

No. 16-6738

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CYNTOIA BROWN,
Petitioner-Appellant,

v.

CAROLYN JORDAN, Warden
Respondent-Appellee,

On Appeal from the United States District Court
for the Middle District of Tennessee

**BRIEF OF *AMICUS CURIAE* TENNESSEE ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS IN SUPPORT OF APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of this Court, TACDL states there is no corporation or other entity that owns a financial interest in TACDL, and TACDL has no financial interest, directly or indirectly, in the outcome of this proceeding.

/s/ Christopher J. Climo

Christopher J. Climo

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INTEREST OF THE *AMICUS CURIAE*¹

The Tennessee Association of Criminal Defense Lawyers (“TACDL”) is one of the nation’s oldest state criminal bar associations. It has over 750 members statewide, primarily lawyers actively representing citizens accused of criminal offenses. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. TACDL is committed to advocating the fair and effective administration of criminal justice. Its mission includes education, training, and support to criminal defense lawyers, as well as advocacy before courts and the legislature of reforms calculated to improve the administration of criminal justice in Tennessee. TACDL also offers its assistance to appellate courts on important issues affecting the Tennessee criminal justice system.

¹ Pursuant to Rule 29(a), counsel for *Amicus* certifies that all parties have consented to the filing of this brief. *Amicus* further certifies that no party or any counsel for a party in this appeal authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. *Amicus* further certifies that no person or entity other than *Amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Cyntoia Brown's mandatory life sentence was an unreasonable application of clearly established federal law because (1) under Tennessee's sentencing scheme, the court was unconstitutionally prohibited from considering Brown's status as a juvenile at the time of the offense before condemning her to life in prison, and (2) Ms. Brown has unconstitutionally been denied any "hope for some years of life outside prison walls." *Montgomery, v. Louisiana*, 136 S.Ct. 718, 736-737 (2016). Accordingly, this Court should reverse the judgment of the district court and remand the case for issuance of the writ pursuant to 28 U.S.C. § 2254.

The Supreme Court held in *Miller v. Alabama*, 567 U.S. 460 (2012), that a sentencing scheme that imposes mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Miller's* holding is rooted in the fundamental principle that juvenile offenders belong to a special class of criminal offenders due to their distinctive attributes of youth, and it requires a sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 479-80. *Miller* emphasizes the importance of providing juveniles with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 489 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

Further, the Supreme Court has explained that *any* sentence of life imprisonment imposed on a child violates the Eighth Amendment unless the sentencer has given appropriate mitigating effect to the characteristics of youth and found that the child is “irreparably corrupt” and incapable of rehabilitation. *Montgomery v.*, 136 S. Ct. at 734.

Tennessee’s sentencing scheme for first-degree murder violates *Miller*, as it mandates a minimum sentence of life imprisonment, even for juvenile offenders. Tennessee has interpreted its sentencing statutes to allow for release under certain circumstances after a first-degree murder conviction, but still requires a minimum of 51 years imprisonment. A mandatory sentence of this length is the functional equivalent of a life sentence without parole, given the life expectancy of a prisoner, and it in no way provides the “meaningful opportunity to obtain release based on maturity and rehabilitation” guaranteed by the Eighth Amendment.

Appellant Cyntoia Brown’s mandatory life sentence, handed down when she was only sixteen years old, violates the constitutional prohibition on cruel and unusual punishment and simply cannot stand.

ARGUMENT

Cyntoia Brown’s mandatory life sentence is an unreasonable application of clearly established federal law in two ways: First, Tennessee’s sentencing scheme violates the clear holding of *Miller* because it prohibited the sentencing court from considering Brown’s juvenile status at the time of the offense before condemning her to life in prison. Second, the sentencing scheme violates *Miller* and *Montgomery* by denying Brown any “hope for some years of life outside prison walls” since Tennessee’s sentencing scheme requires her to serve at least 51 years in prison before she has a chance at release.² Accordingly, this Court should reverse the judgment of the district court and remand the case for issuance of the writ pursuant to 28 U.S.C. § 2254.

I. Tennessee’s Sentencing Scheme Violates the Eighth Amendment’s Requirement of Consideration of Special Circumstances of Juveniles.

In *Graham* and again in *Miller*, the Supreme Court clearly established the constitutional rule that sentences imposed on juvenile offenders must “provide[] some meaningful opportunity for release based on demonstrated maturity and rehabilitation.” *Graham*, 560 U.S. at 50; *Miller*, 567 U.S. at 489. The Supreme Court found the “imposition of a State’s most severe penalties on juvenile

² See Tenn. Op. Atty’y Gen., No. 97-098, 1997 WL 449672 (July 1, 1997). The Tennessee Attorney General determined that Tennessee’s sentencing statutes were conflicting but opined that a defendant must serve a minimum of 51 years in prison before being eligible for release. *Id.* This interpretation has been endorsed by the Tennessee Supreme Court. See *Vaughn v. State*, 202 S.W.3d 106 (Tenn. 2006).

offenders cannot proceed as though they were not children,” even for the crime before it, which it characterized as a “vicious murder.” *Miller*, 567 U.S. at 474, 478. The Supreme Court unequivocally required sentencing authorities to consider a “juvenile’s special circumstances” because “children who commit even the most heinous crimes are capable of change.” *Montgomery v. Louisiana*, 136 S.Ct. 718, 725, 736 (2016). This means that a sentence is unconstitutional unless the sentencing court makes the specific finding that the child “exhibits such irretrievable depravity that rehabilitation is impossible” and that the child is “the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* 733-74. Imposition of a mandatory life sentence requiring a minimum sentence of 51 years without consideration of these circumstances clearly violates the Eighth Amendment’s prohibition on cruel and unusual punishment because it prevents the sentencing authority from “considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change.’” *Miller*, 567 U.S. at 465 (quoting *Graham*, 560 U.S. at 68, 74).

Children are “constitutionally different” from adults when it comes to sentencing due to their “diminished culpability” and greater likelihood of rehabilitation, and they are thus “less deserving of the most severe punishments” even for homicide crimes. *Id.* at 471 (quoting *Graham*, 560 U.S. at 68). The Supreme Court has explained that juveniles have a “lack of maturity and an

underdeveloped sense of responsibility” that may lead to “recklessness, impulsivity, and heedless risk-taking.” *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (internal quotation marks omitted). In *Roper*, the Supreme Court noted that “[t]hese qualities often result in impetuous and ill-considered actions and decisions,”³ but they are transient and “as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Id.* at 569-570 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott)). Juveniles are also more susceptible to negative influences and outside pressures, and they have reduced control of their environment. *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). For these reasons, juveniles can “be forgiven for failing to escape negative influences in their whole environment.” *Id.* at 569-570.

