A16-553

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Mahdi Hassan Ali,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I.

The doctrine of the "law of the case" does not apply where the law has changed. Here, subsequent to this Court's affirming appellant's consecutive life sentences on two counts of first degree murder (*Ali* I), the United States Supreme Court held in *Montgomery* that the right to a Miller sentencing hearing is a substantive due process right. Consequently, even if prior to *Montgomery* this Court upheld an aggregate sentence of no possibility of release for at least 60 years, subsequent to *Montgomery* that decision violates appellant's constitutional rights.

Respondent's brief argues that this Court's affirmance in *Ali* I of the discretionary imposition of consecutive sentencing is the "law of the case" and could only have been challenged by filing a petition for certiorari to the United States Supreme Court. R.8[1]; *see State v. Ali*, 855 N.W.2d 235 (Minn. 2014). However, appellant is not seeking to re-litigate an issue already settled. Instead,

[1] "R." refers to Respondent's brief.

appellant has properly challenged the constitutionality of aggregate sentencing under the ruling in *Montgomery* made subsequent to *Ali* I and that held *Miller* to be a new substantive rule. *See Montgomery v. Louisiana,* 136 S.Ct. 718 (2016); *Miller v. Alabama,* 132 S.Ct. 2455 (2012). At the time of the initial appeal in *Ali* I the challenge was to the life without possibility of release sentence: the other two consecutive life with possibility of release sentences were a moot point. That issue was not ripe until after the remand. Accordingly, the PSI noted the following:

> The presumptive sentences for ... [appellant's offenses] has been established bylaw and is life in prison for the deaths of Mr. Mohammed and Mr. Warfa and life in prison without the possibility of release for the death of Mr. Elmi. As the sentences are non-negotiable, this report is being offered to the Court for information purposes only.

See Court File, PSI ordered on September 23, 2011 (PSI at 6).

Because appellant, at the time of the first appeal, did not know and could not know what sentence he might receive on remand, he could not at that time properly ask this Court to rule hypothetically on the constitutionality of every possible permutation of sentence that might be imposed after remand. Appellant now in this appeal properly challenges the consecutive sentencing imposed absent a Miller hearing and in violation of *Montgomery.*

Appellant did not have at the time of *Ali* I, as he now has, the proper foundation to challenge the consecutive sentences on two of the three counts of conviction as denying substantive due process prior to the United States Supreme Court deciding *Montgomery.* By re-considering the constitutionality of consecutive sentencing that fails to provide a meaningful opportunity for release

absent proof a juvenile is permanently incorrigible, this Court is not refusing to follow precedent or ignoring the law of the case: this Court is rending a decision based on a subsequent change of precedent and a new ruling.

II.

Montgomery clarified that the requirement for a Miller hearing is substantive – not merely procedural. One ramification of this ruling is that failing to hold a Miller hearing cannot be analyzed as to whether the error was harmless: such an error is structural and necessitates vacating the sentence. This Court cannot review the record to determine if information known at the time or the discretion exercised rendered lack of a hearing harmless. Therefore, this Court should reject Respondent's argument that, in effect, the error to not hold a Miller hearing was harmless because the district court considered the juvenile's age and culpability before imposing the functional equivalent of a natural life sentence.

Either a Miller hearing has been held or the juvenile cannot be sentenced to a natural life sentence or its functional equivalent. There is no harmless error analysis following the United States Supreme Court's ruling in *Montgomery* declaring that *Miller* guarantees a substantive right – not merely a procedural one. Such a structural error requires vacating the sentence: the record is inadequate to determine whether the sentence, even absent a Miller hearing, was accurate and fair:

> [E]rrors violating constitutional rights can be divided into two categories: "trial errors" and "structural defects." .... Trial errors occur during the presentation of the case to the jury, and "may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." .... In cases involving trial errors, we apply a harmless error test, which requires reversal unless the guilty verdict rendered is "surely unattributable" to the error. ....
>
> In contrast, structural errors are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."

