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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

REPLY 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
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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 does not comply with C.A.R. 28(g). It contains 6360 words. An appropriate motion is being filed.

/s/ Eric A. Samler
Eric A. Samler

1401270034 2479 36-1011 9

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Colorado Cases

Colorado Constitution , Statutes and Court Rules

1401270034 2479 36-1011 11

Federal Authority

1401270034 2479 36-1011 12

Other Authority

1401270034 2479 36-1011 13

Out of State Authority

1401270034 2479 36-1011 14

ARGUMENT

I. 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 IMPRISONMENT WITH THE POTENTIAL FOR PAROLE AFTER FORTY YEARS.

A. *MILLER'S* REQUIREMENT FOR INDIVIDUALIZED SENTENCING FOR JUVENILES IS NOT SATISFIED BY ALLOWING THE POSSIBILITY OF PAROLE IN FORTY YEARS.

Despite the recognition by the Supreme Court in *Miller v. Alabama,* ____ U.S. __ ,132 S.Ct. 2455 (2012) and *Graham v. Florida,* 560 U.S. 48 (2010) that youth matters; despite the recognition by the Supreme Court in *Miller* that a sentencing court should not treat the fourteen year old (or in this case, a fifteen year old) precisely the same as the individual two weeks shy of his or her eighteenth birthday; despite the recognition by the Supreme Court that the sentencing court should not treat the first time offender the same as the repeat offender; despite the recognition by the Supreme Court that the sentencing court should not treat the child from a chaotic home the same as the child from the stable home,[1] the Court of Appeals held, and the People argue, that this Court should ignore all that and simply impose life imprisonment sentences upon all

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[1] *Miller*, 132 S.Ct at 2467.

1401270034 2479 36-1011 15

juveniles convicted of first degree murder because those juveniles will be eligible for parole when they are in their mid- to late fifties and therefore based upon statutory mortality tables, they have a fighting chance to beat death in a race to the prison gates. This is contrary to both the underlying rationale of *Miller* and *Graham* and the explicit recognition by the Court in both cases that because "an offender's age ...is relevant to the Eighth Amendment ...criminal procedure laws that fail to take defendant's youthfulness into account at all would be flawed." *Miller*, 132 S.Ct. at 2466, quoting *Graham,* 130 S.Ct. at 2031.

Miller's basic premise is that 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. Courts must consider the undeveloped juvenile brain, as well as mitigating factors such as social and family history, age, criminal history, degree of involvement, culpability, and intoxication before imposing the "most serious penalties" on juvenile offenders. *Miller*, at 2464, 2466, 2469.

The cornerstone of the Court's decision in *Miller* is that because adolescent crime is often the result of the transient hallmark features of youth -- impulsivity,

1401270034 2479 36-1011 16

recklessness, risk-taking, failure to fully appreciate consequences -- and because the vast majority of juvenile offenders are "adolescence-limited offenders, whose antisocial behavior begins and ends during adolescence and early adulthood,"[2] permanent decisions about a juvenile's life should not be made at sentencing.[3] As one commentator noted in interpreting the Court's decision in *Graham*:

> It would be inherently inconsistent to strike down life without parole in the name of juvenile growth and maturation, yet sustain a forty-year sentence, which implicitly suggests that a juvenile serving forty years is barred from growth and maturation.
>
> On this point, it has been noted that '[i]mposing such a punishment on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood . . .

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[2]*State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013), citing 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).

[3]See Transcript of Oral Argument at 41, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Ginsburg, J.), where Justice Ginsburg asked Petitioner Graham's counsel: "[H]ow do you answer the argument that unlike an adult, because of the immaturity, you can't really judge a person--judge a teenager at the point of sentencing? That it's only after a period of time has gone by, and you see: Has this person overcome those youthful disabilities? That's why a proportionality review on the spot doesn't accommodate the--what is the driving force of the--your--the Petitioner's argument is you can't make a judgment until years later to see how that person has -has done."

1401270034 2479 36-1011 17

> Further, If the child's brain is still growing until either twenty or twenty-five . . . subjecting a child to adult punishment, especially life without possibility of parole, is irrational. We do not know who that child will be in five years or ten years. Just as teenagers' bodies change as they mature, so do their brains

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 BU Pub. Int. LJ 35 61 (Fall 2010). In fact the Court in *Graham* explicitly recognized that "[a] sentence lacking any penological justification is by its nature disproportionate to the offense. " *Graham,* 132 S.Ct. at 2028. *See also Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring) ("if there is less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary.")

