A16-553

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Mahdi Hassan Ali,

Appellant.

APPELLANT'S SENTENCING BRIEF

LORI SWANSON
Attorney General
State of Minnesota
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

MICHAEL O. FREEMAN
Hennepin County Attorney
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487-0501

ATTORNEYS FOR RESPONDENT

OFFICE OF THE MINNESOTA APPELLATE PUBLIC DEFENDER

LESLIE J. ROSENBERG
Assistant State Public Defender
License No. 0206118
540 Fairview Avenue North
Suite 300
St. Paul, MN 55104
Telephone: (651) 201-6700

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATE STATUTES

STATE CASES

FOREIGN JURISDICTIONS

FEDERAL CASES

MISCELLANEOUS

A16-553

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Mahdi Hassan Ali,

Appellant.

PROCEDURAL HISTORY

1. January 6, 2010: Three persons killed in a robbery in Hennepin County.
2. February 4, 2010: Appellant indicted in Hennepin County District Court and charged with three counts of murder in the first degree pursuant to Minn. Stat. § 609.185(a)(1) (premeditated murder), and three counts of murder in the first degree pursuant to Minn. Stat. § 609.185(a)(3) (murder committed during the course of a felony).
3. September 13, 2010: Following an evidentiary hearing, district court ruled that appellant was at least sixteen years old on the date of the offense.
4. September 6 – 23, 2011: Jury trial held, Judge Peter A. Cahill presiding. Appellant was found guilty on all counts.
5. October 31, 2011: Appellant was sentenced on one count of first degree premeditated murder to life without possibility of release, and on two counts of

first degree felony murder to two sentences of life with possibility of release after 30 years, all sentences to run consecutively.

6. January 31, 2012: Notice of appeal was filed in Minnesota Supreme Court.
7. October 8, 2014: Minnesota Supreme Court filed opinion affirming conviction but vacating life without possibility of release sentence on Count III and remanding proceeding to district court for re-sentencing on Count III.
8. September 16, 2015: Hearing was held in district court on remand.
9. January 6, 2016: Appellant was resentenced to a third life sentence with possibility of release after 30 years to run consecutively to the other two sentences of life with possibility of release after 30 years, all sentences to run consecutively.
10. April 5, 2016: Notice of sentencing appeal was filed in Minnesota Supreme Court, and transcripts ordered.
11. April 11, 2016: Minnesota Supreme Court filed order granting appellant an extension to file its brief on or before sixty days after the transcript is delivered.
12. May 19, 2016: Transcript received.

STATEMENT OF THE CASE

On appeal from the direct judgment of conviction, the Minnesota Supreme Court vacated the life without possibility of release sentence because it is unconstitutional under the United States Supreme Court's decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2015). The proceeding was remanded to the district court for re-sentencing. Upon remand, the district court substituted a third life with possibility of release sentence to run consecutively to the already-imposed two life with possibility of release sentences, thus requiring appellant to be incarcerated for 90 years before any possibility of release by a parole board. This sentencing appeal followed.

LEGAL ISSUES

I.

For juveniles, a mandatory natural life sentence violates the Eighth Amendment because all juveniles must have a possibility of release, absent proof of permanent incorrigibility. No crime-specific or multiple victim exception should abrogate this requirement. Therefore, because appellant's consecutive sentences deny him any possibility of release until at least age 110, is his aggregate sentence the functional equivalent of natural life, unconstitutionally imposed absent proof of permanent incorrigibility?

The district court ruled in the negative.
Miller v. Alabama, 132 S.Ct. 2455 (2015)
Montgomery v. Louisiana, 136 S.Ct. 718 (2016)
McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016)
State v. Raglund, 836 N.W.2d 107 (Iowa 2013)

II.

The district court did not hold a *Miller* hearing to determine if appellant was permanently incorrigible. Instead, the court exercised its discretion only to consider whether retribution for multiple victims justified consecutive life sentences. Because the crime-specific factors governing consecutive sentencing differ from the factors under *Miller* concerning whether a juvenile is permanently incorrigible, did the court's exercise of discretion to sentence consecutively fail to apply the proper legal standard and fail to consider the proper factors and evidence?

The district court ruled in the negative.
Montgomery v. Louisiana, 136 S.Ct. 718 (2016)
McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016)
State v. Sweet, 879 N.W.2d 811 (Iowa 2016)
People v. Chavez, 175 Cal. Rptr. 3d 334 (Cal. Ct. App. 2014)

III.

Under the constitutional guarantee of equal protection, any disparate treatment of a similarly situated class of individuals must be supported by a rational basis. Appellant is similarly situated to juveniles identified under *Miller* who must be provided a realistic opportunity for release, absent proof of permanent incorrigibility. However, without any determination that he was permanently incorrigible, the district court imposed on appellant three consecutive life sentences based on retribution for multiple victims. *Miller* makes clear that no rational basis exists to penologically justify a life sentence for a juvenile based on retribution for crime-specific factors. Therefore, was appellant denied equal protection of the law because, based on a crime-specific factor of multiple victims instead of the proper standard of permanent incorrigibility, he was not provided a realistic opportunity for release?

The district court was not asked to rule.
State v. Russell, 477 N.W.2d 886 (Minn. 1991)
Reed v. Albaaj, 723 N.W.2d 50 (Minn. Ct. App. 2006)
State v. Richmond, 730 N.W.2d 62 (Minn. Ct. App. 2007)
R.B. v. C.S., 536 N.W.2d 634 (Minn. Ct. App. 1995)

IV.

Alternatively, if this Court agrees with the district court that any exercise of discretion would support an aggregate sentence, even if it is the functional equivalent of natural life, did the district court abuse its discretion in sentencing appellant to three consecutive life sentences without properly taking into account appellant's youth and its attendant characteristics?

The district court ruled in the negative.
State v. Sanchez-Diaz, 683 N.W.2d 824 (Minn. 2004)
State v. McLaughlin, 725 N.W.2d 703 (Minn. 2007)
State v. Brom, 463 N.W.2d 758 (Minn. 1990)
State v. Ouk, 516 N.W.2d 180 (Minn. 1994)

STATEMENT OF FACTS

This proceeding is a sentencing appeal following a remand by the Minnesota Supreme Court after vacating the mandatory life without possibility of release consecutive sentence imposed on appellant under Minn. Stat. § 609.185(a)(1) and Minn. Stat. § 609.106, Subd. 2(1) ("heinous crimes" statute).[1] The mandatory life without possibility of release ("LWOP") sentence was held unconstitutional for a juvenile who committed an offense before the age of 18. *See Miller v. Alabama*, 132 S.Ct. 2455, 2460 (2012).

Following remand, the parties litigated several issues including the following: whether three consecutive life sentences allowing no possibility of release until 90 years have been served was the functional equivalent of an LWOP sentence; and, whether a *Miller* hearing could be held without violating the separation of powers. *See* Court File, Defense Memorandum filed January 15, 2016. The defense made the following objections: three consecutive life sentences is the functional equivalent of a natural life sentence; the district court did not exercise proper discretion in imposing consecutive sentences; appellant should have had an individualized hearing but the separation of powers doctrine would be violated by holding a *Miller* hearing. Def. Memo at 2 – 11.

