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District Court, Jefferson County, 1997CR1195

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Petitioner:
The People of the State of Colorado,

v.

Respondent:
Frank Vigil, Jr.

Case Number: 2014SC495

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AMICUS BRIEF OF THE DISTRICT ATTORNEYS FOR THE SECOND AND EIGHTEENTH JUDICIAL DISTRICTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief contains 4,997 words and 24 pages.

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STATEMENT OF THE ISSUES

Whether *Miller v. Alabama*, 132 S.Ct. 2455 (2012) is to be applied retroactively to cases on collateral review.

If *Miller v. Alabama* is retroactive, whether the trial court properly ordered a new sentencing hearing.

INTEREST OF THE AMICI

On February 9, 2015 the Court issued an order inviting any interested organization to file a brief as amicus curiae. This amicus curiae brief is filed jointly by the District Attorneys for the Second and Eighteenth Judicial Districts. Our two districts—which together encompass the City and County of Denver, as well as Arapahoe, Douglas, Elbert, and Lincoln Counties—are Colorado's largest judicial districts, measured by population. Of the juveniles in Colorado whose life-without-parole sentences were final when *Miller* was announced, more than half were convicted in the Second and Eighteenth Judicial Districts. In other words, our two District Attorney Offices prosecuted more than half of the cases that will be affected by the Court's resolution of this appeal.

Like the District Attorney for the First Judicial District in *Vigil*, our offices have been opposing motions filed by offenders whose convictions were final when

Miller was announced, but who seek relief under *Miller*. The outcome of this appeal will likely determine the outcome of that litigation in our courts.

The District Attorneys for the Second and Eighteenth Judicial Districts respectfully disagree with the position taken by the Colorado Attorney General that *Miller* should be applied retroactively to offenders whose convictions were final when *Miller* was announced, and we also disagree with the Attorney General on what relief offenders should receive in the event *Miller* is deemed to be retroactive. Because the Attorney General's position has already been adopted in one published appellate decision, *see People v. Banks*, ___ P.3d ___, 2012 COA 157, and because our own views are closer to those advocated here by the prosecutors in this Jefferson County appeal, the District Attorneys for the Second and Eighteenth Judicial Districts submit this brief as amicus curiae.

SUMMARY OF THE ARGUMENT

Miller v. Alabama created a non-watershed, procedural rule, so it does not apply retroactively to convictions on collateral review. The arguments for retroactivity in Vigil's answer brief are unpersuasive and should be rejected. Offenders whose convictions were final at the time *Miller* was announced therefore must serve out their sentences of life without parole.

If this Court instead deems *Miller* to be retroactive, the offenders should receive a sentencing hearing. At the hearing, the court should consider the circumstances of the offender and the offense, and determine whether a sentence of life without parole is an appropriate and just consequence. If so, the court should impose it. If, on the other hand, the court concludes that lifetime parole ineligibility is not appropriate, the court should impose a life sentence with the possibility of parole after forty calendar years.

ARGUMENT

I. *Miller v. Alabama* created a non-watershed, procedural rule, so it does not apply retroactively to convictions on collateral review.

Miller v. Alabama held that States may impose life-without-parole sentences on offenders who were under the age of 18 at the time of their crimes, but only through individualized sentencing decisions; such sentences cannot be mandatory.

See Miller, 132 S.Ct. at 2460-2475. Whether *Miller* applies retroactively to cases on collateral review should be assessed under the framework set out in *Teague v. Lane*, 489 U.S. 288 (1989), which Colorado adopted in *Edwards v. People*, 129 P.3d 977 (Colo. 2006). Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive; or (2) the rule is a "watershed" rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id.*

A. In prohibiting mandatory life-without-parole sentences for juvenile offenders, *Miller* announced a new rule.

A new rule "breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. A new rule is one that "was not dictated by precedent existing at the time the defendant's conviction became final." *Bockting*, 549 U.S. at 416. *Miller* broke new ground by prohibiting mandatory life-without-parole sentences for juvenile offenders: although *Graham v. Florida*, 560 U.S. 48 (2010), had prohibited life-without-parole sentences for juveniles in non-homicide offenses, *Graham* did not decide whether juvenile offenders could receive mandatory life-without-parole sentences in cases involving

homicide. The *Miller* rule was not dictated by *Graham* or other Supreme Court precedent, and therefore constituted a "new rule."