Although Professor Wallace was addressing the inherent inconsistency in striking down a sentence of life without parole for a juvenile nonhomicide offender yet allowing a lengthy sentence to a term of years, the same inherent inconsistencies exist when the offense is a homicide. After all the Court made abundantly clear in Miller that what it said about juveniles in *Roper v. Simmons,* 543 U.S. 551 (2005), *Graham,* and *Miller* is not crime specific. *Miller,* 132 S.Ct. at 2465.

1401270034 2479 36-1011 18

The People seize upon the following language in *Miller* to support their argument that the *Miller* rule merely prohibits mandatory life without parole sentences on a juvenile, and that so long as the sentence is something other than mandatory life without parole it passes constitutional muster:

> Our decision does not categorically bar a penalty for a class of offenders or type of a crime– as for example we did in *Roper* or *Graham*. Instead it mandates only that a sentence follow a certain process – considering an offender's youth and attendant characteristics -- before imposing a particular penalty.

Miller, 132 S.Ct. at 2471, citing *Roper, supra* and *Graham, supra*. However, this language must be put in context. The Court was addressing the government's argument that "because many states impose mandatory life without parole sentences on juveniles, [the court] may not hold the practice unconstitutional." *Id.,* at 2470. The court went on to explain that "[i]n considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether objective indicia of society's standards, as expressed in legislative enactments and state practices, show a national consensus against a sentence for a particular class of offenders." *Id., citing Graham*, 130 S.Ct. at 2022. Therefore the language stating that the decision does not "categorically bar a penalty," was distinguishing the *Miller* issue from the issue in those cases where the court tallied legislative enactments to determine whether a punishment is cruel and unusual. *Id.,* at 2471.

1401270034 2479 36-1011 19

For this reason, the language quoted above does not necessarily support the general position that the court intended the *Miller* rule (the right to an individualized sentencing hearing) to be inextricably tied to one particular sentence -- life imprisonment without parole.

Chief Justice Roberts, dissenting in *Miller,* recognized that the Court went well beyond its holding in *Woodson v. N. Carolina,* 428 U.S. 280 (1976) that "individualizing sentencing determinations . . . [is] simply enlightened policy rather than a constitutional imperative," and now believes that individualized sentencing is a constitutional imperative at least for juveniles:

> *Roper* and *Graham* attempted to limit their reasoning to the circumstances they addressed — *Roper* to the death penalty, and *Graham* to nonhomicide crimes. Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try. After all, the Court tells us, 'none of what [*Graham*] said about children ... is crime-specific.' *Ante,* at 2465. The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. See *ante,* at 2467 – 2469. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive

Miller, 132 S.Ct. at 2481 (2012)(Roberts, C.J., dissenting).

Although clearly from the tone employed, the Chief Justice disagrees with the Court's reasoning, nevertheless he accurately assesses the inevitable result of the *Miller* decision. See also William Wray, Jr., Why Logic, Experience, and

1401270034 2479 36-1011 20

Precedent Compel the Demise of Mandatory Sentencing Statutes, 18 Roger Williams U. L. Rev. 139, 159-60 (Spring 2013):

> Categorical challenges to a given punishment require that the defendant seeking relief provide evidence of national consensus (legislative enactments and state practice) regarding the sentencing practice. Given that a majority of United States jurisdictions made a life without parole sentence mandatory for juveniles who committed homicide, it seemed unlikely that any national consensus against that sentencing practice could be found. But Justice Kagan, writing for the majority, shouldered aside the requirement for national consensus against a given sentencing practice by recasting the petitioners' challenge as one to the process of meting out the penalty. The decision cites several cases for support that there is such a thing as a process-based challenge under the Eighth Amendment, but each one of those cases was decided in the context of the death penalty. *Miller* casually extends this process-based challenge to youths, ensuring that '[t]here is no clear reason that [this] principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive.' Indeed, there is no clear reason that this principle would not bar all mandatory sentences for any defendants who exhibit some characteristic that uniformly mitigates their culpability for a crime (e.g., mentally deficient defendants) or those who did not pull the trigger in a felony-murder. By holding that in process-based challenges, 'we have not scrutinized or relied in the same way on legislative enactments,' the *Miller* court cast loose the Court's Eighth Amendment jurisprudence from the strictures of national consensus.

