317 Conn. 52

Jason CASIANO

v.

COMMISSIONER OF CORRECTION.

No. 19345.

Supreme Court of Connecticut.

Argued Sept. 16, 2014.

Decided May 26, 2015.*

Background: Petitioner petitioned for writ of habeas corpus. The Superior Court, Judicial District of Tolland, Cobb, J., rendered summary judgment in favor of the Commissioner of Correction, and petitioner appealed.

Holdings: The Supreme Court, McDonald, J., held that:

(1) the new procedural rule in *Miller* requiring that a sentencing authority conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before sentencing a juvenile offender to a life sentence without parole constituted a watershed rule of criminal procedure, and thus, applied retroactively to petitioner's collateral state habeas proceeding, and

(2) imposition of a 50-year sentence without the possibility of parole on a juvenile offender was subject to the sentencing procedures set forth in *Miller*, requiring the trial court to conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before imposing such a sentence.

Reversed and remanded.

Zarella, J., filed dissenting opinion, joined by Robinson, J.

Espinosa, J., filed dissenting opinion.

* May 26, 2015, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

1. Criminal Law ⚿1028

A reviewing court has discretion to consider an unpreserved claim if exceptional circumstances exist that would justify review of such an issue if raised by a party, the parties are given an opportunity to be heard on the issue, and there is no unfair prejudice to the party against whom the issue is to be decided.

2. Habeas Corpus ⚿816

The Supreme Court was not precluded from considering the issue of whether the youth related factors set forth in *Miller v. Alabama* applied retroactively to habeas petitioner's sentence of fifty years imprisonment without the opportunity for parole, imposed following conviction for a crime committed when petitioner was 16 years old, where petitioner had the opportunity to address the issue of retroactivity in his reply brief and at oral argument.

3. Courts ⚿100(1)

The new procedural rule in *Miller* requiring that a sentencing authority conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before sentencing a juvenile offender to a life sentence without parole constituted a watershed rule of criminal procedure, and thus, the rule applied retroactively to petitioner's collateral state habeas proceeding challenging a sentence of 50 years without the possibility of parole.

4. Courts ⚿100(1)

The rule in *Miller*, requiring that a sentencing authority conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before sentencing a juvenile offender to a life sentence without parole, is more properly

characterized as a "procedural," rather than a "substantive," rule, for purposes of determining whether its holding applies retroactively to cases on collateral review, because it focuses on the process by which juveniles can be sentenced to life without parole.

See publication Words and Phrases for other judicial constructions and definitions.

5. Courts ⚿100(1)

In determining whether to apply *Teague's* bar against retroactivity to a new rule in a collateral state proceeding, the court must first ascertain the legal landscape as it existed at the time the petitioner's conviction became final and ask whether the United States constitution, as interpreted by the precedent then existing, compels the rule; that is, the court must decide whether the rule is actually new.

6. Courts ⚿100(1)

A constitutional rule is "new" for purposes of *Teague's* bar against retroactivity of a new rule in a collateral state proceeding if the result was not dictated by precedent existing at the time the defendant's conviction became final.

See publication Words and Phrases for other judicial constructions and definitions.

7. Courts ⚿100(1)

If a new rule is substantive, that is, if the rule places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe, it must apply retroactively; such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.

8. Courts ⚿100(1)

If a new rule is procedural, it applies retroactively if it is a watershed rule of criminal procedure, implicit in the concept of ordered liberty, meaning that it implicates the fundamental fairness and accuracy of a criminal proceeding; watershed rules of criminal procedure include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.

9. Courts ⚿100(1)

Rule that regulates only the manner of determining the defendant's culpability is procedural, and is applied retroactively only if it is watershed rule of criminal procedure.

10. Courts ⚿100(1)

A rule is procedural, for retroactivity purposes, when it affects how and under what framework a punishment may be imposed but leaves intact the state's fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment.

11. Infants ⚿3011

Sentencing and Punishment ⚿1607

Imposition of a 50-year sentence without the possibility of parole on a juvenile offender was subject to the sentencing procedures set forth in *Miller*, requiring the trial court to conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before imposing such a sentence.

12. Constitutional Law ⚿2350

Whether *Miller's* requirement that a sentencing authority conduct an individualized sentencing procedure and consider the mitigating circumstances of youth before sentencing a juvenile offender to a life sentence without parole applies to sentences shorter than the legislatively defined "life imprisonment" of sixty years is a question for the Supreme Court and not for the legislature.

Heather Golias, assigned counsel, for the appellant (petitioner).

Robin S. Schwartz, assistant state's attorney, with whom, on the brief, were Michael Dearington, state's attorney, and Adrienne Maciulewski, deputy assistant state's attorney, for the appellee (respondent).

ROGERS, C.J., and PALMER, ZARELLA, EVELEIGH, McDONALD, ESPINOSA and ROBINSON, Js.

McDONALD, J.

[54] We recently held in *State v. Riley,* 315 Conn. 637, 659, 110 A.3d 1205 (2015), that, to comport with the eighth amendment to the federal constitution, the trial court must give mitigating weight to the youth related factors set forth in *Miller v. Alabama,* —— U.S. ——, 132 S.Ct. 2455, 2464–65, 2468, 183 L.Ed.2d 407 (2012), when considering whether to impose a life sentence without the possibility of parole on a juvenile homicide offender. In *Riley,* the defendant challenged on direct appeal a total effective sentence of 100 years with no possibility of parole before his natural life expired, a sentence that the state conceded was the functional equivalent to life without parole. *State v. Riley,* supra, at 642, 110 A.3d 1205. The different procedural posture and sentence in the present case raises two significant issues regarding the reach of *Miller:* whether *Miller* applies retroactively under Connecticut law to cases arising on collateral review, and, if so, whether *Miller* applies to the imposition of a fifty year sentence on a juvenile offender. We answer both questions in the affirmative [1] and, therefore, reverse the habeas court's decision rendering summary judgment in favor of the respondent, the Commissioner of Correction, on the [55] petition for a writ of habeas corpus filed by the petitioner, Jason Casiano.

This case arises in the context of the following undisputed facts. In 1995, the petitioner, then sixteen years old, and two accomplices attempted to rob a Subway sandwich shop. When the store employee failed to promptly comply with a demand for money, the petitioner shot him four times, resulting in his death. The petitioner and his accomplices fled the scene without completing the robbery. The petitioner was arrested and charged with felony murder in violation of General Statutes § 53a–54c, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a–49 and 53a–134 (a)(2), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a–48 and 53a–134 (a)(2). The state also sought an enhanced penalty for the use of a firearm during the commission of these offenses in violation of General Statutes § 53–202k. For these crimes, the petitioner faced a potential total effective sentence of between twenty-five and 105 years imprisonment.

The petitioner entered a plea of nolo contendere to the three substantive charges pursuant to a court indicated plea agreement, conditioned on his right to appeal the trial court's denial of his motion to suppress incriminating statements he made to the police. In accordance with the plea agreement, the trial court sentenced the petitioner to a total effective prison term of fifty years: fifty years on the felony murder count, and separate twenty year sentences on the counts of attempt to commit robbery in the first degree and conspiracy to commit robbery in the first degree, to run concurrent to

1. As we explain later in this opinion, the petitioner has advanced an additional claim that we decline to address at this juncture. See footnote 4 of this opinion.

the felony murder sentence. The petitioner is not eligible for parole on the felony murder conviction. See General Statutes § 54–125a (b)(1)(C). The Appellate Court upheld the petitioner's conviction on appeal; *State v. Casiano,* 55 Conn.App. 582, 591, 740 A.2d 435 (1999); [56] and this court denied certification to appeal that decision. *State v. Casiano,* 252 Conn. 942, 747 A.2d 518 (2000).[2]

After the petitioner's conviction and sentence became final, the United States Supreme Court decided a trilogy of cases that altered the landscape of juvenile sentencing practices. The court held that, under the eighth amendment to the federal constitution, "children are constitutionally different from adults for purposes of sentencing"; *Miller v. Alabama,* supra, 132 S.Ct. at 2464; and, therefore, that they cannot be sentenced in certain circumstances as if they are adults. See *Roper v. Simmons,* 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (eighth and fourteenth amendments prohibit imposition of death penalty on offenders who were under age of eighteen when their crimes were committed); *Graham v. Florida,* 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (eighth amendment prohibits sentence of life without possibility of parole for juvenile nonhomicide offender); *Miller v. Alabama,* supra, at 2463–64 (eighth amendment prohibits sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offender, thereby precluding sentencing authority from considering offender's age and hallmarks of adolescence).

In light of these legal developments, the petitioner filed a petition for a writ of habeas corpus, arguing that General Statutes §§ 53a–35a (2) and 54–125a (b), the authority under which his fifty year prison term with no possibility of parole was imposed, violate the eighth amendment as applied to him. He requested that his sentence be vacated and his case remanded to the trial [57] court for further proceedings. The respondent filed a motion for summary judgment, arguing, inter alia, that the petitioner's claims were controlled by the Appellate Court's decision in *State v. Riley,* 140 Conn.App. 1, 14–19, 58 A.3d 304 (2013), which held that Connecticut sentencing practices that permit the trial court to impose a lesser sentence than life imprisonment without parole and to consider any mitigating evidence offered are constitutional under *Miller.*[3] The habeas court agreed and granted the respondent's motion.

[1, 2] Following this court's decision granting certification to appeal in *State v. Riley,* 308 Conn. 910, 61 A.3d 531 (2013), the petitioner appealed from the habeas court's judgment to the Appellate Court, and we transferred the appeal to this court. In his appeal, the petitioner argues that *Miller* requires a trial court to consider the characteristics of youth as mitigating evidence in determining whether a sentence of life without parole is appropriate.[4]

2. See *Beard v. Banks,* 542 U.S. 406, 411, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) ("[s]tate convictions are final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied" [internal quotation marks omitted]).

3. In that same filing, the respondent also sought dismissal of the petition on the ground that the petitioner had waived his right to argue that his sentence is disproportionate when he accepted a plea deal. The respondent later withdrew his motion to dismiss.

4. The petitioner also asserts a separate claim that, under *Graham,* he is entitled to a review of his sentence at some later point in time—a "'second look'"; *State v. Riley,* supra, 140

He argues that his sentence of fifty years imprisonment without the opportunity for parole is the functional equivalent of a life sentence and therefore [58] must comport with the requirements set forth in *Miller*. The respondent counters that *Miller* does not apply retroactively to cases on collateral review.[5] The respondent further contends that, even if it does apply, the petitioner cannot avail himself of the individual sentencing procedure under *Miller* because his fifty year sentence is not a life sentence, nor was it imposed pursuant to a mandatory sentencing scheme. We conclude that *Miller* applies retroactively under Connecticut law to the petitioner's case.

I

In *Riley*, we provided an overview of the Supreme Court's reasoning in *Roper*, *Graham*, and *Miller*. *State v. Riley*, supra, 315 Conn. at 645–53, 110 A.3d 1205. Therefore, we limit our discussion of that court's juvenile sentencing cases to the aspects of those cases that are particularly relevant to the questions in the present case. Although *Miller* is our principal focus, we also address *Graham* insofar as that decision sheds light on the substantive question before us.

The eighth amendment to the United States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The United States Supreme [59] Court has recognized that the eighth amendment contains a proportionality principle, that is, that "punishment for crime should be graduated and proportioned to both the offender and the offense." (Internal quotation marks omitted.) *Miller v. Alabama*, supra, 132 S.Ct. at 2463.

In *Graham*, the court adopted a categorical rule, concluding that the eighth amendment bars a sentence of life without parole for juvenile nonhomicide offenders. *Graham v. Florida*, supra, 560 U.S. at 82, 130 S.Ct. 2011. Similarities between the death penalty—which *Roper* had barred for juvenile offenders—and life without parole—" 'the second most severe penalty permitted by law' "; id., at 69, 130 S.Ct.

Conn.App. at 22, 58 A.3d 304 (*Borden, J.*, dissenting); at which he should have the opportunity to obtain release based on demonstrated maturity and rehabilitation. Consistent with our approach in *Riley*, which we explained in further detail in that decision, we decline to address this claim. Because we conclude that *Miller* applies to the petitioner's sentence, he may, at a later proceeding, receive a sentence that cannot reasonably be characterized as the functional equivalent of life without parole, which is the factual predicate for his *Graham* claim. In addition, as we explained in *Riley*, our legislature has taken steps to consider wholesale changes to the availability of parole for juvenile offenders, a matter that is delegated to that body. *State v. Riley*, supra, 315 Conn. at 662, 110 A.3d 1205. Therefore, concerns of deference to a coordinate branch of government and ripeness counsel against reaching this issue.

