities of sentencing a fifteen year old child to life without parole can be cured by maintaining a mandatory life sentence with the possibility of discretionary parole only after he serves a minimum term of forty years. Contrary to the Court's conclusion, this 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*.

a. The evolution of Eighth Amendment jurisprudence regarding the sentencing of juveniles.

The Iowa Supreme Court, in *State v. Null* ___ NW2d ___ , 2013 WL 4250939 (Iowa, August 16, 2013) analyzed in depth the evolution of juvenile

sentencing from the mid 1990's through post- *Miller*. The Court recognized that the "perceived increase in juvenile crime" in the 1990's and the fear of the "coming generation of super-predators" led states to enact laws that transferred more juveniles to adult court. According to the Court:

> The fear of juvenile predators may be reflected in sentencing practices nationwide. According to one study, in eleven out of the seventeen years between 1985 and 2001, youth convicted of murder in the United States were more likely to enter prison with a life without parole sentence than adult murder offenders. Human Rights Watch & Amnesty International, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 2 (2005). Another study during approximately the same time frame indicates that for violent, weapons-related, and other crimes, juvenile offenders transferred to criminal court were more often sentenced to prison and for longer periods of time than their adult counterparts. Donna Bishop & Charles Frazier, Consequences of Transfer, in The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court 227, 234 -36 (Jeffrey Fagan & Franklin E. Zimmering eds., 2000).

During that same period of time, however, "developments in social psychology and neuroscience have reinforced traditional notions that juveniles and adults are, in fact, quite different." While the United States Supreme Court had recognized this for decades (*See Eddings v. Oklahoma,* 455 U.S. 104, 115, (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological change."); *Johnson v. Texas*, 509 U.S. 350, 367,(1993)) it was not until the *Roper*,

Graham, Miller trilogy that the Court more formally acknowledged the scientific underpinnings in support of the proposition that juveniles should not be treated the same as adults for sentencing purposes.

b. Children are different.

In *Atkins v. Virginia,* 536 U.S. 304 (2002) the Court prohibited the execution of a defendant who has mental retardation. In *Roper,* the Court held that the Eighth and Fourteenth Amendments prohibit the execution of individuals who were under 18 years of age at time of their capital crimes. According to a study relied on heavily by the Court in *Roper,*

> juveniles achieve the ability to use adult reasoning by mid-adolescence, but lack the ability to properly assess risks and engage in adult-style self-control.... The influence of peers tends to replace that of parents or other authority figures. Risk evaluation is not generally developed. Adolescents also differ from adults with respect to self-management and the ability to control impulsive behavior. Finally, identity development, which is often accompanied by experimentation with risky, illegal, or dangerous activities, occurs in late adolescence and early adulthood.

Null, supra, citing Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 34 (2008). The Court in *Null* went on to state that

> science establishes that for most youth, the qualities are transient. That is to say, they will age out. A small proportion, however, will not, and will catapult into a career of crime unless incarcerated. [Scott and Steinberg, supra. at 53] (estimating that only about five percent of young offenders will persist in criminal activity into

> adulthood). Unfortunately, however, it is very difficult to identify which juveniles are adolescence-limited offenders, whose antisocial behavior begins and ends during adolescence and early adulthood, and those who are life-course-persistent offenders whose antisocial behavior continues into adulthood. Id. at 54 (internal quotation marks omitted); see also Beth A. Colgan, Constitutional Line Drawing at the Intersection of Childhood and Crime, 9 Stan. J. C.R. & C.L. 79, 81-85 (2013) (summarizing advances in brain imaging and social science); Elizabeth S. Scott & Laurence Steinberg, Social Welfare and Fairness in Juvenile Crime Regulation, 71 La. L.Rev. 35, 64- 66 (2010); Elizabeth S. Scott & Laurence Steinberg, Blaming Youth, 81 Tex. L.Rev. 799, 811-21 (2003).

As a result of these studies as well as the fact that "[t]he predictions of the mid-1990s that thousands of juvenile superpredators would soon appear and threaten public safety did not materialize,"[1] Eighth Amendment jurisprudence as it relates to the sentencing of juveniles continued to evolve.

In *Graham* the Court held that the Eighth Amendment prohibits imposition

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[1]In fact two of the professors who championed the view that the "juvenile superpredator" would soon be among us, John J. Dilulio Jr., and James Alan Fox, subsequently recanted and in fact joined in the amicus brief on behalf of the petitioner in *Miller v. Alabama*. *See Null*:

> [Professors Dilulio and Fox] further declared that these predictions did not come to pass, that juvenile crime rates had in fact decreased over the recent decades, that state legislative actions in the 1990s were taken during an environment of hysteria featuring highly publicized heinous crimes committed by juvenile offenders, and that recent scientific evidence and empirical data invalidated the juvenile superpredator myth.

Null.

of LWOP on juvenile offenders who did not kill or intend to kill. The Court's decision in *Miller* represents a further step in the evolving Eighth Amendment jurisprudence concerning the sentencing of juveniles. The thread throughout the *Atkins, Roper, and Graham* trilogy was that a particular punishment was deemed to constitute cruel and unusual punishment as applied to a group of individuals that society considered less responsible for their actions. 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 in *Miller, supra,* held that "children are constitutionally different from adults for purposes of sentencing." *Id.,* at 2464. Relying on *Roper, supra,* and *Graham, supra,* the Court held that "because juveniles have diminished culpability and greater prospects for reform ... they are less deserving of the most severe punishments." *Id., quoting Graham,* 130 S.Ct., at 2026. According to the Court, *Roper* and *Graham*

> relied on three significant gaps between juveniles and adults. First, children have a ''lack of maturity and an underdeveloped sense of responsibility,'' leading to recklessness, impulsivity, and heedless

> risk-taking. *Roper,* 543 U.S., at 569. Second, children 'are more vulnerable ... to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' *Id.*, at 570.

Miller, at 2464. It is these innate differences between a juvenile offender and an adult criminal that constitutionally require that the juvenile be treated differently at sentencing.

c. **Individualized sentencing is required.**

In *Miller* the Court made clear that because "youth matters … criminal [sentencing] laws that fail to take defendants' youthfulness into account at all would be flawed." *Id*. at 2466. Thus the Court imposed the requirement of individualized sentencing for youth facing a state's most serious punishments where the trial court must consider "the mitigating qualities of youth." *Id.*, *citing*, *Johnson v. Texas,* 509 U.S. 350 (1993). The Court emphasized that "everything we said in *Roper* and *Graham* about [adolescence] also appears in *Johnson* and *Eddings*." *Miller,* 132 S,Ct. at 2467. Those decisions, according to the Court, 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. As the Iowa Supreme Court recognized in *Null, supra:*

> [While] Miller...does not expressly address to what extent a mandatory minimum sentence for adult crimes can automatically be imposed on a juvenile tried as an adult without allowing the juvenile to seek a lesser sentence based on the reasoning of *Roper, Graham* and *Miller*,..[t]he notion that the reasoning of *Roper* was limited to the death penalty cases was proven wrong in *Graham* and the notion that *Graham's* reasoning was limited to nonhomicide cases was proven wrong in *Miller*. Further, the Supreme Court in *Miller* specifically declared what it said about juveniles in *Roper Graham* and *Miler* is not crime specific. *Miller,* 132 S.Ct at 2465.