Id., at 159-60.[4]

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[4]Although at the time *Miller* was decided a majority of states allowed for a sentence of life without parole for juvenile offenders, the United States was one of only two countries in the world (the other being Somalia) that had not ratified the Convention on the Rights of the Child that explicitly prohibits the imposition of such sentences. See Wallace, *supra* n.2.

1401270034 2479 36-1011 21

While it is true that the Court in *Miller* equated a life without parole sentence with a death penalty sentence, ultimately the Court's conclusion that the imposition of such a mandatory sentence was unconsitutional was not based upon the holding that the imposition of a life without parole sentence on a juvenile, like the execution of an individual because of a crime he committed while a juvenile, was cruel and unusual, but rather was based upon the recognition that because a juvenile has an enormous potential for growth and maturity, and because of the potential "disabilities" of youth, it is cruel and unusual to not provide an individualized sentence hearing where these factors can be explored before meting out punishment because the failure to do so raises the very real possibility that the sentence imposed upon the juvenile will be disproportionate not to the crime committed but to the culpability of the offender. This very real possibiltiy remains regardless of whether the sentence imposed is life without parole or life with the possibility of parole after forty years.

There is a disitnction that must be drawn between, for example, a mandatory five-year sentence and a mandatory sentence of life with possible parole after forty years. While every mandatory sentence may not violate *Miller*, a mandatory forty year sentence does. It is in complete contradiction to *Miller's* rejection of "one

1401270034 2479 36-1011 22

size fits all" for juveniles convicted of homicide. The imposition of a mandatory forty years to life sentence prevents the sentencer from fulfilling his or her constitutional obligation under *Miller* to consider individual mitigating circumstances. It may be that some juveniles will be sentenced to life with the possibility of parole after forty years or even life imprisonment, but *Miller* requires a sentencing hearing with consideration of specific factors before those sentences can be imposed.

Thus a mandatory five-year sentence, for example, may not violate *Miller*, because it provides for a meaningful opportunity for release. A sentence that requires a juvenile to serve forty calendar years before becoming eligible for parole consideration does not.

While the People may argue that possible release after forty years when a defendant is in his mid- to late fifties provides a meaningful opportunity for release, recent research indicates otherwise. Researchers recently analyzed data requested and obtained from the Colorado Department of Corrections for deaths in custody between 2008-2012.[5] The data indicates that Colorado prisoners' life

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[5]Stacie Nelson Colling, Esq. and Adele Cummings, Ph.d, There Is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables n Post Graham Sentences, http://cjdc.org/wp/wp-content/uploads/2014/01/Life-Expectancy-Article_Colling-and-Cummings1.pdf.

1401270034 2479 36-1011 23

expectancy is in the low 50's, calling into question the applicability of the statutory mortality tables found in C.R.S. § 13-25-103 or the tables published by the Center for Disease Control (CDC)[6] as both appear to significantly over-estimate the life expectancy of prisoners. This is in line with the United States Sentencing Commission that defines a "life sentence" as 470 months (or just over 39 years), based on average life expectancy of those serving federal prison sentences. See, e.g., *United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. Ill. 2007); U.S. Sentencing Commission Preliminary Quarterly Data Report (through Sept. 30, 2012) at A-8, http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_4th_Quarter_Report.pdf.

What this data indicates is that a sentence of life with the possibility of parole after forty years is a *de facto* life sentence. See *People v. Ranier*, 2013 COA 51 (April 11, 2013)(holding unconstitutional as a *de facto* life sentence without parole when the parole eligibility date fell outside the defendant's life expectancy.) At the very least this Court should remand for an evidentiary hearing to determine whether, due to the decreased life expectancy of those serving lengthy sentences in the Colorado Department of Corrections, a sentence that

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[6]http://www.cdc.gov/nchs/fastats/lifexpec.htm.

1401270034 2479 36-1011 24

establishes the first parole eligibility date as forty calendar years is a *de facto* life sentence without parole.

B. ALLOWING DISCRETIONARY PAROLE AFTER THE EXPIRATION OF FORTY CALENDAR YEARS DOES NOT SATISFY THE REQUIREMENT IN *GRAHAM v. FLORIDA* OF A MEANINGFUL OPPORTUNITY TO RELEASE BASED ON DEMONSTRATED MATURITY AND REHABILITATION.