B. The new rule announced in *Miller* is not substantive; it is procedural.

Generally, a new rule will apply retroactively if it is substantive. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). Substantive rules include decisions that narrow the scope of a criminal statute by defining its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish. *Id.* at 351-352. *See also Bousley v. United States*, 523 U.S. 614, 620-621 (1998). *Summerlin* determined that the holding in *Ring v. Arizona*, 536 U.S. 584 (2002), was properly classified as procedural. *Ring* held that "a sentencing judge, sitting without a jury," may not "find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. *Summerlin*, in deeming *Ring's* new rule to be procedural, observed that rules which "allocate decision making authority in this fashion are prototypical procedural rules." *Summerlin*, 542 U.S. at 353.

Miller is akin to *Ring*: both decisions deal with the sentencing phase of homicide cases, and create a requirement that information be presented to the sentencing authority so that an appropriate sentence may be determined. Just as *Ring* "allocate[d] decision making authority" (between judge and jury), *see*

Summerlin, 542 U.S. at 353, *Miller* allocates decision making authority (between the legislature and the judge or jury) by requiring that life-without-parole sentences for juvenile offenders be based on an individualized assessment of the juvenile, instead of being mandatory. *Miller's* new rule is procedural because it does not alter the range of conduct or the class of persons that the law punishes, *see Bousley*, 523 U.S. at 620-621. Instead it allocates decision making authority at the sentencing stage, which places it in the class of "prototypical procedural rules." *See Summerlin*, 542 U.S. at 353.

C. The new rule announced in *Miller* is not a "watershed" rule of criminal procedure.

A new procedural rule applies retroactively in a collateral proceeding only if it is a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Bockting*, 549 U.S. at 416. This watershed rule exception is "extremely narrow," *id.* at 417, and "is clearly meant to apply only to a small core of rules requiring observance of those procedures" that are "implicit in the concept of ordered liberty." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (internal citations and quotations omitted). The Supreme Court has recognized only one watershed rule of criminal procedure: the new rule announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which recognized a

criminal defendant's right to the assistance of counsel. *See Beard v. Banks*, 542 U.S. 406, 417-418 (2004); *see also Edwards*, 129 P.3d at 979. To qualify as watershed, a new rule (1) must be necessary to prevent "an impermissibly large risk of an inaccurate conviction," and (2) must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Bockting*, 549 U.S. at 418.

Miller's new rule does not meet either of these two tests. First, the rule announced in *Miller* is not necessary to prevent an "impermissibly large risk of an inaccurate conviction." The *Miller* rule applies to the sentencing phase of a case, not the trial phase, and does not affect the accuracy of the conviction. Second, the Supreme Court has said that, to "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," a new rule must itself constitute a previously unrecognized bedrock procedural element. *Bockting,* at 421. The Confrontation Clause rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004) did not constitute such a bedrock procedural element, as it did not effect a "profound" and "sweeping" change, *see Bockting*, at 421, and likewise the new rule announced in *Miller* did not effect a profound and sweeping procedural change. *Miller* therefore did not announce a watershed rule of criminal procedure, and does not apply retroactively to cases on collateral review.