Null. It follows that the mitigating factors of youth in general and the mitigating factors unique to the juvenile being sentenced must always be considered by the court. See Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L.Rev. 457, 489-93 (2012) (arguing against the imposition of mandatory minimum sentences for juveniles); Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 Conn. Pub. Int. L.J. 297, 322 (2012) (arguing for judicial discretion in juvenile sentencing); David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641,697-98 (2002) (rejecting one size fits all sentencing for juveniles); Leslie Patrice Wallace,

"And I Don't Know Why It Is That You Threw Your Life Away": Abolishing Life Without Parole, the Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance, 20 B.U. Pub. Int. L.J. 35, 71 (2010) (arguing for legislation that would require that the sentences of all juveniles who were sentenced under a mandatory minimum sentencing scheme be periodically reviewed.)

Treating the fourteen-year-old exactly the same as one who is two weeks shy of his eighteenth birthday completely fails to take into account the offender's youth. Yet that is precisely what the Court of Appeals has done– it has proscribed a one-size- fits- all sentence of life with the possibility of parole after forty calendar years, which is diametrically opposed to the individualized sentencing requirements adopted by *Miller*. *See State v. Riley*. 58 A. 3d 304, 312 (Conn. App. 2013):

> In determining an appropriate sentence, the court must be permitted to consider potentially mitigating factors such as the defendant's age and "its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; the characteristics of his home environment, from which "he cannot usually extricate himself—no matter how brutal or dysfunctional"; the circumstances of the offense, including the extent of his participation and whether peer pressure may have induced his involvement; and his difficulties in negotiating the criminal justice system, including the diminished ability to assist his attorneys in presenting a defense. *Miller*, 132 S.Ct. at 2468. Failure to consider these potentially mitigating

> circumstances—an inherent failure of mandatory schemes—presents a risk that punishment will be disproportionate to the young defendant's degree of culpability. *Id*., at 2469.

Riley, 58 A.3d at 312.[2]

The requirement that mitigating factors be taken into account by the sentencer derives from the principle of proportionality. "[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant" that the sentencing judge or jury must consider mitigating evidence; such consideration is essential if the sentencer is to give a "reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989) (emphasis omitted); *see also Penry v. Johnson*, 532 U.S. 782, 787 (2001) (reviewing court must be "sure" that the sentencer "fully considered the mitigating evidence as it bore on the broader question of ... moral culpability"); *cf. Gall v. United States*, 552 U.S. 38, 52 (2007) ("It has been

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[2] Although the Connecticut Court of Appeals upheld a 100 year sentence without the possibility of parole, the Connecticut Supreme Court (*State v. Riley*, 61 A.3d 531 (2013) has granted certiorari on the following issue:
"Did the Appellate Court properly conclude that the juvenile defendant's total sentence of 100 years imprisonment was properly imposed under the eighth amendment to the United States constitution as interpreted by *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455,(2012), and *Graham v. Florida*, 560 U.S. 48(2010)?"

uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.")

The Eighth Amendment's proportionality principle requires the courts to consider each defendant as a unique and singular moral being, and treat him with dignity - even in cases in which that defendant has committed the most heinous of crimes. This is doubly so for children whom the Supreme Court has held to be less morally culpable for the actions. Consequently, not only does a child have a constitutional right to present mitigating evidence to the court, but the court has a corresponding constitutional obligation to consider that evidence in making the individualized sentencing determination.

One Federal District Court, in a pre-*Miller* decision, relied heavily on the following language from *Roper* in finding that imposition of a statutory minimum sentence of five years constituted cruel and unusual punishment when the defendant was a developmentally immature adult and the crime occurred when he was between the age of 15 and 19*:*

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and

> as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decision.' *Johnson*, 509 U.S. at 367; *see also Eddings*, 455 U.S. at 116 ('Even the normal 16–year–old customarily lacks the maturity of an adult'). It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.' Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving juries, or marrying without parental consent. … The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, *supra*, at 115 ('*[Y]outh is more than a chronological fact.* It is a time and condition of life when a person may be most susceptible to influence and to psychological damage'). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. *See* Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)… ('[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting'). The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. *See* generally E. Erikson, *Identity: Youth and Crisis* (1968).

United States v. C.R., 792 F. Supp. 2d 343, 495-96 (E.D.N.Y. 2011),[3] quoting

[3]It is precisely because of this research, and the reality of brain and emotional development, that teenagers are a protected class throughout Colorado

Roper, 543 U.S. at 569–70.

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. Failure to do so runs afoul of the Eighth amendment. See *Jackson v. Norris*, ___ S.W. 3d. ___ 2013 Ark. 175 (2013), the companion case to *Miller*, where the Arkansas Supreme Court upon remand from the United States Supreme Court was faced with the issue of what the proper sentencing procedures were for a juvenile sentenced to LWOP. In doing so the Court rejected " the State['s] suggest[ion] that Jackson, through severance of language from various statutes,

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regulatory, civil, administrative, and criminal law. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (*citing Eddings*). "The legal disqualifications placed on children as a class – e.g. limitations on their ability to alienate property, enter into a binding contract enforceable against them, and marry without parental consent – exhibit the settled understanding that the differentiating characteristics of youth are universal. In fact Mr. Banks, who was 15 at the time of the crime, was too young to obtain a driver's license. C.R.S. § 42-2-104 C.R.S. § 42-2-105.5

may be sentenced by this court to a mandatory sentence of life imprisonment with the possibility of parole, the imposition of that sentence by this court would not allow for consideration of *Miller* evidence."[4]

Under *Miller*, a mandatory sentencing scheme that is not graduated and proportionate to both the offender and the offense is cruel and unusual under the Eighth Amendment. *See State v. Riley*, 58 A.3d at 324-325, Borden, J. Dissenting, *cert. granted*, 61A.3d 531 (2013):

> Furthermore, the [*Mille*r] Court stated that a juvenile's youth implicates the proportionality principle inherent in the eighth amendment beyond the context of a mandatory sentence. ....' *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.*' (Citation omitted; emphasis added; internal quotation marks omitted.) Id., at 2465–66.