The Court, rather than "[tying] its holding to a requirement that states make ... juvenile offenDers, eligible for parole ... instead employed the phrase 'meaningful opportunity for release.'" Sara French Russell, *Review for Release : Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 415 (Winter, 2014). This is based upon a realization that parole practices vary greatly from state to state and that "a state's existing parole system will comply with the Eighth Amendment only if it actually uses a meaningful process for considering release." *Ibid.*

This notion of "procedural rights [flowing] from, the Eight Amendment " is not new. *Russell, supra. See Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson. supra*. As Professor Russell noted, "Although scholars have described *Woodson* and *Lockett* as requiring "super due process" in the capital context, the cases invoke the Eighth Amendment rather than procedural due process analysis as the basis for the holdings." *Id.*, at 416. See also Richard A. Bierschbach & Stephanos

1401270034 2479 36-1011 25

Bibas, Constitutionally Tailoring Punishment, 112 Mich. L. Rev. 398 (2013), and Richard A. Bierschbach, Proportionality and Parole, 160 U. Pa. L. Rev. 1745 (2012). Thus the absence of a meaningful review process for release would violate the Eighth Amendment. Even if the Court were to view *Graham* and *Miller* as extending procedural due process protections under the Fourteenth Amendment to parole hearings for juvenile offenders rather than the Eighth Amendment, it would still follow that the Court in *Graham* created a liberty interest in release for juvenile offenders. See *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 7-8 (1979), which states that minimal due process protections do not apply to parole hearings absent a state statute creating a liberty interest in release.

While *Miller* does not go so far as to guarantee release, it does require that the state must "provide some meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Miller,* at 2469, quoting *Graham*, at 2030. The choice of the term "meaningful oportunuity" is telling as that phrase is common in procedural due process cases. *See Boddie v. Connecticut,* 401 U.S. 371, 377 (1971)(due process requires "a menaningful opportunity to be heard"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (United States citizen denominated as an "enemy combatant" must be provided a "meaningful opportunity" to

1401270034 2479 36-1011 26

challenge the conditions of his confinement); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (due process requires that a defendant have "a meaningful opportunity to present a complete defense") (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

Unless the Colorado parole process provides the juvenile offender with the full panoply of due process protections, it does not satisfy *Miller* or *Graham*. Thus one of the questions this Court must answer is whether mere parole eligibility, when the underlying sentence if still a life sentence, can be characterized as a "meaningful opportunity for release." Established case law indicates parole is a "privilege." The *possibility* of parole provides no more than a mere hope that the benefit will be obtained. There is no right to due process and the decision of the Board to grant or deny parole is not subject to judicial review. See *White v. People*, 866 P.2d 1371, 1373 (Colo. 1994) ("The parole decision is 'subtle and dependent on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Parole Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release."); *In re Question Concerning State Judicial Review of Parole Denial Certified by U. S. Court of Appeals for Tenth Circuit*, 199 Colo. 463, 610 P.2d 1340, 1341(1980) ("The decision of the Board to grant or deny

1401270034 2479 36-1011 27

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.") Thus the Colorado parole process does not satisfy the due process requirements set forth in *Graham* and *Miller* and thus simply tackng on to the sentence the phrase, "with the possibility of parole after forty years," does not convert the sentence to a constitutional one.

By setting an initial parole eligibility date some forty years down the line, the program opportunities available to the juvenile including education, job training, counseling are limited as those resources are usually reserved for those with upcoming parole eligibility dates. If in fact the Court wishes to treat the opportunity for parole as being the equivalent to a "meaningful opportunity for release" then there must be put in place a system which accounts for the rapid psychological and emotional changes and maturation experience by a youth in his early twenties. One such model would be built in sentencing reviews every ten years and the requirement that rehabilitative programs be provided from the outset. See Wallace, *supra*, noting that "these reviews would provide a meaningful opportunity for release in a time frame that does not deprive the juvenile of hope, a significant factor in the *Graham* Court's opinion." Failure to put something in

1401270034 2479 36-1011 28

place, and simply setting a parole hearing for some time when the offender is in his fifties does not accomplish the underlying goal of *Miller* or *Graham*.