D. Vigil's arguments for retroactivity should be rejected.

Vigil argues that the rule announced in *Miller* has already been applied retroactively to a case on collateral review, in *Jackson v. Hobbs*, an Arkansas case that was decided together with *Miller*. (Vigil Answer Brief, pp. 3-4.) But the U.S. Supreme Court did not mandate that *Miller* be applied retroactively to Mr. Jackson's case: it concluded the joint *Miller-Jackson* opinion by saying, "We accordingly reverse the judgments of the Arkansas Supreme Court and the Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion." 132 S.Ct. at 2475. The Supreme Court had previously held, in *Danforth v. Minnesota*, 552 U.S. 264 (2008), that States are free to give newly articulated constitutional rules broader retroactivity than required by *Teague v. Lane*. The remand in *Miller-Jackson* "for further proceedings not inconsistent with this opinion" is best understood as a statement that the Arkansas Supreme Court was free to apply the new rule to Mr. Jackson's case if, under Arkansas law, it deemed retroactive application to be appropriate.

Vigil also argues that *Miller* announced a substantive rule, as opposed to a procedural rule, on the theory that an alteration to a minimum penalty is an alteration to the penalty itself, citing *Alleyne v. United States*, 133 S.Ct. 2151 (2013). (Vigil Answer Brief, pp. 4-8.) *Alleyne* held that any fact that increases a

mandatory minimum penalty is an "element" of the crime that must be determined by a jury. Numerous courts have rejected the argument that *Alleyne* is retroactive to cases on collateral review. *See, e.g., Butterworth v. United States*, 775 F.3d 459, 465-468 & n. 4 (1st Cir. 2015) (collecting cases). *Alleyne* did not prohibit minimum sentences; it said that facts requiring imposition of mandatory minimum sentences must be proven to a jury beyond a reasonable doubt—a procedural rule. Likewise, *Miller* did not prohibit life-without-parole sentences for juvenile murderers; it said that the assessment of whether such a sentence is appropriate must be made on a case-by-case basis by a judge—a procedural rule.

Claiming that Colorado law supports retroactive application of *Miller*, Vigil cites several cases that pre-date Colorado's adoption of *Teague's* retroactivity test. (Vigil Answer Brief, pp. 8-10, citing *People v. Close*, 22 P.3d 933 (Colo. App. 2000), *People v. Allen*, 843 P.2d 97 (Colo. App. 1992), and *People v. Diaz*, 985 P.2d 83 (Colo. App. 1999).) The Colorado Supreme Court adopted *Teague* in 2006—in *Edwards*, 129 P.3d 977. And the post-*Edwards* case cited by Vigil undermines his claim for *Miller* retroactivity: *People v. McDowell*, 219 P.3d 322 (Colo. App. 2009), assessed whether the new rule concerning interrogations announced in *Missouri v. Seibert*, 542 U.S. 600 (2004), should be applied retroactively and concluded—under *Teague* and *Edwards*—that it should not.

Vigil argues for retroactive application of *Miller* based on the retroactive application of the rules announced in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). (Vigil Answer Brief, pp. 10-12.) *Roper* categorically barred imposition of the death penalty on offenders who were juveniles when their crimes were committed, and *Graham* categorically barred life-without-parole sentences for juveniles convicted of non-homicide offenses. Those categorical bans on punishment are substantive, while the ban in *Miller* involves a matter of process:

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

Miller, 132 S.Ct. at 2471. *Roper* and *Graham* created substantive rules that warrant retroactive application under *Teague*, unlike *Miller's* procedural rule. *See, e.g., Bockting*, 549 U.S. at 416.

Vigil also argues for retroactive application of *Miller* because *Sumner v. Shurman*, 483 U.S. 66 (1987), while not categorically barring the death penalty, categorically barred a mandatory death penalty scheme, and *Sumner* was decided on a form of collateral review—federal habeas. (Vigil Answer Brief, pp. 11-12.) *Sumner*, though, was decided before *Teague*. Subsequent to *Teague* the Supreme

Court has, in cases on collateral review, repeatedly applied the *Teague* framework to assess arguments for retroactive application of new procedural rules concerning the death penalty. *See, e.g., Graham v. Collins*, 506 U.S. 461 (1993) (denying collateral relief where habeas petitioner's own capital sentencing scheme argument would require adoption of a "new rule"); *Saffle v. Parks*, 494 U.S. 484 (1990) (same); *Sawyer v. Smith*, 497 U.S. 227 (1990) (denying collateral relief where habeas petitioner sought application of a "new rule" that had been adopted in another capital defendant's case, on direct appeal); *Butler v. McKellar*, 494 U.S. 407 (1990) (same); *cf. Stringer v. Black*, 503 U.S. 222 (1992) (affording collateral relief where recent decisions relied on by habeas petitioner had not announced a "new rule"). A pre-*Teague* case such as *Sumner* is uninstructive on whether retroactive application of a rule is appropriate under the *Teague* framework.