A rule that automatically sentences juveniles to life imprisonment with the possibility of parole would fail under *Miller* because it fails to provide for any meaningful consideration of the mitigating effects of youth. Mr. Banks has a constitutional right to present evidence not only of the mitigating effects of youth

[4] Because the Arkansas Capital Murder Statute, while providing for a sentence of death or LWOP, also delineated the crime as a Class Y Felony which carries with it a sentence of 10-40 years, the Court was able to "sever" a portion of that statute as applied to juveniles and still be left with both a procedure and penalty that complies with *Miller*.

in general but also evidence specific to him including the circumstances surrounding the crime itself as well as, perhaps more importantly, the specific psychological impairments and immaturity at the time of the crime, the family and home environment that surrounded him and from which he was unable to extricate himself, his suggestibility and malleability, the experiences he had up to the time of the crime which shaped him, peer pressure, including the presence in his life of older individuals from whom he was seeking approval and acceptance, and of course the possibility of rehabilitation.

The *Miller* court unequivocally stated that "[d]iscretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole **or a lengthy term of years**." Id. at 2475 (emphasis added). The solution is not substituting one mandatory sentence for another. It is providing for individualized sentencing where the sentencer has discretion to impose what it deems to be the appropriate sentence. Cf. *Flakes v. People,* 153 P.3d 427, 437 (2007) *citing, Kent v. United States,* 383 U.S. 541, 560-62 (1966). ("A decision to impose an adult sentence on a juvenile without judicial findings risks an arbitrary deprivation of a juvenile's liberty interest in avoiding harsh punishment.")

In *Woodson v. North Carolina,* 428 U.S. 280 (1976) the Court held that

> Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See *Williams v. New York*, 337 U.S[241, 247-249 (1949); *Furman v. Georgia*, 408 U.S.[238, 402-403 (1972](Burger, C. J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. [86, 100 (1958) (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson , 428 U.S. at 304 The *Miller* court expanded this "constitutional imperative" to the sentencing of juveniles. In rejecting a claim that *Harmelin v. Michigan*, 501 U.S. 957(1991), which upheld a mandatory life without parole sentence for an adult, the Court held:

> We think that argument myopic. *Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.

Miller, 132 S. Ct. at 2470.

Several states nationwide have followed the mandate of *Miller* and remanded cases back for re-sentencing. Pennsylvania, in particular outlined numerous factors that the sentencing court should consider reflective of the factors

described in *Miller*. *See Commonwealth v. Knox*, 50 A. 3d 749, 768 (Pa. Sup. Ct. 2012). Other states have vacated the unconstitutional mandatory life without parole sentences imposed upon juveniles tried and convicted as adults in homicide cases and have remanded for resentencing hearings consistent with the *Miller* opinion. *See State v. Bonner*, 735 S.E.2d 525 (S.C. App. 2012); *Washington v. State*, 103 So. 3d 917 (Fla. Dist. Ct. App. 2012); *Daugherty v. State*, 96 So. 3d 1076 (Fl. Dist. Ct. App. 2012); *State v. Ragland*, ___ N.W. 2d ___ available at 2013 WL 4303970 (Iowa, 2013)(holding that governor's commuting of all mandatory juvenile LWOP sentences to life with the possibility of parole after 60 years unconstitutional.) In California, the court found that California's statutory presumption in favor of life without parole violated the 8th Amendment and the court vacated the sentence remanding the case for re-sentencing "consistent with the views expressed in Miller." *People v. Moffett*, 209 Cal. App. 4th 1465, 1479 (Cal. App. 2012), *petition for review granted* 209 P.3d 1171 (Cal. 2013). [5] Because a global conversion of every life without parole sentence to a life with the possibility of parole after forty years is not a "reasoned moral response to the

[5]In two memorandum opinions the Louisiana Appellate court remanded the cases to the sentencing court for reconsideration of mandatory life without parole sentences after "conducting a sentencing hearing in accord with the principles enunciated in *Miller*." *State v. Simmons*, 99 So. 3d 28 (MEM) (La. App. 2012); *State v. Graham*, 99 So. 3d 28 (Mem) (La. App. 2012).

defendant's background, character, and crime," *Penry v. Lynaugh*, 492 U.S. at 327-28, it violates the Eighth Amendment's proportionality principle and therefore does not provide juveniles with the constitutional protections they have been afforded after the *Roper, Graham, Miller* trilogy.

B. GRANTING MR. BANKS (AND ALL OTHER JUVENILES) THE RIGHT TO APPLY FOR PAROLE AFTER FORTY YEARS DOES NOT MAKE THE SENTENCE CONSTITUTIONAL.

1. A Minimum Sentence Of Forty Years For Juveniles Is Too Harsh.

The *Roper, Graham, Miller* trilogy makes it clear -- for Eighth Amendment purposes juveniles represent a special category of offenders. These cases represent a paradigm shift in how the Court views children in the criminal justice system. *"Graham* is the first case ever to side with minors in their claim that they have a right to be treated as children even when the state does not agree." Martin Guggenheim, *Graham v. Florida* and a Juvenile's Right to Age-Appropriate Sentencing, 47 Harv. C.R.-C.L. L. Rev. 457, 487. Professor Guggenheim argues that *"Graham* suggests for the first time that treating children differently from adults, even when it comes to sentences well below the most severe, is not simply something states may choose; rather, it is something to which children have a right." *Id*. at 489.

Mr. Banks was 15 years old when he committed the crime for which the Court of Appeals has imposed a mandatory life sentence with possible parole after forty years. By the time he is even eligible for parole, he will have spent 71% of his life in prison. This does not comport with the lynchpin of *Graham* and *Miller* that juveniles are categorically less culpable than adults who commit similar offenses. In other words, juveniles who commit first degree murder are categorically less culpable than adults who commit first degree murder. Because juveniles who commit first degree murder are categorically less culpable than adults who commit first degree murder, it is illogical to set such a categorically high threshold of forty years for parole to even be considered, since the legislature has set the minimum sentence much lower for less culpable *adult* murderers.

The minimum sentence for second degree murder is 16 years, while the maximum is 48. C.R.S. §18-1.3-406. *See also* C.R.S. §18-3-103. A person convicted of second degree murder is eligible for parole after serving 75% of his or her sentence less earned time (C.R.S. § 17-22.5-405.). C.R.S. §17-22.5-403(2.5)(a). Thus an adult receiving the maximum sentence for second degree murder would be parole eligible after 36 years less ten days for each month of incarceration, or up to 120 days per year of earned time. If the maximum amount of earned time was earned, a person receiving a 48 year sentence would be parole

eligible after serving less than 28 years of his or her sentence.

