SUPREME COURT

OF THE

STATE OF CONNECTICUT

No. S.C. 19954

Judicial District of Hartford

STATE OF CONNECTICUT

v.

TAUREN WILLIAMS-BEY

BRIEF OF THE DEFENDANT-APPELLANT

Heather Clark
Assigned Counsel
Juris No. 429967
Clark Law Office
300 State Street, Suite 309
New London, Connecticut 06320
Tel.: (860) 574-9112
Fax: (860) 574-9220
Email: heather@hclarklaw.com

Counsel of Record and
Arguing Attorney

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STATEMENT OF ISSUES

I. "Under the Connecticut Constitution, Article First, §§ 8-9, are all juveniles entitled to a sentencing proceeding at which the court expressly considers the youth related factors required by the United States Constitution for cases involving juveniles who have been sentenced to life imprisonment without possibility of release? See Miller v. Alabama, 567 U.S. 460 (2012)."

II. "If the answer to question one is in the affirmative and a sentencing court does not comply with the sentencing requirements under the Connecticut Constitution, does parole eligibility under General Statutes § 54-125a(f) adequately remedy any state constitutional violation?"

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STATEMENT OF THE NATURE OF THE PROCEEDINGS

On January 4, 2000, the defendant, a juvenile offender, appeared in the Hartford Judicial District and pled guilty to murder as an accessory, in violation of Conn. Gen. Stat. § 53a-54a and § 53a-8. See A 1-2.[1] The court, Clifford, J., waived the preparation of the presentence investigation report and, on February 25, 2000, sentenced the defendant to 35 years in prison, in accord with the court-indicated sentence. See A 2. The defendant did not appeal his conviction and sentence. On December 16, 2013, the defendant filed a motion to correct an illegal sentence under Conn. Practice Book § 43-22, which he amended on April 2, 2014. In April, he also filed a brief in support of the amended motion. See A 3, 5-15.

The defendant claimed that his sentence violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article First, §§ 8-9 to the Connecticut Constitution based on Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, 132 S.Ct. 2455 (2012). See A 5-6. On the state constitutional claim, the defendant cited State v. Geisler, 222 Conn. 672, 610 A.2d 1225 (1992). See A 6.

The matter came before the court, Alexander, J., on April 2, 2014 for oral argument. See Tr. Thereafter, on July 29, 2014, the court, Alexander, J., dismissed the amended motion by memorandum of decision. See A 16-24. The court "was not convinced that the Miller line of cases should be so broadly interpreted and applied, particularly without a directive from the legislature or guidance from our Supreme Court." See A 20. In sum, the court concluded: "the defendant's case does not fall within the narrow confines of Graham and Miller and the relief sought exceeds the jurisdiction of this court." See A 23.

The defendant timely filed an application for the waiver of fees and the appointment of counsel of appeal, which the court granted. See A 3, 26. On April 2, 2015, the defendant, through court-appointed counsel, filed a motion to reconsider in the trial court based on State v. Riley, 315 Conn. 637, 110 A.3d 1205 (2015). The defendant also filed a motion to

[1] The defendant-appellant's appendix is referenced as "A," and the transcript of the April 2, 2014 hearing on the defendant's amended motion to correct is referenced as "Tr."

exercise supervisory authority, under Conn. Practice Book § 60-2, in the Appellate Court, in which he sought a stay in his appeal, which motion was denied on May 19, 2015.

After full briefing and oral argument, the Appellate Court affirmed on alternative grounds. Though the "trial court improperly determined that it lacked jurisdiction," see Williams-Bey, 167 Conn. App. at 747, 144 A.3d at 470, the court held:

> the defendant's sentence does not violate the eighth amendment as interpreted in Miller…Furthermore…in light of...Montgomery[2]…and the fact that the defendant will be parole eligible under § 1 of No. 15-84…codified in…§ 54-125a(f), the defendant …[has] been provided with a constitutionally adequate remedy.

Williams-Bey, 167 Conn. App. at 749-50, 144 A.3d at 471. The court further held that for "juvenile defendants whose sentences violated Miller and who are, or will be, eligible for parole under § 54-125a(f), resentencing is not required under our state constitution." The court reversed and "remanded with direction to render judgment denying the defendant's motion." Id. at 781, 144 A.3d at 490.

The defendant filed a petition for certification to appeal. See A 46-56. By February 7, 2017 order, this Court took "no action" on that petition, but sua sponte remanded:

> to [the Appellate Court] with direction to reconsider its ruling that the trial court did have jurisdiction over the motion to correct an illegal sentence in light of our holding in State v. Delgado, 323 Conn. 801 (2016) and State v. Boyd, 323 Conn. 816 (2016).

See A 57. On May 9, 2017, without any briefing, the Appellate Court ruled: "we are constrained by Delgado to conclude that the trial court properly dismissed the defendant's motion to correct an illegal sentence and that its judgment should be affirmed." State v. Williams-Bey, 173 Conn. App. 64, 66, 164 A.3d 31, 32 (2017). The defendant again filed a petition for certific-ation to appeal. See A 59-69. This Court granted the defendants petitions limited to two specific questions, quoted in the statement of issues. See A 70-71. This brief is filed timely.

STATEMENT OF THE FACTS

[2] Montgomery v. Louisiana, 136 S.Ct. 718 (2016).

On January 4, 2000, the defendant, a juvenile offender, pled guilty to murder as an accessory, in violation of Conn. Gen. Stat. § 53a-54a and § 53a-8. See A 1-2. The court, Clifford, J., waived the preparation of the presentence investigation report. See A 2. The matter next came before the court, Clifford, J., on February 25, 2000, for sentencing. See A 1. The court noted: "[t]here is a court-indicated sentence of 35 years in prison." See A 84.

The state referenced the court's knowledge of the matter since this judge pretried the co-defendants' matters. See A 84. The state argued that the defendant was the "actual murderer," but that the defendant took "advantage of the plea bargain," unlike co-defendant Michael Spyke, who proceeded to trial and will serve a longer sentence. See A 84-85. The state agreed with the decedent's family that the defendant "should do the rest of his life in jail, but unfortunately…accept[ed] the realities of system." See A 85.

Defense counsel explained that he had known the defendant's mother for ten years and further interjected his personal view: "knowing Tauren's mother, I know that he wasn't raised this way." See A 86-87. Counsel offered no mitigation. Instead, he noted that "it is numbing to hear these cases one after another;" while the defendant "is going to get 35 years," the co-defendants' sentences were 50 years, 25 years and eight or 15 years. See A 86. Counsel further undermined the defendant by arguing that Tauren "didn't really have a defense other than that he was with a group of young men. What the argument was about eludes me….And that's what's the most upsetting, I think, is that there is no real reason for this." See A 87. Before imposing sentence, the court noted:

> [t]his was an execution-style murder…I don't think these kids certainly look ahead to the consequences of their actions. They just get involved in this macho gun play that leaves them, some of the youth of our city and all over Connecticut, to spending the rest of their life, basically, in prison; and it makes no sense.

See A 88. The court emphasized that "plea bargaining is necessary" in the justice system; "it involves the tradeoff of the certainty of punishment." Using Spyke's trial and the long jury deliberations as an example, the court noted: "that's the reason plea bargaining is involved, because some of these cases where people are accepting large numbers as a result of a

guilty plea may be cases that would result in a not guilty or a hung jury." See A 89-90.

The court, Clifford, J., then imposed a sentence of 35 years in prison, of which 25 years was the mandatory minimum. To conclude, the state withdrew the previously filed sentence enhancement. See A 3-4, 90.

On December 16, 2013, the defendant filed a motion to correct an illegal sentence under Conn. Practice Book § 43-22, which motion he amended on April 2, 2014. See A 3, 5-6. The defendant argued that his prison sentence violated the United States and Connecticut Constitutions, citing Graham, Miller and Geisler in support of his claim. See A 6. The defendant prayed that the court vacate his sentence and remand the matter, or that the Board of Pardons and Paroles immediately evaluate him for release. See A 6.

The matter came before the court, Alexander, J., on April 2, 2014 for oral argument on the amended motion. See Tr. The court noted that: "I did receive, and I will review after the court session, some entries that have been submitted from the defendant himself, as well as numerous…certificates and evaluations from the Department of Corrections which have shown Mr. Williams-Bey's full compliance and progress in maturity." See Tr. 2.

The defendant's attorney argued that Tauren was 16 years old on the date of the offense; at that age, "the best psychiatrist in the world can't…say, this kid is beyond hope. This kid is completely…beyond rehabilitation." See Tr. 4, 6. The state, in turn, argued that Miller did not apply and focused on the facts of the offense of conviction. See Tr. 10. The defendant then spoke on his own behalf:

> Since my incarceration, I've earned my high school diploma, completed all programs that level four has to offer, I received recommendations from counselor's supervisor, of classification, and the warden for a level override only to be denied by population management because of the length of my time. I'm currently facilitating to criminal justice duties about the reality of prison. It's important for society to know confrontation don't stop postconviction, but it can stop through reason and learning different behaviors. My prison file can speak volumes on my behalf in that regard.

See Tr. 10. The court then made clear: "there is legislation being considered, I'm certainly going to defer my decision at least until after the close of the session." See Tr. 11-12. The

hearing ended with the defendant's attorney reiterating his Geisler argument. See Tr. 13.

On July 29, 2014, the court, Alexander, J., dismissed the amended motion to correct an illegal sentence by memorandum of decision. See A 16-24. The Appellate Court ultimately affirmed that dismissal. See Williams-Bey, 173 Conn. App. at 66, 164 A.3d at 32.

ARGUMENT

I. STANDARD OF REVIEW.

Question of "whether the trial had jurisdiction over the motion to correct" based on "the allegations that the sentence was illegal and imposed in an illegal manner in violation of the eighth amendment" to the United States Constitution, or here, Article First, §§ 8-9 to the Connecticut Constitution, is a "question of law" for which "plenary review" applies. See Delgado, 323 Conn. at 809-10, 151 A.3d at 351.