The defense requested re-sentencing of appellant to three consecutive concurrent life sentences. In its reply, the state argued that appellant should be re-sentenced to a third consecutive sentence of life with the possibility of release. *See* Court File, State

[1] A full statement of the facts from the trial may be found in the parties' briefs to this Court in the direct appeal from the judgment of conviction.

Memorandum filed July 6, 2016. The district court denied the appellant's motion to be sentenced concurrently, and held that the motion challenging the jurisdiction to hold a *Miller* hearing was moot. In its decision, the court stated that *Miller* did not apply to aggregate sentences that were the functional equivalent of natural life because in *Miller* "the United States Supreme Court never addressed the 'functional equivalent of LWOR' of certain life sentences." *See* Court File, Order filed November 6, 2015 at 4. Further the court found that based on this Court's decision in *State v. Ali*, 855 N.W.2d 235 (Minn. 2014), the constitutionality of the consecutive life sentences on Counts I and II was the "law of the case" and the district court had no authority to re-sentence on those counts. Order at 5.

On January 6, 2016, a re-sentencing hearing was held in the district court to impose a third consecutive life sentence in accord with the district court's ruling. The district court noted that the Minnesota Supreme Court had vacated the LWOP sentence but had affirmed the other two consecutive life sentences. The court noted that the state had offered a stipulation that it would withdraw the request for an LWOP sentence and would not contest the court imposing a third consecutive life with possibility of release sentence. R.3 – 4.[2]

The defense placed on the record that it had not agreed to so stipulate and was preserving all arguments made in its motion for re-sentencing. R.4; *see* Def. Memo. The prosecution explained that its reason for deciding not to request a *Miller* hearing so that

[2] "R." refers to the transcript of the re-sentencing hearing held on January 6, 2016, following remand by this Court.

LWOP could, if the burden was met, be re-imposed, was because appellant "will be over 100 years old before he is eligible for parole." R.4. Whether appellant served two life sentences consecutive to an LWOP sentence or three consecutive life with possibility of release sentences, appellant would not have even a possibility of release for 90 years. After noting that the defense motions had been denied, the court stated that based on the jury verdict appellant would be committed to the custody of the Commissioner of Corrections to a life sentence with possibility of release after 30 years to run consecutively to the two other life sentences with possibility of release after 30 years. R.5.

ARGUMENT

I.

For juveniles, a mandatory natural life sentence violates the Eighth Amendment because all juveniles must have a possibility of release, absent proof of permanent incorrigibility. No crime-specific or multiple victim exception should abrogate this requirement. Therefore, because appellant's consecutive sentences deny him any possibility of release until at least age 110, his aggregate sentence is the functional equivalent of natural life, unconstitutionally imposed absent proof of permanent incorrigibility.

A. Standard of review.

This Court reviews de novo a district court's determination of legal issues. *Martin v. State*, 748 N.W.2d 294, 295 (Minn. 2008).

B. Absent proof of permanent incorrigibility, *Miller* guarantees every juvenile offender a possibility of release.

Children are different.

"Children are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2015) (citations omitted). In *Miller*, the United States Supreme Court held "that the Eighth amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S.Ct. at 2469. In sentencing a juvenile, a court should be required 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. The *Miller* case did not carve out any exception for aggregate sentencing: nor does the reasoning underlying *Miller* support construing the decision to bar life without possibility of parole (LWOP) but to allow its functional equivalent – here, a 90 year term (to be served in prison before

any chance at parole) that effectively precludes any reasonable possibility of release. As the United States Supreme Court held in *Montgomery*, juveniles "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 – 737 (2016). In sum, absent proof of permanent incorrigibility, a sentence violates the Eighth Amendment if it deprives a juvenile of a realistic possibility of release during the juvenile's natural life expectancy. *See Montgomery*, 136 S. Ct. at 734 ("Miller did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect *permanent incorrigibility*.") (emphasis added).

Significantly, *Miller* culminated over a decade of United States Supreme Court rulings, each one expanding on the rights of juveniles under the principle that juveniles, as a class, are categorically less culpable than adults. *See Montgomery*, 136 S.Ct. at 732 ("The 'foundation stone' for *Miller's* analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles."). The guiding principle of the Supreme Court's juvenile jurisprudence has been that "[t]he lesser culpability of children dictates a diminished penological justification for harsh sentencing and retribution." *Montgomery*, 136 S.Ct. at 733.

> Life in prison without parole is disproportionate unless the juvenile defendant's crime reflects irreparable corruption. *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 726. Sentencing courts must consider a child's diminished culpability as well as his heightened capacity for change. *Id.* At ——, 136 S.Ct. at 726. Children are immature, irresponsible, reckless, impulsive and vulnerable to negative influence. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2464. Additionally, they lack control over their environment

> and the ability to extricate themselves from crime-producing circumstances. *Id.* at ——, 132 S.Ct. at 2464. Because a juvenile's character is not well formed, his actions are less likely to demonstrate irretrievable depravity. *Id.* at ——, 132 S.Ct. at 2464. It follows that youth diminishes penological justifications: (1) reduced blameworthiness undermines retribution; (2) impetuosity undermines deterrence; and (3) ordinary adolescent development undermines the need for incapacitation. *Id.* at ——, 132 S.Ct. at 2465. Additionally, life without parole entirely negates the possibility of rehabilitation. *Id.* at ——, 132 S.Ct. at 2465.

People v. Nieto, _ N.E.3d _, 2016 IL App (1st) 121604, ¶ 53, slip op. at *10 (Apr. 29, 2016) (unpublished).

Insofar as *Miller* engendered a new substantive rule prohibiting a category of punishment for juveniles – mandatory life without possibility of release – it made imposing LWOP on juveniles an uncommon punishment of last resort. *Montgomery*, 136 S.Ct. at 732. Subsequently, *Montgomery* made clear that the ruling in *Miller* was not to be narrowly construed as only a procedural requirement for a hearing. *See Nieto*, 2016 IL App (1st) 121604, ¶ 46, slip op. at *8:

> Prior to *Montgomery*, courts in this state understood *Miller* as prohibiting no more than mandatory life-sentences without parole for juveniles…. The language in *Montgomery*, however, strongly suggests that *Miller* does more.

See also Brown v. State, 10 N.E.3d 1, 8 (Ind. 2014) (Courts should "focus on the forest, not on the trees."). It is this mandate to construe *Miller* broadly to preclude LWOP – whether natural life or its functional equivalent – for all but the most incorrigible juveniles that was flagged by the *Montgomery* dissent:

> [E]ven when the procedures that *Miller* demands are provided the constitutional requirement is not necessarily satisfied.

Montgomery, 136 U.S. at 734 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.).

Accordingly, in complying with *Miller* and *Montgomery*, some state supreme courts have held that sentences of life without parole and its functional equivalent imposed following even a court's exercise of discretion still violate *Miller. See e.g. State v. Riley,* 110 A.3d 1205, 1216 (Conn. 2015); *State v. Long,* 8 N.E.3d 890, 892 (Ohio 2014); *Aiken v. Byars,* 765 S.E.2d 572, 576 – 577 (S.C. 2014); *People v. Gutierrez,* 324 P.3d 245, 249 – 250 (Cal. 2014); *but contra see e.g. Bun v. State,* 769 S.E.2d 381, 383 – 384 (Ga. 2015); *Castillo v. McDaniel*, No. 62188, 2015 WL 667917, *1 (Nev. Feb. 12, 2015); *Pennington v. Hobbs*, 451 S.W.3d 199, 201- 202 (Ark. 2014); *Jones v. Com.*, 763 J.E.2d 823, 825 – 826 (Va. 2014); *State v. Redman*, No. 13-0225, 2014 WL 1272553, *3 (W.Va. 2014); *see also Nieto*, 2016 IL App (1st) 121604, ¶ 45, slip op. at *8 ("'noting that legal scholars recognize the United States Supreme Court is moving toward the complete abolition of life without parole sentences for juveniles.'") (citation omitted)).