5. We reject the petitioner's contention that we should not consider the issue of retroactivity because the respondent failed to raise it as a defense before the habeas court. It is appropriate for this court to consider the issue of retroactivity because the respondent undoubtedly will raise it following our remand. See *State v. Tabone*, 292 Conn. 417, 431, 973 A.2d 74 (2009) (addressing issue likely to arise on remand). Moreover, as we explained in *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 128, 84 A.3d 840 (2014), a reviewing court has discretion to consider an unpreserved claim if "exceptional circumstances exist that would justify review of such an issue if raised by a party . . . the parties are given an opportunity to be heard on the issue, and . . . there is no unfair prejudice to the party against whom the issue is to be decided." The petitioner had the opportunity to address the issue of retroactivity in his reply brief and at oral argument.

2011; played a significant role in the court's basis for its holding in *Graham.* See *Miller v. Alabama,* supra, 132 S.Ct. at 2463 (court in *Graham* "likened life without parole for juveniles to the death penalty"). The court in *Graham* explained that life without parole "is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.... [T]his sentence 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 convict], he will remain in prison for the rest of his days." (Citation omitted; internal quotation marks omitted.) *Graham v. Florida,* supra, at 69–70, 130 S.Ct. 2011.

In *Miller,* the court held that, before a sentence of life without the possibility of parole may be imposed on a juvenile homicide offender, a sentencing authority must engage in an individualized sentencing process that accounts for the mitigating circumstances of youth and its attendant characteristics. *Miller v. Alabama,* supra, 132 S.Ct. at 2469. Relying on its prior decisions in *Roper* and *Graham,* which both cited science and social [60]science as support for their conclusions, the court noted that studies show that "[o]nly a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. [*Roper v. Simmons,* supra, 543 U.S. at 570, 125 S.Ct. 1183] [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control. [*Graham v. Florida,* supra, 560 U.S. at 68, 130 S.Ct. 2011] [T]hose findings—of transient rashness, proclivity for risk, and inability to assess consequences—both [lessen] a child's moral culpability and [enhance] the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." (Footnote omitted; internal quotation marks omitted.) *Miller v. Alabama,* supra, at 2464–65.

Accordingly, the court in *Miller* reasoned that, before "irrevocably sentencing [a juvenile offender] to a lifetime in prison," a sentencing authority must "take into account how children are different, and how those differences counsel against irrevocably sentencing [a juvenile offender] to a lifetime in prison." Id., at 2469. The court identified those salient factors as including, in addition to the offender's age at the time of the crime: "immaturity, impetuosity, and failure to appreciate risks and consequences"; the offender's "family and home environment" and the offender's inability to extricate himself from that environment; "the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him"; the offender's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation...." Id., at 2468; see also *State v. Riley,* supra, 315 Conn. at 658, 110 A.3d 1205. A mandatory sentencing scheme, however, renders these factors irrelevant: "By removing [61]youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these [sentencing] laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller v. Alabama,* supra, at 2466.

In *Riley,* we recognized that, although "*Miller* is replete with references to 'man-

datory' life without parole and like terms"; *State v. Riley,* supra, 315 Conn. at 653, 110 A.3d 1205; its reasoning extends beyond mandatory sentencing schemes. Id., at 654, 110 A.3d 1205. We held that "if a sentencing scheme permits the imposition of [a life sentence without any possibility of parole] on a juvenile homicide offender, the trial court *must* consider the offender's 'chronological age and its hallmark features' as mitigating against such a severe sentence." (Emphasis in original.) Id., at 658, 110 A.3d 1205. The individualized sentencing requirement in *Miller,* in other words, "establish[ed] ... a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances." Id., at 655, 110 A.3d 1205. With this background in mind, we consider whether *Miller* also must be applied to cases arising on collateral review, and whether a fifty year sentence falls within *Miller*'s individualized sentencing mandate.

II

[3, 4] In *Miller,* the court was not faced with, and therefore did not consider, the question of whether its holding must apply retroactively to cases on collateral review.[6] We conclude that the rule announced in *Miller* is a watershed rule of criminal procedure that must be applied retroactively.

[5, 6] Our starting point for determining whether *Miller* applies retroactively is the framework set forth in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). See *Thiersaint v. Commissioner of Correction,* 316 Conn. 89, 112, 111 A.3d 829 (2015) (adopting *Teague* framework). Under *Teague,* the court "must [first] ascertain the legal landscape" as it existed at the time the petitioner's conviction became final and "ask whether the [United States] [c]onstitution, as interpreted by the precedent then existing, compels the rule.... That is, the court must decide whether the rule is actually new." (Citation omitted; internal quotation marks omitted.) *Beard v. Banks,* 542 U.S. 406, 411, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004). A constitutional rule is "new" for purposes of *Teague* "if the result was not dictated by precedent existing at the time the defendant's conviction became final." (Internal quotation marks omitted.) *Thiersaint v. Commissioner of Correction,* supra, at 103, 111 A.3d 829.

[7] With two exceptions, a new rule will not apply retroactively to cases on collateral review. *Teague v. Lane,* supra, 489 U.S. at 311–13, 109 S.Ct. 1060. First, if the new rule is "substantive," that is, if the rule "places certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe"; (internal quotation marks omit-

6. We recognize that several courts that have concluded that *Miller* applies retroactively relied on the fact that relief also was afforded to the petitioner in *Jackson v. Hobbs,* an appeal that arose on collateral review and was heard and decided together with *Miller. Miller v. Alabama,* supra, 132 S.Ct. at 2461–62, 2475; see, e.g., *People v. Davis,* 379 Ill.Dec. 381, 6 N.E.3d 709, 722, cert. denied, —— U.S. ——, 135 S.Ct. 710, 190 L.Ed.2d 439 (2014); *State v. Ragland,* 836 N.W.2d 107, 116 (Iowa 2013); *Diatchenko v. District Attorney,* 466 Mass. 655, 666, 1 N.E.3d 270 (2013); *Jones v. State,* 122 So.3d 698, 703 n. 5 (Miss.2013); *Petition of State,* 166 N.H. 659, 666, 103 A.3d 227 (2014); *Aiken v. Byars,* 410 S.C. 534, 575, 765 S.E.2d 572 (2014). We do not believe this fact settles the issue. The question of retroactivity was not squarely before the court in *Miller* and its holding did not require the petitioner in *Jackson* to be resentenced in light of its opinion; it only remanded the case "for further proceedings not inconsistent with this opinion." *Miller v. Alabama,* supra, at 2475.

ted) *Thiersaint v. Commissioner of Correction*, supra, 316 Conn. at 108 n. 8, 111 A.3d 829; it must apply retroactively. "Such rules apply retroactively because they necessarily carry a significant risk that a defendant [63] stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." (Internal quotation marks omitted.) *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

[8] Second, if the new rule is procedural, it applies retroactively if it is "a watershed [rule] of criminal procedure ... implicit in the concept of ordered liberty"; (citation omitted; internal quotation marks omitted) *Beard v. Banks*, supra, 542 U.S. at 417, 124 S.Ct. 2504; meaning that it "implicat[es] the fundamental fairness and accuracy of [a] criminal proceeding." (Internal quotation marks omitted.) Id.; see also *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (rule is watershed when it improves accuracy and "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding" [emphasis omitted; internal quotation marks omitted]), quoting *Teague v. Lane*, supra, 489 U.S. at 311, 109 S.Ct. 1060. Watershed rules of criminal procedure include those that "raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro v. Summerlin*, supra, 542 U.S. at 352, 124 S.Ct. 2519. The United States Supreme Court has narrowly construed this second exception and, in the twenty-five years since *Teague* was decided, has yet to conclude that a new rule qualifies as watershed. See id. (class of watershed rules of criminal procedure "is extremely narrow, and it is unlikely that any ... ha[s] yet to emerge" [internal quotation marks omitted]); *State v. Mares*, 335 P.3d 487, 502 (Wyo.2014) ("[t]he [United States] Supreme Court has found no watershed rules ... since it adopted *Teague*" [internal quotation marks omitted]).

We note that, although this court concluded that we will apply the *Teague* framework, we did so "with the caveat that, while federal decisions applying *Teague* may be instructive, this court will not be bound by those [64] decisions in any particular case, but will conduct an independent analysis and application of *Teague*." *Thiersaint v. Commissioner of Correction*, supra, 316 Conn. at 113, 111 A.3d 829; see also *Danforth v. Minnesota*, 552 U.S. 264, 280–81, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) ("[T]he *Teague* rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own [s]tate's convictions."). We therefore remain free to "apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise apply it where a particular state interest is better served by a broader retroactivity ruling." *State v. Mares*, supra, 335 P.3d at 504; see also *Rhoades v. State*, 149 Idaho 130, 139, 233 P.3d 61 (2010) (because comity concerns do not apply to state court's review of state's convictions, Idaho courts are "not required to blindly follow [the United States Supreme Court's] view of ... whether a new rule is a watershed rule"), cert. denied, 562 U.S. 1258, 131 S.Ct. 1571, 179 L.Ed.2d 477 (2011).

Every court that has considered whether *Miller* applies retroactively to cases on collateral review under *Teague* has con-

cluded that *Miller* announced a new rule. See, e.g., *State v. Mares*, supra, 335 P.3d at 505 ("we have found no decision addressing the retroactivity of *Miller* that concluded [that *Miller* did not announce a new rule]").[7] There is a split of authority, however, as to [65]whether *Miller* satisfies either of *Teague*'s exceptions.[8] Many courts have recognized that it is difficult to categorize *Miller* as either substantive or procedural, as its holding has characteristics of both types of rules. *State v. Mantich*, 287 Neb. 320, 339, 842 N.W.2d 716 ("how the rule announced in *Miller* should be categorized is [66]difficult, because it does not neatly fall into the existing definitions of either a procedural rule or a substantive rule"), cert. denied, —— U.S. ——, 135 S.Ct. 67, 190 L.Ed.2d 229 (2014); *State v. Mares*, supra, at 506 ("[t]he question whether *Miller* announces a substantive or a procedural rule is not one that has been easily answered ... because the holding has aspects of both"). Indeed, the holding in *Miller* was predicated on the "confluence" of two strands of the court's proportionality jurisprudence; *Miller v. Alabama*, supra, 132 S.Ct. at 2464; one strand applying categorical bars, which must ap-

7. See also *In re Morgan*, 713 F.3d 1365, 1366 (11th Cir.2013); *Craig v. Cain*, Docket No. 12–30035, 2013 WL 69128, *1 (5th Cir. January 4, 2013); *Williams v. State*, —— So.3d ——, ——, Docket No. CR12–1862, 2014 WL 1392828, *4 (Ala.Crim.App. April 4, 2014); *People v. Davis*, 379 Ill.Dec. 381, 6 N.E.3d 709, 722, cert. denied, —— U.S. ——, 135 S.Ct. 710, 190 L.Ed.2d 439 (2014); *State v. Ragland*, 836 N.W.2d 107, 114–17 (Iowa 2013); *Diatchenko v. District Attorney*, 466 Mass. 655, 662, 1 N.E.3d 270 (2013); *People v. Carp*, 298 Mich.App. 472, 510, 828 N.W.2d 685 (2012), aff'd, 496 Mich. 440, 852 N.W.2d 801 (2014); *Chambers v. State*, 831 N.W.2d 311, 325–26 (Minn.2013); *State v. Mantich*, 287 Neb. 320, 331, 842 N.W.2d 716, cert. denied, —— U.S. ——, 135 S.Ct. 67, 190 L.Ed.2d 229 (2014); *Petition of State*, 166 N.H. 659, 665, 103 A.3d 227 (2014); *Aiken v. Byars*, 410 S.C. 534, 539, 765 S.E.2d 572 (2014); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex.Crim.App.2014).