> At issue is whether the defendant has raised a colorable claim within the scope of [Conn.] Practice Book § 43-22 "that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of the sentence."…In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence. Id. at 810. 151 A.3d at 351.

Conn. Practice Book § 43-22 "embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition [or it may correct a sentence imposed in an illegal manner]." See State v. Clark, 136 Conn. App. 421, 424-25, 47 A.3d 391, 393 (2012); State v. Parker, 295 Conn. 825, 834, 992 A.2d 1103, 1109 (2010) ("it long has been understood that, if a court imposes an invalid sentence, it retains jurisdiction to substitute a valid sentence").

In relevant part, "[s]entences imposed in an illegal manner" are "'within the relevant statutory limits but…imposed in a way which violates [a] defendant's right…to be addressed personally at sentencing and to speak in mitigation of punishment…to be sentenced by a judge relying on accurate information…solely in the record, or his right that the government keeps its plea agreement promises." Parker, 295 Conn. at 839, 992 A.2d at 111.

II. OUR STATE CONSTITUTION GUARANTEES THAT ALL JUVENILES ARE ENTITLED TO A SENTENCING PROCEEDING AT WHICH THE

COURT CONSIDERS YOUTH RELATED FACTORS.

"It is well established that federal constitutional law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights." See State v. Ross, 230 Conn. 183, 247, 646 A.2d 1318, 1355 (1994); Danforth v. Minnesota, 552 U.S. 264, 295 (2008) (states can "give greater substantive protection under their own laws than…available under federal law, and could give whatever retroactive effect to *those* laws they wish").

"[I]n the area of fundamental civil liberties – which includes all protections of the declaration of rights contained in article first of the Connecticut constitution" this Court "sit[s] as a court of last resort. In such constitutional adjudication, [the] first referent is Connecticut law and the full panoply of rights Connecticut citizens have come to expect as their due." State v. Santiago, 318 Conn. 1, 15-16, 122 A.3d 1, 13-14 (2015). "[O]ur state constitution is an instrument of progress…[and] is intended to stand for a great length of time and should not be interpreted too narrowly or too literally." Ross, 230 Conn. at 248, 646 A.2d at 1355.

"[W]henever…called on as a matter of first impression to define the scope and parameters of the state constitution," this Court employs the "six nonexclusive tools of analysis" identified in Geisler: "(1) persuasive relevant federal precedents; (2) historical insights into the intent of our constitutional forebearers; (3) the operative constitutional text; (4) related Connecticut precedents; (5) persuasive precedents of other states; and (6) contemporary understandings of applicable economic and sociological norms, or, as otherwise described, relevant public policies." Santiago, 318 Conn. at 17-18, 122 A.3d at 15; see Geisler, 222 Conn. at 684-85, 610 A.2d at 1232.

Analysis of the Geisler factors supports the conclusion that Article First, §§ 8 and 9 to the Connecticut Constitution guarantee all juveniles offenders a sentencing proceeding "at which the court expressly considers the youth related factors required by the United States Constitution," and articulated in Miller and Riley.

A. The textual approach.

"It is by now well established that the constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9. Those due process protections take as their hallmark principles of fundamental fairness rooted in our state's unique common law, statutory, and constitutional traditions." Santiago, 318 Conn. at 16-17, 122 A.3d at 14; see Ross, 230 Conn. at 246, 646 A.2d at 1355.

To begin, "[p]rior to the adoption of the state constitution in 1818, the common law in Connecticut recognized that the state did not have unlimited authority to inflict punishment for the commission of a crime." See Ross, 230 Conn. at 246-47, 646 A.2d at 1355. Prior to that adoption, "Connecticut's earliest reported judicial decisions indicate that the courts, like the legislature, had begun to adopt a broader conception of cruel and unusual punishment." See Santiago, 318 Conn. at 35, 122 A.3d at 25. Thus,

> [i]n light of our state's firm and enduring commitment to the principle that even those offenders who commit the most heinous crimes should not be subjected to inhumane, barbarous, or cruel punishment, the question naturally arises why the framers of the 1818 constitution decided to embed these traditional liberties in our dual due process clauses…rather than in an express punishments clause.

Id. at 38-39, 122 A.3d at 27. Connecticut's broader legal history provides the answer.

At the turn of the 19th century, "Connecticut courts routinely safeguarded the basic rights enshrined in the federal Bill of Rights on the basis of natural rights or common law, without the need for any formal constitutional sanction." Important, "there was a particular fear in Connecticut that the adoption of a written bill of rights would imply, by negative inference, that citizens were no longer entitled to unenumerated protections long enshrined in the state's common law." Santiago, 318 Conn. at 39, 122 A.3d at 28.

In that historical context, this Court has "assume[d] that the framers believed that individuals would continue to possess certain natural rights even if those rights were not enumerated in the written constitution." Thus, "in determining whether unenumerated rights were incorporated into the constitution," the Court "must focus on the framers' understanding of whether a particular right was part of the natural law, i.e., on the framers' understand-

ing of whether the particular right was so fundamental to an ordered society that it did not require explicit enumeration." Santiago, 318 Conn. at 40, 122 A.3d at 28 (quoting Moore v. Ganim, 233 Conn. 557, 660 A.2d 742 (1995)).

Within this framework, the defendant turns to the text of Article First, §§ 8 and 9 to our constitution. Article First, § 8 to the Connecticut Constitution provides, in part, that: "No person shall…be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed." Specific to Article First, § 8, this Court has explained that the Geisler factors "inform our application of the established state constitutional standards – standards that…derive from United States Supreme Court precedent concerning the eighth amendment," see Santiago, 318 Conn. at 18, 122 A.3d at 15, applicable here, standard articulated in Miller.

Article First, § 9 provides that: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."[3] "Read in its entirety, the text indicates that the specific content appropriately to be assigned to the phrase 'clearly warranted by law' depends on the particular liberty interest that is at stake. Such a construction is, of course, entirely consonant with the general contours of a constitutional safeguard rooted in flexible principles of due process." See State v. Lamme, 216 Conn. 172, 178, 181, 579 A.2d 484, 487-88 (1990) (noting that in the 20th century, "the case law under article first, § 9,… emphasize[d] the central role of statutory safeguards in implementing the constitutional right of personal liberty").[4]

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[3] This Court did not address the claim of that the death penalty "violate[d] the provision of article first, § 9, of the constitution of Connecticut barring punishment 'except in cases clearly warranted by law.'" See Santiago, 318 Conn. at 13 n. 9, 122 A.3d at 12 n. 9.

[4] Connecticut courts rarely have interpreted Article First, § 9. In 1923, our Supreme Court of Errors explained: provision that "no person shall be arrested, detained, or punished, except in cases clearly warranted by law," "need not arise out of any criminal prosecution." When no statutory provision authorized "detention pending an appeal…and hence, there was no warrant of law for such detention…detention of…plaintiff…in the Connecticut School for Boys was illegal, and he should be freed therefrom." See Cingue v. Boyd, 99 Conn. 70, 121 A. 678, 686 (1923) (purpose of juvenile courts "is not to punish but to save"). The liberty interest at stake here is "punish[ment]…in cases clearly warranted by law."

Textually Article First, §§ 8 and 9 to the Connecticut Constitution prohibit cruel and unusual punishment regardless of age. This conclusion is supported in that the text of the Connecticut Constitutions of 1818 and 1965, in their entirety, do not reference minors, juveniles, children or the age of majority except in the context of the voting age, detailed infra.[5]

B. Federal precedent.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Miller, 567 U.S. at 469. Whether a sentencing scheme "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and 'greater capacity for change,'" and thus, "runs afoul of…cases' requirement of individualized sentencing for defendants facing the most serious penalties," implicates a "confluence" of "two strands" of Eighth Amendment precedent that reflect "concern for proportionate punishment." Id. at 465, 469-70.

The first strand of precedent "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." Miller, 567 U.S. at 470; see Roper v. Simmons, 543 U.S. 551 (2005); Graham, supra. The second strand "demand[ed] individualized sentencing when imposing the death penalty." Miller, 567 U.S. at 475; see Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). These strands are taken in turn.

The first strand of precedent: "Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing." Miller, 567 U.S. at 471. Further, "Roper and Graham emphasized that the distinctive attributes of youth diminish the peno-

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[5] Of note, this Court has not interpreted the cruel and unusual punishment prohibition under our constitution on challenges made by juvenile offenders because the appellants repeatedly "provided no independent analysis under the state constitution, as required under…Geisler." See e.g. State v. Allen, 289 Conn. 550, 580 n. 19, 958 A.2d 1214, 1233 n. 19 (2008) (juvenile mandatory life in prison without the possibility of release) (overruled by both Miller and Riley); State v. Perez, 218 Conn. 714, 723, 591 A.2d 119, 123 (1991) (juvenile waiver of rights under Miranda v. Arizona, 384 U.S. 436 (1966)); State v. Morales, 240 Conn. 727, 738 n. 12, 694 A.2d 758, 764 n. 12 (1997) (juvenile transfer statute).

logical justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 472.

In Roper, the Supreme Court explained: "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." Roper, 543 U.S. at 561. The Court noted "[t]hree general differences between juveniles under 18 and adults," that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."

> First, as any parent knows and as the scientific and sociological studies…tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."…The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure… The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Roper, 543 U.S. at 569-70. Since "[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," the "States should refrain from asking jurors to issue a far graver condemnation…the death penalty." Id. at 573. Based on analysis of "the evolving standards of decency that mark the progress of a maturing society," Roper established a categorical bar on the execution of juveniles under 18 years of age when the crimes were committed, because that punishment was "so disproportionate as to be cruel and unusual." Id. at 574, 578.

In Graham, the Supreme Court expounded upon Roper: "No recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles…[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." Graham, 560 U.S. at 68. Thus, based on analysis of the "evolving standards of decency," Graham established a categorical bar on life without parole sentences for juvenile nonhomicide offenders under 18 years of age when the crimes were committed, because disproportionate. Id. at 61, 74 ("penological

theory is not adequate to justify life without parole for juvenile nonhomicide offenders; the limited culpability of juvenile[s]…; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual").