C. Similarly, absent proof of permanent incorrigibility, the functional equivalent of natural life may not be imposed.

Even an aggregate sentence should allow the reasonable possibility of release.

Montgomery left no room for lower courts to evade the dictates of over a decade of juvenile justice jurisprudence expanding the rights of juveniles to be treated as less culpable than adults. *See Montgomery*,136 S.Ct. at 173 (LWOP should be rare). No crime-specific exception exists: no multiple victim exception exists. Nor should this Court create or allow an exception for the functional equivalent of LWOP. A "state is misguided to reject *Miller* as irrelevant solely because a term of imprisonment is not labeled 'life without the possibility of parole.' *Miller's* concern that youth are subjected

to disproportionate punishment does not diminish for a juvenile who faces a century – or more – of imprisonment rather than 'life.'" Robert S. Chang, David A. Perez, Luke M. Rona, Christopher M. Schafbuch, *Evading Miller*. 39 Seattle U. L. Rev. 85, 99 (Fall 2015).

For these reasons, a natural life sentence and its functional equivalent should be treated similarly. *See Nieto,* 2016 IL App (1st) 121604, ¶ 42, slip op. at *7 ("Given that defendant will not be released from prison until he is 94 years old, we find that he effectively received a sentence of natural life without parole."); *see also McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) ("But it is such a long term of years [100 years] (especially given the unavailability of early release) as to be—unless there is a radical increase, at present unforeseeable, in longevity within the next 100 years—a *de facto* life sentence, and so the logic of *Miller* applies."); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1045 (Conn. 2015) (60 years is a natural life sentence).

> An LWOP sentence is the second-most severe penalty that is possible in the United States Justice System, and the imposition of such a punishment in defiance of the Supreme Court's recent holdings is a grave matter. A court's decision to permit the imposition of these ambiguously defined [including functional equivalent of natural life] LWOP sentences fails to reflect the proper consideration of adolescent psychology and diminished juvenile culpability that the Court used to advance its holding in *Miller*.

Alexander L. Nostro, *The Importance of an Expansive Deference to Miller v. Alabama*. 22 Am. U.J. Gender Soc. Pol'y & Law 167, 179 – 180 (2013), *but contra see e.g. Henry v. State,* 82 So.3d 1084 (Fla. Dist. Ct. App. 2012) (court recognizes difficulty in adopting bright line rule); *Guzman v. State,* 110 So.3d 703 (Fla. Dist. Ct. App. 2013) (finding no language in *Graham* prohibiting functional equivalent of LWOP); *State v. Brown,* 118

So.3d 332 (La. 2013) (invoking narrow reading of *Graham*); *see also* Therese A. Savona, *The Growing Pains of Graham v. Florida: Deciphering Whether Lengthy Term-of-Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life Without the Possibility of Parole,* 25 St. Thomas L. Rev. 182 n.15 (2013) (compiling list of cases pro and con and concluding that since *Graham*, various jurisdictions around the country have taken differing positions on whether the functional equivalent of natural life should be treated the same as an LWOP sentence).

Under the Eighth Amendment, there are no "throw away" children. Moreover, because children are different for purposes of sentencing, *Miller* cannot be logically limited only to natural life sentences, "as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life." *Butler*, 809 F.3d at 911. The jurisprudence of the United States Supreme Court has established that the law is "not satisfied by pretending that a cumulative sentence labeled as a term of years will in all cases be distinct from a sentence of natural life without the possibility of parole." *Nieto,* 2016 IL App (1st) 121604, slip op. at *7; *State v. Null*, 836 N.W.2d 41, 71 – 72 (Iowa 2013) ("The prospect of geriatric release … does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society.") (citation omitted)); *Bear Cloud v. Wyoming*, 334 P.3d 1332 (Wyo. 2014) (holding a 45 year sentence was a "de facto equivalent to life sentence without parole that triggered prohibition against mandatory sentence of life without parole for juvenile offender"); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015), *as modified* (Jan. 6, 2016) (holding that in nonhomicide case distinguishing between natural life and its functional

equivalent would frustrate the supreme court's reasoning regarding a juvenile's opportunity to demonstrate growth and maturity if a realistic opportunity for release would not arise during the juvenile's natural life expectancy); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding in nonhomicide case that, "Defendant in the present matter will become parole eligible over 100 years from now. (§ 3046, Subd.(b) [requiring defendant to serve a minimum of 110 years before becoming parole eligible].) Consequently, he would have no opportunity to 'demonstrate growth and maturity' to try to secure his release, in contravention of *Graham's* dictate.").

> The rationale of *Miller* … reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole … [T]he spirit of the law [must] not be lost in the application of the law … 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.

State v. Raglund, 836 N.W.2d 107, 121 (Iowa 2013).

Cases opposite to this principle seem to illogically rely on the technicality that neither *Graham*, nor *Miller* nor *Montgomery* mentioned aggregate sentencing when discussing LWOP, or on the difficulty of determining a bright line for when an aggregate sentence is the functional equivalent of natural life. Without specifying why the United States Supreme Court's juvenile jurisprudence, which specifically endeavors to guarantee an opportunity for rehabilitation, would allow such a loophole, such cases misconstrue

the law. Further, these cases, mainly decided prior to *Montgomery*, fail to credit the key point of *Montgomery* that the change in law making LWOP a rare punishment is substantive. *See Montgomery*, 136 S.Ct. at 736 – 737; *cf. Bunch v. Smith*, 685 F.3d 546, 550 – 551 (6th Cir. 2012) (*Graham* does not apply to 89 year prison term); *State v. Kasic*, 265 P.3d 410, 414 – 416 (Ariz. Ct. App. 2011) (aggregate sentence is not de facto natural life sentence).

Although this Court's ruling in *Williams* denied a challenge to a functional equivalent of a natural life sentence, that case was decided without benefit of the ruling in *Montgomery*. *See State v. Williams*, 862 N.W.2d 701, 703 (Minn. 2015). In *Williams*, this Court denied a pro se defendant's appeal seeking to "extend the rule announced in *Miller* to a district court's discretionary imposition of consecutive sentences that, as he contends, are the functional equivalent of life imprisonment without the possibility of release." *Id.* Significantly, even though the *Williams* court affirmed the sentence, the court never held that an exception existed for the functional equivalent of natural life sentences. *See Williams*, 862 N.W.2d at 720 (court noted that defendant would serve an aggregate sentence of "at least 74 years in prison" before any possibility of release but court did not determine whether LWOP and its functional equivalent could be treated differently under *Miller*).

Instead, the *Williams* holding rested on a finding that the aggregate sentence was not mandatorily-imposed and for that reason alone the requirements of *Miller* were met. *Id.* Thus, the only issue upon which *Williams* is relevant is whether any exercise of discretion in sentencing fulfills the mandates of *Miller*. *See, infra*, Argument II.B

(discretion to sentence consecutively is not the equivalent of a *Miller* hearing). Therefore, even under *Williams*, both a life without possibility of release sentence and its functional equivalent are unconstitutional absent proof of permanent incorrigibility.