II. If *Miller* is retroactive, then the trial court properly ordered a new sentencing hearing.

For first-degree murders committed by juveniles between 1990 and 2006, district courts have imposed the mandatory punishment of life imprisonment. By statute, the offenders are forever ineligible for parole. The life sentences, and the consequent preclusion of parole, were automatic; the sentencing courts did not, and could not, take into account the offender's young age and its attendant

characteristics or other considerations of mitigation and, based on them, elect whether or not to impose life without parole. *Miller* tells that this is impermissible under the Eighth Amendment. Thus, for cases where *Miller* does apply, this Court needs to determine what district courts are to do to remedy the impermissible mandatory imposition of these sentences. The remedy this Court fashions will apply to those cases whose convictions were not final as of the date *Miller* was announced. *Griffith v. Kentucky*, 479 U.S. 314 (1987). Were this Court to conclude that *Miller* applies retroactively to cases on collateral review, then the same remedy would apply in those cases as well.

As explained below, the appropriate remedy, for whichever cases require one, is for the district court to conduct a new sentencing hearing. At such a hearing, the district court should receive evidence bearing on the circumstances of the offender and the offense, including the offender's age and characteristics associated with it, as well as any other mitigation. Taking all that into account, the district court should determine whether a sentence of life imprisonment without the possibility of parole is an appropriate and just consequence. If so, the district court should impose it. But if the court concludes, based on the information or lack of information presented, that lifetime parole ineligibility is not appropriate, then the

court should impose a life sentence with the possibility of parole after forty calendar years have been served.

A. ***Miller*'s own limits give the starting point of analysis.**

The *Miller* Court's own words, clarifying the narrowness of its holding, provide the starting point for a remedy. The Court expressed what its holding does not do:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*.

Miller, 132 S.Ct. at 2471. It then specified what its holding requires:

> Instead, it mandates only that a sentencer follow a certain process—*considering an offender's youth and attendant characteristics—before imposing a particular penalty* [of life without parole].

Id. (emphasis added). These same points are also expressed in different words elsewhere in the opinion:

> Although *we do not foreclose a sentencer's ability to make that judgment* [that a life-without-parole sentence is appropriate] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id., 132 S.Ct. at 2469 (emphasis added). So a juvenile life sentence that precludes parole passes Eighth Amendment muster if, but only if, it is the product of an

adequate individualized sentencing. To be adequate, *Miller* teaches, the sentencer must take into account mitigating circumstances, including in particular the offender's age and age-related characteristics, as well as the nature of the crime. *Miller*, 132 S.Ct. at 2475. It is the absence of an individualized sentencing decision that makes a particular life sentence offering no possibility of parole unconstitutional.

B. A new sentencing hearing will harmonize the general assembly's sentencing specifications with the Eighth Amendment's requirements—in the event the sentencing court decides life without parole is appropriate.

Colorado's juvenile offenders sentenced for first-degree murders committed between 1990 and 2006 have not had the benefit of the individualized sentencing the Eighth Amendment now requires. Their sentencing judges did not factor in their age and its attendant characteristics or other mitigation. They did not determine whether the individual characteristics of the offender and the offense support life imprisonment without parole.