While a "State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," Graham held that a state must "give defendants…some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham left to "the State, in the first instance, to explore the means and mechanisms for compliance." 560 U.S. at 75; Id. at 82 ("if [a state] imposes a sentence of life it must provide…some realistic opportunity to obtain release before the end of that term").

Important, upon analyzing Roper and Graham, the Miller Court held that: "none of what [the Court, in Roper and Graham], said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." Miller, 567 U.S. at 473. The Miller Court explained: **"An offender's age**, we made clear in Graham, **is relevant to the Eight Amendment, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."** Id. at 473.[6] The Miller Court explained that mandatory penalty schemes "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender," and thus, "contravene Graham's (and…Roper's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 567 U.S. at 474.

The second strand of precedent: "Graham's [t]reat[ment] [of] juvenile life sentences as analogous to capital punishment…ma[de] relevant…a second line of…precedents, demanding individualized sentencing when imposing the death penalty." Miller, 567 U.S. at 475 (internal quotations omitted).

In Lockett, the Supreme Court explained: "[I]n capital cases, the fundamental

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[6] Internal quotations omitted; emphasis added.

respect for humanity underlying the Eighth Amendment…requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." The "qualitative difference between death and other penalties calls for a greater degree of reliability." Lockett, 438 U.S. at 604. Thus, the Lockett Court held that: "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation" violates the Eighth and Fourteenth Amendments. Id. at 605.

In Eddings, the Supreme Court expounded upon Lockett: "the rule in Lockett is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual;" "the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency." Eddings, 455 U.S. at 110. The Eddings Court held: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence," i.e., "an emotionally disturbed youth with a disturbed child's immaturity." Id. at 113-14, 116.

To so hold, the Eddings Court explained that: "[Y]outh is more than a chronological fact…Our history is replete with laws and judicial recognition that minors, especially in their early years, generally are less mature and responsible than adults." 455 U.S. at 115-16; see Johnson v. Texas, 509 U.S. 350, 367 (1993) ("[t]here is no dispute that…youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of Lockett and Eddings").

Next, on this second strand of precedent, the Miller Court explained:

> Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the "mitigating qualities of youth."…Everything we said in Roper and Graham about that stage of life also appears in these decisions. As we observed, "youth is more than a chronological fact."…It is a time of immaturity, irresponsibility, "impetuousness[,] and recklessness."…It is a moment and "condition

> of life when a person may be most susceptible to influence and to psychological damage."…And its "signature qualities" are all "transient."…"[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability.

Miller, 567 U.S. at 476. Thus, "[i]n light of Graham's reasoning…mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and wealth of characteristics attendant to it" and should be "strictly forbidden." Id. at 476.

In combining the two strands of precedent, the Miller Court explained: "So Graham and Roper and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, **a sentencer misses too much if he treats every child as an adult**." 567 U.S. at 477 (emphasis added). "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence" a sentencing scheme that mandates life without parole "poses too great a risk of disproportionate punishment." Id. at 479. "[A]ppropriate occasions for sentencing juveniles to this harshest…penalty will be uncommon… because of the great difficulty…noted in Roper and Graham of distinguishing at this…age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" Id. at 479-80.

The Eighth Amendment requires a sentencer "to take into account how children are different, and how those differences counsel again irrevocably sentencing them to a lifetime in prison." Miller, 567 U.S. at 480; Id. at 489 ("Graham, Roper and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles").

Here, the question is not whether our state constitution mandates a categorical ban on a specific penalty, but rather, akin to Miller, whether a sentencing court that imposes a penalty without "taking account of an offender's age and wealth of characteristics attendant to it" "poses too great a risk of disproportionate punishment" in violation of our constitutional prohibition on cruel and unusual punishment. See Miller, 567 U.S. at 476, 479 (quotes). The teachings of Roper, Graham and Miller "that children are constitutionally different from

adults for purposes of sentencing," see Miller, 567 U.S. at 471, support the individualized sentencing of all juvenile offenders regardless of the offense of conviction or the label of the punishment, since nothing about juvenile's "distinctive (and transitory) mental traits and environmental vulnerabilities…is crime-specific," see id. at 473.[7] It bears repeating: "An offender's age…is relevant to the Eight Amendment, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Id. at 473.[8]

A final federal precedent, in Montgomery, the United States Supreme Court held that: "Miller announced a substantive rule that is retroactive in cases on collateral review." Montgomery, 136 S.Ct. at 731-32 ("[t]here is no grandfather clause that permits States to enforce punishments the Constitution forbids").

While "Miller's holding has a procedural component," the Montgomery Court explained that a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." 136 S.Ct. at 734-35. A "hearing does not replace but rather gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Id. at 35. Though "careful to limit the scope of any procedural requirement," the Montgomery Court noted that "[a] State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Id. at 735-36.[9]

C. Connecticut precedent.

This Court first applied Miller to Connecticut's discretionary sentencing scheme in

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[7] Of import, the Miller Court did not conduct an independent analysis of the "evolving standards of decency" on life without parole sentences imposed on juvenile homicide offenders, but instead, relied on Graham, which analyzed only the "evolving standards of decency" on life without parole sentences imposed on juvenile nonhomocide offenders. See Graham, 560 U.S. at 62-67 (discussing a national study on life without parole sentences imposed on juvenile nonhomicide offenders); Id. at 74 ("[i]n sum, penological theory is not adequate to justify life without parole for juvenile nonhomocide offenders").

[8] Internal quotation omitted.

[9] Analysis of the remedy more properly is addressed under the second question.

Riley. The Riley Court explained that "[a]lthough the unique aspects of adolescence had long been recognized in the Supreme Court's jurisprudence, it was not until the trilogy of Roper, Graham, and Miller that the court held that youth and its attendant circumstances have constitutional significance for purposes of assessing a proportionate punishment under the eighth amendment." 315 Conn. at 644-45, 110 A.3d at 1208.

After articulating that trilogy, the Riley Court acknowledged that "Miller is replete with references to 'mandatory' life without parole and like terms," but continued: "the Supreme Court's incremental approach to assessing the proportionality of juvenile punishments counsels against viewing these cases through an unduly myopic lens." Riley, 315 Conn. at 653, 110 A.3d at 1213. Thus, the Supreme Court's "approach in this arena counsels...[the] examin[ation] [of] the logical implications of its reasoning" in Roper, Graham and Miller. See Riley, 315 Conn. at 654, 110 A.3d at 1214.

The Court in Riley explained that "[t]hree aspects of Miller,…read in light of Roper and Graham, demonstrate that the decision logically reaches beyond its core holding." 315 Conn. at 654, 110 A.3d at 1214.

> First, Roper, Graham and Miller emphasized their reliance on an ever growing body of authoritative evidence establishing constitutionally significant differences between adult and juvenile brains...Second, in Miller, the court expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant circumstances, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."...Third, Miller and Graham analogized the harshness of…life…without parole for a juvenile to the death penalty.

Riley, 315 Conn. at 654-55, 110 A.3d at 1214.

The Riley Court thus concluded that: "Miller logically indicates that, if a sentencing scheme permits the imposition of…[life without parole] on a juvenile homicide offender, the trial court *must* consider the offender's 'chronological age and its hallmark features' as mitigating against such a severe sentence." Riley, 315 Conn. at 658, 110 A.3d at 1216; Id. at 653, 110 A.3d at 1213 ("the dictates set forth in Miller may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it

fails to give due weight to evidence that Miller deemed constitutionally significant before determining that such a severe punishment is appropriate"). Those features include:

> "immaturity, impetuosity, and failure to appreciate risks and consequences"; the offender's "family and home environment" and the offender's inability to extricate himself from that environment; "the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him"; the offender's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation...."

Riley, 315 Conn. at 658, 110 A.3d at 1216. The Riley Court made clear that: "[t]o conform to Miller's mandate and our rules of practice…the record must reflect that the trial court has considered and given **due mitigating weight** to these factors in determining a proportionate punishment." Id. at 659, 110 A.3d at 1217 (emphasis added).

Of note, "following the decision in Miller," but before the Riley decision, "our state's presentence report has incorporated these factors as required subjects of investigation and reporting," including "any scientific and psychological evidence showing the differences between a child's…and an adult's brain development." Riley, 315 Conn. at 658-69, 110 A.3d at 1216-17. However, prior thereto, "nothing in our sentencing scheme specifically required the trial court…to consider, let alone give mitigating weight to, the defendant's age at the time of the offense or the hallmarks of youth." Id. at 659, 110 A.3d at 1217 (citing Conn. Practice Book § 43-10(6) and Conn. Gen. Stat. § 54-91a(c) on presentence reports).

This Court next applied Miller in State v. Taylor G., 315 Conn. 734, 743, 110 A.3d 338, 345 (2015), summarizing the federal precedent: "because the eighth amendment prohibition against cruel and unusual punishment is based on the principle that punishment should be graduated and proportioned to the offender and the offense, courts must consider mitigating evidence of youth and immaturity when sentencing juvenile offenders." The Taylor G. Court held that the defendant's "ten and five year mandatory minimum sentences [did not] violate[] the eighth amendment," since the mandatory minimums, "while limiting the trial court's discretion to some degree, still left the court with broad discretion to fashion an appropriate sentence that accounted for the defendant's youth and immaturity

when he committed the crimes." Id. at 744, 110 A.3d at 345-46. Of note, Taylor G. was sentenced after Miller. Id. at 740, 110 A.3d at 343 (sentenced March 2013).