Due to the “incompetencies associated with youth,” juveniles are also more likely to receive an unduly harsh sentence. *Miller*, 567 U.S. at 477-78. They have an “inability to deal with police officers or prosecutors” and “incapacity to assist [their] own attorneys.” *Id.* “The features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings,” providing another

³ This principle has been codified in Tennessee, as in other states, “In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.” *Id.*

basis for the Supreme Court’s decisions relating to juvenile sentencing. *Id.* at 478 (quoting *Graham*, 560 U.S. at 78).

Not only do these characteristics make juveniles less culpable, because the character traits of juveniles are “less fixed” and not “well formed” compared to adults’, but even horrible actions by a juvenile are “less likely to be ‘evidence of irretrievable depravity.’”⁴ *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 570) (alterations omitted).

These factors reduce a child’s “moral culpability” and impact what punishment is appropriate under the Eighth Amendment, which requires punishment to be proportional not only to the crime, but also to the offender. *Roper*, 543 U.S. at 469-72. It is not enough to simply consider a child’s chronological age; instead, the sentencing court may impose a life sentence on a child only after making a properly informed determination that a child “exhibits such irretrievable depravity that rehabilitation is impossible.” *Montgomery*, 136 S. Ct. at 733. A mandatory life sentence necessarily forgoes the required analysis and “disregards the possibility of rehabilitation even when the circumstances most suggest it.” *Miller*, 567 U.S. at 478.

⁴ See Robert J. Sampson & John H. Laub, A Life-Course View of the Development of Crime, 602 *Annals Am. Acad. Pol. & Soc. Sci.* 12, 17-18 (2005) (demonstrating that a sizable percentage of antisocial early adolescents stop their antisocial behavior by adulthood); Steinberg & Scott, (“For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.”).

Tennessee's sentencing scheme ignores the clear mandates of *Roper*, *Graham*, *Miller*, and *Montgomery* by instituting a mandatory minimum sentence of life on all persons, including children, who commit first-degree murder. Supreme Court precedents on juvenile sentencing have been interpreted across the nation to bar not only sentences of life without the possibility of parole, but also sentences like Brown's that withhold parole eligibility until after the likely end of her life. Because it does not allow a sentencing authority to take into account a juvenile offender's youth and the characteristics that attend it, Tennessee's mandatory minimum for first-degree murder violates the Eighth Amendment's prohibition on cruel and unusual punishment as applied to children like Brown.

II. Tennessee's Mandatory Sentencing Scheme Does Not Allow A "Meaningful Opportunity for Release Based on Maturity and Rehabilitation."

Brown's mandatory minimum life sentence under Tennessee law is an unreasonable application of clearly established federal law. The Tennessee sentencing scheme allows for release only after an offender serves a minimum of 51 years in prison. *See Vaughn v. State*, 202 S.W.3d 106 (Tenn. 2006). This punishment is the harshest in the nation by a wide margin,⁵ and by blindly applying a one-size-fits-all sentencing scheme for first-degree murder, clearly violates *Miller*, *Graham*, *Roper* and *Montgomery*'s foundational principle that a

⁵ Report of Dr. Ashley Nellis, dated January 16, 2017.

child's youth must be considered before imposition of a sentence that does not provide a meaningful opportunity for release based on maturity and rehabilitation.⁶

Brown's sentence violates clearly established law requiring a "meaningful opportunity for release based on maturity and rehabilitation" for children in several ways. First, a minimum 51 year sentence on a child offender exceeds her life expectancy. Second, even the miniscule number of juvenile offenders that might survive 51 years of continuous prison confinement would, upon their release, be deprived of the opportunity to meaningfully engage in a free society. Third, Tennessee's mandatory minimum 51-year sentence denies juveniles any opportunity or incentive to demonstrate maturity or rehabilitation.

a. Tennessee's Sentencing Scheme Mandates A *De Facto* Life Sentence.

Tennessee's mandatory minimum 51-year life sentence on a juvenile violates *Miller* and *Montgomery*, because it is the functional equivalent of a life sentence without the possibility of parole.

The average life expectancy for a Tennessee resident is 76 years, but a juvenile who will live most of her life in prison is not likely to live to that age. Dr. Michael Freeman, who provided a report for this brief, found that the probability that the average inmate would survive to release is approximately 1.5%. *See*

⁶ The last of these laws went into effect in 1995, so no offender has yet spent 51 years in prison under this sentencing scheme. It is unlikely that any prisoner in the state has survived a single 51-year term, for the reasons discussed herein.

Report of Dr. Michael Freeman, dated January 15, 2017 (“Freeman Report”) at 7.⁷

The likelihood that an individual sentenced at age 16 would survive a 51-year sentence is no greater than ten percent, and may be less as it appears no female inmate has ever survived a single 51 year sentence. *See* Freeman Report at 4. One reason for this disparity may be that a large number of these defendants come from impoverished and traumatic backgrounds that diminish life expectancy, but the harsh conditions of prison also contribute to this discrepancy. *See* Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 Am. J. of Pub. Health 523, 526 (2013) (concluding that “[a] person suffers a two-year decline in life expectancy for every year locked away in prison.”). *See also United States v. Taveras*, 436 F.Supp.2d 493, 500 (E.D.N.Y.2006) (acknowledging that life expectancy within federal prison is “considerably shortened”), *vacated in part on other grounds sub nom, United States v. Pepin*, 514 F.3d 193 (2d Cir. 2008); *Iowa v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (acknowledging that “long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population”).

⁷ This analysis is supported by similar studies. A study conducted by Campaign for the Fair Sentencing of Youth found that Michigan juveniles with life sentences have average life expectancy of 50.6 years, much lower than the general population. Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, 2 (2012-2015).