D. A juvenile's sentence should not exceed average life expectancy.

A realistic possibility of release depends on average life expectancy.

Data analyzing a person's life expectancy establish that, on average, a person may expect a lifespan of 79 years. Adele Cummings, Stacie Nelson Colling, *There is no Meaningful Opportunity in Meaningless Data: Why It is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*. 18 U.C. Davis J. Juv. L. & Pol'y 267, 279 (Summer 2014); *see also e.g. Kelly Scavone, How Long is Too Long? Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 Fordham L. Rev. 3439, 3460 (May 2014) (standard mortality tables show life expectancy is 78.6 years). In general, the life expectancy for prisoners is lower than that for the average person. The life expectancy for the prison population has been calculated to be only 64 years. U.S. Sentencing Commission Preliminary Quarterly Data Report (through June 30, 2012) at A-8.[3] It is generally accepted that life in prison, with its stressors, violence and disease in and of itself significantly shortens one's life expectancy. *See United States v. Taveras*, 436 F.Supp.2d 493, 500 (E.D.N.Y. 2006) (noting that life expectancy within federal prison is considerably shortened).

[3] Available at http://www.ussc.gov/Data and Statistics/FederalSentencing-Statistics/Quarterly-Sentencing-Updates/USSC_2012_3rd_Quarter_Report.pdf

Further, the life expectancy for incarcerated men of color is lower than that for the general population. For African-American males, the life expectancy is 64.6 years. U.S. Census, Expectation of Life at Birth.[4] Thus, the average defendant sentenced at the age of 20 would have about 60 years remaining in a lifetime. 18 U.C. Davis at 279. Prison sentences that prevent a defendant from being released until shortly before an average person would have reached the end of a life expectancy insure that almost one-half of incarcerated defendants will have died before reaching the end of their lifetime. 18 U. C. Davis at 283. In Michigan, it is calculated that the life expectancy for African-American prisoners is only 56 years. Deborah LaBelle, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences." At *2.[5] For those defendants in Michigan entering prison as juveniles, it is even less – about 50 years. *Id.*; *see also United States v. Nelson*, 491 F.3d 344, 349 – 350 (7th Cir. 2012) (acknowledging the decreased life expectancy for incarcerated individuals based on United States Sentencing Commission data). Moreover, juveniles are younger when sentenced and "will end up serving a longer sentence before dying in jail." *Miller*, 132 S.Ct. at 2468. Consequently, absent proof of permanent incorrigibility, even an aggregate sentence must allow for possibility of release during an average life expectancy.

[4] Available at http://www.census.gov/compendia/statab/2012/tables/12e0105.pdf
[5] Available from Deborah LaBelle, Project Director, ACLU of Michigan Juvenile Life Without Parole Initiative, deblabelle@aol.com.

E. Ninety years is the functional equivalent of a natural life sentence.

Ninety years offers no reasonable possibility of release.

In this Court's decision following appellant's direct appeal from the judgment of conviction, this Court remanded for re-sentencing on Count III – the conviction for premeditated murder on which the district court had imposed a mandatory life without possibility of release sentence. *See Ali*, 855 N.W.2d 235. In *Ali*, this Court directed that a *Miller* hearing would have to be held before any re-sentencing to LWOP. *Ali*, 855 N.W.2d at 256. However, on remand the state asked the district court to instead impose a sentence of life with possibility of release after 30 years and to order the sentence to run consecutively to the other two life sentences with possibility of release after 30 years. R.3 – 4. At the re-sentencing, the state noted that its reason for not pursuing a *Miller* hearing was that this Court had affirmed consecutive sentencing of three life terms and appellant would be "over 100 years old before he is eligible for parole." R.4. Seemingly, the state and court may have believed that by imposing an aggregate sentence that was the functional equivalent of the sentence vacated by this Court, the constitutional mandates of *Miller* were not violated: the court erred.

Attempting to justify this aggregate sentence, the district court, over the defense objection, ruled that *Miller* did not address whether the functional equivalent of an LWOP sentence would necessitate a hearing. *See* Court File, Order at 4; R.3 – 4. Based on this ruling, the district court imposed three life sentences consecutively such that appellant would not have any possibility of release until he had served 90 years in prison, at which time he would be 110 years old – well past his life expectancy. R.5.

F. Even if the consecutive sentence on Count III is vacated, the aggregate sentence for Counts I and II similarly violates *Miller*.

A sixty year term before possibility of release violates Miller.

Although this Court did not remand the proceedings for re-sentencing on Counts I and II, and this Court held that the consecutive sentences for Counts I and II were constitutional, the decision in *Ali* was issued before the United States Supreme Court decided *Montgomery*. *See Ali*, 855 N.W.2d at 258. Insofar as *Montgomery* clarified that its holding in *Miller* formulated a new substantive right that included a presumption against LWOP, this Court should re-visit the district court's entire sentence imposed on appellant. The two consecutive sentences that preclude any possibility of release until appellant has served at least 60 years in prison serve as the functional equivalent of a natural life sentence and, thus, require a *Miller* hearing before being imposed.

In *Ali*, this Court stated that it was the mandatory imposition of LWOP that "was the crucial factor in *Miller*." *Ali*, 855 N.W.2d at 258. This Court, however, failed to pursue why this factor was key. The mandatory nature of the sentence was key only because it meant that juveniles who were not permanently incorrigible might still be precluded from a reasonable opportunity at release. That situation is exactly the one in which appellant now has been placed. No *Miller* hearing was held: appellant will not likely be alive to attend a parole hearing before serving his aggregate sentence.

Applying *Montgomery* to Counts I and II, even if Count III runs concurrentlyc, appellant's sentence of 60 years in prison before possibility of release, at which time he would be 80 years old, would still violate *Miller*. *See Raglund*, 836 N.W.2d at 121 (a

court system "could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths facing a sentence of life without parole and not to those youths facing a sentence of life with no parole until age seventy-eight"). Even a 60 year sentence for appellant, which exceeds an inmate's average life expectancy, *see infra*, Argument I.D., impermissibly would not likely allow for possibility of release within appellant's natural life. Such a sentence does not offer a reasonable possibility of release.

G. Similarly, the aggregate sentence violates the state constitution.

In addition, appellant seeks to preserve his argument, raised in *Ali*, that under Minn. Const. art. I, § 5, the aggregate sentence is unconstitutional. *See Ali*, 855 N.W.2d at 258 – 259. This Court held in *Ali* that appellant's sentence was not cruel or unusual under the state constitution because the consecutive sentences were not disproportionate considering the gravity of the offenses, and because this Court has affirmed such sentences for other juveniles. *Ali*, 855 N.W.2d at 259. As noted in this brief, *Ali* was decided before *Montgomery*. The *Montgomery* decision dictates that appellant's aggregate sentence be found to be cruel or be found to be unusual under the state constitution. *See Montgomery*, 136 S.Ct. at 733.

H. Therefore, all three sentences should run concurrently.

Thirty years should be the maximum term before an initial parole hearing.