But this does not mean those individual characteristics do not call for that consequence. Indeed, in the view of the *Amici*, in a number of these cases the ghastly particulars of the murders, coupled with horrific personal attributes of the killers, lead powerfully to the conclusion that life without parole is wholly justified

and appropriate, even after considering any mitigation. For each of these cases, if reached by *Miller*, the problem is rectified by conducting the constitutionally mandated procedure. When that procedure produces an individualized decision that life imprisonment without parole is appropriate, then such sentence does not offend the Eighth Amendment. Applying the statutes' no-parole provisions comports with the Constitution. *See People v. Gutierrez-Ruiz*, ___ P.3d ___, 2014 COA 109, ¶ 23.

C. And if the new sentencing hearing leads the district court instead to conclude life without parole is too severe, this too will deliver the proper sentencing outcome.

In those cases where an individualized sentencing proceeding—the constitutional prerequisite to a life-without-parole sentence—results in the court's concluding life without parole is not appropriate for the particular offender and offense (or is not pursued), then applying the statutes' no-parole provisions would violate the Eighth Amendment. That is, the no-parole clauses become unconstitutional *as applied*. And so in those situations, the unconstitutional clauses *must not be applied*. Under explicit and unambiguous Colorado law, this leaves the Court with the task of surveying the statutes to see what provisions remain that can be constitutionally applied.

> **2-4-204. Severability of statutory provisions.** If *any provision* of a statute is found by a court of competent jurisdiction to be unconstitutional, *the remaining provisions of the statute are valid*, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 2-4-204, C.R.S. (2014). And it turns out one or more other provisions exist that on their face apply and produce an enforceable, constitutional, result.

The two implicated statutes are Colorado Revised Statutes section 17-22.5-104(2) and the former section 18-1-105(4) (or its relocated replacement, section 18-1.3-401(4)). The statute wording that will be in play in any particular one of the numerous cases will vary slightly. This is because the range of implicated offense dates spans from July 1, 1990, through June 30, 2006.[1] Each of the two pertinent statute sections underwent some changes during that stretch. (For the Court's convenience, an appendix to this brief presents the chronology of these

[1] For murders committed either before or after this date range, the statutes expressly established parole eligibility after forty years. 1985 Colo. Sess. Laws, ch. 145, §§ 3 and 7, pp. 648, 652-53, §§ 17-22.5-104(2)(c) and 18-1-105(4); ch. 146, §§ 1 and 5, pp. 655-57, §§ 17-22.5-104(2)(c) and 18-1-105(4); all effective 7/1/85; 2006 Colo. Sess. Laws, ch. 228, §§ 2 and 3, p. 1052, §§ 17-22.5-104(2)(d)(IV) and 18-1.3-401(4)(b), applicable to offenses on or after 7/1/06.

various iterations.) But while the specific wording changed slightly, the salient structure did not. Over the entire time period, either one or two clauses declared that life sentences for class-one felonies precluded parole, while either one or two other clauses simultaneously existed that on their faces also applied to such sentences and allowed for parole after forty years. At the point a trial court determines (either through an individualized sentencing hearing or upon determining that the state chooses not to pursue retention of the life-without-parole sentence), the trial court necessarily must find the no-parole clause or clauses unconstitutional as applied. What remains is the parole-eligibility-after-forty-years provisions. And section 2-4-204 decrees that these "remaining provisions of the statute are valid."

D. Illustrative example using the statutes pertinent to Mr. Vigil's crime.

For illustration, this brief will set out the specific clauses in effect at the time of Mr. Vigil's crimes. The following statutes were in place on May 31, 1997, the date of his crimes:

> **17-22.5-104.**
> (2) (c) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(d) (I) No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. …

18-1-105.

(4) … As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.

1993 Colo. Sess. Laws, ch. 322, § 3, pp. 1977-78, §§ 17-22.5-104(2)(c) and (2)(d)(I), eff. 7/1/93; 1995 Colo. Sess. Laws, ch. 244, § 3, pp. 1293-94, § 18-1-105(4), eff. 7/1/95.