> *Fulminante,* 499 U.S. at 309, 111 S.Ct. 1246. In *Fulminante,* the Supreme Court gave two examples of structural errors: the deprivation to the right of counsel at trial and the presence of a partial judge. *Id.* at 309, 111 S.Ct. 1246 (citing *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); and *Tumey,* 273 U.S. at 510, 47 S.Ct. 437). The Court stated in *Fulminante* that "[t]he entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." *Id.* at 309-10, 111 S.Ct. 1246; *see also Gray v. Mississippi,* 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) ("We have recognized that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. .... Structural errors require reversal, for without the basic protections of the right to counsel and the right to an impartial judge, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante,* 499 U.S. at 310, 111 S.Ct. 1246 (citing *Rose v. Clark,* 478 U.S. at 577-78, 106 S.Ct. 3101). Accordingly, when a defendant has been deprived of an impartial judge, automatic reversal is required.

State v. Dorsey, 701 N.W.2d 238, 252–53 (Minn. 2005).

One of the key differences between a new procedural rule of law and a substantive right such as was announced in *Miller* is that a new procedural rule is not retroactive: it need not be because a harmless error analysis can be performed in the prior case where the new procedural rule had not been applied. This is possible because even if the proper procedures were not followed, a court can assess if sufficient evidence supported the verdict or whether the outcome would have been different. However, a new substantive rule is not susceptible to harmless error analysis and, for similar reasons, will need to be retroactive. *See e.g. State v. Reiners,* 664 N.W.2d 826, 835 (Minn. 2003) ("We conclude that the erroneous denial of a peremptory challenge also does not lend itself to harmless error analysis. We would find it difficult, if not impossible, to compare an error made during voir dire to all of the evidence presented at trial and gauge its particular impact on

the verdict. "); *cf. State v. Chauvin,* 723 N.W.2d 20, 30 (Minn. 2006) ("The Supreme Court recently determined that *Blakely* errors are not structural and thus are subject to a harmless error analysis."). Here, the lack of an actual Miller hearing cannot be assessed for whether there was an inaccurate sentencing decision because this Court cannot know what evidence the defense might have submitted, and whether that evidence might have made a difference.

Respondent's brief attempts to erroneously imply that a juvenile who commits an offense against more than one person does not necessarily fall within the dictates of *Miller* and *Montgomery*. R.10. However, the rulings in *Miller* and *Montgomery* are not crime - specific. The reasons why a juvenile should have a Miller hearing and an adult has no right to such a hearing are not related to the severity of the offense or the number of victims. *Miller,* 132 S.Ct. at 2468 – 2469. The reason for such a difference is that juveniles are immature, their brains are still developing, they can be hostages to a criminogenic family, neighborhood and environment from which they have no escape. *Id.* The factors to be considered at the Miller hearing are not solely or even mainly the juvenile's culpability but are the juvenile's potential for change, growth and maturity.

Respondent argues that a juvenile who commits an offense against multiple victims must be more blameworthy than a juvenile who harms a single victim and this greater culpability should result in a longer sentence. R.13. Admittedly, sometimes this might be true. However, the point is that the longer sentence can be imposed only after a Miller hearing and after a court considers many factors of which blameworthiness is only one such factor. Absent proof of permanent incorrigibility, even a juvenile offender who

has harmed multiple victims has a substantive due process right to a possibility of release. Thus, Respondent's argument exhibits a fundamental misunderstanding of the principle that juveniles are categorically different and Respondent's citations to cases concerning only adult offenders do not support its argument. *See e.g.* R.11 (citing Vermont case from 1886 dealing with adult offender).

Nor does Respondent offer any analysis as to why *Williams* might be interpreted as foreclosing a challenge to the functional equivalent of a life without possibility of release sentence. In fact, *Williams* held only that the consecutive sentences were not mandatory and, therefore, did not violate *Miller*. However, that decision pre-dated the ruling in *Montgomery* and, therefore, should be revisited, as detailed in appellant's brief to this Court. *See* R.4 (citing *State v. Williams,* 862 N.W.2d 701,704 (Minn. 2015)). Further, Respondent's brief is silent as to why, after *Montgomery*, it could be argued that a court's exercising discretion to impose consecutive sentences due to multiple victims is the same as holding a Miller hearing on whether a juvenile is permanently incorrigible.

Although Respondent has cited some of the cases that do not find imposing the equivalent of a natural life sentence through consecutive sentencing violates *Miller*, Respondent has failed to establish why, if juveniles are categorically less culpable and cannot be sentenced to life without possibility of release absent proof of permanent incorrigibility, somehow there can be read into the law a multiple victim exception that does not exist in the juvenile jurisprudence of the United States Supreme Court. Respondent's brief has failed to distinguish these cases from the better reasoned and correct cases that equate both natural life and functional natural life sentences.