At appellant's sentencing following the jury verdict, the district court had reasonable concerns about the community's stake in retribution for the killing of three victims, reasonable concerns about justice for the victims' families, reasonable concerns

about the deterrence value of a lengthy sentence for a triple homicide and reasonable concerns about public safety, should appellant ever be released. These concerns prompted the court, at the original sentencing, to unabashedly state it was imposing a sentence, mainly based on retribution, to make certain appellant would never be released:

> Well, it's certainly no surprise to you this morning that you'll be spending the rest of your life in prison. The only thing left for me to do is to decide if those sentences are to be concurrent or consecutive. It is the court's intention to sentence you consecutively on each count, and this for two reasons.
>
> The first is symbolic. They should be served consecutively because three men died. …And, accordingly, each should have their own sentence served consecutively.
>
> The second reason is pragmatic. …. [P]erhaps someday, when I'm myself dead and gone, some state leader might think about relooking at these sentences, maybe considering release for those who were sentenced to life without release. So my imposing consecutive sentences is my message to future generations that you not be considered for release no matter what the circumstances, no matter what the change in law is. And that is the most I can do.

S.27.[6] On remand, the court offered no change of heart for imposing the functional equivalent of LWOP. *See* R.5. The court stated, "[e]ven if this Court had the discretion to impose concurrent sentences, it would not. The criteria listed by this court at the original sentencing hearing are still valid. This was still a brutal, inexcusable murder of three innocent members of the community." Order at 6.

In sentencing appellant, the district court ignored that a possibility of release is only that – a possibility. It is the Commissioner of the Department of Corrections, and any designees, that would make the final decision as to whether appellant would ever be

[6] "S." refers to the transcript of the sentencing held October 31, 2011.

released. Minn. Stat. § 243.05, Subd.1; Subd.4. That decision could be made upon input from many sources including the victims' families, and without appellant being represented by counsel.

Here, the district court seemed to ignore that such a weighty decision as whether to deny any reasonable possibility of release – almost akin to a death penalty – might more properly belong to a parole board than the judge who has just sat through a trial involving a triple homicide but has not held any evidentiary hearing at sentencing. "[A] district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved." *See e.g. State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) ("Nothing in this opinion, of course, suggests that a juvenile offender is entitled to parole. The State is not required to make such a guarantee, and those who over time show irredeemable corruption will no doubt spend their lives in prison. The determination of irredeemable corruption, however, must be made when the information is available to make that determination and not at a time when the juvenile character is a work in progress.").

Offering a possibility of release does not mean juvenile offenders will someday be released: a parole board would still determine suitability. Allowing a parole hearing merely shifts the key decision, of whether a juvenile has been rehabilitated and whether a juvenile should be released, from the district court to the parole board. 82 Fordham L. Rev. at 3459. ("Trial courts are simply ill-equipped to make reliable lifetime judgments about juvenile offenders in the immediate wake of their convictions. Such a decision

should wait for the parole hearing.") . In determining whether to release a defendant, the parole board can more accurately gauge the risk to public safety and how, over the years, the sentiments of the community and victims may have remained steady or shifted.

In Minnesota, the legislature has expressed its intent that the only mandatory sentence for most types of first degree murder should be life with possibility of release after 30 years. Even if there are multiple victims, the legislature has not made consecutive sentencing – a sentence for each victim – mandatory, whether the offender is an adult or juvenile offender. For the constitutionally and categorically less culpable juvenile offender, 30 years should be the longest period of incarceration before the juvenile has an opportunity for a parole board to consider whether release on parole, with the limits and conditions of being on parole, might be appropriate. *See* 82 Fordham L. Rev. at 3469 ("… the only adequate manner in which states can address both LWOP and virtual LWOP given to all juvenile offenders is through statutory provisions that remove parole restrictions from juvenile offenders.").

At appellant's re-sentencing, the defense asked the district court to sentence appellant to three concurrent sentences with the possibility of parole after 30 years. Def. Memo at 11. As the defense explained, "[e]ven three *concurrent* life sentences will place the possibility of … [appellant's] release at approximately forty seven years old, a mere three years before the statistical end of his life." Def. Memo at 13 (italics in original). Therefore, this Court should remand to the district court for re-sentencing to no more than three concurrent life sentences with possibility of release after 30 years.

II.

The district court did not hold a *Miller* hearing to determine if appellant was permanently incorrigible. Instead, the court exercised its discretion only to consider whether retribution for multiple victims justified consecutive life sentences. Because the crime-specific factors governing consecutive sentencing differ from the factors under *Miller* concerning whether a juvenile is permanently incorrigible, the court's exercise of discretion to sentence consecutively failed to apply the proper legal standard and failed to consider the proper factors and evidence.

A. Standard of review.

See infra, Argument I.A. (de novo standard of review).

B. No *Miller* hearing was held.

Although this proceeding was remanded for a *Miller* hearing, no *Miller* hearing was held. Order at 6 (need for *Miller* hearing moot due to state's stipulation).[7] In *Montgomery,* the Court held that a *Miller* hearing is distinguished from other types of evidentiary hearings because it is an opportunity for the juvenile to have the sentencing court consider the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing. *Montgomery,* 136 S.Ct. at 725. At a *Miller* hearing, a juvenile should have the opportunity to present evidence of youth, expert testimony on how youth

[7] Although this issue is not squarely before the Court in this appeal from the consecutive sentencing, at the re-sentencing upon remand appellant objected that any *Miller* hearing would violate the separation of powers doctrine and in this appeal appellant does not concede that a *Miller* hearing could be held without violating the separation of powers doctrine because Minnesota has not passed any legislation enabling what *Montgomery* has concluded is a new substantive right. *See Montgomery,* 136 S.Ct. at 736 – 737; *see* Court File, Defense Memo at 9; *see Ali,* 855 N.W.2d at 268 – 269 (Stras, J. concurring in part, dissenting in part) (case should be remanded only with instructions to impose life sentence with the possibility of release); *see also State v. Prentis Cordell Jackson,* A14-2060, currently pending in this Court and raising, among other issues, whether a *Miller* hearing can be held.

limits a juvenile's capacity for foresight, self-discipline, judgement and evidence of the potential for rehabilitation. *Montgomery,* 136 S.Ct. at 726. Thus, the gravamen of *Montgomery* is that "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." *Montgomery,* 136 S.Ct. at 734 (citation omitted).

Montgomery requires that a juvenile be given an opportunity to demonstrate that the juvenile belongs to the large population of juveniles not subject to natural life in prison without parole, even where a natural life sentence resulted from the trial court's exercise of discretion. *Nieto,* 2016 IL App (1st) 121604, ¶ 48, slip op. at *9 (citations omitted) ("the court found the concept that sentencing courts must consider that children are different 'cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors.'"). As Judge Posner has articulated, mere exercise of discretion is insufficient. To be sufficient, a court must apply the proper legal standard:

> And here is where *Miller* plays a role. It does not forbid, but it expresses great skepticism concerning, life sentences for juvenile murderers. Its categorical ban is limited to life sentences made mandatory by legislatures, but its concern that courts should consider in sentencing that "children are different" extends to discretionary life sentences and *de facto* life sentences, as in this case. A straw in the wind is that the Supreme Court vacated, for further consideration in light of *Miller,* three decisions upholding as an exercise of sentencing discretion juveniles' sentences to life in prison with no possibility of parole: *Blackwell v. California,* —— U.S. ——, 133 S.Ct. 837, 184 L.Ed.2d 646 (2013); *Mauricio v. California,* —— U.S. ——, 133 S.Ct. 524, 184 L.Ed.2d 335 (2013); *Guillen v. California,* —— U.S. ——, 133 S.Ct. 69, 183 L.Ed.2d 708 (2012).