Where a sixteen-year-old sentenced to life with a mandatory 51-year term will in all likelihood not live to see her release, there is no meaningful difference between this sentence and a life sentence without the possibility of parole. *See* Freeman Report at 7. *Miller* and *Montgomery* apply to both, as courts across the nation have found. *See e.g. Sam v. Wyoming*, 401 P.3d 834, 860 (Wyo. 2017) (52 years prior to parole eligibility governed by *Miller*); *New Jersey v. Zuber*, 227 N.J. 422, 453, 152 A.3d 197, 216 (2017) (55 years); *Bear Cloud v. Wyoming*, 334 P.3d 132, 144 (Wyo. 2014) (45 years); *Iowa v. Null*, 836 N.W.2d 41 (Iowa 2013) (52.5 years); *California v. Ramirez*, 2017 WL 5824286 (Cal. Ct. App. Nov. 29, 2017) (40 years); *California v. Fernandez*, 2015 WL 1283486 (Cal. Ct. App. Mar. 18, 2015) (50 years); *Washington v. Ronquillo*, 361 P.3d 779, 789 (2015) (51.3 years).⁸

⁸ A published Sixth Circuit decision, *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012), declined to apply *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting life without parole for juveniles who did not commit homicide) to an 89-year sentence imposed on a juvenile. In *Bunch*, the petitioner was sentenced to multiple, consecutive fixed-term sentences totaling 89 years. *Bunch* is distinguishable because it did not address a single *mandatory* life sentence operating as the functional equivalent of life without parole. *See Starks v. Easterling*, 659 F. App'x 277, 282 n.1 (6th Cir. 2016) (distinguishing Tennessee's life-with-parole sentence from *Bunch* because *Bunch* "addressed consecutive, fixed-term sentences for committing multiple nonhomicide offenses, and suggested that a life sentence would present a different case") (internal quotation marks omitted). *See also Wershe v. Combs*, 2016 WL 1253036, at *3 (W.D. Mich. Mar. 31, 2016), *appeal dismissed*, 2017 WL 4546625 (6th Cir. Aug. 21, 2017) (distinguishing the case before it from "the Sixth Circuit's decision in *Bunch* . . . because [*Bunch*] concerned a fixed term sentence, rather than a paroleable life sentence.").

The Iowa Supreme Court, for example, determined that “individualized sentencing evaluations ... are constitutionally required where a juvenile is sentenced to either a *de facto* life sentence or a term of years that would effectively deprive him of a meaningful opportunity for release on parole during his lifetime.” *Greiman v. Hodges*, 79 F. Supp. 3d 933, 941-42 (S.D. Iowa 2015) (summarizing Iowa cases, including *State v. Ragland*, 836 N.W.2d 107, 121–22 (Iowa 2013) (finding that the “same motivation behind the mandates of *Miller* applies to [the sixty year mandatory minimum] sentence in this case or any sentence that is the practical equivalent to life without parole.”)).

A statutory scheme that provides for sentences of life and life without the possibility of parole for juveniles really only offers one choice if parole is so remote a possibility as to have “the practical effect of mandating life in prison without the possibility of parole.” *Bear Cloud*, 294 P.3d at 45. Tennessee’s mandatory minimum 51-year life sentence for minors convicted of murder is the functional equivalent of a life sentence without the possibility of parole, and as such, it violates *Miller*.

The Supreme Court has held that juveniles, in all but the rarest cases, must be allowed a “meaningful” opportunity for “some *years of life* outside prison walls.” *Montgomery*, 136 S. Ct. at 736-737 (emphasis added). The only reasonable interpretation of these cases requires they be applied to juveniles facing mandatory,

lengthy sentences that are the functional equivalent of a life sentence. *See, e.g., Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013) (holding that both lengthy term of years sentencing and life sentences without parole deny the juveniles the chance to reenter society). Tennessee’s sentencing scheme, as applied to juveniles like Cyntoia Brown, simply cannot pass constitutional muster.

b. Tennessee’s Mandatory Life Sentence Denies Juveniles Any Opportunity To Meaningfully Engage in Society.

Even if a particular juvenile defendant could survive 51 years in prison, Tennessee’s mandatory life sentence denies her any real “meaningful” opportunity for “some *years of life* outside prison walls,” as guaranteed by the Eighth Amendment. *See Montgomery*, 136 S. Ct. at 736-737. The Eighth Amendment protection recognized in *Miller* and *Graham* requires states to afford juveniles more than the mere opportunity to survive his or her sentence; they must provide a “meaningful opportunity for release.” *See Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (“If a juvenile offender’s life sentence while ostensibly labeled as one ‘with parole,’ is the functional equivalent of a life sentence without parole, then the State has denied that offender the ‘meaningful opportunity to obtain release’”).

A juvenile, having reached maturity and demonstrated rehabilitation, must have an opportunity to actually engage with the world “outside prison walls” and have a meaningful *life* on release. *See e.g., Casiano v. Comm’r of Correction*, 317

Conn. 52, 115 A.3d 1031, 1047 (2015) (holding a sentence of 50 years without parole eligibility denies a meaningful opportunity to release); *see also California v. Perez*, 154 Cal.Rptr.3d 114 (juvenile sentencing cases under *Miller* center on whether “there is some meaningful life expectancy left” when the offender becomes eligible for parole), *cert. denied*, — U.S. —, 134 S.Ct. 527 (2013). In *Casiano*, the Connecticut Supreme Court found that a 50-year sentence would effectively keep a juvenile offender from experiencing freedom in any real way, as required by the Eighth Amendment:

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 assuming the juvenile offender does live to be released, after a half century of incarceration, he 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 for the few years he has left. A juvenile offender’s release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects. Indeed, the offender will be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment.

115 A.3d at 1046.

This result is untenable, because “[t]he United States Supreme Court viewed the concept of ‘life’ in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for ‘life’ if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.” *Id.* at 1047. *See also Ohio v. Moore* 76 N.E.3d 1127, 1137

(Ohio 2016) (holding that the United States Supreme Court “intended more than to simply allow juveniles-turned-nonagenarians the opportunity to breathe their last breaths as free people”). By withholding parole eligibility until the twilight of juvenile offenders’ lives, sentences like Cyntoia Brown’s “give[] no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” *Graham*, 560 U.S. at 79. They are thus contrary to the mandates of *Roper*, *Graham*, *Miller*, and *Montgomery*.

c. Tennessee’s Mandatory Life Sentence Denies Juveniles Any Opportunity or Incentive to Demonstrate Maturity and Rehabilitation.