In dissent, the Court, Eveleigh, J., "disagree[d] with the majority's conclusion that the rationales of Roper, Graham, and Miller – that juvenile offenders are constitutionally different than adults because of their decreased culpability – apply with less force when the sentence imposed is not the death penalty or life without parole." Taylor G., 315 Conn. at 775, 110 A.3d at 362; Id. at 787, 110 A.3d at 368-39 ("mandatory minimum sentences can never properly take into account the effect of juvenile differences on the culpability of the juvenile, and thus, the proportionality of the sentence imposed"). **"After all, a juvenile's decreased culpability neither depends on the crime charged,…nor the particular penalty."** Id. at 787, 110 A.3d at 369[10] ("none of what [Graham] said about children…is crime specific;" Miller "does not categorically bar a penalty for a class of offenders or type of crime," but rather, "mandates only that a sentencer follow a certain process – considering an offender's youth and attendant characteristics – before imposing a…penalty").[11]

Citing State v. Lyle, 854 N.W.2d 378 (Iowa 2014), the dissent decided that "neither the crime nor its mandatory minimum punishment should be a factor in a sentencing court's ability to comply with the eighth amendment…and, therefore, a sentencing court possesses discretion to fashion a constitutionally permissible sentence, even if that sentence departs downward from a mandatory minimum." Taylor G., 315 Conn. at 776, 110 A.3d at 363 (dissent, Eveleigh, J.). As in Lyle, "it was the defendant's status as a juvenile and not the sentence's label or length that triggered the constitutional protections of Roper, Graham, and Miller." Taylor G., 315 Conn. at 791-92, 110 A.3d at 371 ("[t]his rationale applies to all

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10 Emphasis added.

11 Said differently, "because it is the juvenile offender's age that triggers the…Supreme Court's specific eighth amendment analysis and heightened eighth amendment protection, and because neither the characteristics of juveniles nor the eighth amendment's protections differ on the basis of the crime charged, it follows that the eighth amendment's protections *with respect to juvenile offenders* do not differ on the basis of the *punishment* imposed." Taylor G., 315 Conn. at 796, 110 A.3d at 374 (dissent, Eveleigh, J.).

crimes…no principled basis exists to cabin the protection only for the most serious").[12]

Of final note, the Taylor G. dissent articulated that:

> A sentencing court's mere ability to impose a sentence *harsher* than the mandatory minimum does not satisfy the mandates of Roper, Graham, and Miller, which require that a sentencing court take into consideration a juvenile's unique characteristics...to give effect to its consideration of the juvenile's youth. Moreover, **it does not comport with our state constitution, which affords greater rights for eighth amendment purposes than the federal constitution.**

Taylor G., 315 Conn. at 801-02, 110 A.3d at 376-77 (dissent, Eveleigh, J.).[13]

Next, in Casiano v. Comm'r of Correction, 317 Conn. 52, 67-68, 115 A.3d 1031, 1040-41 (2015), this Court first concluded that "the rule in Miller requiring that a sentencing authority conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before sentencing a juvenile offender to a life sentence without parole is more properly characterized as a [new] procedural" rule.[14] The Casiano Court then held "that the rule in Miller is a watershed rule of criminal procedure" under Teague since Miller "barred a scheme that failed to account for the mitigating circumstances of youth," and made "the individualized sentencing prescribed by Miller…'central to an accurate determination.'" Id. at 69-70, 115 A.3d at 1041-42. Put differently,

> If failing to consider youth and its attendant characteristics creates a risk of disproportionate punishment in violation of the eighth amendment, then the rule in Miller assuredly implicates the fundamental fairness of a juvenile sentencing proceeding because it is a "basic precept of justice" that punishment must be proportionate "to both the offender and the offense."

Id. at 70-71, 115 A.3d at 1042. "The individualized sentencing process required by Miller must, therefore, apply retroactively on collateral review." Id. at 71, 115 A.3d at 1043.

The Casiano Court next applied Riley (i.e., Miller implicates discretionary sentencing

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[12] Important, application of this analysis under our state constitution does not require the Court to overrule Taylor G., decided under the Eighth Amendment only.

[13] Emphasis added.

[14] Casiano does not conflict with Montgomery, but rather, provides an additional basis for retroactivity in Connecticut, since the state "remain[s] free to 'apply the Teague [v. Lane, 489 U.S. 288 (1989)] analysis more liberally than the United States Supreme Court would otherwise apply it where a particular state interest is better served by a broader retroactivity ruling." Casiano, 317 Conn. at 64, 115 A.3d at 1038.

schemes) to the defendant's sentence of fifty years without the possibility of parole, and held that: "the Supreme Court's focus in Graham and Miller was not on the label of a life sentence, but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life." 317 Conn. at 72-74, 115 A.3d at 1043-44.[15] "Reject[ing] the notion that,…for a sentence to be deemed ''life imprisonment,' it must continue until the literal end of one's life," Casiano required "the procedures set forth in Miller…be followed when considering whether to sentence a juvenile…to fifty years imprisonment without parole." Id. at 75, 79, 115 A.3d at 1045, 1048.

To this end, the Court in Casiano noted that "[a] juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting." Even if released after 50 years, the juvenile offender "will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life." 317 Conn. at 78, 115 A.3d at 1046.[16]

Of great import, in Riley, Taylor G. and Casiano this Court consistently interpreted the federal precedent broadly, to "logically reach[] beyond its core holding." See Riley, 315 Conn. at 654, 110 A.3d at 1214. The "dictates set forth in Miller," when not viewed "through

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15 Internal quotations omitted.

16 In State v. Logan, 160 Conn. App. 282, 294, 125 A.3d 581, 589 (2015), the Appellate Court, without any analysis akin to that in Casiano, concluded that "the trial court did not abuse its discretion in denying the defendant's motion to correct an illegal sentence, because…a thirty-one year sentence was not the functional equivalent of life imprisonment without the possibility of parole, and thus, the court did not have to apply Miller prior to accepting his plea and sentencing him." A year later, in State v. Williams-Bey, 167 Conn. App. 744, 762 n. 11, 144 A.3d 467, 478 n. 11 (2016), on appeal here, the Appellate Court rejected an Iowa Supreme Court decision, which court was cited favorably in Casiano, to find "no legally meaningful distinction…between a sentence of thirty-one years without parole in Logan…and the defendant's sentence of thirty-five years without parole." See State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013). That lack of analysis, coupled with the persuasive articulation in the Taylor G. dissent that Roper, Graham and Miller are triggered by the defendant's status as a juvenile, not the label or length of the sentence, support a more expansive interpretation of that federal precedent under our constitutional prohibition on cruel and unusual punishment.

an unduly myopic lens," support further expansion to all juvenile offenders under our state constitutional prohibition on cruel and unusual punishment, which may afford "greater substantive protection…than…available under federal law." See Id. at 653, 110 A.3d at 1213 (quote); Danforth, 552 U.S. at 295 (quote); see also Taylor G., 315 Conn. at 775-76, 110 A.3d at 362-63 (dissent, Eveleigh, J.).

A final state precedent: in Delgado, this Court held that "[t]he eighth amendment, as interpreted in Miller, does not prohibit a court from imposing a sentence of life imprisonment *with* the opportunity for parole for a juvenile homicide offender, nor does it require the court to consider the mitigating factors of youth before imposing such a sentence." 323 Conn. at 810-11, 151 A.3d at 351-52. Because enactment of Public Act 15-84 afforded parole eligibility, Delgado's "sentence no longer falls within the purview of Miller, Riley and Casiano, which require," under the Eighth Amendment, "consideration of youth related mitigating factors only if the sentencing court imposes a sentence of life without parole," consistent with the Supreme Court decision in Montgomery. Id. at 811-12, 814, 151 A.3d at 352-53 (noting that a defendant "is not entitled to resentencing under P.A. 15-84, codified" in Conn. Gen. Stat. § 54-91g, which the legislature did not apply retroactively).[17]

D. The sibling approach.

Like Connecticut, several states have interpreted Miller "beyond its core holding." See Riley, 315 Conn. at 654, 110 A.3d at 1214.

To begin, at least two states have held that the individualized sentencing articulated in Miller applies to all juvenile offenders, irrespective of the length of the sentence. First, the Iowa Supreme Court, in Lyle, interpreted Article I, § 17 to the Iowa Constitution, which "embraces a bedrock rule of law that punishment should fit the crime," to hold that "**death has ceased to be different for the purposes of juvenile justice**" after Roper, Graham and Miller. 854 N.W.2d at 384, 396.[18] On that court's "exercise of…independent judgment,

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17 Analysis of the remedy more properly is addressed under the second question.

18 Emphasis added.

as…required…under the constitutional test, [it] conclude[d] that the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability." Id. at 398.

Important, the Iowa court explained that: "the Supreme Court has emphasized that nothing it said is 'crime-specific,' suggesting the natural concomitant that what it said is not punishment-specific either;" "[i]f a juvenile will not engage in the kind of cost-benefit analysis involving the death penalty that may deter them from committing a crime, there is no reason to believe a comparatively minor sentence to a term of years subject to a mandatory minimum will do so." Lyle, 854 N.W.2d at 399. Thus, "compl[iance] with the spirit of Miller, Null[19] and Pearson,…require[d] [the court] to conclude that their reasoning applies to even a short sentence that deprives the district court of discretion in crafting a punishment that serves the best interests of the child and of society." Id. at 402.

Second, the Washington Supreme Court, in State v. Houston-Sconiers, 391 P.3d 409, 414 (Wash. 2017), held: "Because 'children are different' under the Eighth Amendment and hence 'criminal procedure laws' must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable [guideline] ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there." Important, that court explained: "Critically, the Eighth Amendment requires trial courts to exercise this discretion at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line." Id. at 419. That maxim applied to "any juvenile defendant, even in the adult criminal justice system." Id. at 420.

Next, at least two states have applied Miller to effective sentences of less than 50 years in prison. In Pearson, the Iowa Supreme Court held that a minimum sentence of 35

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

years without the possibility of parole "violates the core teachings of Miller" under article I, § 17 to the Iowa Constitution. 836 N.W.2d at 96. The court vacated Pearson's sentence, imposed without consideration of the Miller factors, since "the district court emphasized the nature of the crimes to the exclusion of the mitigating features of youth." Id. at 97.