The Iowa Supreme Court, in determining whether the sentence of a juvenile who was required to serve 52.5 years before being eligible for parole violated the precepts of *Graham* and *Miller,* held that

> the determination of whether the principles of *Miller* or *Graham* apply in a given case should [not] turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Graham*, 560 U.S. at ____ We also note that in the flurry of legislative action that has taken place in the wake of Graham and Miller, many of the new statutes have allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty-five years of incarceration

Null, supra.

It is the transitory nature of youth itself that requires the Court to allow a child upon reaching maturity to demonstrate that the factors that contributed to the offense are no longer present :

> Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions. As we observed, 'youth is more than a chronological fact.' *Eddings v. Oklahoma,* 455 U.S 104 (1982). It is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.' *Johnson,* 509 U.S., at 368. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage.'

> *Eddings*, 455 U.S. at 115. And its 'signature qualities' are all 'transient.' *Johnson*, 509 U.S. at368 (1993).

Miller, at 2467. See also Civil Justice Clinic of Quinnipac University School of Law, and the Allard K. Lowenstein International Human Rights Clinic of Yale Law School, Youth Matters; Second look for Connecticut's Children Serving Long Prison Sentences, March 2013, endnote 76:

> The [U.S. Department of Justice, *Report of the Attorney General's National Task Force on Children Exposed to Violence* 111 (2012)] explains that reform must involve an understanding that children in the justice system are not "bad kids" but, instead, are traumatized survivors who have made bad decisions but can still turn things around if they have help. "By failing to correctly identify and treat children exposed to violence, the system wastes an opportunity to alter the delinquent or criminal conduct of the children. . . This is not inevitable. These youth are not beyond our ability to help if we recognize that exposure to violence causes many children to become desperate survivors rather than hardened criminals. There are evidence-based interventions that can help to repair the emotional damage done to children as a result of exposure to violence and that can put them on a course to be well-adjusted, law-abiding, and productive citizens. *Id.*

In *Roper*, the Court, in holding that the imposition of the death penalty on a juvenile was cruel and unusual punishment, recognized that when determining whether a sentence is constitutionally disproportionate and therefore constitutes cruel and unusual punishment under the Eighth Amendment, the Court must consider whether the sentence violates "evolving standards of decency." In the

words of the Court, it is "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual. *Roper*, 543 U.S. at 560, *quoting Trop v. Dulles*, 356 U.S. 86, 100–101, (1958) (plurality opinion) In determining what constitutes evolving standards of decency, the Court acknowledged that international law, while not controlling was still instructive:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.

Roper, 543 U.S. at 578. International law counsels against the imposition of lengthy prison terms for juveniles:

> The international human rights law framework establishes that juveniles must be treated differently than adults in criminal sentencing. The International Covenant on Civil and Political Rights, which the United States has signed and ratified, creates a legally binding obligation to account for age and the desirability of promoting juveniles' rehabilitation in criminal procedures.
> International standards require that sentences of imprisonment for children must be limited to the shortest appropriate amount of time and employed only as a last resort, and must conscientiously account for the child's age and for the need to safeguard 'the well-being and the future of the young person.'
> Criminal sanctions for children should promote their rehabilitation and reintegration into society. The goal must be to prepare incarcerated young people 'to assume socially constructive and productive roles in society.'
> Countries around the world recognize that children should be

> incarcerated only as a measure of last resort and for the minimum necessary period, and most countries limit maximum sentences for children to between five and twenty-five years.

Youth Matters, *supra* at 31 (footnotes omitted but citing the following):

Convention on the Rights of the Child art. 37(b), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); U.N. Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, ¶¶11, 77-88; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. Res. 40/33, art. 17, 19.1; United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("The Havana Rules"), G.A. Res. 45/113, art. 1, U.N. Doc. A/RES/45/113 (Dec. 14, 1990); United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), G.A. Res. 45/112, art. 46, UN Doc. A/RES/45/112 (Dec. 14, 1990); Human rights in the administration of justice, GA A/Res/65/213, art.14, U.N. Doc. A/RES/65/213 (Apr. 1, 2011); Eur. Parl. Ass., *Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice*, IV(A)(6)(19) (Nov. 17, 2010) ("Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time."); Inter-Am. Comm'n H.R., *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, princ.

III(1) (March 3-4, 2008) [hereinafter IACHR Best Practices], *available at* http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm. See also IACHR Juvenile Justice Report, *Juvenile Justice and Human Rights in the Americas*, Inter- Am. Comm'n H.R., ¶ 360 (2011) [*available at* http://www.cidh.oas.org/countryrep JusticiaJuvenileng/jjtoc.eng.htm ("When, in observance of the principles of last resort and the proportionality of the sentence, a State decides to sentence a child to some form of deprivation of liberty for violation of a criminal law, it must also make certain that the measure has an upper limit, which should be reasonably short.").

The United States Justice Department in a 2012 report also recommended that the practice of imposing lengthy prison terms on juveniles be abandoned:

> Laws and regulations prosecuting [juveniles] as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore and diminish their capacity to grow must be replaced or abandoned.

U.S. Department of Justice, *Report of the Attorney General's National Task Force on Children Exposed to Violence* xviii (2012)

The great weight of academic literature also recognizes that youth is a mitigating factor making juveniles less culpable for the same crime committed by

an adult. As one expert notes,

> criminal law arrays actors' culpability and blameworthiness along a continuum from a premeditated killer for hire at one end to the minimally responsible actor barely capable of discerning right from wrong at the other end, even though each caused the same harm. […]Youthfulness affects the actor's abilities to reason instrumentally and freely to choose behavior, and locates an offender closer to the diminished responsibility end of the continuum than to the fully autonomous free-willed actor.

Barry C. Feld ,*Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 500-501 (2003) Feld further argues, "[e]very other area of law recognizes that young people have limited judgment, are less competent decision-makers because of their immaturity, and require greater protection than do adults. Applying the same principle of diminished responsibility in the criminal law requires…shorter sentences for youths than for adults convicted of the same offenses." at 498-499. *See also* David A. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (not)to Punish Minors for Major Crimes*, 82 Tex. L. Rev. 1555, 1557-58 (2004); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* Youth On Trial: A Developmental Perspective On Juvenile Justice 271 (Thomas

Grisso & Robert G. Schwartz eds., 2000) ("[T]he criminal law needs to make sense as a language of moral desert, punishing only those who deserve condemnation, punishing the guilty only to the extent of their individual moral desert, and punishing the range of variously guilty offenders it apprehends in an order that reflects their relative blameworthiness.").