Finally, by withholding parole eligibility until the twilight of juvenile offenders’ lives, a sentence like Cyntoia Brown’s “share[s] . . . characteristics with death sentences” – it “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the offender], he will remain in prison for the rest of his days.” *Graham*, 560 U.S. at 69-70.

Just as “[l]ife without parole ‘forfeits altogether the rehabilitative ideal,’” *Miller*, 567 U.S. at 473 (citing *Graham*, 560 U.S. at 74), so too does Tennessee’s mandatory minimum 51-year sentence, which erases all hope of freedom and any corresponding incentive for personal betterment. A 51-year sentence does not take into account the transitory nature of juvenile impetuosity and related

characteristics, even though studies show these temporary characteristics resolve in relatively short order. *See* Rotem Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 *Personality & Individual Differences* 681, 684-86 (2007) (reporting significant decline in impulsivity from ages 14-16 to 20-22 on two different impulsivity scales). Tennessee’s draconian sentencing scheme mandates a juvenile convicted of murder will spend her entire life in jail, without regard for her prospects for maturation and rehabilitation. Such a sentence flies in the face of the Supreme Court’s decisions on juvenile sentencing.

In *Roper*, *Graham*, *Miller*, and *Montgomery*, the Supreme Court has repeatedly held that the Eighth Amendment requires states to ensure prisoners like Brown have “their hope for some years of life outside the prison walls . . . restored.” *Montgomery*, 136 S. Ct. 736-37. *See also In re Pinchon*, No. 17-5104, slip op. at *3 (6th Cir. Aug. 18, 2017) (noting in an order of a motions panel: “The ‘central intuition’ and mandate of *Miller* and *Montgomery* is that sentencing courts must consider a ‘juvenile’s special circumstances’ because ‘children who commit even heinous crimes are capable of change’ and, in all but the most extreme circumstances, are required to have ‘hope for some years of life outside prison walls.’”) (quoting *Montgomery*, 136 S.Ct. at 725, 736-37).⁹ Even if Tennessee’s scheme provides a miniscule chance of geriatric release after 51 years of

⁹ Cases not available in an electronically available database are attached hereto.

continuous incarceration, it violates the constitutional prohibition against cruel and unusual punishment because it does not provide juvenile offenders a *meaningful* opportunity for release based on maturity and rehabilitation as required by the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the *Amicus Curiae* respectfully requests that the Court find Tennessee's sentencing scheme for first-degree murder unconstitutional as applied to juvenile offenders, and that Cyntoia Brown's sentence be vacated and she be resentenced.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4,219 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2010 in Times New Roman 14-point font, a proportionally-spaced typeface.

/s/ Christopher J. Climo
Christopher J. Climo

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I filed and served the foregoing motion on counsel of record through this Court's CM/ECF system.

/s/ Christopher J. Climo
Christopher J. Climo

EXHIBIT A



**THE
SENTENCING
PROJECT**

RESEARCH AND ADVOCACY FOR REFORM

January 16, 2018

David R. Esquivel
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**Re: Cyntoia Brown v. Carolyn Jordan: Tennessee's First Degree Murder
Sentencing Scheme**

Dear Mr. Esquivel:

I recently completed a review of Tennessee's life sentence under Tenn. Code Ann. § 40-35-501, interpreted by the Tennessee Department of Corrections to require a minimum 51-year prison term before eligibility for release for first-degree murder (the "51 Year Life Sentence"), as well as its counterparts across the nation. On behalf of the Sentencing Project, I write to provide you with a summary of points of that analysis pertinent to the above-referenced case.

QUALIFICATIONS AND EXPERIENCE

I am recognized as a national expert on the study of life sentences and my research is cited widely for its unique contribution to the field of criminology, most recently in President Barack Obama's Harvard law review article, *The President's Role in Advancing Criminal Justice Reform*.¹ Since 2009 I have authored four national reports that document the prevalence of life sentences.² In addition to these national reports, my work has appeared in scholarly journals and law reviews,³ and I have frequently been invited to present my work before professional and

¹ Obama, B. (2017). The President's role in advancing criminal justice reform. *Harvard Law Review* 130(3): 811-865.

² Nellis, A., and King, R. S. (2009). *No Exit: The Expanding Use of Life Sentences in America*. Washington, D.C.: The Sentencing Project; Nellis, A. (2012). *The Lives of Juvenile Lifers: Findings from a National Survey*. Washington, DC: The Sentencing Project; Nellis, A. (2013). *Life Goes On: The Historic Rise in Life Sentences in America*. Washington, DC: The Sentencing Project; Nellis, A. (forthcoming). *Still Life: The Continued Expansion of Life Sentences in the Era of Criminal Justice Reform*.

³ Nellis, A. (October 2010). Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States. *Federal Sentencing Reporter* 23(1) 27-32; Nellis, A. (2013). Tinkering with Life: A Look at the Inappropriateness of Life without Parole as an Alternative to the Death Penalty. *University of Miami Law Review* 67(2): 439-458.

David R. Esquivel
January 16, 2018
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academic audiences.

Outside of my published work on life sentences, in 2009 I assisted with the national data collection effort cited widely in the *Graham v. Florida*⁴ ruling that identified Florida's disproportionate use of parole-ineligible life sentences for juveniles convicted of non-homicide offenses.⁵ In addition, The Sentencing Project's amicus curiae brief in support of the plaintiff in that case was referenced in the majority opinion.⁶

My work has been recognized in international circles as well. In 2016, I co-authored a chapter in a volume on the use of life sentences internationally, showing U.S. trends in life sentences in the context of international practices and norms.⁷

FINDINGS

Tennessee's 51 Year Life Sentence Is Out of Line with National Standards

Individuals serving life sentences in Tennessee under the 51 Year Life Sentence are not considered for release until they have served at least 85%, or 51 years, of a 60-year mandatory minimum term of incarceration. To my knowledge, this is the harshest mandatory minimum time-served on a life sentence in the country.⁸

The statute requiring a 51 Year Life Sentence set in motion the longest mandatory minimum sentence in the nation for prisoners serving life. Lifers in Tennessee are now required to serve at least 51 years before being released. A recent study of parole policies for life-sentenced prisoners shows that Tennessee lifers wait longer than life-sentenced prisoners anywhere else in the country for their first parole hearing.⁹

⁴ *Graham v. Florida*, 560 U.S. 48 (2010).