Butler, 809 F.3d at 914.

Consequently, even if in this case the district court exercised discretion or held some type of hearing, absent a hearing in which the legal standard of permanent incorrigibility was applied, the court failed to hold the requisite *Miller* hearing, failed to apply the proper legal standard and failed to consider the relevant evidence. Exercising discretion to determine if retribution justifies consecutive sentencing is not sufficient absent a hearing to determine if appellant is that rare juvenile who is permanently incorrigible.

C. Aggravating factors under the sentencing guidelines differ from the *Miller* factors.

Whether, here, the court exercised discretion to weigh aggravating and mitigating factors under the sentencing guidelines is immaterial. The guidelines do not embody the proper legal standard that must be applied to hold a proper *Miller* hearing. *See* Minn. Sent. G. Comment, 2.D.201. Under the Minnesota Sentencing Guidelines, if an offense was committed against multiple victims, consecutive sentencing is permissive. *Id.* at 2.F.2.a(1)(ii) (noting that "[i]f the offender is being sentenced for multiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences …, the convictions may be sentenced consecutively to each other."); *see e.g. State v. Wilson*, 539 N.W.2d 241, 246 (Minn. 1995) (allowing consecutive sentencing for multiple victims). This means that a court need not find departure factors but must simply exercise discretion to choose whether to impose consecutive sentences based on some fair and rational consideration related to how the offense was committed. Minn. Stat. §

609.15, Subd. 1(a). The exercise of discretion is limited only by an appellate court's review as to whether the sentence exaggerated the criminality of the offense. *See e.g. State v. Perleberg*, 736 N.W.2d 703, 705 (Minn. Ct. App. 2007) ("Our review is guided by sentences imposed on other similarly situated offenders.").

The aggravating and mitigating factors generally considered by the court under the sentencing guidelines are specific to the crimes committed. *Williams*, 862 N.W.2d at 703; *see e*.g. *State v. Roan*, 532 N.W.2d 563, 575 (Minn. 1995) (noting the "court is guided by sentences received by past offenders") (citation omitted)); *State v. Fardan*, 773 N.W.2d 303, 322 – 323 (Minn. 2009) (no exaggeration of criminality where crime involved multiple victims, was "senseless" and victim did not resist despite defendant's diagnosis of Fetal Alcohol Syndrome).

In contrast, the factors to be considered in a *Miller* hearing differ. *Miller* requires considering offender-specific characteristics, not offense-specific factors. The determining factor is not how the crime was committed but whether the juvenile can be rehabilitated. *Sweet*, 879 N.W.2d 811, slip op. at *38 ("The traits of youth that diminish ordinary criminal culpability are not crime specific and are present even in juveniles who commit heinous crimes.") (citation omitted)). Nor does *Miller* articulate a weighing approach that balances mitigating factors against aggravating factors. Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*. 56 B.C. L. Rev. 553, 567 (March 2015). Thus, a court's consideration of offense-specific factors, as happened here, would not be a sufficient substitute for a *Miller* hearing.

D. The proper legal standard must be applied.

Even if a court exercises discretion in sentencing a juvenile offender, if the wrong legal standard such as retribution or public safety is applied instead of the correct standard of permanent incorrigibility, the juvenile's constitutional rights have been violated. *See State v. Pearson*, 836 N.W.2d 88 (Iowa 2013) (juvenile's background erroneously analyzed to determine culpability instead of potential for rehabilitation). It is the "characteristic of youth," and not the specifics of the crime that are most relevant. *Pearson*, 836 N.W2d at 97 (citation omitted). In analyzing the "characteristic of youth," a sentencing court should consider whether a juvenile offender's transient immaturity requires some degree of leniency. *People v. Chavez*, 175 Cal. Rptr. 3d 334, 343 (Cal. Ct. App. 2014) (certified for partial publication). In determining the penalty, the sentencing court must provide an in-depth analysis as to why the juvenile offender falls outside the general rule that most juveniles who engage in criminal activity are not destined to be lifelong criminals and should make specific factual findings to support its decision. *Pearson*, 836 N.W.2d at 95.

Accordingly, the court in *Nieto* found that a consideration of age and a consideration of aggravating factors specified by the state did not meet the requirements of a *Miller* hearing:

> With that said, the record shows that the court did not consider the corresponding characteristics of defendant's youth. In support of defendant's sentence, the State notes the aggravating factors found by the trial court, defendant's prior convictions, the unsatisfactory termination of probation, the death of his brother, his gang violence, his pride in announcing that he "lit up some flakes" and "hit a dome shot," his use of police scanners and his decision to shoot unarmed victims. Yet, examining

> these factors through the lenses of *Miller* may have led to a shorter sentence. Accordingly, defendant is entitled to relief.

Nieto, 2016 IL App (1st) 121604, ¶ 56, slip op at *11; *see also Landrum v. State*, No. SC15-1071, 2016 WL 3191099, at *1 (Fla. June 9, 2016) ("Even in a discretionary sentencing scheme, the sentencing court's exercise of discretion before imposing a life sentence must be informed by consideration of the juvenile offender's 'youth and its attendant circumstances.'").

In *Sweet*, the Iowa Supreme Court detailed the type of evidence and analysis that would constitute a *Miller* hearing. *Sweet*, 879 N.W.2d 811. In *Sweet*, the juvenile offered the testimony of "a highly qualified expert witness in the field of clinical psychology with a special focus on the assessment of violence, risk and psychopathic personality disorder." *Sweet*, 879 N.W.2d, slip op. at *8. The type of hearing held in *Sweet* dovetailed with the long-standing ABA guidelines for mitigation hearings in death penalty cases, which provide a baseline for what should happen at a *Miller* hearing. The ABA requires prehearing efforts by defense counsel to discover all reasonable available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. Evidence such as the child's crime, family life, schooling, medical history and social networks would be considered relevant. Nick Straley, *Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children*. 89 Wash. L. Rev. 963, 999 – 1000 (October 2014).

As numerous courts have held, the guiding concern in sentencing a juvenile to a natural life sentence in prison is not whether discretion was exercised. "The relevance to

sentencing of children are different' also cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary sentences must be guided by consideration or age-relevant factors." *Butler,* 809 F.3d at 911. The guiding concern is, instead, whether permanent incorrigibility was proved.

This error in conflating an exercise of discretion with the review required by a *Miller* hearing is the error making this Court's decision in *Williams* inapplicable to appellant. In *Williams*, this Court affirmed a lengthy aggregate sentence for a juvenile merely because the sentencing court had exercised discretion. *See Williams*, 862 N.W.2d at 704 (finding that because sentence was discretionary defendant's reliance on *Miller* was "misplaced."). The *Williams* court noted that the sentencing court had not mandatorily imposed consecutive sentences but had exercised its discretion before doing so by considering "all of the aggravating and mitigating circumstances specific to the crimes that Williams committed." *Williams*, 862 N.W.2d at 703.