Finally, Respondent argues that providing a meaningful opportunity for release by using actuarial data based on factors such as race or gender, would be the equivalent of impermissibly considering race. R.15. Just as in cases such as *Batson*, where differences in race and gender lead to discrimination, efforts to undo unfair treatment are not, themselves, discriminatory. *See e.g. Batson v. Kentucky,* 476 U.S. 79 (1986). The fact that a history of oppression and discrimination might result in a shorter life expectancy for certain groups compels courts to consider a specific remedy tailored to such groups: ignoring such unfairness does not promote fairness.

III.

The right to counsel is guaranteed at every critical stage of a proceeding. This right is meaningless if counsel is not provided the opportunity to advocate for a defendant's rights. Here, Respondent argues that because the district court had information about appellant's age, background and history, it was, in effect, harmless error that appellant's counsel never had the opportunity to investigate, introduce expert testimony, litigate or advocate at an adversarial hearing the factors outlined in Miller that exceed what the district court considered when re-sentencing appellant.

Respondent argues, in effect, that because the offenses of which appellant was convicted of committing were "senseless," "devastated the victims' families and their communities," and because appellant "did not confess," and "has accepted no responsibility for his crimes," permissive consecutive sentencing was commensurate with his criminality. R.19. Further, Respondent argues that the district court was aware of appellant's age and the "attendant characteristics of youth." R.18.

Implicit in this argument is a point of view that defense counsel is not relevant to the sentencing proceeding: a district court judge sitting through the trial can review the

record and the PSI and then sentence the juvenile, absent an adversarial hearing, which is required, for example, by *Blakely* even for adults to receive simply a longer than presumptive guidelines sentence. *Blakely v. Washington,* 542 U.S. 296 (2004). According to Respondent's argument, all the defense might add would be some expert testimony on the "general concepts of adolescent brain development unlikely to have changed the district court's analysis." R.18. In support, Respondent cites a law review article that no neurological expert can provide a specific opinion about whether any given juvenile's neurological development shows transient immaturity. R.18.

Again, Respondent's argument has misconstrued what should happen at a Miller hearing. A juvenile needs to be evaluated – not just by a probation agent but at the least by a psychologist as is routine in certification and EJJ proceedings, and any other relevant experts to determine possible neurological disorders, organic brain disease, possible fetal alcohol syndrome, possible post-traumatic stress disorder, learning disorders, psychiatric illnesses and the possibilities for treatment and rehabilitation. Insofar as Respondent's argument rests on a faulty understanding of why the United States Supreme Court has mandated Miller hearings as a substantive right, Respondent's arguments miss the point.

The substantive right to a Miller hearing is not merely the right to have the district court review the circumstances of the crime and the juvenile's age. Similar to Blakely hearings and death penalty mitigation hearings, the right to a Miller hearing – a substantive due process right– a juvenile has the right to have counsel investigate, litigate and advocate that the juvenile is not permanently incorrigible: a standard different from

mainly assessing culpability. Additionally, as noted in *Jackson*, a Miller hearing should consider a "juvenile's mindset and characteristics." *Jackson v. State*, No. A14-2060, 2016 WL 4126394, at *7 (Minn. 2016). A fair consideration of "mindset and characteristics" has to allow for expert evaluation through psychometric testing and advocacy of information gleaned from investigation by the juvenile's own advocate.

Even a Blakely hearing would be insufficient if it simply involved a judge reviewing the record and the PSI and then pronouncing sentence. Even a Blakely hearing involves the right to a jury and rights similar to trial rights, as shown in the following exchange in a case where a defendant was waiving such rights:

> The following exchange then took place between Closner and his attorney about his *Blakely*-hearing rights:
>
> Q: Now, with regards to the aggravating factors that [the prosecutor] and I have discussed on the record, you understand that, if we were to go to trial, those aggravating factors would be the subject of a separate sentencing trial. We discussed that, correct?
>
> A: Yes.
>
> Q: And you understand that the State would have to prove to the jury, and that jury would have to be unanimous in its verdict, that the State had proven those aggravating factors by proof beyond a reasonable doubt. Do you understand that?
>
> A: Yes.
>
> Q: You understand that by admitting to engaging in those acts and that you have conducted yourself in such a way to have committed this offense with those aggravating factors being present that you're giving up your right to have that separate sentencing trial with regards to the aggravating factors; is that correct?
>
> A: Yes.