In this particular iteration of the statutes, the following are the no-parole provisions, which become unconstitutional as applied in the absence of an individualized sentencing determination that life without parole is appropriate: the first sentence of section 17-22.5-104(2)(d)(1) and the last sentence of section 18-1-105(4). This leaves, as valid and controlling according to the dictate of section 2-4-104, the following: section 17.22.5-104(2)(c), and the second-to-last sentence of section 18-1-105(4). The Court is left with the statutes set out below; this is the law adopted *by the general assembly*, marked to indicate the portion that cannot constitutionally be applied:

17-22.5-104.

(2) (c) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(d) (I) ~~No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole.~~ …

18-1-105.

(4) … As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. ~~As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.~~

By pursuing this path—holding an individualized sentencing hearing to determine whether life imprisonment without parole is appropriate, imposing it if so, and imposing life imprisonment carrying forty-year parole eligibility if not (or if the state, for reasons of lack of evidence, victim input, agreement with the defense, compassion, or otherwise, declines to pursue that determination)—a district court does nothing more than apply all of the general assembly's sentencing and parole provisions where constitutionally permissible, or, where that is not permissible, apply the subset that the Constitution regards as valid. This is precisely what the legislature has commanded in section 2-4-204. *People v. Banks*, 2012 COA 157 (upon finding no-parole clauses are unconstitutional as applied, holding section 2-4-204 requires adherence to the parole-eligibility-after-forty-

years provisions); *see also Gutierrez-Ruiz*, ___ P.3d ___, 2014 COA 109, ¶¶ 25-27 (agreeing with *Banks*' severability analysis, but only in the context where the no-parole clauses become unconstitutional as applied because individualized resentencing does not result in imposition of life without parole); *but see People v. Wilder*, ___ P.3d ___, 2015 COA 14, ¶¶ 33, 35.

Just last week, a court-of-appeals panel issued an opinion in *Wilder* agreeing in part with *Gutierrez-Ruiz*, and disagreeing with *Banks*. The *Wilder* panel agreed that individualized resentencing is required. But it disagreed that a life-with-parole-eligibility-after-forty-year sentence should be the result if life without parole is rejected. In its view, a resentencing court is not bound by *any* statute, and instead is free to impose any "sentence that it determines is appropriate for [the] defendant." *Wilder*, ¶ 41. The *Amici* respectfully submit that *Wilder* is flawed in several respects. For one, the opinion eschews the *Banks* resolution upon observing that, once the no-parole clause of 18-1.3-401(4) is held unconstitutional as applied to a certain defendant, a sentencing court is "left with no applicable legislative sentencing guidelines to apply…." *Id.* at ¶ 40. But that is wrong. For all affected defendants, at least one statute—and in Mr. Wilder's case, just as in Mr. Vigil's, it is actually two—applies and imposes a valid sentence-plus-parole consequence. *See* II.C above. Actually, it is *Wilder's* solution that is wholly

untethered to any sentencing statute. And that points up yet other flaws. The opinion intimates that there is some "minimum sentence that must be imposed," *id.* at ¶ 41, but it neither articulates what that is nor points to any statute to find it. This is because really it considers there is none. Quite the opposite, it characterizes its sentencing approach as "open-ended"; and it endorses a district court's imposing a life sentence with parole eligibility after whatever number of years it chooses (with no statutory mooring), or even something other than a life sentence (equally lacking any statutory basis). In contrast, the solution adopted in *Banks*, approved in *Gutierrez-Ruiz*, and advanced above is grounded in provisions enacted by the general assembly.

E. A note about a 2002 insertion into section 18-1-105(4).

The specific statutory clauses utilized above were in effect from July 1, 1993 through July 11, 2002. Hence, they are the ones directly pertinent to Mr. Vigil. The clauses before then (from 1990 to 1993) differ in only minor, insignificant ways. *See* Appendix, pp. 1-3.