In Bear Cloud v. State, 334 P.3d 132, 141-42 (Wyo. 2014), the Wyoming Supreme Court held that "the teachings of the Roper/Graham/Miller trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform,' when…the aggregate sentences result in the functional equivalent of life without parole." Of import, that court vacated and remanded for resentencing on all counts of conviction (including sentences of 20 to 25 years) even though Wyoming's statutory scheme afforded Bear Cloud an opportunity for release in 45 years, or, with "good time" credit, in 35 years. Id. at 136 n. 3.

Further, like Connecticut, several states have held that Miller applies to discretionary sentencing schemes. See e.g. Windham v. State, No. 44037-2016, *9-11 (Idaho Jul. 10, 2017) (based on Montgomery, "Miller was retroactive not only for those juveniles sentenced to a mandatory of life without parole, but also for those for whom the sentencing court imposed a fixed-life sentence without considering the distinctive attributes of youth;" "a retrospective analysis does not comply with Miller and Montgomery where the evidence of the required characteristics and factors was not presented during the sentencing hearing," and thus, the denial of post-conviction relief was reversed).

See also Luna v. State, 387 P.3d 956, 962-63, 2016 Ok. Cr. 27 (Okla. Crim. App. 2016) (applying Miller to a discretionary sentencing scheme and, further, holding that "Miller requires a sentencing trial procedure conducted before the imposition of the sentence, with a judge or jury fully aware of the constitutional 'line between children whose crimes reflect transient immaturity and those *rare* children whose crimes reflect irreparable corruption'"); Landrum v. State, 192 So.3d 459, 460 (Fla. 2016) (the "requirement that sentencing courts give due weight to evidence that Miller deemed constitutionally significant before determin-

ing that the most severe punishment…for juvenile offenders is appropriate" applies "[e]ven in a discretionary sentencing scheme" under both the federal and state constitutions); Veal v. State, 784 S.E.2d 403, 410-11 (Ga. 2016) ("the explication of Miller…in Montgomery demonstrates that our previous understanding of Miller…was wrong…Montgomery… explains that the process discussed in Miller was really just a procedure through which [a defendant] can show that he belongs to the [constitutionally] protected class," and thus, "a sentence imposed in violation of this *substantive* rule…'is not just erroneous but contrary to the law and…void,'" in a discretionary sentencing scheme); People v. Gutierrez, 58 Cal. 4th 1354, 171 Cal. Rptr. 3d 421, 450 (2014) ("court which is unaware of the scope of its discretionary powers can no more exercise that…discretion than one whose sentence is…based on misinformation regarding a material aspect of…defendant's record");[20] State v. Long, 138 Ohio St.3d 478, 2014-Ohio-849 (2014); Aiken v. Byars, 765 S.E.2d 572 (S.C. 2014).

Several states also have held that Miller applies to lengthy, aggregate sentences for both homicide and non-homicide offenses. See e.g. Null, 836 N.W.2d at 50, 71 ("52.5-year mandatory minimum sentence…amounts to a de facto life sentence in violation of…the Eighth Amendment;" "determination of whether the principles of Miller or Graham apply… should [not] turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates"); Sam v. State, 2017 Wy. 98, *5, *33 (Wyo. 2017) (an "aggregated minimum sentencing exceeding the 45 [sentence]/61 [parole eligibility age] standard is the functional equivalent of life without parole;" a sentence that, "without counting good time, [afforded] parole eligibility…[at] 52 years" violated Miller); State ex rel. Carr v. Wallace, No. SC93487 (Mo. Jul. 11, 2017) ("life without the possibility of parole for 50 years violates the Eighth Amendment;" the remedy is resentencing in accord with Miller).

Finally, several states have held that eligibility for release does not remedy violation of the Eighth Amendment, as articulated in Miller, but rather, a resentencing hearing in

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[20] Internal quotations omitted.

accord with the procedure set forth in Miller is required. See e.g. State ex rel. Carr, supra.; Atwell v. State, 197 So.3d 1040, 1046-47, 1050 (Fla. 2016) ("consistently follow[ing] the spirit of Graham and Miller rather than a narrow, literal interpretation," to hold that the "practical implications" of Atwell's sentence, with parole eligibility after 140 years, required resentencing in accord with Miller); State v. Young, 794 S.E.2d 274 (N.C. 2016) (judicial review of life without parole after 25 years, and every two years after, based on "unguided discretion" did not "reduce to any meaningful degree the severity of the sentence;" post-Montgomery, that statutory scheme violated Miller and required resentencing).

Of note in Houston Sconiers, that Washington court held, post-Montgomery, that the passage of a statute "to allow inmates who are serving sentences for crimes committed as a juvenile to petition for early release after serving 20 years," did not remedy a Miller violation, in part, because: "Miller is mainly concerned with what must happen at sentencing…Miller's holding rests on the insight that youth are generally less culpable *at the time of their crimes* and culpability is of primary relevance in sentencing." 391 P.3d at 420; cf. State v. Bassett, No. 47251-1-II, *23, 29-30 (Wash. App. 2017) ("our Supreme Court has adopted and applied Miller's reasoning beyond its holding…[our] jurisprudence has 'embraced the reasoning' of Miller, Roper, and Graham and has 'built upon it and extended its principles;'" a Miller-fix statute that allows imposition of a life without parole sentence, violates the state's constitutional prohibition against cruel and unusual punishment); State v. Ronquillo, 361 P.3d 779, 781, 786 (Wash. App. 2015) (similar, applied to a sentence of 51.3 years).

Analysis under the sibling approach supports an expansion of Miller and Riley to all juvenile offenders under our constitutional prohibition on cruel and unusual punishment.

E. The historical approach.

Connecticut has a strong history of action in juvenile matters based on developments in science and psychology. See e.g. Richard A. Mendel, Justice Policy Institute, Juvenile Justice Reform in Connecticut 46 (Feb. 27, 2013) available at: http://www.justicepolicy.org/research/4969 and http://www.justicepolicy.org/uploads/justicepolicy/documents/

jpi_juvenile_justice_reform_in_ct.pdf (for example, noting neuroscientist Dr. Abigail Baird's testimony on "the differences between adolescent and adult brains to…legislators" and her impact in the raise the age debate).

To start, in Connecticut, "by the mid-nineteenth century the humanitarian view of children as essentially good beings in need of proper experiences and influences replaced the seventeenth century vision of children as the equivalent of adults, subject to the same restraints and punishments." See Nancy Hathaway Steenberg, Children and the Criminal Law in Connecticut, 1635-1855: Changing Perceptions of Childhood 207 (2005). Example: the opening of the Granby copper mine in the 1780's, which meant that "minors now could face lengthy incarceration…could have influenced the increasingly formal treatment of their rights to ensure some form of legal protection or representation," including the appointment of guardians to represent minors "under indictment for breaking the law" beginning in the early 1800's. See Id. at 186-87, 192 (though "use of such guardians was inconsistent").

Likewise, by the 1840's, the General Assembly "passed a discretionary sentencing law, which allowed children" in some circumstances "to avoid incarceration with adults in the State Prison in Wethersfield." See Id. at 75; but see Id. at 200 (unfortunately discretionary sentencing "did not solve the problem of how to reform children who broke the law but merely kept them closer to home" since "the duration of sentences remained identical" in the state prison and county jail). This time period also marked a "shift in attitudes toward children who broke the law…blam[ing] lack of parental guidance and control for the children's criminal propensities rather than complaining about the youths' 'innate vicious propensities.'" See Id. at 198; but see Id. at 205-06 (the envisioned reform school was underfunded). While inconsistent and often ineffective, these reform efforts evidenced an important societal shift in how children were viewed in Connecticut.

Next, in 1972, the statutory age of majority was lowered from 21 years old to 18 years old. See Conn. Gen. Stat. § 1-1d. A similar reduction in age occurred constitutionally. Under the Connecticut Constitution of 1818, the voting age of a white, male, property

owning citizen was 21 years. See Conn. Const., art. 6, § 2 (1818); Conn. Const., amend. art. 8 (1845) (eliminated property); Conn. Const., amend. art. 11 (1964) (eliminated race and gender). The voting age was lowered to 18 years old under the Connecticut Constitution of 1965. See Conn. Const., art. 6, § 1 (1965); Conn. Const., amend. art. 9, 10 § 11 (1976) (eliminated English literacy); Conn. Const., amend. art. 15 (1980).

As the age of majority decreased, age restrictions on dangerous activities increased. For example, the drinking age increased from 18 to 19 years old in 1982, then from 19 to 20 years old in 1983, and then again from 20 to 21 years old in 1985. See Ely v. Murphy, 207 Conn. 88, 94 n. 8, 540 A.2d 54, 57 n. 8 (1988) (these amendments "reflect a continuing and growing public awareness and concern that children as a class are simply incompetent by reason of their youth and inexperience to deal responsibly with the effects of alcohol").

The age at which minor children could purchase cigarettes also increased from 16 to 18 years old in 1987. See Public Act 87-374; N.Y. Times, Curbing Tobacco for Teen-Agers (Aug. 23, 1987) available at: http://www.nytimes.com/1987/08/23/us/follow-up-on-the-news-curbing-tobacco-for-teen-agers.html (noting that the Tobacco Institute "discourage[s] youth using our products"); Conn. Gen. Stat. § 53-344 (prohibited the purchase of cigarettes by minor children); Conn. Gen. Stat. § 53-344b (extended the prohibition to "electronic nicotine delivery system" and "vapor product") (enacted in 2014 by Public Act 14-76, § 1).

Similarly, the statutory requirements imposed on minor children to secure a driver's license have increased, as have the number of restrictions on minor children after securing a license. See Blanos v. Kulesva, 107 Conn. 476, 141 A. 106 (1928) (in the 1920's, a 16 year old could obtain a license and drive a motor vehicle alone and could drive without a license, but with a licensed operator for 30 days; youth instruction permits were not required); Conn. Gen. Stat. § 14-36(c), (d) (required youth instruction permit and safe driving course completion for 16 and 17 year olds and age/experience required of those instructing minor children driving with permits); Conn. Gen. Stat. § 14-36g (restrictions on drivers age 16 and 17 years) (enacted 2003 by Public Act 03-171, § 16).