⁵ Annino, P., Rasmussen, D.W. and Rice, C. B. (2009), *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* (September 14, 2009). FSU College of Law, Public Law Research Paper No. 399, available at SSRN: <https://ssrn.com/abstract=1490079> or <http://dx.doi.org/10.2139/ssrn.1490079>

⁶ “As one amicus notes, defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. See Brief for Sentencing Project as Amicus Curiae 11–13.” *Graham*, 560 U.S. at 74.

⁷ Mauer, M. and Nellis, A. (2016). The Impact of Life Imprisonment on Prospects for Criminal Justice Reform in the U.S. In (Dirk Van Zyl Smit and Catherin Appleton, Eds.) *Life Imprisonment and Human Rights*. London: Hart Publishing

⁸ See Mehta, S. (2016). *False hope: How parole systems fail youth serving extreme sentences*. Washington, DC: American Civil Liberties Union.

⁹ Mehta, S. (2016). *False hope: How parole systems fail youth serving extreme sentences*. Washington, DC: American Civil Liberties Union.

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Page 3

States generally allow parole review for life sentences in instances of a murder conviction after 25 years. Internationally as well, the standard minimum is 25 years, with release expected to occur at that time. Life sentences are extremely rare elsewhere in the world.¹⁰

Tennessee's 51 Year Life Sentence Is Functionally Equivalent to Tennessee's Life Without Parole Sentence

States define prison terms for individuals who commit murder in a range of ways. Though most states allow the first parole review for lifers at about 25 years, a select few states delay the first parole hearing for individuals serving life sentences further,¹¹ but to my knowledge none require 51 years.

In a state where the first opportunity for parole does not come for at least a half-century, juries and judges are provided with a choice between two prison sentences that are functionally equivalent. Given Tennessee's statutory distinction between life without parole (which is currently served by more than 200 individuals) and life with the possibility of parole, one must conclude that there is value that the state finds in having these two distinct sentences.

Yet in reality there is only one sentence: death in prison. The Sentencing Project obtained data on people serving life sentences from the Tennessee Department of Correction in 2003, 2008, 2012, and 2016. The data shows that the average age of death for the 170 life-sentenced prisoners who died between 2005 and 2015 was 59 years old. Over these years, the average age at death ranged from 57 years old (2005) to 62 (2013). The potential for outliving a life sentence that is 51 years or more is practically nonexistent, given the death data provided by the state.

Tennessee's 51 Year Life Sentence is the harshest in the country and requires a sentence wildly out of line with the average mandatory minimums for life sentences in other states.

Sincerely,



Ashley Nellis, Ph.D.
Senior Research Analyst, The Sentencing
Project

¹⁰ Van syl Smit, D. and Appleton, C. (2016) Eds. *Life imprisonment and human rights*. Oxford: Hart Publishing.; *Vinter and Others v United Kingdom*, App nos. 66069/09, 130/10 and 3896/10 (9 July 2013).

¹¹ These states are Colorado (40 years), Delaware (45 years), Kansas (40 years), Nebraska (40 years). See Mehta, S. (2016). *False hope: How parole systems fail youth serving extreme sentences*. Washington, DC: American Civil Liberties Union.

EXHIBIT B



Forensic Research + Analysis

January 15, 2018

David R. Esquivel
Bass Berry & Sims PLC
150 Third Avenue South
Nashville, Tennessee 37201
Phone: (615) 742-6285
Email: desquivel@bassberry.com

RE: *Cyntoia Brown v. Carolyn Jordan*

Dear Mr. Esquivel,

I am in receipt of your correspondence and materials regarding the above-named action. My report in this matter is in response to the questions that you have posed regarding sentencing practices in the Tennessee penal system. Specifically, I am responding to your questions regarding the 51-year life sentence, and how this mandatory minimum sentence affects the proportion of inmates with a life sentence who will die while serving the 51-year sentence (while incarcerated).

My methods and opinions in this case pertain to the field of epidemiology. Epidemiology is defined as the scientific study of disease and injury in populations, including prevalence, risk, and incidence in specific populations, and includes the study of survival and mortality risk. The methods applied in this report are consistent with those outlined in the Reference Guide on Epidemiology, from the Reference Manual on Scientific Evidence, published by the Federal Judicial Center and the National Academies of Science (3rd Edition, 2011), as well as in the text Forensic Epidemiology: Principles and Practice, published by Elsevier (2016).

Qualifications

I am a doctor of medicine and an epidemiologist, and my field of expertise is forensic medicine and forensic epidemiology. I hold the following academic degrees: a doctor of medicine degree from Umeå University, a Ph.D. in public health with a major focus in epidemiology from Oregon State University, and an MPH in epidemiology and biostatistics, also from Oregon State University, *inter alia*. I have completed a 2-year post-doctoral fellowship in forensic pathology at Umeå University in Sweden, and am currently an affiliate medical examiner with the Allegheny County Medical Examiner's office, a fellow of the Pathology section of the American Academy of Forensic Sciences (AAFS), and vice chair of of the US national standards board for medicolegal

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death investigation for the AAFS.

I am a Fulbright Fellow, and hold a 3-year appointment (2017-20) with the United States Department of State as a Fulbright Specialist in the field of forensic medicine.

I serve as an Associate Professor of Forensic Epidemiology at Maastricht University Medical Center, an Affiliate Professor of Psychiatry at Oregon Health and Science University (OHSU) School of Medicine, and an Adjunct Professor of Forensic Medicine and Epidemiology in the Faculty of Health Sciences at Aarhus University. I have taught courses for the past 17 years in forensic medicine, forensic epidemiology, and injury epidemiology at OHSU.

I currently serve or have served as an associate editor or editorial board member of 13 peer-reviewed scientific journals, and have published approximately 180 scientific papers, abstracts, book chapters and books on topics largely related to scientific methods of causal evaluation. I am the editor of the textbook *Forensic Epidemiology: Principles and Practice* (Elsevier, 2016), the most comprehensive authority on the topic, and co-authored the chapter on survival analysis in that textbook.

I have provided testimony in more than 300 civil and criminal trials in state and Federal courts throughout the United States, Canada, Australia, and Europe. Please see my CV for further details.