In July of 2002, the general assembly responded to *Ring v. Arizona*, 536 U.S. 584 (2002), by amending numerous death-penalty related statutes. *Ring* had invalidated judge fact finding in capital-punishment proceedings, and in a special legislative session the general assembly returned its death-penalty scheme

to its pre-1995 jury mode. Though it largely used the exact language from its pre-1995 statutes, one aspect in which the ensuing 2002 enactment differed from the pre-1995 version was in one of the clauses under consideration here. Specifically, the parole-eligibility-after-forty-years clause in section 18-1-105(4) had, up to that point, only specified a starting effective date (July 1, 1985), and no ending date. *See* Appendix, pp. 1-3. But when the regressive amendment was made to 18-1-105(4), an ending date was also inserted into that clause. *See* 2002 Colo. Sess. Laws, 3rd Ex. Sess., ch. 1, § 7, p. 15, § 18-1-105(4), eff. 7/12/02; Appendix, p. 5. The same insertion was made to the slated replacement of that statute. *See* 2002 Colo. Sess. Laws, 3rd Ex. Sess., ch. 1, § 8, p. 15, § 18-1.3-401(4), eff. 10/1/02; Appendix, p. 6.

As the Appendix reveals, this means that for offenses from July 12, 2002 on, the parole-eligibility-after-forty-years provisions in sections 18-1-105(4) or 18-1.3-401(4) would appear not to be available as a source for imposing that form of life sentence. But this does not change the outcome, because section 17-22.5-104(2)(c) has remained in effect throughout. In any post-7/11/2002 case where the no-parole clauses of sections 17-22.5-104(2)(d) and 18-1-105(4) or 18-1.3-401(4) cannot constitutionally be applied, the life-imprisonment mandate of section 18-1-105(1) or 18-1.3-401(1) applies, and the parole-eligibility-after-forty-years provision in

17-22.5-104(2)(c) facially applies and yields a valid result, in obedience to the severability dictate of section 2-4-204.[2]

[2] The *Wilder* panel asserts that under the approach taken in *Banks* and *Gutierrez-Ruiz*, and advanced here, it would be necessary to sever the clause "and before July 1, 1990" from 18-1.3-401(4)(a) (and, by implication, from the predecessor 18-1-105(4) as it existed between July 12 and October 1, 2002). This is incorrect. Even with this clause left in it, the penultimate sentence does not *forbid* parole for the later offenses. It is simply unavailable to *bestow* its parole eligibility upon them—it doesn't apply to those offenses at all. But, as detailed above, section 17-22.5-104(2)(c) *does* bestow parole eligibility. Separately, it is important to remember that the clause was not inserted until 2002.

CONCLUSION

Miller is not retroactive, but if it were, the remedy in Colorado would be a new sentencing hearing at which the judge would either impose life without parole, or life with parole eligibility after forty years.

Dated: March 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 2, 2015, I served a copy of the above AMICUS BRIEF OF THE DISTRICT ATTORNEYS FOR THE SECOND AND EIGHTEENTH JUDICIAL DISTRICTS upon the below listed persons, via the Integrated Colorado Courts E-Filing System (ICCES).

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APPENDIX

1. Statutes effective 7-1-1990 through 6-5-1991

17-22.5-104.

(2) (a) No inmate imprisoned under a life sentence for a crime committed before July 1, 1977, shall be paroled until he has served at least ten calendar years, and no application for parole shall be made or considered during such period of ten years.

(b) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1977, but before July 1, 1985, shall be paroled until he has served at least twenty calendar years, and no application for parole shall be made or considered during such period of twenty years.

(c) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until he has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(d) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1990, shall be eligible for parole.

17-22.5-104(2)(d) added by 1990 Colo. Sess. Laws, ch. 118, § 3, p. 928, eff. 7-1-90.

18-1-105.

(4) "… As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years.

2. Statutes effective 6-6-1991 through 6-30-1993

17-22.5-104.

(2) (a) No inmate imprisoned under a life sentence for a crime committed before July 1, 1977, shall be paroled until he has served at least ten calendar years, and no application for parole shall be made or considered during such period of ten years.

(b) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1977, but before July 1, 1985, shall be paroled until he has served at least twenty calendar years, and no application for parole shall be made or considered during such period of twenty years.