Sally Terry Green, in Realistic Opportunity for Release Equals Rehabilitation? How the States Must Provide Meaningful Opportunity for Release, 16 Berkeley J. Crim. L. 1, 12-13 (2011) addresses the need for changes in various states parole systems (or the reinstatement of those systems) after the Court's decision in *Graham*:

> In *Graham*, the Supreme Court ruled that the Eighth Amendment prohibits the sentence of life without the possibility of parole for juvenile non-homicide offenders. The logical inference is that the alternative sentence of life **with** the possibility of parole is constitutional for such offenders. The possibility of parole, however, is not a guarantee that the juvenile offender will eventually be released. Thus, the sentence of life with the possibility of parole for juvenile offenders violates the Eighth Amendment **unless** the States provide a 'meaningful opportunity for release.' The question then is whether the traditional parole model in which a board administratively releases inmates from prison can adequately determine the release of juvenile life sentence offenders.

Professor Sarah French Russell, in a just-published law review article, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373 (Winter 2014), surveyed every parole board n the country in collecting data. According to the survey completed by the Colorado

1401270034 2479 36-1011 29

Parole Board, attorney input is not considered,[7] an attorney cannot present mental health expert testimony or other witness testimony, nor can he or she present a written mental health report. *Id.* at p. 434 (appendix). The board does, however, consider input from the prosecutor both in writing and in person, as well as input from the victim. *Ibid.*

Professor Green continues on to say that:

> It would be incongruent to constitutionally prohibit the sentence of life without parole for juvenile offenders because of their diminished culpability, and then not require the States to consider the underlying basis for such culpability when imposing the sentence. The States must give credence to the Court's conclusions by providing juveniles with sufficient opportunity for personal development. Otherwise, the opportunity for personal growth will effectively become a non-opportunity as incarcerated juveniles learn to become seasoned criminals while subjected to the highly criminogenic adult prison culture. If the States fail to adequately counter this likelihood, an incarcerated juvenile will effectively serve a life sentence 'without parole.' ...The Court in *Graham* intentionally empowered the States to implement procedures for compliance with the 'meaningful opportunity for release' standard. It also empowered the States to formulate appropriate and effective rehabilitative techniques.

Just recently, Judge Corbett O'Meara of the United States District Court for the Eastern District of Michigan, in *Hill v. Snyder,* Case 10-4568 (Appendix), entered an order directing the Michigan Department of Corrections to, among

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[7]Colorado is one of six states where the parole board does not consider attorney input while thirty-one parole boards do so. Russell, *supra*, at 402 n.188.

1401270034 2479 36-1011 30

other things, schedule parole hearings for all prisoners sentenced to life without parole for crimes committed while juveniles who have served ten years or more; that their eligibility for parole must be "considered in a meaningful and realistic manner," all hearings must be public; the parole board must issue and explain its decision, there will be no veto power of the decision, and that "no prisoner sentenced to life imprisonment without parole for a crime committed as a juvenile will be deprived of any educational or training program which is otherwise available to the general prison population." What Judge O'Meara implicitly recognized in his Order is that the possibility of parole can satisfy the constitutional requirement that the juvenile offender be given a meaningful opportunity for release only if the offender be given a realistic opportunity to demonstrate maturity, growth and rehabilitation, if parole hearings are meaningful hearings, and only if the hearings occur not forty years down the road but rather within a reasonable amount of time after the juvenile reaches adulthood. Only then can a judgment be made as to whether the child's criminal behavior was a result of the transient characteristics of youth and the offender has grown and matured and is now ready to take his or her place as a contributing member of society. See Russell, *supra*, at 408 (footnotes omitted):

1401270034 2479 36-1011 31

> Although some might assert that providing the chance for release after forty years' imprisonment fulfills *Graham*'s mandate, the better view is that a 'meaningful opportunity' for release means that review should come at a point in time that provides the prisoner with the chance to live a meaningful life outside of prison. Thus, *Graham* should not be understood to mean simply that a prisoner must have a chance to be released shortly prior to his expected date of death. Rather, for the chance of release to be meaningful, review must occur at a point in time that will give a prisoner a sense of hope about the future and that reflects society's hope that the prisoner can rejoin society in a meaningful way. A young prisoner contemplating spending at least thirty to forty years in prison -- a much longer span of time than he or she has lived outside of prison -- will almost certainly experience a profound sense of hopelessness. Such a sentence means being incarcerated past the typical childbearing age, past the timeframe in which one could start a meaningful career, and past the age in which one could expect parents or other former caregivers to still be alive. In contrast, providing a juvenile with hope that he or she may someday lead a meaningful life outside of prison will encourage efforts at rehabilitation.