To require Mr. Banks to remain incarcerated until he is at least 56 years old when the transitory "hallmark features of youth" that constitutionally mandate that juveniles to be treated differently at sentencing will have long passed runs counter to the rationale of the Court in both *Miller* and *Graham* and constitutes cruel and unusual punishment under the Eighth Amendment.

2. It Is Still A Mandatory Life Sentence

Removing the discretion from the sentencing judge as to when Mr. Banks should be eligible for parole and ultimately whether he will spend the rest of his life in prison and giving that discretion solely to the parole board does not satisfy the mandates of *Miller*. Justice Powell, dissenting in *Rummel v. Estelle*, 445 U.S. 263(1980),6 rejected the majority's position that the possibility of parole saved the

[6] This dissent served as a template for Justice Powell's majority opinion in *Solem v. Helm*, 463 U.S. 277 (1983) three years later.

constitutionality of a recidivist statute mandating the imposition of a life sentence:

> It is true that imposition in Texas of a mandatory life sentence does not necessarily mean that petitioner will spend the rest of his life behind prison walls. If petitioner attains sufficient good-time credits, he may be eligible for parole within 10 or 12 years after he begins serving his life sentence. But petitioner will have no right to early release; he will merely be eligible for parole. And parole is simply an act of executive grace.
> Last Term in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), we held that a criminal conviction extinguishes whatever liberty interest a prisoner has in securing freedom before the end of his lawful sentence. The Court stated unequivocally that a convicted person has 'no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence.' *Id*., at 7. Of course, a State may create legitimate expectations that are entitled to procedural protection under the Due Process Clause of the Fourteenth Amendment, but Texas has not chosen to create a cognizable interest in parole. The Court of Appeals for the Fifth Circuit has held that a Texas prisoner has no constitutionally enforceable interest in being freed before the expiration of his sentence. See *Johnson v. Wells*, 566 F.2d 1016, 1018 (1978); *Craft v. Texas Board of Pardons and Paroles*, 550 F.2d 1054, 1056 (1977).
> A holding that the possibility of parole discounts a prisoner's sentence for the purposes of the Eighth Amendment would be cruelly ironic. The combined effect of our holdings under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment would allow a State to defend an Eighth Amendment claim by contending that parole is probable even though the prisoner cannot enforce that expectation. Such an approach is inconsistent with the Eighth Amendment. The Court has never before failed to examine a prisoner's Eighth Amendment claim because of the speculation that he might be pardoned before the sentence was carried out.

Rummel, 445 U.S. at 293-94.[7] If "the possibility of parole [does not] discount[] a prisoner's sentence for the purposes of the Eighth Amendment," then the imposition of a mandatory sentence of life imprisonment with the possibility of parole after forty years, does not change the basic nature of the sentence- namely a mandatory life sentence, which the court in *Miller* has held to be unconstitutional.

In *State v. Ragland,* ___ N.W. 2d ___ available at 2013 WL 4303970 (Iowa, 2013) a case decided the same day as *Null,* the Iowa Supreme Court affirmed the trial court's ruling that the Governor's commutation of all mandatory juvenile life without parole sentences to life with the possibility of parole after sixty years did not satisfy the constitutional requirements of *Miller* and *Graham*:

> The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible. In light of our increased understanding of the decision making of youths, the sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adult conduct. At the core of all of this also lies the profound sense of what a person loses by beginning to serve a lifetime of incarceration as a youth.
> ...The commutation lessened his sentence slightly, but without the court's consideration of any mitigating factors as demanded by *Miller*. While such a review process might still permit a life-without-parole sentence to be imposed in a murder case, it might also result in

[7] *Accord White v. People,* 866 P.2d 1371, 1374 (Colo. 1994).

> a sentence far less than life without parole. Thus, Ragland was entitled to be sentenced with consideration of the factors identified in Miller.

3. The Parole Process Is Fundamentally Different Than The Judicial Process.

a. No trial rights like right to counsel, or right to appeal.

A defendant has a constitutional right to counsel at sentencing, *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *People v. Emig*, 177 Colo. 174, 177, 493 P.2d 368, 369-70 (1972), However, because there is no "no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence.'"*Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 7, there is no corresponding right to be represented by counsel before the parole board. Judicial review of a parole board's decision is limited to whether the board considered the statutory factors. The board's actual decision is beyond judicial review. See *In re Question Concerning State Judicial Review of Parole Denial Certified by U. S. Court of Appeals for Tenth Circuit*, 199 Colo. 463, 465, 610 P.2d 1340, 1341 (1980):

> The decision of the Board to grant or deny parole is clearly discretionary since parole is "a privilege, and no prisoner is entitled to it as a matter of right." *Silva v. People*, 158 Colo. 326, 407 P.2d 38 (1965). Thus, the decision of the Board to grant or deny is not subject to judicial review

See also *White v. People*, 866 P.2d 1371, 1374 (Colo. 1994)"(There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz*,442 U.S. at 7; *Andretti v. Johnson*, 779 P.2d 382, 384 (Colo.1989).") By contrast, a defendant has both a statutory right and a constitutional right to challenge the propriety of a sentence. See C.R.S. § 18-1-409 (a); *People v. McCulloch*, 198 P.3d 1264, 1267 (Colo. App. 2008): A challenge to the parole board's decision is limited to whether proper procedures were filed. *In re Question Concerning State Judicial Review of Parole Denial Certified by U. S. Court of Appeals for Tenth Circuit*, 199 Colo. at 465, 610 P.2d at 1341 (It is only when the Board has failed to exercise its statutory duties that the courts of Colorado have the power to review the Board's actions.) Substituting the judgment of the parole board for the discretion of the court does not provide the constitutional safeguards required by *Miller* and *Graham.*

b. The sentence does not comply with the mandates of Miller as different standards apply.