Materials reviewed:

In forming my opinions in this matter, I have reviewed the following case-specific documents:

- The brief of appellant Cyntoia Brown in the subject matter
- Tennessee Department of Correction data on deaths while in custody
- Tennessee Department of Correction data on age at time of incarceration

David R. Esquivel

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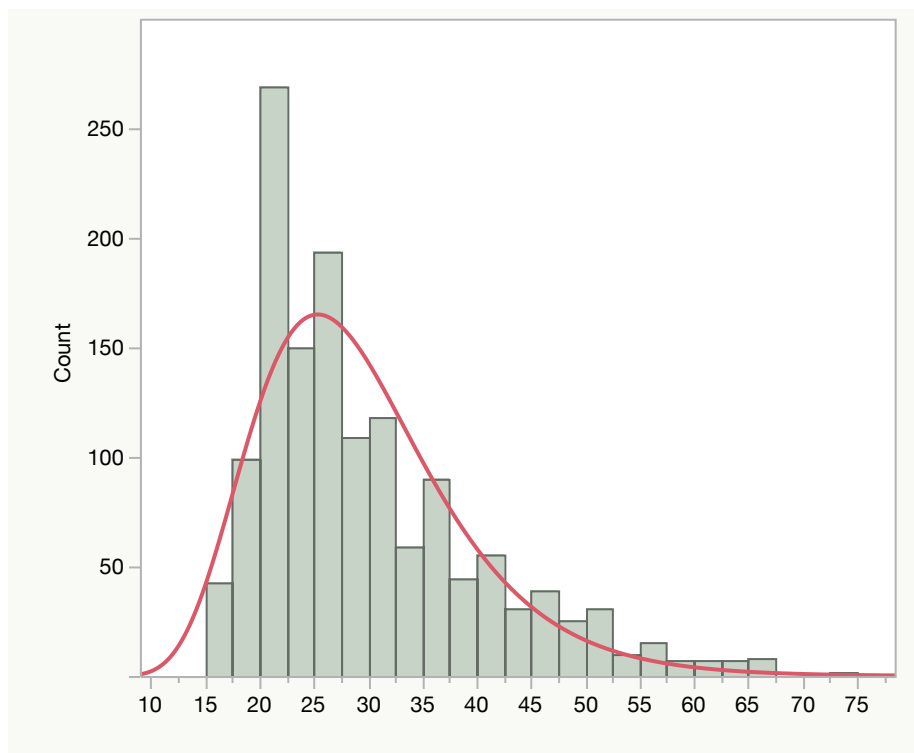
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Opinions

Following my review and analysis of data that I understand to be from the Tennessee Department of Correction (TDOC), I have arrived at the following opinions:

Age at time of incarceration among inmates sentenced to life

The average age at time of conviction among 1,395 inmates with a life sentence in the TDOC system is 29.5 years. It can be seen in the chart below that the distribution of age at time of sentencing is right skewed, meaning that tail of the curve stretches farther to the right of the average than to the left. The median age at time of life sentence is 27 (meaning that 50% of sentences are higher age and 50% are lower age); 25% are over the age of 35 and 10% are over 45.



Age of death among all TDOC inmates

The average age of death among 1,575 inmates who have died in prison (including all men and women) is 52 (tracked since 1991, and through 2015, and both prior to and after the 51 year life sentence minimum, enacted in 1995). Among these deaths, the median is also 52 years of age, and the top 25th and 10th percentiles are 61 and 69 years. Black inmates comprise 34% of the deaths, and almost all of the remaining deaths were among white inmates. Most (82%) of the

David R. Esquivel

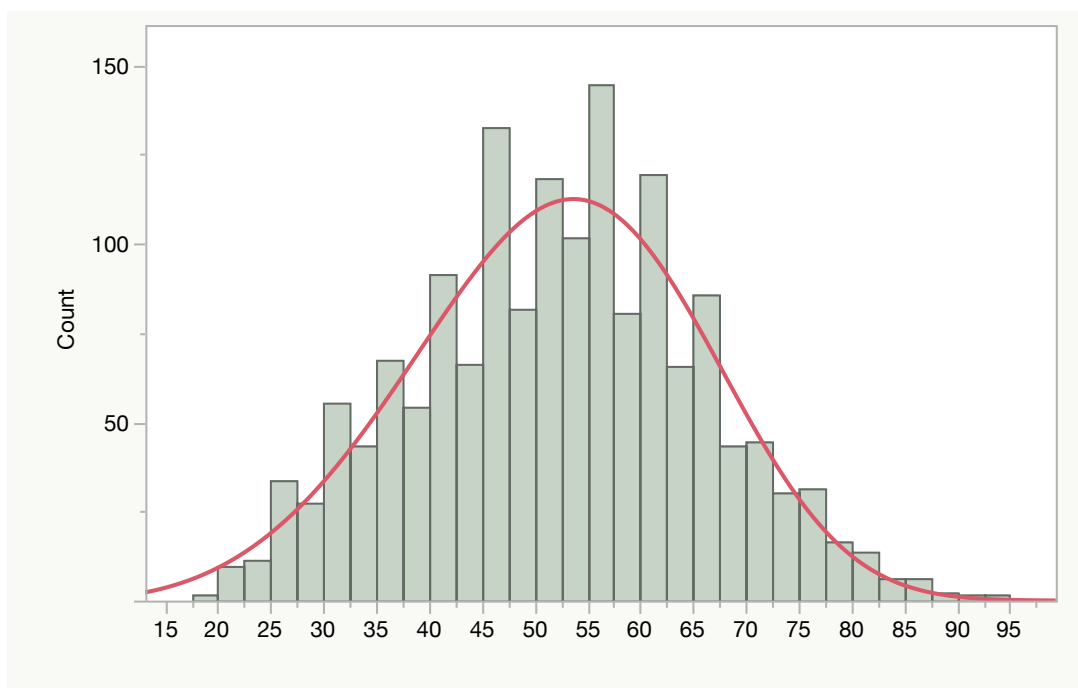
RE: *Cyntoia Brown v. Carolyn Jordan*

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deaths were ruled natural, 9% were due to unspecified illness, 3% suicided, 2% were murdered, and 1% died of HIV/ AIDS complications.

See the chart below for the distribution of age at time of death:



The population of women in TDOC prisons is substantially smaller than the population of men, and thus the population of women who have died in prison is also much smaller. Between 1989 and 2016 there were a total of 50 women who died in Tennessee prisons, at an average age of 49 years. From a list furnished to me of 24 women in the TDOC system with a life sentence, I note that 12 (50%) are listed as deceased at an average age of 58, and after having served an average of 13.2 years of their life sentence (one inmate had died at an age that could not be determined at the time of preparation of this report). Of the remaining women who are serving a life sentence and who were not known to be deceased, the longest time served by any female inmate, living or dead, was 38 years and 2 days. Thus, there is no evidence that I am aware of that any woman has ever even survived 51 years in the history of the Tennessee prison system.