8. Compare *In re Willover*, 235 Cal.App.4th 1328, 1342, 186 Cal.Rptr.3d 146 (*Miller* is retroactive as substantive rule), modified, 2015 Cal.App. LEXIS 345 (2015), *Falcon v. State*, 62 So.3d 954, 960–61, 962–63, 2015 WL 1239365, *6, 8 (Fla.2015) (*Miller* is retroactive under Florida's three part test for retroactivity which considers " '[a] the purpose to be served by the new rule; [b] the extent of reliance on the old rule; and [c] the effect on the administration of justice of a retroactive application of the new rule,' " but noting that court would "reach the same conclusion ... if [the court] were to apply the test [for retroactivity] established in *Teague*"), *People v. Davis*, 379 Ill.Dec. 381, 6 N.E.3d 709, 722 (*Miller* is retroactive as substantive rule), cert. denied, —— U.S. ——, 135 S.Ct. 710, 190 L.Ed.2d 229 (2014), *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013) (same), *Diatchenko v. District Attorney*, 466 Mass. 655, 666, 1 N.E.3d 270 (2013) (same), *Jones v. State*, 122 So.3d 698, 703 (Miss.2013) (same), *State v. Mantich*, 287 Neb. 320, 342, 842 N.W.2d 716, cert. denied, —— U.S. ——, 135 S.Ct. 67, 190 L.Ed.2d 229 (2014) (same), *Petition of State*, 166 N.H. 659, 666, 103 A.3d 227 (2014) (same), *Aiken v. Byars*, 410 S.C. 534, 540, 765 S.E.2d 572 (2014) (same), *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex.Crim.App.2014) (same), *State v. Mares*, supra, 335 P.3d at 508 (same), and *Hill v. Snyder*, Docket No. 10–14568, 2013 WL 364198, *2 n. 2 (E.D.Mich. January 30, 2013) (same), with *In re Morgan*, 713 F.3d 1365, 1368 (11th Cir.2013) (*Miller* not retroactive because it is procedural rule that is not watershed), *Ex parte Williams*, —— So.3d ——, ——, Docket No. 1131160, 2015 WL 1388138, *13 (Ala. March 27, 2015) (same), *People v. Carp*, 496 Mich. 440, 495, 852 N.W.2d 801 (2014) (same), *Chambers v. State*, 831 N.W.2d 311, 331 (Minn.2013) (same), *Commonwealth v. Cunningham*, 622 Pa. 543, 552, 81 A.3d 1 (2013) (same), cert. denied, —— U.S. ——, 134 S.Ct. 2724, 189 L.Ed.2d 763 (2014), and *Malvo v. Mathena*, Docket No. 2:13–CV–375, 2014 WL 2808805, *13 (E.D.Va. June 20, 2014) (same); see also *Craig v. Cain*, Docket No. 12–30035, 2013 WL 69128, *2 (5th Cir. January 4, 2013) (*Miller* not watershed because it was "outgrowth of the [Supreme] Court's prior decisions").

ply retroactively,[9] and the other strand concerning individualized sentencing determinations, which may not apply retroactively.[10] Id., at 2463.

Acknowledging the Supreme Court's narrow view of *Teague*'s second exception, those courts that have held that *Miller* applies retroactively have relied on *Teague*'s first exception. These courts have determined that *Miller* announced a new substantive rule in that it held unconstitutional the *mandatory* imposition of a sentence of life without parole on a class of offenders. See, e.g., *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013); *State v. Mantich*, supra, 287 Neb. at 340–41, 842 N.W.2d 716; *State v. Mares*, supra, 335 P.3d at 508. Notably, these courts have recognized that the rule in *Miller* has a procedural component to it and that it would be "'terribly unfair'" to refrain from applying *Miller* retroactively, but nonetheless characterized the case as announcing a substantive rule, rather than a watershed procedural rule. *State v. Ragland*, supra, at 117; *State v. Mantich*, supra, at 342, 842 N.W.2d 716; *State v. Mares*, supra, at 508.

We agree with every other court that has considered the issue that *Miller* created a "new rule." See footnote 7 of this opinion. When the petitioner's conviction became final in 2000, existing precedent did not compel the conclusion that it was unconstitutional to impose a life sentence without the possibility of parole on a juvenile offender. Indeed, the cases on which the court relied in *Miller*—*Roper* and *Graham*—were decided several years after the petitioner's conviction became final. See *Thiersaint v. Commissioner of Correction*, supra, 316 Conn. at 103, 111 A.3d 829 ("a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final" [internal quotation marks omitted]); *Diatchenko v. District Attorney*, 466 Mass. 655, 662, 1 N.E.3d 270 (2013) (cases decided before *Miller* "suggested the opposite result from the one ultimately reached in *Miller*"); *Chambers v. State*, 831 N.W.2d 311, 325 (Minn.2013) ("when [the petitioner's] conviction became final in 1999, *Roper* and *Graham* had not been decided yet and *Miller* was certainly not 'dictated by precedent'").

[9, 10] We also agree that it is difficult to categorize *Miller* squarely in one of *Teague*'s exceptions or the other. Nonetheless, we conclude that the rule in *Miller* requiring that a sentencing authority conduct an individualized sentencing proce-

9. See *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (noting that *Teague*'s first exception for retroactivity of new substantive rules "should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense").

10. The Supreme Court's individualized sentencing cases, which required that a sentencing authority consider mitigating circumstances of the offender and the offense before imposing the death penalty; *Woodson v. North Carolina*, 428 U.S. 280, 303–305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Skipper v. South Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Sumner v. Shuman*, 483 U.S. 66, 78, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); have been applied retroactively, but they were decided pre-*Teague*. See, e.g., *Dutton v. Brown*, 812 F.2d 593, 599 and n. 7 (10th Cir.) (noting *Lockett* applies retroactively and applying *Skipper* retroactively), cert. denied, 484 U.S. 870, 108 S.Ct. 197, 98 L.Ed.2d 149 (1987). Post-*Teague* rules that have expanded the Supreme Court's jurisprudence in this area have been held to be nonretroactive. See, e.g., *Saffle v. Parks*, 494 U.S. 484, 494–95, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

dure and consider the mitigating [68]circumstances of youth before sentencing a juvenile offender to a life sentence without parole is more properly characterized as a procedural, rather than a substantive, rule. "[R]ules that regulate only the manner of determining the defendant's culpability are procedural." (Emphasis omitted.) *Schriro v. Summerlin*, supra, 542 U.S. at 353, 124 S.Ct. 2519. "[A] rule that alters the manner of determining culpability merely raise[s] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.... Applying this understanding to new rules governing sentences and punishments, a new procedural rule creates the possibility that the defendant would have received a less severe punishment but does not necessitate such a result. Accordingly, a rule is procedural when it affects how and under what framework a punishment may be imposed but leaves intact the state's fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment." (Citation omitted; internal quotation marks omitted.) *People v. Carp*, 496 Mich. 440, 481, 852 N.W.2d 801 (2014).

The court in *Miller* did not eliminate the power of a state to impose a punishment of life imprisonment without the possibility of parole. Rather, it required that a sentencing authority follow a certain process before imposing that sentence. See *In re Morgan*, 713 F.3d 1365, 1368 (11th Cir. 2013); *People v. Carp*, supra, 496 Mich. at 482, 852 N.W.2d 801; *Chambers v. State*, supra, 831 N.W.2d at 328. The court in *Miller* itself acknowledged that it was not "categorically bar[ring] a penalty," but instead was requiring only that a "sentencer *follow a certain process*" before imposing that penalty. (Emphasis added.) *Miller v. Alabama*, supra, 132 S.Ct. at 2471; but see id., at 2469 (expressly leaving open question whether punishment must be categorically barred for all, or certain, juvenile offenders). Although *Miller* has a substantive component, in that it only requires this sentencing pr[69]ocedure for a category of offenders; see footnote 9 of this opinion; the focus in *Miller* on the *process* by which juveniles can be sentenced to life without parole leads us to conclude that, for purposes of *Teague*, *Miller* announced a procedural rule.

We further conclude that the rule in *Miller* is a watershed rule of criminal procedure for purposes of our court's application of the second exception of *Teague*. A watershed rule of criminal procedure is one that (1) is "implicit in the concept of ordered liberty," and that "alter[s] our understanding of the bedrock procedural elements" essential to a proceeding; (emphasis omitted; internal quotation marks omitted) *Teague v. Lane*, supra, 489 U.S. at 311, 109 S.Ct. 1060; such that a proceeding conducted without the benefit of that rule "implicate[s] ... fundamental fairness";[11] id., at 312, 109 S.Ct. 1060; and (2) is "central to an accurate determination of innocence or guilt," such that the rule's absence creates an impermissibly large risk that innocent persons will be convicted. Id., at 313, 109 S.Ct. 1060; see also *Sawyer v. Smith*, supra, 497 U.S. at 242, 110 S.Ct. 2822. In the sentencing

11. To the extent that *Whorton v. Bockting*, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007), may have narrowed this first element of the "watershed rule" test by requiring that the "bedrock procedural element" must have been "previously unrecognized"; id., at 421, 127 S.Ct. 1173; we believe that that case imposes an unduly narrow interpretation of *Teague*. We interpret *Teague* for purposes of our retroactivity law to extend to a new procedural rule that fundamentally alters our understanding of an existing bedrock procedural rule.

context, where the issue is no longer one of guilt or innocence, the second criterion asks whether the new procedure is central to an accurate determination that the sentence imposed is a proportionate one. See *Schriro v. Summerlin*, supra, 542 U.S. at 359, 124 S.Ct. 2519 (Breyer, J., dissenting).[12]

[70]We conclude that *Miller* satisfies this test. In *Miller*, the court barred a scheme that failed to account for the mitigating circumstances of youth. The court in *Miller* posited that, upon proper consideration of "children's diminished culpability and heightened capacity for change," it would be "uncommon" for a sentencing authority to impose the harsh penalty of a life sentence without parole. *Miller v. Alabama*, supra, 132 S.Ct. at 2469. Because *Miller*, in effect, set forth a presumption that a juvenile offender would not receive a life sentence without parole upon due consideration of the mitigating factors of youth, the decision acknowledges that the procedures it prescribed would impact the sentence imposed in most cases. See *State v. Riley*, supra, 315 Conn. at 655, 110 A.3d 1205 (*Miller* "suggests that the mitigating factors of youth establish ... a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances"). Thus, the individualized sentencing prescribed by *Miller* is "central to an accurate determination"; *Teague v. Lane*, supra, 489 U.S. at 313, 109 S.Ct. 1060; that the sentence imposed is a proportionate one. See *Saffle v. Parks*, 494 U.S. 484, 507, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (Brennan, J., dissenting) (four dissenting justices concluded that, because rules ensuring sentencing authority's ability to consider mitigating evidence "are integral to the proper functioning of the capital sentencing hearing, they must apply retroactively under the second *Teague* exception").