Miller establishes particular factors the court must consider in determining the appropriate sentence. At a minimum the sentencer must consider the following factors:

> (a) "the character and record of the individual offender [and] the circumstances of the offense," *Miller*, 567 U.S. at ——, 132 S.Ct. at

> 2467 (quotation marks omitted);
> (b) "the background and mental and emotional development of a youthful defendant," *id.;*
>
> (c) a juvenile's "chronological age and its hallmark features-among them, immaturity, impetuosity, and failure to appreciate the risks and consequences," *id.*, 567 U.S. at ——, 132 S.Ct. at 2468;
> (d) "the family and home environment that surrounds" the juvenile, "no matter how brutal or dysfunctional," *id.;*
> (e) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected" the juvenile, *id.;*
> (f) whether the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," e.g., the juvenile's relative inability to deal with police and prosecutors or to assist his own attorney, *id.;* and
> (g) the juvenile's potential for rehabilitation, *id.*

Bear Cloud v. State 294 P.3d 36, 47 (Wyo 2013*).*

These constitutionally-mandated sentencing factors are very different from the statutory factors that the Colorado parole board considers. *See* C.R.S. §17-22.5-404 (attached hereto). Noticeably missing from the statute are the factors that *Miller* explicitly states the Court must consider before sentencing a juvenile to a State's harshest penalty.[8] They completely fail to take into account those factors that *Miller* requires the court to consider when sentencing: the unique characteristics of the juvenile as they existed at the time of the crime. See *Miller*,

[8]Of course, the statutory standards could change decades into the future. That is why *Graham* and *Miller* require the meaningful consideration of the identified factors at the time the sentence is imposed.

132 S.Ct. at 2467–68.

The differences between the rules of the process demonstrate that only judicial re-sentencing – not the possibility of executive clemency or parole -- comports with *Miller*:

> Postponing proportionality analysis until parole eligibility is simply inconsistent with *Miller* ...as the statutory and administrative standards governing our parole board's decision-making bear no resemblance to the most relevant mitigating factors identified in *Miller:* a juvenile's diminished moral culpability, the "wealth of characteristics and circumstances attendant to" an offender's youth at the time he committed the crime, and the harshness of a life sentence imposed on, for example, a 14–year–old child. *Miller,* 132 S Ct at 2467**.**

People v. Eliason, 833N.W. 2d. 371 (Mich. App. 2013) Gleicher, PJ., (concurring in part and dissenting in part).

One of the inherent dangers of juvenile sentencing is that a sentencer will improperly count an offender's young age against her rather than as a mitigating factor. See *Roper,* 543 US at 573. *Roper* counseled that such overreaching could be addressed with rules designed to guarantee that sentencers give proper effect to "the mitigating force of youth." *Id.* at 573. Relying on this lesson from *Roper*, *Miller* requires sentencers "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S Ct at 2469; see also *id*. at 2467-68 (discussing how age

must be treated as a mitigating factor "when a juvenile confronts a sentence of life (and death) in prison"). Not only does Colorado's parole system fail to require the parole board to consider an applicant's age at the time of the offense as a mitigating factor, it does not bar the parole board from penalizing an applicant due to his youth status. Because Colorado's parole system lacks any provision requiring that an individual's juvenile status at the time of the crime must be deemed a mitigating factor, a mandatory life sentence that leaves the possibility of release solely in the hands of the parole board cannot satisfy *Miller*'s prohibition on "making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence." *Id.* at 2469.

II. THE COURT OF APPEALS 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.

C.R.S. §18-1.3-401(1)(a)(V)(A), provides that the presumptive sentencing range for class-one felonies is life imprisonment to death, with the parole period specified as "*None.*" (See Attachment A). C.R.S. §18-1.3-401(4)(a) states:

> A person who has been convicted of a class 1 felony shall be punished by life imprisonment in the department of corrections …. As to any 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.*

C.R.S. §17-22.5-104(2)(Attachment B), states, in pertinent part:

> (c) 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. (d)(I) *No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole….*

These statutes, which mandate life without parole for *all* those convicted of class-one felonies committed on or after July 1, 1990 (and before July 1, 2006)[9] plainly violate *Miller, supra*, the Eighth Amendment and article II, §20 of the Colorado Constitution as applied to juvenile offenders.

The Court of Appeals, recognizing this, held that the solution to this constitutional infirmity was not to remand this case for the individualized hearing as required by *Miller*, but rather to "restrict[] the applicability of the last sentence of section 18-1.3-401(4)(a) and the first sentence of C.R.S. § 17-22.5-104(2)(d)(I)

[9] C.R.S. §18-1.3-401(4)(b), providing a possibility of lifetime parole after 40 calendar years for juveniles convicted of F1s as adults,; "shall apply to persons sentenced for offenses committed *on or after July 1, 2006."*

to adult offenders," and make C.R.S. § 17-22.5-104(2)(c) applicable to juveniles convicted between 1990 and 2006.

The initial error the Court makes is in its assumption that the only part of C.R.S. §18-1.3-401 that is void as applied to juveniles is subsection (4)(a) which eliminates the possibility of parole. While the Court is correct that the life without parole provision is unconstitutional, the Court fails to take into account that *Miller* also holds that it is the mandatory imposition of a sentence of life imprisonment for a child in the first place that is unconstitutional. *Miller, supra*. The absence of any discretion to consider the mitigating circumstances of the child and the circumstances of the crime is the core constitutional flaw under *Mille*r that remains uncured by the Court's solution. Thus, the remaining sections of 18-1.3-401 are not "otherwise sound." *Montezuma Well Serv. v. I.C.A.O.*, 928 P.2d 796, 798 (Colo. App. 1996).

Not only does this fail to rectify the constitutional infirmity, it is also premised on a misapprehension of the authority conferred by CRS §2-4-204.

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.

CRS §2-4-204, by its very terms, provides authority to "sever" a "void" provision from an otherwise valid statute. *Id*.; *see also Black's Law Dictionary* p. 1232 (Fifth ed.)(a "severable statute" is one which, "after an invalid portion is *stricken out*…remains…self-sustaining and capable of separate enforcement without regard to the *stricken* portion….")(emphasis added). This Court has explained the authority granted to it by CRS§ 2-204 as follows:

> 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.) *Accord 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) and *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.

In actuality, the Court of Appeals did not apply C.R.S. §2-4-204, because it severed no void language from the statutes. If it had severed the provisions that are unconstitutional as applied to juveniles it would have invalidated life without parole sentences for adult offenders as well. C.R.S. §2-4-204 does not provides authority to judicially amend (rather than sever) statutory language that is unconstitutional only as applied to certain offenders. As a panel of the Court of Appeals in the unpublished decision of *People v. Tate* (07CA2467, September 13, 2012) held, section 2-4-204 permits the excision of a phrase rendering a statute *facially* unconstitutional; there appears to be "no case…using [Section 2-4-204] to address a statute held unconstitutional as applied." (Slip Op. P 21) The Court of Appeals cites no such authority, either.