Conclusions:

A minimum 51-year sentence added to an average age at time of incarceration of 29.5 years results in an average age at release of 80.5 years among all TDOC inmates. There is an approximately 1.5% probability that a TDOC inmate will live to this age, and thus a 1.5% chance

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that the average TDOC inmate sentenced to life will survive long enough to be released, and conversely, a 98.5% probability that he or she will not survive to release date.

Questions:

In the following section of this report I have responded to specific questions that you have posed.

Life Expectancy: Prison v. General Population

- Is life expectancy lower for individuals in prison compared to the general population in the United States? By how much? What is the average life expectancy for prisoners in the United States?

Response: Life expectancy is defined as the average age of death for a population. The precise life expectancy of the prison population is unknown, largely because most people who have been in prison will die after release, and the duration of incarceration has an effect on survival. Research conducted on the Georgia prison population has indicated an approximately 43% increased 15-year risk of death versus the never incarcerated population,¹ but this value doesn't translate to a life expectancy for the incarcerated population, as most inmates are released prior to death. A study of the prison population with a life sentence in Michigan reported an overall life expectancy of 58.1 years for all prisoners (56.0 for African-American males and 60.1 years for white males), and 50.6 years for prisoners sentenced as children, based on 400 deaths.² These life expectancies are approximately 15 years less than for the non-incarcerated population of the same race and gender.³ Other researchers have reported similar findings; for every year spent behind bars roughly 2 years of life expectancy is lost in the imprisoned and paroled population,⁴ and this life shortening effect is more pronounced in younger prisoners.⁵

- Is there any reason to believe that life expectancy for inmates in TDOC custody would be longer than the average life expectancy for prisoners in the United States generally? Shorter?

¹ Spaulding AC et al. Prisoner survival inside and outside of the institution: implications for health-care planning. *Am J Epidemiol.* 2011;173(5):479-87.

² <http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf>

² <http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf> accessed January 2, 2017.

³ https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_11.pdf

⁴ Patterson EJ. The dose-response of time served in prison on mortality: New York State, 1989-2003. *Am J Public Health.* 2013;103(3):523-8.

⁵ Kouyoumdjian FG, Andreev EM, Borschmann R, Kinner SA, McConnon A. Do people who experience incarceration age more quickly? Exploratory analyses using retrospective cohort data on mortality from Ontario, Canada. *PLoS One.* 2017;12(4):e0175837.

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RE: *Cyntoia Brown v. Carolyn Jordan*

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Response: Based on the above reported data analysis, the average age at death (an approximation of life expectancy) is substantially less for TDOC inmates than inmates in the Michigan study. Part of this difference may be due to the fact that the Tennessee population has an approximately 2 year shorter life expectancy than the Michigan population, and part of it may be due to the fact that such a large proportion of inmates sentenced to life in prison in the TDOC are under the age of 25 at the time of incarceration (refer to the first chart above).

- What is the life expectancy for inmates in TDOC custody?

Response: See the previously described analysis. The only available proxy for life expectancy that is available for the TDOC life sentence population is the average age at death.

- By how much is life expectancy lower for inmates in TDOC custody compared to the general population in Tennessee and the United States?

Response: The general population in Tennessee has a life expectancy of approximately 76 years, whereas the US population life expectancy is nearly 79 years. The average age at death of a TDOC inmate is 24 years less than for the general population in Tennessee.

51 Year Sentence

- Given that individuals are required to serve 51 years prior to release, what percent of individuals serving that sentence would be expected to live longer than their sentence? Said otherwise, what is the likelihood that an individual sentenced at age 16 will survive her 51-year sentence?

Response: An individual sentenced at age 16 (like Ms. Brown) would be released at age 67, and nearly 90% of the deaths in the TDOC occur prior to this age. Thus, there is an approximately 10% probability that a 16 year-old individual would survive to see her release (although we have no evidence that this has ever even occurred).

- Is a 51-year sentence the equivalent of a life without parole sentence (*i.e.* is it the equivalent to a sentence under which the inmate will die in prison)? Said otherwise, is there a meaningful difference between a 51 year sentence and a life without parole sentence?

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RE: *Cyntoia Brown v. Carolyn Jordan*

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Response: The probability that the *average* inmate (*i.e.* an inmate sentenced at the average age of sentencing) would survive to release is approximately 1.5%, and therefore there is a 98.5% probability of dying before release. Thus, on average, in 98.5% of cases a 51-year sentence is equivalent to a life without parole sentence.

- If an inmate lives beyond the 51 years to which she is sentenced, how many years do you estimate she will live?

Response: As mentioned above, the probability that the average inmate would survive to 81 years of age (average age of release) is approximately 1.5%. The US Life Tables indicate that an 81 year-old woman has a life expectancy of approximately 9 years. The 1.5% of prisoners who survive 51 years to their release would thus live 9 or fewer years after release, on average.

- Does a 51-year sentence provide a meaningful opportunity for release?

Response: As the opportunity for release is available to fewer than 1 in 65 prisoners sentenced to life, the answer is no. A 51-year life sentence is 98.5% identical to a life sentence without the possibility of parole.

The preceding opinions and responses were given as reasonable scientific probabilities.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Ma', with a long horizontal line extending to the left and a shorter one to the right.

Michael D. Freeman, MedDr PhD MPH FAAFS
Forensic Medicine and Epidemiology

No. 16-6738

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CYNTOIA BROWN,
Petitioner-Appellant,

v.