Similarly, the court recognized that "making youth (and all that accompanies it) irrelevant" to a sentencing procedure "poses too great a risk of disproportionate punishment." *Miller v. Alabama*, supra, 132 S.Ct. at 2469. If failing to consider youth and its attendant characteristics creates a risk of disproportionate punishment in violation of the eighth amendment, then the rule in *Miller* assuredly implicates the fundamental fairness of [71]a juvenile sentencing proceeding because it is a "basic precept of justice" that punishment must be proportionate "to both the offender and the offense." (Internal quotation marks omitted.) Id., at 2463. The court in *Miller* also "alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a [juvenile sentencing] proceeding"; (emphasis omitted; internal quotation marks omitted) *Sawyer v. Smith*, supra, 497 U.S. at 242, 110 S.Ct. 2822; because the court required that certain factors be considered in an individualized sentencing proceeding before a certain class of offenders may receive a particular punishment. In other words, our understanding of the bedrock procedural element of individualized sentencing was altered when the court intertwined two strands of its eighth amendment jurisprudence to require consideration of new factors for a class of of-

12. In *Schriro*, four dissenting justices concluded that the rule set forth in *Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that a jury, not a judge, must make the findings necessary to qualify a person for the death penalty, was a watershed procedural rule because *Teague*'s second exception "asks whether the new procedure is 'central to an accurate determination' that death is a legally appropriate punishment." (Emphasis omitted.) *Schriro v. Summerlin*, supra, 542 U.S. at 359, 124 S.Ct. 2519 (Breyer, J., dissenting).

fenders to create a presumption against a particular punishment. As one court aptly noted, albeit in dicta: "[I]f ever there was a legal rule that should—as a matter of law and morality—be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice." (Emphasis omitted.) *Hill v. Snyder*, Docket No. 10–14568, 2013 WL 364198, *2 (E.D.Mich. January 30, 2013). The individualized sentencing process required by *Miller* must, therefore, apply retroactively on collateral review. In light of this conclusion, we turn to the question of whether the petitioner's sentence in the present case, which was imposed without consideration of the mitigating factors set forth in *Miller*, falls within the ambit of that rule.[13]

III

[11] In *Riley*, we concluded that the holding in *Miller* implicates not only mandatory sentencing schemes, but also discretionary sentencing schemes that permit a life sentence without parole for a juvenile offender but do not mandate consideration of *Miller*'s mitigating factors. *State v. Riley*, supra, 315 Conn. at 658, 110 A.3d 1205. This holding disposes of the respondent's argument that *Miller* does not apply to the petitioner's sentence because it was not imposed pursuant to a mandatory

13. In his dissenting opinion, Justice Zarella relies heavily on the petitioner's presentence investigation report and asserts that, in light of that report, our characterization of the petitioner's sentence as one imposed without consideration of the mitigating factors set forth in *Miller* is unsupported by the record in this case. The absence of any discussion of that presentence investigation report from our opinion, however, is simply reflective of our judgment that it is neither legally nor factually relevant. Although presentence investigation reports required information regarding some of the *Miller* factors, they did not, prior to a recent revision, require examination of others, principal among which is the factor that provided the linchpin of *Miller*'s reasoning and the basis for its presumption against imposing life sentences on juvenile offenders—scientific and psychological evidence demonstrating the lesser culpability of juveniles and their greater capacity for reform. Indeed, the presentence investigation reports did not include a field for the offender's age at the time of the offense (although such information could be calculated from the date of the offense and date of birth fields on the form), nor did they require the reporting officer to examine the factors relevant to *Miller* through a different lens when the offender was a juvenile. Moreover, the presentence investigation report prepared for the petitioner in the present case was submitted to the court two months after he pleaded guilty pursuant to a court indicated plea for a fifty year sentence. Thus, the court determined that a functional life sentence without parole was presumptively an appropriate sentence before it received information on mitigating factors relating to the petitioner's youth. When the court imposed the fifty year sentence two days after the presentence investigation report was prepared, it neither referred to the petitioner's age at the time of the offense nor any other *Miller* factor. Although we presume that the trial court considered the presentence investigation report before imposing sentence in accordance with the court indicated plea; see General Statutes § 54–91a (a); there is nothing *in the record* to suggest that the trial court ever determined that the petitioner was the rare juvenile offender whose acts and history were so uncommon that the presumption against imposing the functional equivalent of life without parole on a juvenile offender had been overcome. See *State v. Riley*, supra, 315 Conn. at 659, 110 A.3d 1205 ("the record must reflect that the trial court has considered and given due mitigating weight to [*Miller*'s mitigating] factors in determining a proportionate punishment"). Insofar as Justice Zarella underscores the fact that defense counsel made no real effort to refute the prosecutor's negative characterizations of the petitioner before the court imposed sentence, that fact is unsurprising given that the petitioner had no right to argue for a lesser sentence than that proposed in the court indicated plea.

sentencing scheme.[14] Our inquiry in the present case, therefore, focuses on whether the imposition of a fifty year sentence without the possibility of parole is subject to the sentencing procedures set forth in *Miller*. We conclude that it is.

Numerous courts have considered whether a sentence for a lengthy term of years should be deemed the functional equivalent of a life sentence subject to the Supreme Court's juvenile sentencing requirements. Some courts have concluded that these requirements only apply to a literal "life" sentence regardless of whether the sentence exceeds the average life expectancy of a juvenile offender.[15] We agree, however, with [74] those courts that have concluded that the Supreme Court's focus in *Graham* and *Miller* "was not on the label of a 'life sentence' " but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life. *Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir.2013); see also *Thomas v. Pennsylvania*, Docket No. CV–10–4537, 2012 WL 6678686, *2 (E.D.Pa. December 21, 2012) ("the Supreme Court's analysis would [not] change

14. The respondent also argues that, because the petitioner entered a plea whereby he agreed to serve a fifty year sentence, any mitigation argument before the trial court would have served no purpose. We are not persuaded by this contention. In the present case, the plea was entered pursuant to a court indicated plea. Thus, there was a clear opportunity for the court to consider the *Miller* factors. There is no evidence in the record before us that such factors were considered when the plea agreement was proposed. See footnote 13 of this opinion. To the extent that the respondent is suggesting that *Miller* cannot apply to a sentence imposed pursuant to a plea agreement, this contention is undermined by the express reference in *Miller* to a juvenile offender's ''inability to deal with . . . prosecutors (*including on a plea agreement*)'' as one of the concerns that the court sought to remedy. (Emphasis added.) *Miller v. Alabama*, supra, 132 S.Ct. at 2468. Even outside the context of a court indicated plea, courts have discretion in accepting the terms of a plea agreement reached between the state and a defendant. Presumably in recognition of this fact, many courts post-*Miller* have applied its requirements in cases wherein a juvenile offender accepted a plea deal. See, e.g., *State v. Null*, 836 N.W.2d 41, 45, 76 (Iowa 2013); *Aiken v. Byars*, 410 S.C. 534, 536, 765 S.E.2d 572 (2014); *Bear Cloud v. State*, 334 P.3d 132, 135 (Wyo.2014); *Thomas v. Pennsylvania*, Docket No. CV–10–4537, 2012 WL 6678686, *1 and n. 2 (E.D.Pa. December 21, 2012).

15. Although the courts reaching this conclusion have done so in considering whether *Graham*'s bar on life sentences without parole for nonhomicide offenders applies to lengthy terms, the logic necessarily would apply with equal force to *Miller*'s rule regarding life sentences for homicide offenders. See, e.g., *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir.2012) (acknowledging that eighty-nine year sentence ''may end up being the functional equivalent of life'' but concluding that *Graham* only applies ''if [the] state imposes a sentence of 'life' ''), cert. denied sub nom. *Bunch v. Bobby*, —— U.S. ——, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013); *State v. Kasic*, 228 Ariz. 228, 231, 233, 265 P.3d 410 (App. 2011) (consecutive sentences totaling 139 years imprisonment not constitutionally excessive); *Guzman v. State*, 110 So.3d 480, 482, 483 (Fla.App.2013) (sixty year sentence not improper because ''[w]hile we understand the temptation to acknowledge that certain term-of-years sentences might constitute 'de facto' life sentences, we are compelled to apply *Graham* as it is expressly worded, which applies only to actual life sentences without parole''); *Adams v. State*, 288 Ga. 695, 696, 701, 707 S.E.2d 359 (2011) (twenty-five year sentence not improper because ''[n]othing in the [c]ourt's opinion [in *Graham*] affects the imposition of a sentence to a term of years without the possibility of parole'' [internal quotation marks omitted]); *State v. Brown*, 118 So.3d 332 (La.2013) (four consecutive ten year sentences not effective life sentence because ''holding [in *Graham*] . . . applies only to sentences of life in prison without parole, and does not apply to a sentence of years without the possibility of parole'').

simply because a sentence is labeled a term-of-years sentence rather than a life sentence").

Indeed, most courts that have considered the issue agree that a lengthy term of years for a juvenile offender will become a de facto life sentence at some point, although there is no consensus on what that point is.[16] ⌊75⌋Some courts conclude that only a sentence that would exceed the juvenile offender's natural life expectancy constitutes a life sentence.[17] Others have found that a sentence is properly considered a de facto life sentence if a juvenile offender would not be eligible for release until near the expected end of his life. See, e.g., *People v. J.I.A.*, Docket No. G040625, 2013 WL 342653, *5 (Cal.App. January 30, 2013) (de facto life sentence when defendant's life expectancy was "anywhere from [sixty-four] to [seventy-six] years" and he was eligible for parole at age seventy, because he had no possibility for release "until about the time he is expected to die"); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (concluding that fifty-two years is effective life sentence even though evidence "does not clearly establish that [the defendant's] prison term is beyond his life expectancy" but rather that it may "closely come within two years of his life expectancy"); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) ("[t]he prospect of [only] geriatric release" is functional equivalent of life without parole [internal quotation marks omitted]).

[12] We, too, reject the notion that, in order for a sentence to be deemed "life imprisonment," it must continue until the literal end of one's life. Indeed, our legislature defines life imprisonment as including a "definite sentence of sixty years . . . ." General Statutes § 53a–35b. The law in Connecticut, therefore, presumes that, at a ⌊76⌋minimum, a sixty year term of imprisonment is the functional equivalent of a life sentence. The question that remains is whether a sentence for a term of years less than that sixty year threshold also may be deemed a life sentence for purposes of *Miller*.[18]

16. Compare *People v. Rainer*, —— P.3d ——, ——, Docket No. 10CA2414, 2013 WL 1490107, *1, 12 (Colo.App. April 11, 2013) (112 year sentence with opportunity for parole when defendant reached seventy-five years old was de facto life sentence without parole), *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014) (150 year sentence is effective life sentence), *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (52.5 year sentence is ''sufficient to trigger *Miller*-type protections''), and *Bear Cloud v. State*, 334 P.3d 132, 136, 142 (Wyo. 2014) (parole eligibility after forty-five years imprisonment constitutes de facto life sentence), with *People v. Lucero*, —— P.3d ——, ——, ——, Docket No. 11CA2030, 2013 WL 1459477, *1, 12 (Colo.App. April 11, 2013) (eighty-four year sentence not effective life sentence without parole), *Thomas v. State*, 78 So.3d 644, 646 (Fla.App.2011) (''[w]hile we agree that at some point, a term-of-years sentence may become the functional equivalent of a life sentence,'' fifty year sentence is not functional equivalent), and *Ellmaker v. State*, Docket No. 108,728, 2014 WL 3843076, *10 (Kan.App. August 1, 2014) (fifty year sentence is not functional equivalent of life sentence without parole).

17. See, e.g., *People v. Sanchez*, Docket No. B230260, 2013 WL 3209690, *6 (Cal.App. June 25, 2013) (fifty years not effective life sentence because ''[i]t is entirely possible that appellant will become eligible for parole or release during his lifetime''), cert. denied, —— U.S. ——, 134 S.Ct. 950, 187 L.Ed.2d 814 (2014); *People v. Lucero*, —— P.3d ——, ——, ——, Docket No. 11CA2030, 2013 WL 1459477, *1, 3 (Colo.App. April 11, 2013) (eighty-four year sentence not effective life sentence when defendant was eligible for parole at age fifty-seven because he has meaningful opportunity for release within his natural lifetime).

18. We note that, although the legislature is free to create and define Connecticut's sentencing scheme; see *State v. Heinemann*, 282

We begin by observing that recent government statistics indicate that the average life expectancy for a male in the United States is seventy-six years. United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Reports, Vol. 62, No. 7 (January 6, 2014), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf (last visited May 26, 2015). This means that an average male juvenile offender imprisoned between the ages of sixteen and eighteen who is sentenced to a fifty year term of imprisonment would be released from prison between the ages of sixty-six and sixty-eight, leaving eight to ten years of life outside of prison. Notably, this general statistic does not account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison. See, e.g., Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at ⌊78http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited May 26, 2015) (concluding that Michigan juveniles sentenced to natural life sentences have average life expectancy of 50.6 years); N. Straley, "*Miller*'s Promise: Re–Evaluating Extreme Criminal Sentences for Children," 89 Wn. L.Rev. 963, 986 n. 142 (2014) (data from New York suggests 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); *State v. Null*, supra, 836 N.W.2d at 71 (acknowledging that "long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population"). Such evidence suggests that a juvenile offender sentenced to a fifty year term of imprisonment may never experience freedom.

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. See 42 U.S.C. § 416 (*l*) (defining " 'retirement age' " under ⌊78Social Security Act as between ages sixty and

Conn. 281, 311, 920 A.2d 278 (2007); we are not constrained by the legislature's definition of life imprisonment as a sixty year term. We are charged with interpreting the eighth amendment to the federal constitution in light of the Supreme Court's decision in *Miller*. Whether *Miller* applies to sentences shorter than the legislatively defined ''life imprisonment'' of sixty years is, therefore, a question for this court and not for the legislature. See *Graham v. Florida*, supra, 560 U.S. at 67, 130 S.Ct. 2011 (although legislative enactments are ''entitled to great weight ... the task of interpreting the [e]ighth [a]mendment remains our responsibility'' [citation omitted; internal quotation marks omitted]); *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 260, 957 A.2d 407 (2008) (''it is the role and the duty of the judiciary to determine whether the legislature has fulfilled its affirmative obligations within constitutional principles'' [internal quotation marks omitted]).

sixty-seven). Any such prospects will also be diminished by the increased risk for certain diseases and disorders that arise with more advanced age, including heart disease, hypertension, stroke, asthma, chronic bronchitis, cancer, diabetes, and arthritis. See Federal Interagency Forum on Aging–Related Statistics, "Older Americans 2012: Key Indicators of Well–Being," (June 2012) pp. xvi, 27, available at http://agingstats.gov/agingstatsdotnet/Main_Site/Data/2012_Documents/Docs/EntireChartbook.pdf (last visited May 26, 2015).