> Q: Now, all of those trial rights that we've discussed, your right to remain silent, your right to be presumed innocent, the right to a unanimous verdict in the jury, your right to challenge the State's evidence with an attorney to assist you, your right to present evidence in your own defense at the sentencing phase of the trial, you understand you have all those rights with regards to that sentencing phase of the trial on the issue of aggravating factors; is that correct?

State v. Closner, No. A13-1949, 2014 WL 4175865, at *3 (Minn. Ct. App. Aug. 25, 2014). Here, no such rights were accorded to appellant, despite that he faced the equivalent of a natural life prison sentence.

An adversarial sentencing hearing is quite different than what happened here where the court, based on information it had heard during the course of the proceedings and information in the PSI, determined the sentence without an opportunity for the defense to present its case. At the time, since appellant was being sentenced to life without possibility of release on one of the murder counts, there was no relevance to the defense requesting a hearing or litigating the sentence. However, where any discretion exists, a true adversarial testing of the evidence is essential to fairness:

> These several elements of the ideal due process hearing are intended primarily to assure that factual determinations have been reliably made, and hence to promote the societal interest in just outcomes. "Most errors," Professor O'Neil has argued, "are bound to produce injustice, whether by deprivation or by misallocation," and some of these errors may well be both significant and irreversible. The due process hearing guards against this possibility in several ways. First, the primary role assigned to the disputants converts the parties' self-interest into a motivation for the fullest presentation of pertinent facts. Second, reliance on trained advocates insures that factual assertions unfavorable to one side will be fully tested. Finally, the insistence upon a neutral decisionmaker and a reasoned decision minimizes the possibility of arbitrary or biased decisionmaking. In sum, these safeguards serve as a prophylactic against official abuse of power. They "counteract the distortions introduced into official decision-making by the good faith factors of overzealousness, inertia, or tunnel-

> vision, as well as those other distortions suggested by the darker implications of the maxim that power tends to corrupt"; they encourage fairness generally, and that is of benefit to the community as a whole.

David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 Stan. L. Rev. 841, 848 (1976).

Respondent's final summation as to why appellant should serve the functional equivalent of a natural life sentence with no meaningful opportunity for release, absent a Miller hearing, is stated at the end of the brief as follows: prohibiting consecutive life sentences for multiple victims "is contrary to common sense." R.20. Again, it is not being argued that life without possibility of release can never be imposed on a juvenile or that consecutive sentencing that denies a meaningful opportunity for release can never be imposed. All that is at issue here is that appellant be afforded his constitutional right to a full and fair Miller hearing at which he is represented by counsel and able to investigate and litigate his case. Insofar as Respondent might be arguing not just a harmless-error argument but that in cases of multiple victims no Miller hearing is needed no matter how long the sentence, Respondent has failed to show how such a rule would not violate *Miller* and the spirit of *Miller* and the United States Supreme Court's juvenile jurisprudence.

In sum, Respondent has not presented any compelling or logical arguments to establish why, if a juvenile cannot serve a natural life sentence absent proof of permanent incorrigibility, the juvenile can serve its functional equivalent without a Miller hearing. Respondent does not and cannot argue that appellant received a Miller hearing. Nor does Respondent argue that the exercise of discretion by the district court to impose

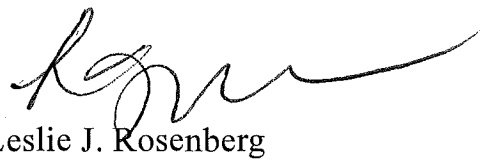
permissive consecutive sentences was the same as an adversarial Miller hearing. Instead, Respondent seems to rely on a two-fold argument: the district court knew a lot of unfavorable facts about appellant's offense and background and appellant is highly culpable, not remorseful and his offense involved multiple victims. However, very significantly, it was Respondent's choice at re-sentencing to forego a Miller hearing. Respondent should not be allowed to deprive appellant of the hearing yet argue that what happened was good enough because appellant is guiltier than a defendant who killed only one person. The state chose to forego the necessary steps to allow a life without possibility of release or its functional equivalent sentence to be imposed. It is not for this Court to be a backup prosecution. This Court should reject any and all attempts to erode the significant constitutional protections guaranteed to appellant.

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: September 1, 2016

Respectfully submitted,



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