Also important to a historical analysis are the limited legal rights and responsibilities of minor children. For example, children historically:

- Could not enter into a binding contract, see Riley v. Mallory, 33 Conn. 201, 206-07 (1866) (citing an 1818 publication); Gregory v. Lee, 64 Conn. 407, 30 A. 53 (1894);[21]
- Could not own real property; see Inhabitants of Huntington v. Inhabitants of Oxford, 4 Day 189, 189, 192 (1810) ("[a] minor cannot gain a settlement by residence");
- Could not marry without parental or judicial consent, see Gould v. Gould, 78 Conn. 242, 605 (1905) (the General Assembly Revision of 1702 prohibited the marriage of "minors, without the consent of the parent or guardian"); Conn. Gen. Stat. § 46b-30;
- At least by the nineteenth century, were limited in the type and length of their work, see Inhabitants of Huntington, 4 Day at 194 (a minor child apprentice was bound by a written indenture); O.L.R. Research Report 2007-R-0629, Legislative History of State Law Permitting 15-Year-Olds to Work (Nov. 23, 2007); Conn. Gen. Stat. § 31-12 (hours of minors in manufacturing/mechanical) Conn. Gen. Stat. § 31-13 (hours of minor in mercantile); Conn. Gen. Stat. § 31-14 (night work of minors); and
- Were entitled to support by their parents, see Weisbaum v. Weisbaum, 2 Conn. App. 270, 272-73, 477 A.2d 690, 692 (1984) (noting the statutory and common law duty).

In addition to age-related restrictions and limited legal rights and responsibilities, more recently, the General Assembly enacted legislation to "raise the age" of jurisdiction in the Superior Court, Juvenile Matters. In 2009, Public Act 09-7, §§ 69-91, amended several statutes to define a "child" as a person "under seventeen years of age," effective January 1, 2010. See Conn. Gen. Stat. § 46b-120 (delinquency matters and proceedings); Conn. Gen. Stat. § 46b-121 (juvenile matters); Conn. Gen. Stat. § 46b-127(c) (juvenile status maintained until seventeen years of age unless transferred to regular criminal docket); Conn. Gen. Stat. § 46b-133c(f) (child on the regular criminal docket maintained in correctional facility

[21] See also Conn. Gen. Stat. § 46b-150d (effect of emancipation).

for children and youth until seventeen years of age or sentenced); Conn. Gen. Stat. § 46b-133d(f) (similar, serious sexual offender); Conn. Gen. Stat. § 10-19m(c) (Comm'r of Educ. reports to the General Assembly on the referral or diversion of children under seventeen years from the juvenile justice system). Public Act 09-7, further amended those statutes to define a "child" as a person "under eighteen years of age," effective July 1, 2012.

The General Assembly also enacted legislation amending Conn. Gen. Stat. § 46b-127 to provide greater protections to children on potential transfers to the regular criminal docket. See Public Act 10-1 § 30 (effective July 1, 2010, allowing transfer to the docket for juvenile matters, in part, if "after a hearing considering the facts and circumstances of the case and the prior history of the youth, the court determines that the programs and services available…in the superior court for juvenile matter would more appropriately address the needs of the youth and that the youth and…community would be better served by treating the youth as a delinquent"); Public Act 12-1 § 280 (effective October 1, 2012, requiring the superior court for juvenile matters to conduct a hearing to determine whether to transfer a class C, D or unclassified felony to the regular criminal docket, based in part, on "the best interests of the child" and the "availability of services in the docket for juvenile matters"); Public Act 15-183 (effective October 1, 2015, limiting the felony offenses that require automatic transfer to the regular criminal docket, and on those newly excluded offenses, requiring a hearing prior to transfer, similar to that described in Public Act 12-1 § 280).

Finally, in 2015, the General Assembly enacted Public Act 15-84. Section 1 of Public Act 15-84 amended Conn. Gen. Stat. § 54-125a to grant parole eligibility to "a person convicted of one or more crimes committed while such person was under eighteen years of age…who received a definite sentence or total effective sentence of more than ten years." See Public Act 15-84, § 1(f)(1). Section 2 created Conn. Gen. Stat. § 54-91g to require that in "the case of a child…transferred to the regular criminal docket of the Superior Court…convicted of a class A or B felony pursuant to such transfer, at the time of sentencing, the court shall" consider factors articulated in Miller. See Public Act 15-84 §

2(a). The child's presentence report, which the court no longer can waive, must address the Miller factors. See Id. at § 2(b).

Thus, under the historical approach, persons under the age of majority were treated differently than adults, largely based on the continually evolving understanding that children are less mature and less responsible and have less competence and less experience than adults. To protect children, additional restrictions were imposed on children and additional procedures were required in superior courts. Analysis of the historical approach, and the trend throughout our history to provide greater protections to juveniles, supports expansion of Miller and Riley to all juvenile offenders under Article First, §§ 8 and 9 to our constitution.

F. Economic and sociological considerations.

Connecticut-specific research studies have established that race disproportionately is represented in juvenile justice statistics. The Connecticut Juvenile Justice Advisory Committee of the Office of Policy and Management funded three studies to assess minority overrepresentation in the Connecticut juvenile justice system. The first study, published in 1991, revealed that "more than three-fourths of youth confined at Long Lane School[22] were Black or Hispanic, even though just 11 and 10 percent of the state's youth population were Black or Hispanic, respectively." See Mendel, supra., at 7.

> The minority overrepresentation study also found that, controlling for offense and other characteristics, Black and Hispanic youth were more likely than White youth to be detained and held for longer periods in detention. Once committed to state custody, Black and Hispanic youth were also more likely than their White counterparts to be placed at the Long Lane training school, held in a maximum security unit, and remain longer at the facility. See Id.

The Committee released a second report in 2001, which analyzed data from 1998 to 1999. See Id. at 13; Eliot C. Hartston, Ph.D. and Dorinda M. Richetelli, A Reassessment of Minority Overrepresentation in Connecticut's Juvenile Justice System (June 5, 2001) available at: http://www.ct.gov/opm/lib/opm/cjppd/cjjyd/jjydpublications/reassessminority

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[22] Long Lane School was the state's youth correctional facility. Mendel, supra., at 6.

overrep2001.pdf. "[M]any significant disparities remained. Black and Hispanic youth comprised more than 70 percent of the population placed in detention or committed to the Long Lane training school in 1999, more than three times their share of the state's overall youth population." See Mendel, supra., at 13.

Most recently, the Committee released a third report in 2009, which analyzed data from 2005 to 2007. See Id. at 26; Dorinda M. Richetelli, et al., A Second Reassessment of Disproportionate Minority Contact in Connecticut's Juvenile Justice System (May 15, 2009) available at: http://www.ct.gov/opm/lib/opm/cjppd/cjjjyd/jjydpublications/final_report_dmc_study_may_2009.pdf. This report "showed that the situation had actually deteriorated - with several prior disparities growing more pronounced, and some new disparities appearing." See Mendel, supra., at 26.

Logically following analysis of the characteristics of incarcerated juvenile offenders is discussion of the cost of incarceration. In Connecticut, the "average daily cost of incarceration for the Department of Correction, per inmate, is approximately $95.16 per inmate." See Department of Correction, Frequently Asked Questions, #7 (modified 5/4/2015), previously available at: http://www.ct.gov/doc/cwp/view.asp?q=265472.[23] That equals, on average, $34,733.40 per year to incarcerate an individual. In contrast, [t]he cost of supervising an appropriate offender in the community…averages out to approximately $32.66 a day." See Id. That equals, on average, $11,920.90 per year to supervise an individual.

Connecticut, thus, pays three times more per day (and year) to incarcerate a juvenile offender than one on supervised release. That cost is greater when a period of supervision following release is not needed. These costs are relevant when a juvenile offender was sentenced by a court that did not consider youth and its hallmark features, i.e., "immaturity, impetuosity, and failure to appreciate risks and consequences," and "the science that establishes such factors as...applicable." See Riley, 315 Conn. at 660, 110 A.3d at 1217.

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[23] Currently, the Department of Correction website no longer provides this information.

These sociological and economic factors support expansion to Miller to all juvenile offenders under our Constitution, to attempt to redress the disproportionate impact seen in the justice system on minorities.

To conclude, the six "tools of analysis" set forth in Geisler support interpretation of Article I, §§ 8 and 9 to the Connecticut Constitution to prohibit, as cruel and unusual, sentencing proceedings for all juvenile offenders where the trial court does not expressly consider, on the record, the youth related factors articulated in Miller. To render Conn. Gen. Stat. § 54-91g(a) in accord with that holding, this Court must excise the language "and the child is convicted of a class A or B felony pursuant to such transfer."

G. Application.

Akin to Riley, the trial court here did not consider facts that reflect "immaturity, impetuosity, and failure to appreciate risks and consequences" or "the science that establishes such factors." 315 Conn. at 660, 110 A.3d at 1217. First, the court did not receive or review a presentence investigation report, which was waived. See A 2, 84. Second, even if a report was prepared, "nothing in our sentencing scheme" then-in effect "specifically required the trial court…to consider, let alone give mitigating weight to, the defendant's age at the time of the offense or the hallmarks of youth." Riley, 315 Conn. at 659, 110 A.3d at 1217.

Third, the sentencing transcript here, like in Riley, does not reflect "that the trial court adequately considered the factors identified in Miller." Riley, 315 Conn. at 660, 110 A.3d at 1217. Though the defense counsel "made an oblique reference to age," see Riley, 315 Conn. at 660, 110 A.3d at 1217, i.e., "Tauren was 16 when this happened," he did not offer any mitigation, see e.g. A 86. Rather, defense counsel focused on his relationship with the defendant's mother, i.e., "I know that he wasn't raised this way" and argued that his client had no defense; "there is no real reason for this" offense. See A 86-87. The state argued that the defendant "should do the rest of his life in jail;" the reason for the 35 year sentence was that the defendant took "advantage of the plea bargain." See A 84-86.