The 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. See *Graham v. Florida*, supra, at 560 U.S. at 75, 130 S.Ct. 2011 (states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for juvenile nonhomicide offender); see also *People v. Perez*, 214 Cal.App.4th 49, 57, 154 Cal.Rptr.3d 114 (juvenile sentencing cases are concerned with whether "there is *some meaningful life expectancy left*" when the offender becomes eligible for release [emphasis added]), cert. denied, —— U.S. ——, 134 S.Ct. 527, 187 L.Ed.2d 379 (2013). In analogizing a life sentence without parole for a juvenile offender to the death penalty, *Graham* underscored the sense of hopelessness that accompanies such a sentence. See *Graham v. Florida*, supra, at 69–70, 130 S.Ct. 2011 (Life imprisonment without parole "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.... [T]his sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever [79] the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." [Citation omitted; internal quotation marks omitted.]). In light of the foregoing statistics and their practical effect, a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." Id., at 79, 130 S.Ct. 2011. Thus, we agree with the Iowa Supreme Court that "[e]ven if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*." *State v. Null*, supra, 836 N.W.2d at 71; see also id. (concluding that prospect of "geriatric release" implicates concerns raised in *Graham*).

We need not decide in the present case whether the imposition of a term of less than fifty years imprisonment without parole on a juvenile offender would require the procedures set forth in *Miller*,[19] or whether other characteristics might bear on a juvenile offender's life expectancy. Indeed, we have every reason to expect that our decisions in *Riley* and in the present case will prompt our legislature to renew earlier efforts to address the implications of the Supreme Court's decisions in *Graham* and *Miller*. See Substitute House Bill No. 5221, 2014 Sess.; Substi-

19. In *State v. Taylor G.*, 315 Conn. 734, 744, 110 A.3d 338 (2015), this court concluded that a mandatory minimum sentence of ten years imprisonment does not implicate the concerns articulated in *Roper*, *Graham* and *Miller*.

tute Senate Bill No. 1062, 2013 Sess.; Substitute House Bill No. 6581, 2013 Sess. We are nonetheless persuaded that the procedures set forth in *Miller* must be followed when considering whether to sentence a juvenile offender to fifty years imprisonment without parole. The habeas court, therefore, improperly granted the respondent's motion for |80 summary judgment on the ground that *Miller* does not apply to the petitioner's sentence.

The judgment is reversed and the case is remanded to the habeas court for further proceedings consistent with this opinion.

In this opinion ROGERS, C.J., and PALMER and EVELEIGH, Js., concurred.

ZARELLA, J., with whom ROBINSON, J., joins, dissenting.

In *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), the United States Supreme Court determined that the eighth amendment to the federal constitution forbids a state sentencing scheme for juvenile homicide offenders that mandates life imprisonment without the possibility of parole [1] but did not consider whether the rule applies retroactively to cases in which the defendant's sentence became final before *Miller* was decided. Since that time, however, numerous jurisdictions have addressed that question and have concluded unanimously that, to the extent *Miller* articulated a new rule of criminal procedure, it is not a watershed rule under *Teague v. Lane*, 489 U.S. 288, 311–13, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion), and does not apply retroactively to juvenile offenders in postconviction proceedings. The majority disagrees, thus making Connecticut the *only* jurisdiction in the nation to reach the contrary conclusion. Moreover, the majority provides no explanation as to why it believes that every other jurisdiction to have considered the question has reached the wrong result, even under a more liberal state retroactivity analysis than the analysis required under *Teague*. See part |81 II of this opinion. The majority also concludes that the rule announced in *Miller* applies to the petitioner, Jason Casiano, because it deems his fifty year sentence the functional equivalent of life imprisonment without the possibility of parole. The majority arrives at this conclusion even though the sentences at issue in *Miller* required the juvenile offenders in that case to spend the remainder of their lives in prison, and despite the fact that the Connecticut legislature has determined that sixty years is the functional equivalent of life without the possibility of parole under this state's carefully crafted sentencing scheme. See General Statutes § 53a–35b. For the reasons that follow, I reject the majority's conclusions as legally unsupportable, and, accordingly, I respectfully dissent.

I

I first consider the sentencing issue because this court need not decide whether *Miller* applies retroactively unless it determines initially that the petitioner's sentence is the functional equivalent of life without the possibility of parole. On this issue, I agree with Justice Espinosa [2] that *Miller* applies to a sentencing scheme that

1. Although the General Assembly refers to life imprisonment without the possibility of *release;* see, e.g., General Statutes § 53a–35b; we use the term life without the possibility of parole in accordance with the United States Supreme Court's use of that term in *Miller*. The terms are synonymous.

2. Justice Espinosa also has issued a dissenting opinion in the present case.

mandates life in prison without the expectation of release, in part because that was the sentence imposed on the two juvenile offenders in *Miller.* See *Miller v. Alabama,* supra, 132 S.Ct. at 2460. The court in *Miller* also consistently described the issue as whether the eighth amendment proscribes a sentence that requires a juvenile homicide offender to spend the remainder of his life in prison. See id., at 2460, 2469. In addition, this court recognized in *State v. Riley,* 315 Conn. 637, 110 A.3d 1205 (2015), that "*Miller* is replete with references to ... life without parole and like terms." Id., at 653, 110 A.3d 1205. Accordingly, the petitioner's fifty year sentence, on its face, is not within the purview of *Miller* because it is [82]a term of years under which the petitioner will be released at the age of sixty-six, and, as a consequence, he is not expected to spend the remainder of his life in prison.

Insofar as the majority rejects this conclusion and determines that the petitioner's sentence is the functional equivalent of life without the possibility of parole, it acts in defiance of the legislature and this court's repeated recognition of the legislature's definition of "life imprisonment" in Connecticut's revised sentencing scheme. Under § 53a–35b, "life imprisonment," with two exceptions, is defined as a "definite sentence of sixty years...." [3] The legislature enacted the provision in 1980 [4] as part of its comprehensive revision of the state's criminal sentencing structure, which abolished indeterminate sentencing in favor of definite sentencing; *Mead v. Commissioner of Correction,* 282 Conn. 317, 325, 920 A.2d 301 (2007); in part to create more uniformity and consistency in the sentencing of similarly situated offenders. See, e.g., 23 H.R. Proc., Pt. 14, 1980 Sess., p. 4340, remarks of Representative Christopher Shays; Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1980 Sess., pp. 1133–34, remarks of Edwin Sullivan on behalf of New Haven Mayor Biagio DiLieto. As this court explained in *Castonguay v. Commissioner of Correction,* 300 Conn. 649, 16 A.3d 676 (2011), "[b]efore July 1, 1981, all felonies, with limited exceptions, were punishable by an indeterminate sentence of imprisonment.... Under this scheme, the trial court was authorized to set both the minimum and maximum portion of the sentence ... [and] parole eligibility [was] established at the minimum less any good time used to [83]reduce that minimum term.... The maximum term for a class A felony was life imprisonment, which meant the prisoner's natural life.... In 1980, as part of the legislature's comprehensive revision of the state's sentencing structure abolishing indeterminate sentencing and creating definite sentencing, the legislature enacted No. 80–442 of the 1980 Public Acts (P.A. 80–442), which became effective July 1, 1981.... The legislature also enacted new legislation ... that provided that ... felonies committed on or after July 1, 1981, are punishable by a definite sentence. Under this scheme, sentencing courts were authorized to impose a flat or exact term of years of imprisonment without a minimum or maximum [term].... For the crime of murder, the legislature provided that the sentence is a definite term of not less than twenty-five years nor more than life.... The legislature also enacted new legislation ... defining imprisonment for

3. General Statutes § 53a–35b provides: "A sentence of life imprisonment means a definite sentence of sixty years, unless the sentence is life imprisonment without the possibility of release, imposed pursuant to subparagraph (A) or (B) of subdivision (1) of section 53a–35a, in which case the sentence shall be imprisonment for the remainder of the defendant's natural life."

4. See Public Acts 1980, No. 80–442, § 11.

life as a definite sentence of sixty years." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., at 653–54, 16 A.3d 676. Accordingly, the definition of a life sentence in § 53a–35b was carefully chosen and has served as an integral part of Connecticut's criminal sentencing scheme for more than thirty years.

Since the revised sentencing scheme was enacted, this court has recognized repeatedly that life imprisonment, with two limited exceptions that do not apply in the present case,[5] means a term of sixty years. See, e.g., *State v. Adams*, 308 Conn. 263, 274, 63 A.3d 934 (2013); *Ostroski v. Commissioner of Correction*, 301 Conn. 84 360, 360–61, 21 A.3d 444 (2011); *Castonguay v. Commissioner of Correction*, supra, 300 Conn. at 654, 16 A.3d 676; *State v. Collins*, 299 Conn. 567, 615, 10 A.3d 1005, cert. denied, —— U.S. ——, 132 S.Ct. 314, 181 L.Ed.2d 193 (2011); *State v. Courchesne*, 296 Conn. 622, 746 n. 84, 998 A.2d 1 (2010); *Mead v. Commissioner of Correction*, supra, 282 Conn. at 325, 920 A.2d 301; *State v. Stenner*, 281 Conn. 742, 745 n. 4, 917 A.2d 28, cert. denied, 552 U.S. 883, 128 S.Ct. 290, 169 L.Ed.2d 139 (2007); *State v. Azukas*, 278 Conn. 267, 270 n. 2, 897 A.2d 554 (2006); *State v. Ross*, 269 Conn. 213, 340 n. 73, 849 A.2d 648 (2004); *State v. Roseboro*, 221 Conn. 430, 432 n. 2, 604 A.2d 1286 (1992); *State v. Carpenter*, 220 Conn. 169, 171, 595 A.2d 881 (1991), cert. denied, 502 U.S. 1034, 112 S.Ct. 877, 116 L.Ed.2d 781 (1992); *State v. Tucker*, 219 Conn. 752, 759, 595 A.2d 832 (1991); *State v. Weinberg*, 215 Conn. 231, 233 n. 2, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S.Ct. 430, 112 L.Ed.2d 413 (1990); *State v. Arnold*, 201 Conn. 276, 277 n. 1, 514 A.2d 330 (1986); *State v. Hill*, 196 Conn. 667, 668 n. 2, 495 A.2d 699 (1985). Thus, even though sixty years does not constitute an actual life sentence under *Miller* for a convicted juvenile offender, Connecticut courts must, at the very least, comply with the legislative determination that sixty years is the functional equivalent of life in prison because this court always has followed the principle that "[w]e defer to the broad authority that legislatures possess in determining the types and limits of punishment for crimes. Indeed, [i]n examining the rationality of a legislative classification, we are *bound* to defer to the judgment of the legislature unless the classification is clearly irrational and unreasonable." (Emphasis added; internal quotation marks omitted.) *State v. Heinemann*, 282 Conn. 281, 311, 920 A.2d 278 (2007).

The majority casts aside this well established statutory authority and legal precedent, and, in effect, implicitly determines that § 53a–35b is unconstitutional as 85 applied to juvenile offenders in Connecticut, declaring that, "although the legislature is free to create and define Connecticut's sentencing scheme ... we are not constrained by the legislature's definition of life imprisonment as a sixty year term. We are charged with interpreting the eighth amendment to the federal constitution in light of the ... [c]ourt's decision in *Miller*. Whether *Miller* applies to sentences shorter than the legislatively defined 'life imprisonment' of sixty years is, therefore, a question for this court and not for the legislature." (Citation omitted.) Footnote 18 of the majority opinion. The

5. The two exceptions are life imprisonment for a capital felony committed prior to April 25, 2012, under the version of General Statutes § 53a–54b in effect prior to April 25, 2012, and life imprisonment for the class A felony of murder with special circumstances committed on or after April 25, 2012, under the version of § 53a–54b in effect on or after April 25, 2012, both of which involve life imprisonment without the possibility of release unless, in the case of a capital felony committed prior to April 25, 2012, a sentence of death is imposed. See General Statutes § 53a–35a (1).

majority thus rejects the notion that, "in order for a sentence to be deemed 'life imprisonment,' it must continue until the literal end of one's life." The majority instead concludes that "[t]he United States Supreme Court viewed the concept of 'life' in *Miller* and *Graham [v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)] more broadly than biological survival" and that the court "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." I disagree.