This Court should hold that a mandatory sentence of life with possible parole after forty calendar years, in light of both the length of time a juvenile offender must serve before being eligible for parole, and because the parole process does not satisfy the proecedural requirements envisioned by *Graham* and *Miller*, is unconstitutional.

1401270034 2479 36-1011 32

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.

The People rely on *People v. Johnson*, 13 P.3d 309, 313-15 (Colo. 2000) for the proposition 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." *Id.*, at 313. The People then conclude that because in other cases the sentence and the mandatory parole portion are separate, therefore this court can somehow sever the "no parole portion" of the sentence, and add a parole portion from other statutory provisions. Not only does this go well beyond the mere severance of a portion of a statue and ultimately result in the rewriting of the statute, it is based on a misreading of *Johnson*, in which this Court held that

> the term 'offender's sentence' in section 17-27-105(1)(e) refers to the period of confinement, imprisonment, or term of custody over which a court may exercise discretion when imposing a sentence, exclusive of any reference to mandatory parole.

Johnson, 13 P.3d at 314. The sentence imposed upon Mr. Banks was Life Imprisonment. The sentence remains "Life Imprisonment" regardless of whether

1401270034 247

there is or there is not parole eligibility. In other words, even if there is the eligibility for parole after forty years, the court has still imposed a life sentence.[8]

Johnson was concerned only with whether the additional time a defendant must spend on parole is included in determining the length of the sentence. The court concluded it was not and the sentence imposed was six years of confinement to DOC. The sentence imposed here was life confinement to DOC. If the offense was committed after July 1, 2006, the period of parole is life (CRS § 18-1.3-401(4)(b) provides that "regardless of whether the state board of parole releases the person on parole, the person shall remain in the legal custody of the department of corrections for the remainder of the person's life and shall not be discharged.") If the crime is committed prior to July 1993, the period of parole is up to the parole board. C.R.S. § 17-22.5-403(5). *Johnson* is not concerned with parole elgibility but with the length of parole and whether the length of parole impacts the length of the sentence. It does not.

The People claim that it is not "the mandatory nature of the sentence to life imprisonment" that violates the Eighth Amendment but the absence of a parole

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[8]Moreover, the Court in *Johnson* was distinguishing between the period of confinement porition of the sentence, over which the court had discretion, and the parole portion, which was mandatory. Here, the period of confinement portion, which equals "the sentence" is not discretionary -- it is mandatory.

1401270034 2479 36-1011 34

provision that makes the mandatory life sentence unconstitutional. With or without a parole provision, the sentence is still a mandatory life sentence. Adding a cookie-cutter parole provision to all mandatory life sentences for juvenile offenders does not satisfy the Eighth Amendment requirement of proportionality.

Mr. Banks does not dispute the People's assertion that after *Miller* "a judge or jury could **choose** ... a lifetime prison term with the possibility of parole or a lengthy term of years." In fact, he endorses that claim. However, what the People ignore is that the Court specifically stated that what makes these options constitutionally viable is the fact that the judge or jury could choose to do so. Clearly this indicates that the judge or jury has discretion and therefore has a choice of sentences. The sentence cannot be not mandatory.

As the Iowa Supreme Court recently noted:

> Finally, it is clear that the Eighth Amendment is designed to curb legislative excesses. Its very function is, at the margins, to prevent the majoritarian branches of government from overreaching and enacting overly harsh punishments. As the Court noted in *Trop [v. Dulles*, 356 U.S. 86 (1958)], 'We cannot push back the limits of the Constitution merely to accommodate challenged legislation.' 356 U.S. at 104, If the Eighth Amendment was not judicially enforceable, it would amount to ' 'little more than good advice.' ' *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring) (quoting *Trop*, 356 U.S. at 104). As noted by Justice Powell, '[O]ur system of justice always has recognized that appellate courts *do* have a responsibility—expressed in the proportionality

1401270034 2479 36-1011 35

> principle—not to shut their eyes to grossly disproportionate sentences that are manifestly unjust.' *Hutto v. Davis*, 454 U.S. 370, 377 (1982) (Powell, J., concurring). While the power of judicial review does not mean that we should blue pencil every sentence, we do have a constitutional obligation to ensure sentences remain within constitutional boundaries. In engaging in the determination of whether a sentence is cruel or unusual, the United States Supreme Court has recognized that, at the end of the day, a court must exercise its independent judgment. *Graham*, 560 U.S. at __, __, 130 S. Ct. at 2022; *Kennedy* [*v. Louisiana*, 554 U.S. 407, 421 (2008)]; *Roper*, 543 U.S. at 564.