However, in deciding *Williams*, this Court lacked the benefit of the United States Supreme Court's holding in *Montgomery*, which clarified that a mere exercise of discretion will not cure the constitutional violation. *Miller* was substantive and not merely procedural because *Miller* required a particular standard to be met – not just that age be a factor in sentencing. *Miller* precluded LWOP for those juveniles whose crimes did not reflect permanent incorrigibility. *Montgomery*, 136 S.Ct. at 734 (citation omitted). No such showing was made in *Williams* mainly because no such showing was required or needed under the Minnesota Sentencing Guidelines for consecutive sentencing. A mere

exercise of discretion cannot substitute for a *Miller* hearing following the ruling in *Montgomery*.

E. Appellant was denied the opportunity to be heard.

Even if this Court were to accept that a mere exercise of discretion applying the sentencing guidelines is sufficient, failing to provide an evidentiary hearing where a juvenile is provided a full and fair opportunity for counsel to advocate for a lesser sentence violates a juvenile's right to have age and its attendant characteristics considered in sentencing. Here, before appellant was sentenced to the functional equivalent of a natural life sentence, he was denied the opportunity for his counsel to thoroughly advocate for the possibility of release. Instead, the court relied upon the information it had learned about appellant, haphazardly, as a collateral effect of the prosecution presenting its case both to show appellant was over the age of 15 and was properly standing trial as an adult without an opportunity for a certification hearing, and to show that appellant had committed the charged offenses.

A judge's having presided at trial is an insufficient substitute for holding a *Miller* hearing. As the United States Supreme Court noted in *Roper,* "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper v. Simmons,* 543 U.S. 551, 573 (2005). Here, the district court noted that during the course of the proceedings it had learned some details of appellant's life. Order at 3. The court noted that it had considered a "plethora of information" about appellant's youth, personal background and unique circumstances.

Order at 5. However, this information was not presented in the context of a sentencing hearing: it was information admitted for other purposes: to prove guilt at trial and to prove, both before and after trial, whether appellant was older than age 15. Therefore, to use this information for sentencing purposes meant that the court relied on only a partial and unsystematic view of appellant's circumstances, presented not in the context for leniency by an experienced advocate for appellant, but presented mainly by the prosecution.

The district court heard some evidence about appellant's troubled life. *See* Appellant's Brief for direct appeal from judgment of conviction at 20 – 23. This included evidence adduced during trial including but not limited to the following: evidence suggesting appellant's recklessness and impulsivity associated with his youth. *See* e.g. Court File for direct appeal, St. Joe's Initial Assessment of Apr. 3, 2005; CHIPS petition by Dennis O'Rourke of Apr. 6, 2005; Evidentiary hearing of August. 25, 2010 on age determination at 182 – 183, 187 – 189, 215 – 216, 236 – 240; Evidentiary hearing on age at 371 – 398; Letter from Bridge for Youth by Nikki Beasley of Mar. 11, 2010 (appellant experienced difficulties at home after custody granted to biological mother); discharge summary by Valerie Moore & Cynthia Slowiak (noting appellant was "easily angered and frustrated … verbally aggressive and at times, physically aggressive … initiated a great deal of peer conflict, was very defensive, and had a great deal of difficulty understanding his role in conflicts.'); Clinical Treatment Plan by Lynell Anderson of May 2005 (noting appellant grew up in Kenyan refugee camp and primary family remained there).

However, the court did not hear from the defense how this evidence should be interpreted in the context of whether appellant could mature and be rehabilitated. *See* Sentencing of October 11, 201, and January 6, 2016. Although the court heard facts about appellant's difficulties, early life, family and school problems, the court did not receive any expert explanation as to why appellant had these problems or what such problems portended for appellant's future behavior, especially if he received treatment. It is the "why" of appellant's behavior that is significant for a *Miller* hearing: here, the court heard only the how – the specifics of how the offenses occurred and how appellant has behaved during his childhood.

Most importantly, the district court did not hear any expert evidence as to whether appellant was capable of change and could be rehabilitated. *See* Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *The Supreme Court and the Transformation of Juvenile Sentencing*, *Models for Change: Systems Reform in Juvenile Justice*, September 2015, at *17 – 21 (explaining the requirement of *Miller* in terms of wide-ranging psychological assessment of a juvenile's ability to make decisions, act independently, utilize legal procedural safeguards (competency) as well as the context of the offense and life history (to examine for potential for rehabilitation). Here, no psychological expert testimony on incorrigibility was admitted. The court did not consider a timely psychological evaluation, education records, prison records, or health records (from birth onward). As the defense stated to the district court, the following should have been presented:

> In a case such as … [appellant's], the defense would likely call a sentencing mitigation expert, a neurologist specializing in juveniles and adolescent brain development, a neuropsychiatrist specializing in juveniles and adolescent brain development, a neuropsychiatrist specializing in trauma, and an expert in Somali and Kenyan culture with a focus on the effects of war and refugee camps.

Def. Memo at 16.

Therefore, appellant was sentenced to the functional equivalent of natural life without the opportunity for a *Miller* hearing. His consecutive sentences should be vacated.

III.

Under the constitutional guarantee of equal protection, any disparate treatment of a similarly situated class of individuals must be supported by a rational basis. Appellant is similarly situated to juveniles identified under *Miller* who must be provided a realistic opportunity for release, absent proof of permanent incorrigibility. However, without any determination that he was permanently incorrigible, the district court imposed on appellant three consecutive life sentences based on retribution for multiple victims. *Miller* makes clear that no rational basis exists to penologically justify a life sentence for a juvenile based on retribution for crime-specific factors. Therefore, appellant was denied equal protection of the law because, based on a crime-specific factor of multiple victims instead of the proper standard of permanent incorrigibility, he was not provided a realistic opportunity for release.

A. Standard of review.

This Court has held that the constitutionality of a statute may not be addressed for the first time on appeal, but, this Court has, nevertheless, in other cases, reached the merits of the issue and provided guidance in such cases on the merits of the argument. *See e.g. State v. Moore,* 846 N.W.2d 83, 87 (Minn. 2014) (this Court held constitutionality of statute cannot be challenged for the first time on appeal but, in a footnote, discusses the merits of the argument); *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) ("defendants' argument that § 609.50 is unconstitutional is frivolous").

Appellate courts are "ordinarily loathe to intrude or even inquire into the legislative process on matters of criminal punishment." *State v. Russell*, 477 N.W.2d 886, 888 n. 2 (Minn. 1991). The power to declare a statute unconstitutional should be "exercised with extreme caution and only when absolutely necessary." *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997) (quotation omitted). When possible, a reviewing court

must construe and interpret a statute to uphold its constitutionality. *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005); *State v. Richmond*, 730 N.W.2d 62, 66 – 67 (Minn. Ct. App. 2007); *see also* Minn. Stat. § 645.16 (obliging courts to effectuate the legislature's intent).The party challenging the constitutionality of a Minnesota statute, including a provision of the Minnesota Sentencing Guidelines, bears the very heavy burden of establishing beyond a reasonable doubt that the statute violates a constitutional provision. *Id.* (citation omitted); *see also State v. Shattuck*, 704 N.W.2d 131, 142 (Minn. 2005), as amended on reh'g in part (Oct. 6, 2005) (holding a provision of the sentencing guidelines was a statute that was facially unconstitutional).

Review of an equal protection challenge under the federal rational basis test requires (1) a legitimate purpose for the challenged legislation, and (2) that it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. *Russell*, 477 N.W.2d at 887. Under the Minnesota State Constitution, this Court applies a stricter rational basis test than is applied under the federal constitution. *Russell*, 477 N.W.2d at 891 ("Because the statute creates an irrebuttable presumption of intent to sell without affording the defendant an affirmative defense of lack of intent to sell, and on the basis of that presumption automatically metes out a harsher punishment, the means chosen to effect its purposes are constitutionally suspect.").