The majority's analysis is fatally flawed because it conflates the reasoning in *Graham* and *Miller*. Although *Graham* and *Miller* are both eighth amendment cases, they stand for different principles. The court in *Graham* held that the eighth amendment forbids a sentence of life imprisonment without the possibility of parole for juvenile nonhomicide offenders, in part because, given the lesser magnitude of nonhomicide crimes as compared with homicides, juveniles convicted of the former should be offered "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, supra, 560 U.S. at 75, 130 S.Ct. 2011. The court explained that "defendants who do not kill, intend to kill, or foresee that life will be taken are [86]categorically less deserving of the most serious forms of punishment than are murderers.... There is a line between homicide and other serious violent offenses against the individual.... Serious nonhomicide crimes may be devastating in their harm ... but in terms of moral depravity and of the injury to the person and to the public ... they cannot be compared to murder in their severity and irrevocability." (Citations omitted; internal quotation marks omitted.) Id., at 69, 130 S.Ct. 2011. The court ultimately determined that a categorical rule barring a sentence of life imprisonment without parole was necessary to give "all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.... Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, [and] no hope." Id., at 79, 130 S.Ct. 2011.

In contrast, the court in *Miller* did not bar a sentence of life imprisonment without the possibility of parole for juvenile homicide offenders but held only that a *mandatory* sentence of life without parole is prohibited under the eighth amendment. *Miller v. Alabama*, supra, 132 S.Ct. at 2469. Accordingly, the court in *Miller* was not concerned with the opportunity of convicted juvenile offenders to reenter society and conduct meaningful lives, as the majority maintains, because it did not deem a life sentence without parole for juvenile homicide offenders per se unconstitutional. Rather, the court focused on the sentencing process and the necessity for the sentencing court to consider a juvenile offender's youth *before* deciding whether to impose such a sentence. The court explained: "By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these [mandatory] laws prohibit a sentencing authority [87]from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." Id., at 2466. In sum, the court's concern in *Graham* that juvenile nonhomicide offenders be given the opportunity to obtain parole in order to rejoin society and lead a meaningful life was qualitatively different from its concern in *Miller* that a sentence of life

imprisonment without parole be imposed on juvenile homicide offenders only after their youth and its attendant characteristics have been considered. Accordingly, it cannot be said that *Miller* "implicitly endorsed" the concept of life imprisonment as a lengthy term of years that would deprive the juvenile offender of having any meaningful life outside of prison. The opportunity for juvenile offenders to have a meaningful life was relevant only to *Graham*'s discussion of the opportunity for parole in cases involving juvenile offenders who have committed nonhomicide crimes.

I also disagree with the majority's conclusion that the petitioner in this case will have insufficient time to lead a meaningful life upon his release from prison. It is undisputed that juvenile homicide offenders subject to lengthy sentences will not have the same opportunities to establish a career, marry, raise a family, vote, or enjoy many other activities most law-abiding citizens take for granted or highly value. Homicide is the most serious crime, however, and society has determined that those who murder must be severely punished for this heinous offense. An offender nonetheless may create a meaningful life outside of prison at any age if sufficiently motivated, just as many law-abiding citizens who live their entire lives outside of prison never create what the majority might consider a meaningful life because they are not sufficiently motivated.[6] For all of the foregoing reasons, I reject the majority's conclusion that fifty years is the functional equivalent of a life sentence under *Miller* for juvenile homicide offenders in Connecticut.

II

I next take issue with the majority's conclusion that *Miller* announced a watershed rule of criminal procedure that applies retroactively under the framework established in *Teague*. In *Teague*, a plurality of the court identified "two exceptions to [the] general rule of non-retroactivity for cases on collateral review. First, a new rule should be applied retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.... Second, a new rule should be applied retroactively if it requires the observance of those procedures that ... are implicit in the concept of ordered liberty." (Internal quotation marks omitted.) *Thiersaint v. Commissioner of Correction*, 316 Conn. 89, 108 n. 8, 111 A.3d 829 (2015).

6. To the extent the majority relies on statistics from the Centers for Disease Control and Prevention to calculate the petitioner's life expectancy following his release from prison, I note that different agencies have reached different conclusions. Compare E. Arias, Centers for Disease Control and Prevention, National Vital Statistics Reports (January 6, 2014) p. 11 (calculating life expectancy of male at birth as seventy-six years), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf (last visited May 19, 2015), with United States Social Security Administration, Retirement & Survivors Benefits: Life Expectancy Calculator, available at http://www.ssa.gov/cgi-bin/longevity.cgi (last visited May 19, 2015) (calculating life expectancy of male at birth as approximately eighty-three years). Life expectancy calculations also vary depending on the age that is used as the basis for the calculation. See E. Arias, supra, pp. 11–12 (calculating life expectancy of male at birth as seventy-six years, at age thirty-seven as seventy-eight years, and at age sixty-six as approximately eighty-four years); United States Social Security Administration, supra (calculating life expectancy of male at birth as approximately eighty-three years, at age thirty-six as approximately eighty-two years, and at age sixty-seven as approximately eighty-five years). Accordingly, the majority's conclusion that the defendant would have only a few more years to live following his release from prison at the age of sixty-six is highly speculative.

The court explained in *Teague* that the second exception is reserved for "watershed rules of criminal procedure"; *Teague v. Lane*, supra, 489 U.S. at 311, 109 S.Ct. 1060; that "implicate the fundamental fairness of the |89 trial"; id., at 312, 109 S.Ct. 1060; and "without which the likelihood of an accurate conviction is seriously diminished." Id., at 313, 109 S.Ct. 1060. The court added in *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), that it is "not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." (Emphasis in original; internal quotation marks omitted.) Id., at 242, 110 S.Ct. 2822; see also *Whorton v. Bockting*, 549 U.S. 406, 420–21, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) (stating that second *Teague* exception "cannot be met simply by showing that a new procedural rule is based on a 'bedrock' right," but, rather, "[the] new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding" [emphasis omitted]).

In subsequent decisions, the United States Supreme Court further noted that the class of rules to which the second *Teague* exception applies is "extremely narrow"; *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); and that it had "rejected every claim that a new rule has satisfied the requirements for watershed status." *Whorton v. Bockting*, supra, 549 U.S. at 418, 127 S.Ct. 1173; see, e.g., *Beard v. Banks*, 542 U.S. 406, 420, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (rejecting retroactivity of rule announced in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 [(1988)]); *Schriro v. Summerlin*, supra, at 358, 124 S.Ct. 2519 (rejecting retroactivity of rule announced in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 [(2002)]); *O'Dell v. Netherland*, 521 U.S. 151, 166–67, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (rejecting retroactivity of rule announced in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 [(1994)]); *Gilmore v. Taylor*, 508 U.S. 333, 344–46, 113 S.Ct. 2112, |90 124 L.Ed.2d 306 (1993) (rejecting retroactivity of rule announced in *Falconer v. Lane*, 905 F.2d 1129 [(7th Cir.1990)]); *Sawyer v. Smith*, supra, 497 U.S. at 242–45, 110 S.Ct. 2822 (rejecting retroactivity of rule announced in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 [(1985)]).

In light of this precedent, it is not surprising that all other federal and state jurisdictions that have considered the issue have concluded unanimously that the rule announced in *Miller* is not a watershed rule of criminal procedure that applies retroactively under the second *Teague* exception.[7] See, e.g., *Martin v. Symmes*, 782 F.3d 939, 943 (8th Cir.2015); *Johnson v. Ponton*, 780 F.3d 219, 226 (4th Cir.2015); *In re Morgan*, 713 F.3d 1365, 1367–68 (11th Cir.2013); *Craig v. Cain*, United States Circuit Court of Appeals, Docket No. 1230035, 2013 WL 69128 (5th Cir. January 4, 2013); *Malvo v. Mathena*, United States District Court, Docket No. 2:13–CV–375, 2014 WL 2808805 (E.D.Va.

7. An intermediate appellate court in Illinois appears to be the only court that has concluded that *Miller* constitutes a watershed rule under *Teague*'s second exception. See *People v. Williams*, 367 Ill.Dec. 503, 982 N.E.2d 181, 196–97 (Ill.App.2012), appeal denied, 388 Ill. Dec. 8, 23 N.E.3d 1206 (2015). The reasoning in *Williams*, however, was subsequently rejected by the Illinois Supreme Court in *People v. Davis*, 379 Ill.Dec. 381, 6 N.E.3d 709, 721–22 (2014), which determined that *Miller* applies retroactively because it constitutes a new *substantive* rule.

June 20, 2014); *Ware v. King*, United States District Court, Docket No. 5:12–CV–147–DCB–MTP, 2013 WL 4777322 (S.D.Miss. September 5, 2013); *Ex parte Williams*, —— So.3d ——, ——, 2015 WL 1388138 (Ala.2015); *State v. Tate*, 130 So.3d 829, 841 (La.2013), cert. denied, —— U.S. ——, 134 S.Ct. 2663, 189 L.Ed.2d 214 (2014); *People v. Carp*, 496 Mich. 440, 475 n. 10, 852 N.W.2d 801 (2014); *Chambers v. State*, 831 N.W.2d 311, 331 (Minn.2013); *Commonwealth v. Cunningham*, 622 Pa. 543, 558–59, 81 A.3d 1 (2013), cert. denied, —— U.S. ——, 134 S.Ct. 2724, 189 L.Ed.2d 763 (2014).[8] At least one state court likewise has determined that *Miller* is not retroactive under a more liberal state retroactivity analysis than the analysis required under *Teague*. See *People v. Carp*, supra, at 495–512, 828 N.W.2d 685 (*Miller* not entitled to retroactive application under Michigan's broader retroactivity standard).[9]

Courts have given many reasons why *Miller* is not a watershed rule, including

8. To the extent other courts have held that the rule in *Miller* applies retroactively, they have done so *only* on the ground that it is a new *substantive* rule under *Teague*'s first exception. See, e.g., *Hill v. Snyder*, United States District Court, Docket No. 10–14568, 2013 WL 364198 (E.D.Mich. January 30, 2013); *People v. Davis*, 379 Ill.Dec. 381, 6 N.E.3d 709, 722 (2014); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013); *Diatchenko v. District Attorney*, 466 Mass. 655, 666, 1 N.E.3d 270 (2013); *Jones v. State*, 122 So.3d 698, 703 (Miss.2013); *State v. Mantich*, 287 Neb. 320, 342, 842 N.W.2d 716, cert. denied, —— U.S. ——, 135 S.Ct. 67, 190 L.Ed.2d 229 (2014); *Petition of State of New Hampshire*, 166 N.H. 659, 670–71, 103 A.3d 227 (2014), petition for cert. filed sub nom. *New Hampshire v. Soto*, 83 U.S.L.W. 3558 (U.S. November 26, 2014) (No. 14–639); *Aiken v. Byars*, 410 S.C. 534, 540, 765 S.E.2d 572 (2014), petition for cert. filed, 83 U.S.L.W. 3703 (U.S. February 9, 2015) (No. 14–1021); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim.App.2014); *State v. Mares*, 335 P.3d 487, 508 (Wyo.2014). The Florida Supreme Court also recently held that *Miller* applied retroactively on substantive grounds under its own more liberal retroactivity test, which provides that a change in the law does not apply retroactively in Florida ''unless the change: (a) emanates from [the Florida Supreme Court] or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.'' (Internal quotation marks omitted.) *Falcon v. State*, 162 So.3d 954 (Fla.2015). After concluding that the first two prongs of the test had been met, the court determined that the rule in *Miller* constituted a development of fundamental significance because it ''announce[d] a new *substantive* bar to mandatory life sentences without the possibility of parole for all juveniles and proclaim[ed] that the [e]ighth [a]mendment forbids such mandatory sentencing schemes.'' (Emphasis added.) Id. The Florida Supreme Court thus concluded that the rule in *Miller* was retroactive under Florida's retroactivity standard for the same reason a new rule may be deemed retroactive under the first *Teague* exception.