Null, 836 at 58. Thus the fact that there exists somewhere in the stautory schemes a mandatory sentence of life with the possibility of parole after forty years for certain offenders (those who committed their crimes between 1985 and 1990 and juveniles who committed their crime after July 1, 2006), does not mean that this Court should refrain from scrutinizing the constitutionality of that scheme.

The People make the same severance argument that they made to the Court of Appeals in *People v. Tate*, 07CA2467 (Sept. 13, 2012)(unpublished). In *Tate*, the Court of Appeals characterized the argument as follows:

> Because sections 18-1.3-401(1)(a)(V)(A) and (4)(a) contain no severability clauses, the Attorney General relies on Colorado's general severability statute, which provides: 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

1401270034 2479 36-1011 36

> 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. Section 2-4-204, C.R.S. 2011.

Id., pp. 20-21. In rejecting this argument, the Court of Appeals in *Tate* stated: "However, the Attorney General cites no case, nor have we found one, using this statute to address a statute held unconstitutional as applied." *Id.*, p. 21. Despite a myriad of opportunities to do so, the People have yet to cite any such case.

In fact, rather than responding to Mr. Banks' detailed analysis of why the Court's attempt to pick and choose different provisions of C.R.S. §§ 18-1.3-401 and 17-22.5-104 and meld them together to come up with a sentence of life with the possibility of parole after forty years is not viable, the People simply repeat their argument that the Court should construct a new statute by looking solely to C.R.S. § 17-22.5-104(2)(c) and apply that to Mr. Banks (and presumably all similarly situated individuals) and simply ignore the fact that the second sentence of C.R.S. § 18-1.3-401 (4)(a) specifically limits the applicability of C.R.S. § 17-22.5-104(2)(c) to crimes committed during a particular five year period- 1985-1990. They simply fail to explain, as did the Court of Appeals, why the temporal limitation set forth in the second sentence of C.R.S. § 18-1.3-401(4)(a) can simply be ignored.

1401270034 2479 36-1011 37

The People argue that the cases cited by Mr. Banks in his opening brief where the court remanded for resentencing are inapplicable because in those cases the defendant was sentenced to mandatory life without parole. What this ignores, of course, is that this is precisely the sentence to which Mr. Banks was sentenced. In Pennsylvania after *Miller,* the legislature enacted new legislation where life without parole was not mandatory but permissible: if the offender was under fifteen years old, the potential penalty for murder was either LWOP or a minimm of 25 to life; if the offender was 15 but less than 18 the potential sentences were LWOP or a minimm of 35 years to life. The statute, however, specifically applied to crimes committed after *Miller* was decided and thus did not apply to the defedants in either *Commonwealth v Knox,* 50 A.3d 749 (Pa. Super. Ct. 2012) or *Commonwealth v Batts*, 66 A.3d 286 (PA. 2013). It is Mr. Banks' position that the sentence constructed by the Court of Appeals is not applicable to Mr. Banks because the statutes setting forth that particular sentence, by their very language, apply only to crimes committed after July 1, 2006 and between July 1, 1985 and July 1, 1990 and that neither of these time periods are applicable to Mr. Banks. Thus contrary to the People's contention, the Pennsylvania cases are directly on point. The other cases cited (*Daugherty v. State*, 96 So. 3d 1076 (Fla. Dist. Ct. App. 4th 2013) and *Washington v. State*, 103 So. 3d 917 (Fla. Dist. Ct. App. 1st

1401270034 2479 36-1

2012)) involve the imposition of the same sentence received by Mr. Banks, life without parole, and because no other sentence was statutorily applicable, as well as for other reasons, a remand for an individualized sentencing hearing was required under *Miller*. The same rationale applies here: there is no statutorily applicable statute, and thus under *Miller*, Mr. Banks is entitled to an individualized sentencing hearing.