The Court of Appeals also ignored the fact that in discerning the pertinent legislative intent it is "the intent of the *enacting* legislative body," i.e., that of the drafting body *at the time of enactment* that is relevant. *Lakewood v. Colfax*

Unlimited Ass'n., 634 P.2d 52 (Colo.1981) ; *See also, e.g., Barber v. Ritter*, 196 P.3d 238,250 (Colo.2008)("There is no indication in the language of the cash funds' enabling legislation that, at the time the enactments at issue were passed and the fees collected, the intent of the legislature was anything other than to use the fees to subsidize the costs of special services."); *United States v. Wise*, 370 U.S. 405,411 (1962)("[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage.").

Here, the 1990 General Assembly specifically eliminated the possibility of parole for those convicted of a class 1 felony after July 1, 1990 and thus they clearly intended a mandatory life without parole sentence for juveniles convicted of class one felonies as adults—nothing less. Even if the intent were, more generally, to impose "the most serious penalty that is constitutionally available," that would weigh against arbitrarily mandating a minimum forty-years-to-life sentence in every case. Under *Mille*r, a proportionate, and thus constitutional sentence can be determined only after the court considers all of the relevant *Miller* factors. *Id.* at 2468. In fact, after *Miller*, it remains possible that a sentence of forty-five years to life would be appropriate and constitutional in a given case, although in another, a determinate thirty-year sentence may be too harsh.

Even if, as the Court of Appeals also contends, it was "the general

assembly's intent to impose the most serious penalty that is constitutionally permissible for such offenders" (*Banks* at ¶128) this does not support the Court's conclusion that a mandatory sentence of life imprisonment with a parole eligibility date after forty calendar years for all individuals who were juveniles at the time they committed a class 1 felony is constitutional after *Miller*. *Miller* specifically held that before imposing the "harshest possible penalty" upon a juvenile, the court must hold an individualized sentencing hearing where mitigating evidence can be introduced. *Miller,* 132 S.Ct. at 2475. Only after such a hearing can the court constitutionally exercise its discretion as to the appropriate sentence for the juvenile. The relief fashioned by the Court of Appeals is neither tailored to the unconstitutionality (since *Mille*r declined to rule on whether LWOP is categorically prohibited for juvenile offenders, although noting it should be "uncommon"), nor does it necessarily cure the unconstitutionality, since it provides no individualized determination that a sentence of imprisonment for forty calendar years to life is appropriate in a given case.

If the intent of the 2006 General Assembly were a relevant factor to consider, it too would weigh against the Court's resolution. That legislative body made clear that it did *not* want those with offenses predating July 1, 2006 to ever be released on parole. *See* §18-1.3-401(4)(b) (the possibility of lifetime parole

after 40 calendar years "shall apply to persons sentenced for offenses committed on or after July 1, 2006."). See *Minto v. Sprague*, 124 P.3d 881, 885 (Colo. App. 2005)

> If a statute is ambiguous, we may consider other matters, including the legislative history of the statute. Section 2–4–203, C.R.S.2004. However, 'c]ourts avoid deducing the intent behind one act of [the legislature] from the implication of a second act passed years later.' *Schrader v. Idaho Dep't of Health & Welfare*, 768 F.2d 1107, 1114 (9th Cir.1985). Moreover, the "interpretation placed upon an existing statute by a subsequent group of [legislators] who are promoting legislation and who are unsuccessful has no persuasive significance." *United States v. Wise*, 370 U.S. 405, 411 (1962).

The Court, after "severing" the first sentence of C.R.S. § 17-22.5-104(d)I), applied C.R.S. §17-22.5-104 c 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. This ignores the fact that both C.R.S. §18-1.3-401(4)(a) and C.R.S. §17-22.5-104(2)(d)(1) both address those convicted of and sentenced to life in prison for a class 1 felony while C.R.S. § 17-22.5-104(2)(c) speaks more generally about persons sentenced to life in prison after 1985. While currently only those convicted of a class 1 felony can be sentenced to a determinate life

sentence in 1985 (as well as in 1990), a life sentence could be imposed for a habitual offender under CRS § 16-13-101-103. Although CRS § 17-22.5-104(2)(c)does not have an end date, that is because those sentenced to life in prison even after 1990 for something other than a class 1 felony (i.e. as a habitual offender) remained eligible for parole after forty years, even after the enactment of CRS § 16-13-101-103. 17-22.5-104(c) and CRS § 16-13-101-103. 18-1.3-401(4)(a). It is for this reason that in CRS § 16-13-101-103,18-1.3-104(4(a) the legislature specified that the provision allowing for parole eligibility after forty years for class 1 felonies applies only to those convicted of class 1 felonies for crime committed between July 1, 1985 and July 1, 1990. The more specific provisions of Section 17-22.5-104(2) (d)(1) as well as the second sentence of CRS 18-1.3-401(4)(a) apply. *Board of County Comm'rs v. Hygiene Fire Protection Dist*., 221 P.3d 1063, 1066 ((Colo. 2009)("Specific provisions control over general provisions.") Moreover, the sentence of life with the possibility of parole after forty years in 18-1.3-401(4)(a) would not apply even if the last sentence of that provision were stricken, because the legislative limitation to acts "committed on or after July 1, 1985, and before July 1, 1990" remains, and CRS § 18-1.3-401(1)(a)(V)(A) also still dictates that the applicable parole period for class one felonies is "none."

Furthermore, CRS § 17-22.5-104(d)(IV) and CRS § 18-1.3-401(b) are by their language only applicable to offenses committed on or after July 1, 2006. [10] Thus in order to apply CRS § 17-22.5-104(c) to Mr. Banks in the manner that it did, the Court must either completely ignore CRS § 18-1.3-40(d)(1) or rewrite CRS § 18-1.3-401(d)(1) 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 of the statute, something that goes well beyond the power of the Court.

"[C]ourts must balance the obligation to construe statutes as constitutional and valid whenever possible against the duty to avoid judicially rewriting statutes in derogation of legislative intent." *Williams v. City and County of Denver*, 607 P.2d at 983. The Court's job is not to amend legislation to comport with what the court believes is the intent of a later legislative body, or to predict what a current legislative body might do. *Tate* correctly discerned the relevant legislative intent: CRS §17-22.5-104(2)(d)(I) specifically applies to those serving life "for a class 1 felony committed on or after July 1, 1990," whereas the more general subsection (2)(c)(applying to those "imprisoned under a life sentence for a crime committed

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

on or after July 1, 1985….") was intended to be limited by (2)(d). *See Board of County Comm'rs v. Hygiene Fire Protection Dist*., 221 P.3d at 1066 ("Specific provisions control over general provisions.") *See United States v. Jackson*, 390 U.S. 570, 580 (1968):

> It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

The Court of Appeals 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.