CAROLYN JORDAN, Warden
Respondent-Appellee,

On Appeal from the United States District Court
for the Middle District of Tennessee

**COMPENDIUM OF UNPUBLISHED CASES CITED IN
BRIEF OF *AMICUS CURIAE* TENNESSEE ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS IN SUPPORT OF APPELLANT**

In re Pinchon,
No. 17-5104, slip op. (6th Cir. Aug. 18, 2017) 1

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
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Filed: August 18, 2017

Ms. Caryll S. Alpert
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810 Broadway
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Mr. John H. Bledsoe
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Federal Habeas Corpus Division
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Mr. Nicholas Bolduc
Office of the Attorney General
of Tennessee
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Nashville, TN 37202

Mr. Andrew C. Brandon
Federal Public Defender's Office
810 Broadway
Suite 200
Nashville, TN 37203

Re: Case No. 17-5104, *In re: Edward Pinchon*
Originating Case No. : 3:01-cv-00237 : 3:13-cv-00015

Dear Sir or Madam,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Bryant L. Crutcher, **for**
Case Manager Robin Baker
Direct Dial No. 513-564-7013

cc: Mr. Keith Throckmorton

Enclosure

No mandate to issue

No. 17-5104

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

<p>FILED</p> <p>Aug 18, 2017</p> <p>DEBORAH S. HUNT, Clerk</p>

In re: EDWARD PINCHON,

Movant.

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O R D E R

Before: KETHLEDGE, WHITE, and STRANCH, Circuit Judges.

Edward Pinchon, a Tennessee prisoner represented by counsel, moves for an order authorizing the district court to consider a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2244(b)(3)(B).

In 1999, a Tennessee jury convicted Pinchon of first degree murder; Pinchon was seventeen years old when he committed the crime. *See State v. Pinchon*, No. M1999-00994-CCA-R3-CD, 2000 WL 284071, at *1 (Tenn. Crim. App. Mar. 17, 2000). The trial court imposed a sentence of life confinement, with the possibility of parole. Under Tennessee law, such a sentence requires a defendant to serve at least 51 years in prison before he is eligible for parole. *See Starks v. Easterling*, 659 F. App'x 277, 278 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017); Tenn. Code Ann. § 40-35-501(h)(1) and (i)(1). Pinchon appealed his conviction, and the Tennessee Court of Criminal Appeals affirmed. *See Pinchon*, 2000 WL 284071, at *1. Additionally, Pinchon unsuccessfully sought state court post-conviction relief. *See Pinchon v. State*, No. M2003-00816-CCA-R3-PC, 2004 WL 193055, at *1 (Tenn. Crim. App. Jan. 28, 2004).

Pinchon filed his initial § 2254 petition in 2001 asserting claims of insufficient evidence and unconstitutional jury instructions. The district court denied the petition and this court affirmed. *See Pinchon v. Myers*, 615 F.3d 631, 635 (6th Cir. 2010). In 2012, Pinchon filed another § 2254 petition asserting multiple ineffective-assistance-of-counsel claims, which the

No. 17-5104

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district court transferred to this court for consideration as a motion for authorization to file a second or successive petition. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). We denied his motion. *See In re Pinchon*, No. 13-5240 (6th Cir. Sept. 26, 2013).

In 2017, Pinchon filed this motion for authorization to file a second or successive petition. In his motion, Pinchon argues that the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, ___, 132 S. Ct. 2455 (2012), which held that sentences of mandatory life imprisonment without parole for juvenile offenders are unconstitutional, announced a new rule of law that was made retroactively applicable to his case in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

We “may authorize the filing of a second or successive” habeas corpus petition only if the petitioner “makes a prima facie showing” that it contains a new claim premised on either: (1) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”; or (2) new facts that “could not have been discovered previously through the exercise of due diligence” and that, “if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2), (b)(3)(C). “A ‘prima facie showing’ . . . is not a difficult standard to meet.” *In re Lott*, 366 F.3d 431, 432 (6th Cir. 2004). It requires only “a sufficient showing of possible merit to warrant a fuller exploration by the district court.” *Id.* (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

Pinchon argues that he is entitled to habeas relief in the wake of *Miller*, 132 S. Ct. at 2460, wherein the Supreme Court held “that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments,’” (quoting U.S. Constitutional Amendment VIII), and *Montgomery*, 136 S. Ct. at 732, which held that *Miller* is retroactive on collateral review. Specifically, he argues that his earliest possible parole date is beyond the scope of his life expectancy and that he is thus

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serving “the functional equivalent of imprisonment for the rest of his life before any opportunity for parole.”

As the State points out, a different panel of this court rejected a similar argument where the movant sought authorization to file a second or successive petition. See *In re Harrell*, No. 16-1048, 2016 WL 4708184, at *1 (6th Cir. Sept. 8, 2016). The movant in *In re Harrell*, argued that his parole eligibility on his 60-to-150-year sentence extended beyond his expected lifetime. *Id.* at *2. Although the *Harrell* panel concluded that “*Miller* and *Montgomery* apply, by their own terms, only to mandatory sentences of life without parole,” *Harrell* is a non-precedential order and Pinchon makes substantial arguments establishing that this issue “warrant[s] a fuller exploration by the district court.”¹ The “central intuition” and mandate of *Miller* and *Montgomery* is that sentencing courts must consider a “juvenile’s special circumstances” because “children who commit even heinous crimes are capable of change” and, in all but the most extreme circumstances, are required to have “hope for some years of life outside prison walls.” *Montgomery*, 136 S. Ct. at 725, 736–37. Because Pinchon’s mandatory sentence of life with the possibility of parole after 51 years is arguably the functional equivalent of a mandatory sentence of life without parole, we conclude that Pinchon has made a prima facie showing that the rule of constitutional law established in *Miller* and *Montgomery* is retroactively applicable to him. Accordingly, Pinchon’s motion for authorization to file a second or successive § 2254 petition is **GRANTED**.

¹ We acknowledge that there is a published decision in this circuit, *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012), that declined to apply *Graham v. Florida*, 560 U.S. 48 (2010) (proscribing life without parole sentences on juveniles who did not commit homicide) to an 89-year sentence imposed on a juvenile. *Bunch* is distinguishable from the instant case because the *Bunch* petitioner was sentenced to eight consecutive fixed-term sentences totaling 89 years’ imprisonment. Thus, *Bunch* did not address the present situation, where a single life sentence operates as the functional equivalent of life without parole. See *Starks v. Easterling*, 659 F. App’x 277, 282 n.1 (6th Cir. 2016) (distinguishing Tennessee’s life-with-parole sentence from *Bunch* because *Bunch* “addressed consecutive, fixed-term sentences for committing multiple nonhomicide offenses, and suggested that a life sentence would present a different case”) (internal quotation marks omitted).

No. 17-5104

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Judge Kethledge dissents and would deny the motion.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written over a horizontal line.

Deborah S. Hunt, Clerk