Mr. Banks recognizes that some courts have held that *Miller* or *Grahan* does not apply to sentences of terms of years, but he argues that the rationale relied upon by those Courts ignore the underlying rationale of the Court in *Miller* and *Graham*. As the Iowa Supreme Court recognized in *Null, supra*:

> We conclude that *Miller's* principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*. We recognize that some courts have viewed *Miller* more narrowly, holding that it applies only to mandatory sentences of life without parole. See, e.g., *People v. Sanchez*, No. B230260, 2013 WL 3209690, at *6 (Cal.Ct.App. June 25, 2013) (unpublished opinion) (holding Miller does not apply to a mandatory minimum prison term of fifty years, which stemmed from a homicide conviction); *People v. Perez*, 214 Cal.App.4th 49, 154 Cal.Rptr.3d 114, 120 (2013) (holding Miller does not apply to a mandatory thirty-year minimum sentence for rape and committing a forcible lewd act); *James v. United States*, 59 A.3d 1233, 1236-38 (D.C.2013) (holding Miller does not apply to a thirty-year-to-

1401270034 2479 36-1011 39

> life sentence for first-degree murder); *People v. Richards*, No. 4-11-1051, 2012 WL 7037330, at *5 (Ill.App.Ct. Nov. 26, 2012) (unpublished opinion). We think these cases seek to avoid the basic thrust of *Roper*, *Graham*, and *Miller* by refusing to recognize the underlying rationale of the Supreme Court is not crime specific. See *Miller*, 567 U.S. at __, 132 S.Ct. at 2465.

Null, 836 N.W.2d at 72-73.

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*. In the alternative, Mr. Banks requests that this Court remand this matter to the district court to hold an evidentiary hearing to determine whether a sentence of life with the possibility of parole after forty years is a *de facto* life without parole sentence based upon the actual life expectancy of Mr. Banks and those similarly situated.

1401270034 2479 36-1011 40

Respectfully submitted this 27th day of January, 2014.

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CERTIFICATE OF MAILING

I certify that on the 27th day of January, 2014 I served the foregoing Reply Brief via ICCES to:

Appellate Division
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1300 Broadway 10th floor
Denver, Co 80203

/s/Eric A. Samler

1401270034 2479 36-1011 41

APPENDIX

1401270034 2479 36-1011 42

1401270034 2479 35-1011 43

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY HILL, *et al.*,

Plaintiffs,

v.

RICK SNYDER, *et al.*,

Defendants.
_____/

Case No. 10-14568

Hon. John Corbett O'Meara

ORDER REQUIRING IMMEDIATE COMPLIANCE WITH *MILLER*

Graham and Miller together declared that convicts sentenced to life imprisonment without parole for crimes committed as juveniles violated the Eighth Amendment by imposing cruel and unusual punishment. This Order addresses and corrects such sentences in a manner consistent with the Opinions in those cases. To date, the defendants have not understood these decisions to require the effective actions described below.

The defendants will, by the end of the day, December 31, 2013:

1. Create an administrative structure for the purpose of processing and determining the appropriateness of paroles for prisoners sentenced to life without parole for crimes committed as juveniles.
2. Give notice to all such persons who have completed 10 years of imprisonment that their eligibility for parole will be considered in a meaningful and realistic manner.

3. Schedule, on a fair and reasonable basis, proceedings including a public hearing for each of the eligible prisoners making application for consideration.

4. Put in place a process for preliminary determination of appropriateness of submission of each eligible prisoner's application for parole to the entire Parole Board.

5. The proceedings, from an initial determination of eligibility will be fair, meaningful, and realistic.

6. The Parole Board will, in each case, issue its decision and explain its decision determining the appropriateness vel non of parole. It will not issue a "no interest" Order or anything materially like a "no interest" Order.

7. There will be no vetoes by the sentencing Judge or anyone else.

8. As of the date this process begins, no prisoner sentenced to life imprisonment without parole for a crime committed as a juvenile will be deprived of any educational or training program which is otherwise available to the general prison population.

On or before January 31, 2014, defendants will submit to this court a program and process compliant with the specifics ordered above. Failure to do so and/or failure to explain to the court any shortfall in defendants' compliance in some manner satisfactory to the court may result, inter alia, in the appointment and empowerment of a Special Master to make available to prisoners sentenced to life without parole for juvenile crimes the process this Order envisions.

1401270034 2479 36-1011 45

SO ORDERED.

s/John Corbett O'Meara
United States District Judge

Date: November 26, 2013

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, November 26, 2013, using the ECF system and/or ordinary mail.

s/William Barkholz
Case Manager

1401270034 2479 36-1011 46