> Since the early eighties, this court has, in equal protection cases, articulated a rational basis test that differs from the federal standard, requiring:
>
> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must

> be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Russell, 477 N.W.2d at 888.

B. Similarly situated persons must be treated the same.

Here, appellant was sentenced under the Minnesota Sentencing Guidelines provision allowing permissive consecutive sentences for multiple victims. Minn. Sent. G. 2.F.2.a(1)(ii). As applied to appellant, no rational basis existed for him to be sentenced to the functional equivalent of LWOP without a hearing, although he was similarly situated with other juvenile offenders not proved to be permanently incorrigible and, thus, not sentenced to a natural life sentence. The guarantee of equal protection mandates that similarly situated individuals shall be treated alike. *Reed v. Albaaj*, 723 N.W.2d 50, 55 (Minn. Ct. App. 2006). "Essential to a ruling that equal protection has been denied by discriminatory administration of the laws is a finding that the persons treated disparately are similarly situated." *Richmond*, 730 N.W.2d at 73 (citing *State by Spannaus v. Lutsen Resorts, Inc.*, 310 N.W.2d 495, 497 (Minn. 1981)). A facially neutral statute can violate the guarantee of equal protection if it is applied in a way that makes distinctions between similarly situated people without a legitimate government interest. *R.B. v. C.S.*, 536 N.W.2d 634, 637 (Minn. Ct. App. 1995). "A statute violates the equal protection clause when it prescribes different punishments or different degrees of punishment for the same conduct committed under the same circumstances by persons similarly situated." *State v.*

Frazier, 649 N.W.2d 828, 837 (Minn. 2002). "An essential element of an equal protection claim is that the persons claiming disparate treatment must be similarly situated to those to whom they compare themselves." *Richmond*, 730 N.W.2d at 71 (citations omitted).

C. Appellant should be sentenced similarly to those not proved to be permanently incorrigible.

Under *Miller*, the United States Supreme Court recognized that juvenile offenders are a category of similarly situated individuals for whom a certain class of punishment cannot be imposed – mandatory LWOP. Only those rare juveniles proved to be permanently incorrigible could receive that punishment. Consequently, two juveniles, both convicted of similar homicide offenses, are treated disparately if one does not receive a natural life sentence because he was not proved to be permanently incorrigible but the other one receives the functional equivalent of natural life, although he too was not proved to be permanently incorrigible.

Here, the manner in which the district court sentenced appellant denied him equal protection of the law. Appellant did not receive a *Miller* hearing but was sentenced to the functional equivalent of a natural life sentence. The purported rational basis for treating him differently than other similarly situated juveniles was, arguably, that his offense was committed against multiple victims. However, retribution, as a factor in sentencing juveniles has been dismissed by the United States Supreme Court. *Miller*, 132 S. Ct. at 2465 (" 'the case for retribution is not as strong with a minor as with an adult.' ").

Appellant was not shown to be permanently incorrigible yet he has received an aggregate sentence denying him any reasonable possibility of release. No proper rational basis underlies why he will almost inevitably die in prison while other juveniles who similarly are not proved to be permanently incorrigible have not been sentenced to LWOP. Such disparate and unfair treatment denies appellant equal protection of the law under both the federal and state constitutions.

IV.

Alternatively, if this Court agrees with the district court that any exercise of discretion would support an aggregate sentence, even if it is the functional equivalent of natural life, the district court abused its discretion in sentencing appellant to three consecutive life sentences without properly taking into account appellant's youth and its attendant characteristics.

A. Standard of review.

A district court's decision to impose permissive consecutive sentences should not be disturbed on appeal absent a clear abuse of discretion. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). "Although the abuse of discretion standard is exacting, it is not a limitless grant of power to the trial court." *State v. Warren*, 592 N.W.2d 440, 451 (Minn. 1999) (citation omitted). This Court will interfere with the district court's discretion if the sentence is "disproportionate to the offense," or if "the resulting sentence unfairly exaggerates the criminality of the defendant's conduct." *State v. Sanchez-Diaz*, 683 N.W.2d 824, 837 (Minn. 2004) (citations omitted).

B. Appellant's youth was not sufficiently considered.

In its memorandum to the sentencing court upon remand, the defense specifically objected to the court imposing three consecutive sentences without providing written findings of "individualized consideration" as to why public safety and the best interests of appellant would be served by consecutive sentencing. Def. Memo at 17. In reviewing whether aggregate sentencing has exaggerated a defendant's criminality and was, therefore, an abuse of the district court's discretion, this Court has mainly reviewed offense-specific factors as applied to adults: the guidelines do not apply to juveniles

except when sentencing a juvenile who stands trial as an adult or is being sentenced as an adult. Minn. Sent. G.3.D. *See e.g. McLaughlin*, 725 N.W.2d at 715 (citations omitted) (this Court held that the mitigating factors of youth, mental illness and bullying did not require a finding that the district court abused its discretion in imposing consecutive sentences); *State v. Brom,* 463 N.W.2d 758, 765 (Minn. 1990); *State v. Ouk,* 516 N.W.2d 180, 186 (Minn. 1994). Although a juvenile is being treated as if he were an adult based on the statutory exceptions in Minnesota, such an offender is still a juvenile and a court's failing to account for youth and its attendant characteristics runs afoul of the mandate from the United States Supreme Court that age is always a mitigating factor. *Montgomery*, 136 S.Ct. at 735 – 736. In sentencing a juvenile, even under the sentencing guidelines, the various cases decided by the United States Supreme Court mandating different treatment for them, require that a trial court should treat the juvenile as less culpable than an adult. Here, where no sentencing hearing was held at which appellant's counsel was able to advocate, with expert testimony, how appellant's youth should lessen culpability, the court abused its discretion by sentencing appellant to the functional equivalent of natural life.

To sentence a juvenile to a lengthy aggregate sentence based on multiple victims - a factor not related to incorrigibility - and not related to an inability to be rehabilitated or to psychopathy – exaggerates the criminality of the juvenile and the offense. Further, juveniles are less able to provide meaningful assistance to their lawyers than adults, a factor that can impact the development of the defense and gives rise to a risk of erroneous conclusions regarding juvenile culpability. *Graham v. Florida,* 560 U.S. 48, 78 (2011). In

Graham, the United States Supreme Court noted that "an unacceptable likelihood exists that the brutality or cold-blooded nature of a particular crime will overcome mitigating arguments based on youth when the objective immaturity, vulnerability, and lack of true depravity should require a lesser sentence." *Graham*, 560 U.S. at 77 – 78. That is what had happened here. Thus, in the alternative, this Court should vacate the consecutive sentences as an abuse of discretion.

CONCLUSION

Appellant requests the following relief: that this Court vacate the three consecutive sentences and remand for re-sentencing to three concurrent life sentences with possibility of release after 30 years.

Dated: July 15, 2016

Respectfully submitted,

By: Leslie J. Rosenberg
Assistant State Public Defender
License No. 206118

540 Fairview Avenue North
Suite 300
St. Paul, MN 55104
Telephone: (651) 201-6700

ATTORNEY FOR APPELLANT

INDEX TO ADDENDUM