(c) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until he has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(d) No inmate imprisoned under a life sentence for a ~~crime~~ class 1 felony committed on or after July 1, 1990, shall be eligible for parole. No inmate imprisoned under a life sentence pursuant to section 16-13-101(2), C.R.S., for a crime committed on or after July 1, 1990, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

Amended by 1991 Colo. Sess. Laws, ch. 73, § 4, p. 404, eff. 6-6-91.

18-1-105.

(4) … As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.

Amended by 1991 Colo. Sess. Laws, ch. 73, § 5, p. 404, eff. 6-6-91.

3. Statutes effective 7-1-1993 through 7-11-2002

17-22.5-104.

(2) (a) No inmate imprisoned under a life sentence for a crime committed before July 1, 1977, shall be paroled until ~~he~~ such inmate has served at least ten calendar years, and no application for parole shall be made or considered during such period of ten years.

Amended by 1993 Colo. Sess. Laws, ch. 322, § 3, p. 1977, eff. 7-1-93.

(b) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1977, but before July 1, 1985, shall be paroled until ~~he~~ such inmate has served at least twenty calendar years, and no application for parole shall be made or considered during such period of twenty years.

Amended by 1993 Colo. Sess. Laws, ch. 322, § 3, p. 1977-78, eff. 7-1-93.

(c) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until ~~he~~ such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

Amended by 1993 Colo. Sess. Laws, ch. 322, § 3, p. 1977-78, eff. 7-1-93.

(d) (I) No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. No inmate imprisoned under a life sentence pursuant to section 16-13-101(2), C.R.S., as it existed prior to July 1, 1993, for a crime committed on or after July 1, 1990, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

Amended by 1993 Colo. Sess. Laws, ch. 322, § 3, p. 1977-78, eff. 7-1-93.

18-1-105.

(4) … As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. As to any person sentenced for

a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.

4. Statutes effective 7-12-2002 through 9-30-2002

17-22.5-104.

(2) (a) No inmate imprisoned under a life sentence for a crime committed before July 1, 1977, shall be paroled until such inmate has served at least ten calendar years, and no application for parole shall be made or considered during such period of ten years.

(b) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1977, but before July 1, 1985, shall be paroled until such inmate has served at least twenty calendar years, and no application for parole shall be made or considered during such period of twenty years.

(c) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(d) (I) No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. No inmate imprisoned under a life sentence pursuant to section 16-13-101(2), C.R.S., as it existed prior to July 1, 1993, for a crime committed on or after July 1, 1990, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

18-1-105.

(4) … As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, <u>and before July 1, 1990,</u> life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.

Amended by 2002 Colo. Sess. Laws, 3rd Ex. Sess., ch. 1, § 7, p. 15, eff. 7-12-02

5. Statutes effective 10-1-2002 through 6-30-2006

17-22.5-104.

(2) (a) No inmate imprisoned under a life sentence for a crime committed before July 1, 1977, shall be paroled until such inmate has served at least ten calendar years, and no application for parole shall be made or considered during such period of ten years.

(b) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1977, but before July 1, 1985, shall be paroled until such inmate has served at least twenty calendar years, and no application for parole shall be made or considered during such period of twenty years.

(c) No inmate imprisoned under a life sentence for a crime committed on or after July 1, 1985, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

(d) (I) No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. No inmate imprisoned under a life sentence pursuant to section 16-13-101(2), C.R.S., as it existed prior to July 1, 1993, for a crime committed on or after July 1, 1990, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

~~18-1-105.~~ 18-1.3-401.

(4) … As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1985, and before July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years. As to any person sentenced for a class 1 felony, for an act committed on or after July 1, 1990, life imprisonment shall mean imprisonment without the possibility of parole.

Relocated by 2002 Colo. Sess. Laws, ch. 318, § 2, pp. 1365, 1397, eff. Oct. 1, 2002; and amended by 2002 Colo. Sess. Laws, 3rd Ex. Sess., ch. 1, § 2, p. 7, 8-9, eff. July 12, 2002 (to amend the statute that was already slated to become effective 10-1-02).