The court echoed the state's emphasis on the necessity of plea bargaining. See A

89-90. The court noted the senselessness of the offense, with only generic reference to "kids," i.e., "[t]hey just get involved in this macho gun play that leaves them, some of the youth of our city…to spending the rest of their life, basically in prison;…it makes no sense." See A 88. In sum, the defendant's sentence violated the prohibition on cruel and unusual punishment to our constitution. See Casiano, 317 Conn. at 73 n. 14, 115 A.3d at 1044.[24]

Expansion of Miller to all juveniles renders the defendant's claim, which addressed "mitigation of punishment" specific to juvenile offenders and sentencing based on "accurate information or considerations solely in the record," within the definition of "illegal manner" over which the court had jurisdiction under Conn. Practice Book § 43-22. See Parker, 295 Conn. at 839, 992 A.2d at 111; State v. Bozelko, 154 Conn. App. 750, 762-65, 108 A.3d 262, 270-72 (2015) (inaccurate or incomplete information in presentence report); State v. Osuch, 124 Conn. App. 572, 579, 5 A.3d 976, 981 (2010); State v. McNellis, 15 Conn. App. 416, 449-50, 546 A.2d 292, 308 (1988) (cannot "rely on considerations not in the record").

III. PAROLE ELIGIBILITY UNDER CONN. GEN. STAT. § 54-125A(F) DOES NOT ADEQUATELY REMEDY THE STATE CONSTITUTIONAL VIOLATION.

The nature of the constitutional violation must determine the scope of the remedy. Here, the sentencing proceeding afforded to the defendant, and likely any juvenile offender sentenced prior to Miller, violated Article First, §§ 8 and 9 to the Connecticut Constitution in that the sentencing court did not expressly consider the youth related factors articulated in Miller and Riley to guarantee the defendant a proportionate sentence. The nature of the violation, i.e., a sentencing proceeding that "pose[d] too great a risk of a disproportionate" sentence, must dictate the scope of the remedy, i.e., a constitutionally adequate resentencing proceeding to impose a proportionate sentence. Parole eligibility under Conn. Gen.

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[24] In Casiano, "the plea was entered pursuant to a court indicated plea…There is no evidence in the record…that…[the Miller] factors were considered when the plea agreement was proposed…[A contention] that Miller cannot apply to a sentence imposed pursuant to a plea agreement…is undermined by the express reference in Miller to a juvenile offender's "inability to deal with…prosecutors (including on a plea agreement)" as one of the concerns that the court sought to remedy." Id. at 73 n. 14, 115 A.3d at 1044 n. 14.

Stat. § 54a-125a(f) cannot remedy that violation for several reasons.

First, though the Teague retroactivity holdings in Casiano and Montgomery do not apply on review of a motion to correct an illegal sentence, the analyses articulated by both Supreme Courts elucidate the nature of the constitutional right. See Parker, 295 Conn. at 834, 992 A.2d at 1109 ("a generally accepted rule…is that a sentence cannot be modified by the trial court…if the sentence was valid;" however, "it long has been understood that, if a court imposes an invalid sentence, it retains jurisdiction to substitute a valid sentence").

In Casiano, this Court consistently articulated the rule in Miller: "the rule in Miller requiring that a sentencing authority conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before sentencing a juvenile offender to a life sentence without parole is more properly characterized as a procedural…rule." 317 Conn. at 67-68, 115 A.3d at 1040-41; Id. at 68, 115 A.3d at 1041 ("a rule is procedural when it affects how and under what framework a punishment may be imposed but leaves intact the state's legal authority to seek the imposition of that punishment on a defendant"). Put differently, Miller "required that a sentencing authority follow a certain process before imposing that sentence," e.g., life without parole; importantly, "the focus in Miller [was] on the *process*." Id. at 68, 115 A.3d at 1041.

In next defining Miller as "watershed rule of criminal procedure," this Court reiterated the rule in Miller: "In Miller, the court barred a scheme that failed to account for the mitigating circumstances of youth." Casiano, 317 Conn. at 70, 115 A.3d at 1042 ("[b]ecause Miller …set forth a presumption that a juvenile offender would not receive a life sentence without parole upon due consideration of the mitigating factors of youth, the decision acknowledges that the procedures it prescribed would impact the sentence imposed in most cases"). To be clear, **"the individualized sentencing prescribed by Miller is 'central to an accurate determination'…that the sentence imposed is a proportionate one."** Id.[25] "If failing to

[25] Emphasis added.

consider youth and its attendant characteristics creates a risk of disproportionate punishment…then the rule in Miller assuredly implicates the fundamental fairness of a juvenile sentencing proceeding because it is a 'basic precept of justice' that punishment must be proportionate 'to both the offender and the offense.'" Id. at 70-71, 115 A.3d at 1042.

> The court in Miller…"alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a [juvenile sentencing] proceeding"…because the court required that certain factors be considered in an individualized sentencing proceeding before a certain class of offenders may receive a particular punishment. In other words, our understanding of the bedrock procedural element of individualized sentencing was altered when the court…require[d] consideration of new factors for a class of offenders to create a presumption against a particular punishment.

Id. at 71, 115 A.3d at 1042-43. Of import, while the "class of offenders" under the Eighth Amendment analysis were juvenile offenders sentenced to life without parole or the functional equivalent of life, see Id. at 75-79, 115 A.3d at 1045-46, the "class of offenders" protected under Article First, §§ 8 and 9 to the Connecticut Constitution are all juveniles, i.e., "it [is] the defendant's status as a juvenile and not the sentence's label or length that triggered the constitutional protections of Miller," see Taylor G., 315 Conn. at 791-92, 110 A.3d at 371 (dissent, Eveleigh, J.).

Though applying a different Teague exception, the Supreme Court in Montgomery defined the rule in Miller similarly to Casiano: "Miller requires that before sentencing a juvenile to life without parole, the…judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" Montgomery, 136 S.Ct. at 733; Id. at 734 ("Miller's holding has a procedural component. Miller requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.").

"Because Miller determined that sentencing a child to life without parole is excessive for all but ''the rare juvenile offender whose crime reflects irreparable corruption,''…it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status' – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Montgomery, 136 S.Ct. at 734. Defining Miller as a substantive rule, the Supreme

Court concluded that Miller "necessarily carr[ies] a significant risk that a defendant – here, the vast majority of juvenile offenders – faces a punishment that the law cannot impose upon him." Id. at 734;[26] Id. at 730 (the "possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment").

Again, the "class of defendants" protected under Article First, §§ 8 and 9 to our constitution are all juvenile offenders, regardless of the label or length of the sentence. Whether viewed as a watershed procedural rule of criminal procedure or a substantive rule (that specific determination is not relevant here), both Casiano and Montgomery make clear that consideration of the mitigating factors of youth is required to impose a proportionate sentence. See e.g. Casiano, 317 Conn. at 66-67, 70, 115 A.3d at 1040-42; Montgomery, 136 S.Ct. at 733-34. Because the nature of the constitutional violation is defined by the sentencing procedure, the remedy must provide that required sentencing procedure.

Second, and to this end, a contrast of the procedures afforded to a juvenile at a judicial sentencing, as opposed to a parole hearing under Conn. Gen. Stat. § 54-125a(f), further supports the conclusion that the appropriate remedy is a resentencing hearing.

Prior to sentencing, "the judicial authority shall order a presentence investigation" upon conviction "of a crime…the punishment for which may include imprisonment for more than one year." See Conn. Practice Book § 43-3(a). That investigation shall include: "the criminal record, social history and present condition of the defendant," "the circumstances of the offense," when "desirable in the opinion of the judicial authority…a physical and mental examination of the defendant," and specific to juveniles post-Miller, "the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development." See Conn. Practice Book § 43-4(a); Conn. Gen. Stat. 54-

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[26] Internal quotations omitted.

91g(a)(1), (b) ("presentence report…[on] a class A or B felony shall address" (a)(1)).[27]

Defense counsel may be present at the defendant's interview to answer questions, resolve factual issues, "protect the defendant against incrimination" on other offenses, and "protect the defendant's rights with respect to…appeal." See Conn. Practice Book § 43-5.

Prior to a juvenile offender's parole hearing, the "board *may* request testimony from mental health professionals or other…witnesses, and reports from the Commissioner of Correction or other persons," but "s*hall* use validated risk assessment and needs assessment tools." See Conn. Gen. Stat. § 54-125a(f)(3).[28] Unlike the presentence investigation, defense counsel is not present at the juvenile's risk assessment interview. Of import, "[n]o hearing…may proceed unless the parole release panel is in possession of the complete file for such applicant, including any documentation from the Department of Correction, **the trial transcript**, **the sentencing record** and any file of any previous parole hearing." See Conn. Gen. Stat. § 54-125a(e).[29] Thus, the parole hearing is dependent upon the judicial sentencing proceeding, which our constitution mandates must comport with Miller for all juvenile offenders. As here, when a presentence investigation report was not prepared, see A 2, and the court did not consider the mitigating characteristics of youth articulated in Miller, see A 84-90, a parole hearing, as a potential Miller fix, is flawed at the outset.[30]

Next, at a sentencing, the "judicial authority shall afford the parties the opportunity to be heard and, in its discretion, to present evidence on any matter relevant to…disposition, and to explain or controvert the presentence investigation report…or any document relied upon by the judicial authority." See Conn. Practice Book § 43-10(1); Conn. Practice Book §

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27 Also post-Miller, "no presentence investigation or report may be waived with respect to a child convicted of a class A or B felony." See Conn. Gen. Stat. § 54-91g(b).

28 Emphasis added.

29 Emphasis added.

30 Even if a presentence investigation report was prepared for a pre-Miller sentencing, that report would not comply with Conn. Gen. Stat. 54-91g(a)(1). See Riley, 315 Conn. at 658-69, 110 A.3d at 1216-17 (before Miller, "nothing in our sentencing scheme specifically required the trial court…to consider, let alone give mitigating weight to, the defendant's age at the time of the offense or the hallmarks of youth").