9. Although Michigan applies the test established in *Teague*, it also applies a state retroactivity analysis derived from the three step test set forth in *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); see *People v. Carp*, supra, 496 Mich. at 497, 852 N.W.2d 801; which has since been replaced in most other jurisdictions by *Teague* because it has led to inconsistent results. See *Thiersaint v. Commissioner of Correction*, supra, 316 Conn. at 123 n. 19, 111 A.3d 829. Applying the state retroactivity analysis in Michigan, which requires consideration of (1) the purpose of the new rule, (2) the extent of reliance on the old rule, and (3) the effect of the retroactive application of the new rule on the administration of justice; *People v. Carp*, supra, at 497, 828 N.W.2d 685; the Michigan Supreme Court explained that ''*Teague* provides a floor for when a new rule of criminal procedure must be applied retroactively, with a state nonetheless free to adopt its own broader test for requiring the retroactive application of a new federal or state constitutional rule.'' Id., at 496, 828 N.W.2d 685. The court then described Michigan's ''predisposition against the retroactive application of new rules of criminal procedure''

that (1) the rule does not involve " 'sweeping' changes" like those in *Gideon v. Wainwright*, 372 U.S. 335, 343–44, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (holding that indigent defendants charged with felonies are constitutionally entitled to appointed counsel), the case against which all other watershed procedural rule arguments are generally compared; *Commonwealth v. Cunningham*, supra, 622 Pa. at 559, 81 A.3d 1; see, e.g., *Craig v. Cain*, supra, United States Circuit Court of Appeals, Docket No. 12–30035; *Williams v. State*, supra, —— So.3d ——; *State v. Tate*, supra, 130 So.3d at 839–40; accord *People v. Carp*, supra, 496 Mich. at 475 n. 10, 852 N.W.2d 801; *Chambers v. State*, supra, 831 N.W.2d at 330; (2) the rule deals only with sentencing and thus does not create an "impermissibly large risk of an inaccurate conviction" or "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding"; (internal quotation marks omitted) *State v. Tate*, supra, at 839; accord *People v. Carp*, supra, at 475 n. 10, 828 N.W.2d 685; *Chambers v. State*, supra, at 330; and (3) "the *Miller* [c]ourt's review of its precedents demonstrates that its holding was not a watershed development . . . [because] [t]he [c]ourt's cases have long established that sentencing juries must be able to give meaningful consideration and effect to all mitigating [93] evidence . . . ." (Internal quotation marks omitted.) *Chambers v. State*, supra, at 330; see also *Craig v. Cain*, supra.

The majority nonetheless concludes in a spare and thinly reasoned analysis that *Miller* is a watershed rule that applies retroactively under Connecticut law because it is "central to an accurate determination that the sentence imposed is a proportionate one" and because "our understanding of the bedrock procedural element of individualized sentencing was altered when the [United States Supreme] [C]ourt . . . require[d] consideration of new factors for a class of offenders . . . ." [10] The majority further concludes that the petitioner's sentence in this case "falls within the ambit" of the rule in *Miller* because it was imposed "without consideration of [*Miller*'s] mitigating factors . . . ." Text accompanying footnote 13 of the majority opinion. The majority's legal analysis, however, is unconvincing, and its fac-

and stated that "only the extraordinary new rule of criminal procedure will be applied retroactively under Michigan's test when retroactivity is not already mandated under *Teague* . . . ." Id., at 497, 828 N.W.2d 685. Relying on the foregoing three factors, the court ultimately concluded that the rule announced in *Miller* did not satisfy Michigan's retroactivity test. Id., at 511–12, 828 N.W.2d 685.

10. To emphasize why the rule announced in *Miller* should be given retroactive effect as a watershed rule of criminal procedure, the majority concludes its analysis with a passage from *Hill v. Snyder*, United States District Court, Docket No. 10–14568, 2013 WL 364198 (E.D.Mich. January 30, 2013): "[I]f ever there was a legal rule that should—as a matter of law and morality—be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice." (Internal quotation marks omitted.) Id. The court's pronouncement in *Hill*, however, has no relevance in the present case because, apparently, unbeknownst to the majority, the court characterized the rule in *Miller* as a *substantive* rule in the context of a direct appeal in a civil action, and not as a watershed procedural rule in the context of collateral review in a criminal action. The court in *Hill* stated in a footnote, however, that it also "would find *Miller* retroactive on collateral review, because it is a new *substantive* rule, which 'generally applies retroactively.' " (Emphasis added.) Id. The majority thus leads the reader to believe, incorrectly, that the court in *Hill* agrees that *Miller* applies retroactively in collateral review cases because it is a watershed rule of criminal procedure.

tual conclusion that the trial court in the present case did not consider *Miller*'s mitigating factors when it sentenced the petitioner is unsupported by the [94]record. Accordingly, I would join every other jurisdiction that has considered the issue and conclude that the rule announced in *Miller* is not a watershed rule that applies retroactively under *Teague*.

With respect to the element of accuracy, the court in *Sawyer* observed that, "because the second [*Teague*] exception is directed only at new rules *essential* to the accuracy and fairness of the criminal process, it is unlikely that many such components of basic due process have yet to emerge." (Emphasis added; internal quotation marks omitted.) *Sawyer v. Smith*, supra, 497 U.S. at 243, 110 S.Ct. 2822. "All of [the] [e]ighth [a]mendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense. Indeed, [the petitioner in *Sawyer*] has not suggested any [e]ighth [a]mendment rule that would not be sufficiently fundamental to qualify for the proposed definition of the exception, and at oral argument ... counsel was unable to provide a single example." (Internal quotation marks omitted.) Id. The court in *Sawyer* thus concluded that the new procedural rule at issue in that case was not a watershed rule of criminal procedure but "an additional measure of protection against error.... The ... rule was designed as an enhancement of the accuracy of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings. But given that it was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness' ... of the type that may come within *Teague*'s second exception." (Citations omitted.) Id., at 244, 110 S.Ct. 2822.

In Connecticut as well, the rule in *Miller* is not a rule "without which the likelihood of an accurate [sentence for a juvenile offender] is seriously diminished," as required under *Teague*'s second exception. *Teague v.* [95]*Lane*, supra, 489 U.S. at 313, 109 S.Ct. 1060. The rule merely *enhances* the accuracy of the sentence because substantial due process protections against fundamental unfairness already exist in Connecticut for juvenile and other offenders. See, e.g., General Statutes § 54–91b (defendant or defense counsel may request record of prior convictions and presentence investigation report before sentencing date); Practice Book § 43–5 (defense counsel shall be notified of, and permitted to attend, interview of defendant for preparation of presentence investigation report to assist defendant in answering inquiries and to protect defendant's rights); Practice Book § 43–10(1) and (3) (during sentencing hearing, court shall afford defendant opportunity to speak on his own behalf, present mitigating evidence, and contest evidence on which court relied for sentencing); Practice Book § 43–14 (allowing defense counsel to raise with sentencing court inaccuracies in presentence investigation report). These protections have long allowed defendants to freely raise the issue of their juvenile status before and during the sentencing hearing. Moreover, courts always have been acutely aware of a juvenile offender's status, given the daily presence of most defendants at trial and the sentencing hearing.

I also disagree with the majority that the rule in *Miller* "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a [juvenile sentencing] proceeding" under Connecticut law. (Internal quotation marks omitted.)

Rather, as previously suggested, the rule in *Miller* represents an incremental step in the continuing evolution of rules and procedures created to afford juvenile offenders in Connecticut adequate due process protections and to ensure that the sentencing process will not be fundamentally unfair.

One of the most important tools used by sentencing courts to provide these protections is the presentence investigation report (PSI). General Statutes § 54–91a (a) [96]provides in relevant part: "No defendant convicted of a crime, other than a capital felony ... or murder with special circumstances ... the punishment for which may include imprisonment for more than one year, may be sentenced, or the defendant's case otherwise disposed of, until a written report of investigation by a probation officer has been presented to and considered by the court...." Subsection (c) further provides in relevant part: "Whenever an investigation is required, the probation officer shall promptly inquire into the circumstances of the offense, the attitude of the complainant or victim, or of the immediate family where possible in cases of homicide, and *the criminal record, social history and present condition of the defendant.* Such investigation shall include an inquiry into any damages suffered by the victim, including medical expenses, loss of earnings and property loss. All local and state police agencies shall furnish to the probation officer such criminal records as the probation officer may request. *When in the opinion of the court or the investigating authority it is desirable, such investigation shall include a physical and mental examination of the defendant* ...." (Emphasis added.) General Statutes § 54–91a (c); see also General Statutes § 54–91b.

The rules of practice implement the statutory mandate of a PSI for defendants convicted of a crime for which the punishment may include imprisonment for more than one year. See Practice Book §§ 43–3 and 43–4. The rules additionally provide that defense counsel shall be permitted to participate in the preparation of the PSI; Practice Book § 43–5; and that copies thereof "shall be provided ... to the defendant or his or her counsel in sufficient time for them to prepare adequately for the sentencing hearing...." Practice Book § 43–7. At the sentencing hearing, the court "shall afford the parties an opportunity to be heard and, in [97]its discretion, to present evidence on any matter relevant to the disposition, and to explain or controvert the presentence investigation report.... When the judicial authority finds that any significant information contained in the presentence report ... is inaccurate, it shall order the office of adult probation to amend all copies of any such report in its possession and in the clerk's file, and to provide both parties with an amendment containing the corrected information." Practice Book § 43–10(1). The court also "shall allow the defendant a reasonable opportunity to make a personal statement in his or her own behalf and to present any information in mitigation of the sentence." Practice Book § 43–10(3). Defense counsel is expected to be familiar with the contents of the PSI and any accompanying reports; Practice Book § 43–13; and "shall bring to the attention of the judicial authority any inaccuracy ... of which he or she is aware or which the defendant claims to exist." Practice Book § 43–14.

The policies and procedures that the Court Support Services Division developed prior to the decision in *Miller* to guide the preparation of PSIs further required a "face sheet" containing basic demographic data describing the offender and the offense, information regarding the offender's version of the facts relating to the offense,

the victim's attitude, the offender's personal history, the offender's criminal record, if any, and "[o]ther [i]nformation" deemed relevant.[11] Court Support Services Division, Policy and Procedures for Presentence Investigation (December 7, 2007) Policy No. 4.31, pp. 5, 10. With respect to the offender's personal history, the guidelines required "detailed information" [98]concerning the offender's family background, relationships, children, employment, education or vocational training, financial status, housing, physical and mental health, substance abuse, and other relevant matters. Id., at p. 10. The guidelines also stipulated that the PSI must "emphasize the five years prior to the report's completion"; id.; which, in the case of juvenile offenders, meant their preadolescent and early adolescent years. The guidelines added that "[i]ssues that predate the five-year time frame will be presented if they represent significant experiences in the offender's life or are determined essential to establishing a pattern of behavior." Id. Accordingly, PSIs prepared prior to *Miller* provided sentencing courts in Connecticut with exactly the type of information that addressed *Miller*'s concerns regarding juvenile offenders.

We know this is true because the court in *Miller* clearly indicated, by example, the information it wanted judicial authorities to consider before sentencing juvenile offenders to life in prison without the possibility of parole. Although the court made the general observation that "children are constitutionally different from adults for purposes of sentencing" because of their (1) "lack of maturity and an undeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking," (2) vulnerability "to negative influences and outside pressures, including from their family and peers," and (3) "limited contro[l] over their own environment and lack [of] the ability to extricate themselves from horrific, crime-producing settings"; (internal quotation marks omitted) *Miller v. Alabama*, supra, 132 S.Ct. at 2464; it also stated that sentencing authorities should seek evidence of these characteristics by considering the offender's role in the offense, family history, educational and behavioral background, and, when appropriate, past violations of the law. See id., at 2467–68.

[99]The court gave three specific examples of such evidence. The court first observed that, in *Eddings v. Oklahoma*, 455 U.S. 104, 105–106, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), it had invalidated the death sentence of a sixteen year old defendant who had shot a police officer at close range and killed him "because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance. [The court] found that evidence particularly relevant—more so than it would have been in the case of an adult offender. . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability." (Citation omitted; internal quotation marks omitted.) *Miller v. Alabama*, supra, 132 S.Ct. at 2467.