The theory of "revival" also does not support the Court's solution. This Court in *People v. District Court*, 834 P.2d 181 (Colo.1992) defined statutory revival as follows:

> the doctrine of statutory revival generally operates to reactivate a prior statute which has been replaced by an invalid act:
>
> > [A]n 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.
>
> 1A Norman J. Singer, Sutherland Statutory Construction 23.24, at 396 (4th ed. 1985).

People v. District Court, 834 P.2d at 189. Neither CRS §18-1.3-401(4)(a) nor CRS §17-22.5-104(2)(d)(I) repealed any older statute. To the contrary, the "older statutes" which address parole eligibility for those convicted of class 1 felonies for crimes committed between July 1, 1985 and July 1, 1990, as well as those sentenced to life imprisonment after 1985 for something other than a class 1 felony (i.e. as a habitual offender) remain in effect. Thus the statutes did not "purport to repeal a prior statute by specific provision." Furthermore, "repeal [was not] the sole purpose of the enactment." In fact there was no repeal- the sentences for class 1 felonies prior to 1990 did not change after the enactment of CRS§§ 18-1.3-401(4)(a) or 17-22.5-104(2)(d)(I). The People's arguments with regard to both revival and severability fails to acknowledge the difference between a statute that is facially unconstitutional, i.e. "invalid," and one that is unconstitutional as applied to a particular group of individuals. CRS §§18-1.3-401(4)(a) and 17-22.5-104(2)(d)(I) remain valid as they apply to adult offenders. Because no "prior statute" was repealed and replaced, and because the current statute remains valid for adults, the doctrine of revival is inapplicable.

The People have suggested that "the fair and just result is that all juveniles convicted as adults of class 1 felonies from 1990 to the present receive identical

sentences." This, however, is the precise problem that *Miller* was addressing. See *Riley*, 58 A.3d at 312:

> The problem with mandatory penalties, the court explained, is that the sentencer is precluded "from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Miller v. Alabama,* supra, 132 S.Ct. at 2467–68.

CONCLUSION

For all of the above stated reasons, Mr. Banks requests that this Court reverse the Court of Appeals, vacate his sentence, and remand this matter to the district court for a sentencing hearing that complies with the dictates of *Miller v. Alabama.*

Respectfully submitted this 4th day of September, 2013.

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CERTIFICATE OF MAILING

I certify that on the 4th day of September, 2013 I dispatched, by first-class mail, the foregoing Opening Brief to:

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/s/ Eric A. Samler

APPENDIX:

C.R.S. § 18-1.3-401

(V)(A) As to any person sentenced for a felony committed on or after July 1, 1993, felonies are divided into six classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

Class	Minimum Sentence	Maximum Sentence	Mandatory Period of Parole
1	Life imprisonment	Death	None

IV ...

4(a) A person who has been convicted of a class 1 felony shall be punished by life imprisonment in the department of corrections unless a proceeding held to determine sentence according to the procedure set forth in section 18-1.3-1201, 18-1.3-1302, or 18-1.4-102, results in a verdict that requires imposition of the death penalty, in which event such person shall be sentenced to death. As to any 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.

(b)(I) Notwithstanding the provisions of sub-subparagraph (A) of subparagraph (V) of paragraph (a) of subsection (1) of this section and notwithstanding the provisions of paragraph (a) of this subsection (4), as to a person who is convicted as an adult of a class 1 felony following direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S., or transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S., the district court judge shall sentence the person to a term of life imprisonment with the possibility of parole after serving a period of forty calendar years. 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.

(II) The provisions of this paragraph (b) shall apply to persons sentenced for offenses committed on or after July 1, 2006.

CRS §17-22.5-104. Parole--regulations

(1) Any inmate in the custody of the department may be allowed to go on parole

in accordance with section 17-22.5-403, subject to the provisions and conditions contained in this article and article 2 of this title.

(2)(a) No inmate imprisoned under a life sentence for a crime committed before July 1, 1977, shall be paroled until such inmate has served at least ten calendar years, and no application for parole shall be made or considered during such period of ten years.

(b) 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 such inmate has served at least twenty calendar years, and no application for parole shall be made or considered during such period of twenty years.

(c) 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.

(d)(I) No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. No inmate imprisoned under a life sentence pursuant to section 16-13-101(2), C.R.S., as it existed prior to July 1, 1993, for a crime committed on or after July 1, 1990, 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.

(II) This paragraph (d) shall not apply to any inmate sentenced pursuant to section 18-1.3-801(2), C.R.S., for any crime committed on or after July 1, 1993, and any such inmate shall be eligible for parole in accordance with section 17-22.5-403.

(III) No inmate imprisoned under a life sentence pursuant to section 18-1.3-801(2.5), C.R.S., and no inmate imprisoned under a life sentence pursuant to section 18-1.3-801(1), C.R.S., on and after July 1, 1994, for a crime committed on and after that date, 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.

(IV) Notwithstanding the provisions of subparagraph (I) of this paragraph (d), an inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 2006, who was convicted as an adult following direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S., or transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S., may be eligible for parole after the inmate has served at least forty calendar years. An application for parole shall not be made or considered during the period of forty calendar years.

CRS §17-22.5-404

(a) In considering offenders for parole, the state board of parole shall consider the totality of the circumstances, which include, but need not be limited to, the following factors:

(I) The testimony or written statement from the victim of the crime, or a relative of the victim, or a designee, pursuant to section 17-2-214;

(II) The actuarial risk of reoffense;

(III) The offender's assessed criminogenic need level;

(IV) The offender's program or treatment participation and progress;

(V) The offender's institutional conduct;

(VI) The adequacy of the offender's parole plan;

(VII) Whether the offender while under sentence has threatened or harassed the victim or the victim's family or has caused the victim or the victim's family to be threatened or harassed, either verbally or in writing;

(VIII) Aggravating or mitigating factors from the criminal case;

(IX) The testimony or written statement from a prospective parole

sponsor, employer, or other person who would be available to assist the offender if released on parole;

(X) Whether the offender had previously absconded or escaped or attempted to abscond or escape while on community supervision; and

(XI) Whether the offender completed or worked toward completing a high school diploma, a general equivalency degree, or a college degree during his or her period of incarceration.

(b) The state board of parole shall use the Colorado risk assessment scale that is developed by the division of criminal justice in the department of public safety pursuant to paragraph (a) of subsection (2) of this section in considering inmates for release on parole.

(c)(I) Except as provided in subparagraph (II) of this paragraph (c), the state board of parole shall also use the administrative release guideline instrument developed pursuant to section 17-22.5-107(1) in evaluating an application for parole.