43-14 (defense counsel shall identify "any inaccuracy in the presentence…report"). Also, "[d]efense counsel may submit…supplementary documents," see Conn. Practice Book § 43-16, and the "judicial authority shall allow the defendant…opportunity to make a personal statement in his…behalf and to present any information in mitigation of the sentence," see Conn. Practice Book § 43-10(3). Specific to juvenile offenders, the court must "**give due weight** to evidence that Miller deemed constitutionally significant," including:

> "immaturity, impetuosity, and failure to appreciate risks and consequences"; the offender's "family and home environment" and the offender's inability to extricate himself from that environment; "the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him"; the offender's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation...."

Riley, 315 Conn. at 653, 658, 110 A.3d at 1213, 1216;[31] see Conn. Gen. Stat. § 54-91g(a); Id. at sub. (a)(2) ("if the court proposes…a lengthy sentence…" it must consider "…how… scientific and psycho-logical evidence…counsels against such a sentence").

At the juvenile offender's parole hearing, "the board shall permit" the offender "to make a statement on…[his] behalf" and defense counsel and the state "to submit reports and other documents." See Conn. Gen. Stat. § 54-125a(f)(3). Unlike sentencing, the board does not hear from defense counsel at the parole hearing, nor is defense counsel afforded an opportunity to controvert or explain any inaccuracies in the risk assessment report or any other document. Moreover, the board is not required to consider all of the Miller factors; rather, the board considers whether the juvenile offender:

> has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child…in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's

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[31] Emphasis added.

rehabilitation considering the nature and circumstances of the crime or crimes. See Conn. Gen. Stat. § 54-125a(f)(4). That consideration, and decision on a "reasonable probability" to "remain at liberty without violating the law" and "the benefits to such person and society from…release to community supervision," see Id., fundamentally differ from imposition of sentence, see e.g. Conn. Gen. Stat. § 54-300(c) (goals of sentencing).[32]

Important, the board, unlike the court, is not required to "give due weight to evidence that Miller deemed constitutionally significant." Riley, 315 Conn. at 653, 110 A.3d at 1213.[33] The significant differences between procedures afforded to a juvenile at sentencing versus a Conn. Gen. Stat. § 54-125a(f) parole hearing render the latter constitutionally inadequate to remedy a Miller violation. See e.g. Windham, No. 44037-2016, *9-11 (a post-conviction "retrospective analysis does not comply with Miller and Montgomery where the evidence of the required characteristics and factors was not presented during the sentencing hearing").

Third, for similar reasons, several states have held that parole eligibility does not afford a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." See Graham, 560 U.S. at 75. Courts have disapproved of a parole board's reliance on the seriousness of the offense to deny a juvenile offender parole. See Atwell, 197 So.3d at 1048-49 ("primary weight" in parole decision "given 'to the seriousness of the offender's present offense…and past criminal record'" and "with no special consideration of the diminished culpability of the youth at the time of the offense" did not remedy a Miller violation); Greiman v. Hodges, 79 F.Supp.3d 933, 944 (S.D. Iowa 2015) (motion to dismiss

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[32] "(1) The primary purpose of sentencing…is to enhance public safety while holding the offender accountable to the community, (2) sentencing should reflect the seriousness of the offense and be proportional to the harm to victims and the community, using the most appropriate sanctions available, including incarceration, community punishment and supervision, (3) sentencing should have as an overriding goal the reduction of criminal activity, the imposition of just punishment and the provision of meaningful and effective rehabilitation and reintegration of the offender, and (4) sentences should be fair, just and equitable while promoting respect for the law." See Conn. Gen. Stat. § 54-300(c).

[33] Of final note, generally, under Conn. Gen. Stat. § 54-95, a defendant may appeal the sentence imposed; under Conn. Gen. Stat. § 54-125a(f)(6), "[t]he decision of the board…shall not be subject to appeal."

denied when defendant denied parole "based solely on the 'seriousness of the offense'").

Courts also have held that a parole board is required to consider the Miller factors to remedy a Miller violation. See Hawkins v. N.Y. State Dept. of Corr. & Cmty. Super., 140 A.D.3d 34 (N.Y. App. Div. 2016) (consideration of "the significance of the petitioner's youth and its attendant circumstances at the time of the commission of the crime…is the minimal procedural requirement necessary" to satisfy Miller); Cal. Penal Code § 4801(c) (board must "give great weight to the diminished culpability of juveniles as compared to adults");[34] cf. Young, 794 S.E.2d at 279 (discretionary sentence review "might increase the chance" of commutation, but "does not provide a…meaningful opportunity to reduce the severity of the sentence," since it does not require consideration of the Miller factors).

Likewise, courts have required greater procedural protections to hold that a parole hearing may remedy a Miller violation. See Diatchenko v. Dist. Atty. for Suffolk Dist., 27 N.E.3d 349 (Mass. 2015) (juvenile entitled to counsel, funds for expert witnesses and judicial review of a parole decision "to ensure that the board's determination…is 'constitutionally exercised,'…in….that the board properly has taken into account the offender's status as a child when the crime was committed"); cf. Luna, 387 P.3d at 962-63 (executive commutation is not "an adequate remedy" since "the opportunity to seek…commutation [occurs] through a procedure largely without evidentiary rules, with no right to obtain expert assistance or testimony, no cross-examination, compulsory process, or…assistance of counsel").

Finally, in addition to the procedural differences, significantly, a juvenile offender's parole eligibility date under Conn. Gen. Stat. § 54-125a(f)(1), is determined based solely on the length of the sentence imposed. Subsection (f)(1) provides: a person "under eighteen years of age" when the crime was committed, who "is serving a sentence of fifty years or less…shall be eligible for parole after serving sixty percent of the sentence or twelve years,

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[34] See also Cal. Penal Code § 1170(d) (California courts may "recall the sentence and commitment previously ordered and resentence the defendant" after he has served at least 15 years in prison "provided the new sentence…is no greater than the initial sentence").

whichever is greater," and who "is serving a sentence of more than fifty years…shall be eligible for parole after serving thirty years." See Conn. Gen. Stat. § 54-125a(f)(1).[35]

When the sole, conclusive factor to determine the parole eligibility date, i.e., the length of the sentence, was imposed without consideration of the Miller factors, in violation of our constitutional prohibition on cruel and unusual punishment, then common sense dictates that parole eligibility date, dependent upon that Miller violation, cannot remedy the same Miller violation. Cf. Gaines v. Manson, 194 Conn. 510, 528, 481 A.2d 1084, 1096 (1984) (though decided in a habeas matter, noting that the remedy must be "commensurate with the scope of the constitutional violations which have been established"); Milliken v. Bradley, 433 U.S. 267, 280 (1977) (though decided in a civil matter, noting that a "remedy must…be related to the 'condition alleged to offend the Constitution"). To hold otherwise would sanction a "mere exercise in circular logic." See e.g. In re. Cambron v. Medical Data Sys., Inc., 2007 WL 4287376, *5 (M.D. Ala. 2007) (unpublished) (e.g. circular logic).[36]

In sum, parole eligibility under Conn. Gen. Stat. § 54a-125a(f) cannot remedy a Miller violation under our constitutional prohibition on cruel and unusual punishment.

CONCLUSION

This Court should hold that Article First, §§ 8 and 9 to our constitution entitles all juvenile offenders "to a sentencing proceeding at which the court expressly considers the youth related factors" articulated in Miller, violation of which is not remedied by parole eligibility under Conn. Gen. Stat. § 54-125a(f), vacate the denial of the defendant's motion to correct an illegal sentence, and remand for further proceedings, including resentencing.

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[35] See Fernandez v. Comm'r of Corr., 139 Conn. App. 173, 180-81, 55 A.3d 588, 593 (2012) ("[p]arole does not destroy the judgment against the prisoner or remit his…guilt. *Neither does parole diminish a judicially imposed sentence or in any way affect it*…Parole alters only the method and degree of confinement during the period of incarceration").

[36] To similar end, Conn. Gen. Stat. § 54-125a does not apply to all juvenile offenders, but rather, is limited to those "who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015."

TAUREN WILLIAMS-BEY
The Defendant-Appellant

By: /s/ Heather Clark
Heather Clark, Clark Law Office
300 State Street, Suite 309
New London, Connecticut 06320
Tel.: (860) 574-9112, (203) 772-7939
Fax: (860) 574-9220
Email: heather@hclarklaw.com
Juris No. 429967

CERTIFICATION

Pursuant to Conn. Practice Book § 62-7(g), the undersigned certifies that the brief of the defendant-appellant and the appendix were delivered electronically on the 23rd day of October, 2017, to the last known e-mail address of each counsel of record, as follows: Michele Lukban, Office of the Chief State's Attorney, Email: DCJ.OCSA.Appellate@ct.gov and Michele.Lukban@ct.gov.

Pursuant to Conn. Practice Book § 67-2, the undersigned certifies that the brief of the defendant-appellant and the appendix: (1) are true and correct copies of the brief and the appendix that were submitted electronically in accord with Conn. Practice Book § 67-2(g) and (i); (2) do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law in accord with Conn. Practice Book § 67-2(g) and (i); (3) comply with all provisions of this rule.

The undersigned further certifies that a copy of the brief and appendix were mailed, first class, postage prepaid on this 23rd day of October, 2017, to: Hon. Joan K. Alexander, New Britain Judicial District, 20 Franklin Square, New Britain, CT 06051; Michele Lukban, Juris No. 409700, Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Tel.: (860)258-5807, Fax: (860)258-5828; and Tauren Williams-Bey, #2264350, Osborn Correctional Institution, 335 Bilton Road, P.O. Box 100, Somers, CT 06071, in accord with Conn. Practice Book § 62-7.

/s/ Heather Clark
Heather Clark Assigned Counsel