The court next discussed the relevant characteristics of the two fourteen year old offenders whose sentences were at issue in

11. Following the decision in *Miller*, the Court Support Services Division updated its guidelines to require more specific information regarding juvenile offenders. See generally Court Support Services Division, Policy and Procedures for Presentence Investigation and Report (August 15, 2013) Policy No. 4.31, pp. 10–20.

Miller. With respect to the first offender, the court examined the circumstances of the crime and noted that he did not fire the bullet that killed the victim, the state did not argue that he had intended to kill the victim, and his conviction was based on an aiding and abetting theory. Id., at 2468. The court further noted that the offender first learned on the way to the scene of the crime that his friend was carrying a gun and that his age could have affected his calculation of the risk that his friend's behavior posed, as well as his unwillingness to walk away at that point, both of which related to his culpability for the offense. See id. The court added that the offender's family background and immersion in violence should have been considered, as well as the fact that his mother and grandmother previously had shot other persons. Id.

[100] With respect to the second juvenile offender, the court observed that, although he had committed a vicious murder, he did so while under the influence of drugs and alcohol he had consumed with the adult victim. Id., at 2469. In addition, "if ever a pathological background might have contributed to a [fourteen year old's] commission of a crime, it [was] here." Id. The court stated that the offender's "stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten.... Nonetheless, [his] past criminal history was limited—two instances of truancy and one of second-degree criminal mischief.... That [he] deserved severe punishment for killing [the victim] is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty." (Citations omitted; internal quotation marks omitted.) Id.

I emphasize that a comparison of the information discussed in *Miller* with the information required in Connecticut PSIs before *Miller* demonstrates that PSIs were required to address almost all of the factors the rule in *Miller* requires sentencing authorities to consider *because the past history and personal circumstances of a juvenile offender are necessarily descriptive of the offender's youth.* Nowhere is this better illustrated than in the present case. The petitioner's PSI, which the trial court reviewed and the prosecutor and defense counsel read and accepted without objection or exception prior to sentencing, contained nearly all of the information required under *Miller.* The nine page report began by describing the petitioner's pivotal role in committing the offense, which included his recruitment of a cousin and a friend to aid him and another [101] cousin in the robbery of a Subway restaurant in the town of North Haven. The report also stated it was the petitioner, and not his cousins or friend, who vaulted over the counter, confronted the victim, shot the victim in the face when he refused to open a storage room door, and shot the victim two more times as he tried to escape.

In a four page description of the petitioner's personal history, the report further explained that the petitioner, the youngest of three children, was raised in a stable home and that his parents, who had been married for more than twenty-five years at the time of the petitioner's crime, "appear[ed] to be hardworking, caring people who made every effort to provide a healthy environment for their children." The father related that, because he had met his wife in an orphanage in New York, "it was extremely important to him that they raise their own children and 'raise

them right.' " The petitioner agreed that his father wanted the children " 'to do better' " and stated that his parents were strict, especially his father. The petitioner denied that his father was abusive, although he indicated that his father had occasionally " 'whipped' " him.

Both parents were employed, the father as a bus driver and truck driver, and the mother as a certified nurse's aide and rehabilitation technician. The petitioner's older brother was a respiratory therapist and the married father of two children, and his sister was a college student, the mother of two children, and employed as a physical therapy assistant. The petitioner had a three year old child and continued to maintain a relationship with the child's mother.

The petitioner's father stated that the petitioner had "posed steady discipline problems for as long as he [could] remember.... [I]n spite of their efforts to control his behavior ... by the time the [petitioner] [102]came to Connecticut [from Florida, where he had lived for the previous ten years], he was simply 'out of control.' He related that the [petitioner] fled Florida weeks before [committing the murder], after reportedly holding up a drug dealer which netted him and his cousin ... [more than $8000]."

The petitioner's mother added that the petitioner "had difficulty in school and was always running away when he didn't like the rules at home, but that he [was] a 'good hearted kid,' especially kind to children and the elderly. The [petitioner's] mother ... [had] difficulty grasping the notion that he took someone's life...."

The petitioner's father described "an ongoing struggle to enlist the aid of Florida's [h]uman [r]esource and [c]riminal [j]ustice agencies in controlling the [petitioner's] behavior. He related that the [petitioner] refused to stay in school beginning in adolescence and at one point, he or [the petitioner's mother was] required to attend with him. They did so until the impracticality of the situation threatened their jobs. The [petitioner's] father stated that [the petitioner] refused to abide by a curfew and when they simply could no longer handle him, they appealed to the [Fort] Myers Police Department, hoping to incarcerate him for his own safety," but the parents were told that the police could do nothing.

The petitioner's father also reported that, whenever the petitioner "was apprehended because of various criminal allegations, because of his age ... '[the authorities] always let him go.' [The father] recalled one police officer telling him ' "[h]e is a rude, filthy-mouthed, nasty kid, who knows the system. He knows you have to come get him and we have to let him go." ' Indications are, however, that the [petitioner's] best behavior occurred in his parents' home. His father indicated that he never stole from there and was not violent [103]or disrespectful. In response to their efforts at discipline, he ran away and did so frequently."

With respect to the petitioner's educational background, the report noted that, at the age of ten, while in the third grade, the petitioner "was referred for psychological testing after evidencing an array of behavioral problems in the classroom. These included [underachievement] in academics, poor group participation, defiance, fighting, severely poor concentration and a gross lack of effort." The petitioner, however, responded well to one-on-one intervention to address his study skills, behavior and various learning problems.

In middle school, the petitioner's academic performance declined even further. By seventh grade, he was failing in his

classes, engaging in fights and vandalism, and attending school even less frequently. The school that he was attending decided, after retaining him for several years, that further retention was counterproductive, in part because of his physical size. The petitioner's return to school was conditioned on his completion of an adolescent treatment program for drugs and alcohol, but, after two months of sporadic cooperation and belligerency, he "ran away from the program." The petitioner subsequently attended, for a few months each, the Southwest Florida Marine Institute, where he did very well, Fort Myers High School, and a vocational technical high school, where he studied hotel management and achieved passing and sometimes higher grades.

The petitioner held several part-time jobs in Florida during his middle teenage years but admitted that he used alcohol and marijuana beginning at the age of fourteen and subsequently used cocaine. His case manager at the drug treatment program he briefly attended stated that, in her view, the petitioner's " 'biggest problem was giving into his friend[s] and giving into peer [104]pressure.' " She also stated that the petitioner was "respectful, bright and motivated 'when he stayed off drugs' " and was " 'a loving father and devoted son.' "

After noting that the petitioner's "parents were unequivocally supportive and cooperative with efforts from 'helping agencies,' " the report summarized the authoring probation officer's findings as follows: "The [petitioner's] difficulties in relating to others and functioning appropriately are recorded as early as the third grade. [F]earful for his future, the [petitioner's] parents maneuvered through amaze of social service and criminal justice agencies in an attempt to control him. Before he left Florida, just weeks before the [murder], his father admitted that in spite of their efforts, he was simply 'out of control.' His lifetime of rebellion and defiance then culminated in this hideous act, which took the life of a young man only doing his job as a counter clerk. [The petitioner] provided warning signs that he was capable of violence and had no regard for anyone, but himself. Unfortunately, the system was unable to put a stop to his behavior before this victim was viciously murdered." The report concludes with a copy of the petitioner's juvenile record, which shows prior arrests in Florida for petit theft, grand larceny, and burglary when the petitioner was fourteen years old, and assault and battery when the petitioner was sixteen years old.

During the sentencing hearing, the prosecutor made the petitioner's personal history a key element of his argument that the petitioner's sentence should be harsh. The prosecutor noted that the petitioner had been "born into a caring, stable family. His parents, his siblings have gone onto peaceful and successful lives. His parents tried to instill in him the best qualities that they apparently accomplished with their other children, and, yet, he apparently ignored them. Very often, the court has before it people with broken families, with violence [105]in their background, family violence in their background, with lack of educational opportunity, with all kinds of marks that . . . their role in society has not been the best, that they're not offered the same benefits as some members of society. None of that is true of this person. And that makes it all the more appropriate that he be isolated from society for the longest amount of time that is appropriate given the circumstances. This was an execution. It appears to have been pre-planned. One of the letters says that [the petitioner] brought along an audience for his preplanned execution, and I think that may be

accurate. There is no doubt that this individual . . . has made, essentially, no contribution to society, that he is violent, that he is incorrigible, and that he should be incarcerated. . . ."

In light of this argument, defense counsel made only the following limited response: "[U]nfortunately, there's very little I can say under the circumstances except to empathize with the victim's family and to say that I, personally, deeply regret their loss. Other than that, I'd simply ask the court to impose the court's indicated sentence. . . ." The petitioner also made a few brief remarks, including an apology to the victim's family and expressions of gratitude to his own family for their support. The trial court ultimately imposed a total effective sentence of fifty years imprisonment, ten years less than a life sentence under Connecticut law; see General Statutes § 53a–35b (defining "[a] sentence of life imprisonment" generally as "a definite sentence of sixty years"); and clearly less than a life sentence under *Miller*, which would have been imprisonment for the remainder of the petitioner's natural life. See *Miller v. Alabama*, supra, 132 S.Ct. at 2460.

In view of the requirement of a PSI and the preceding example of how a PSI is prepared and used by attorneys and the court during a sentencing hearing, it is simply not possible to conclude that the rule established in *Miller* "alter[s] our understanding of the *bedrock procedural* [106] *elements* essential to the fairness of a proceeding" under Connecticut law. (Emphasis in original; internal quotation marks omitted.) *Sawyer v. Smith*, supra, 497 U.S. at 242, 110 S.Ct. 2822. Indeed, to the extent any further evidence is required to support this conclusion, it may be found in the procedural guidelines for PSIs that became effective on August 15, 2013, following the decision in *Miller*. See generally Court Support Services Division, Policy and Procedures for Presentence Investigation Report (August 15, 2013) Policy No. 4.31, pp. 1–22.[12]

Although the newly adopted guidelines are more detailed than the guidelines they replaced, most of the changes intended to address the concerns in *Miller* are refinements, rather than major revisions or additions, to the previous guidelines. For example, the post-*Miller* guidelines specify that the following information shall be provided for an offender under the age of eighteen: the age of the offender at the time of the offense; id., at pp. 10–11; the level of the offender's participation in the offense; id.; the degree of familial influence or pressure on the offender; id., at p. 14; the offender's intellectual capacity; id., at p. 15; the community environment in which the offender is residing; id., at p. 16; the ability of the offender to leave it; id.; and, finally, the offender's level of maturity, degree of impetuosity and ability to appreciate the risks and consequences of his or her own behavior.[13] Id., at p. 17.

12. See footnote 11 of this opinion.

13. These factors correspond to information required by the prior procedural guidelines that would have been contained in the PSI face sheet and the offender's personal history, including details regarding the offense, the offender's family background, relationships, children, education or vocational training, employment, financial status, housing, physical and mental health, and substance abuse, with emphasis on the five years preceding completion of the PSI, and any personal issues before that time that represent significant experiences in the offender's life or are deemed to be essential to establishing a pattern of behavior. Court Support Services Division, Policy and Procedures for Presentence Investigation (December 7, 2007) Policy No. 4.31, pp. 5, 10. For this reason, most of the factors in the post-*Miller* guidelines were discussed in the petitioner's PSI.

The only new information [107]required by the post-*Miller* guidelines relates to the offender's ability to navigate the criminal justice system and to participate meaningfully in defending against the charges, the offender's capacity for rehabilitation within and outside the prison environment, and scientific and psychological evidence showing differences in the brain development of a person under the age of eighteen and an adult. Id., at pp. 17–18. This court recognized in *Riley,* however, that trial courts in Connecticut should consider evidence that *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), *Graham v. Florida,* supra, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825, and *Miller v. Alabama,* supra, —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407, credited as authoritative with respect to the last two factors *until the Court Support Services Division provides further guidance. State v. Riley,* supra, 315 Conn. at 659, 110 A.3d 1205.

Nevertheless, the majority concludes, in the absence of any evidence in the record, that PSIs prepared before the decision in *Miller,* including in the present case, were deficient because they did not examine "scientific and psychological evidence demonstrating the lesser culpability of juveniles and their greater capacity for reform." Footnote 13 of the majority opinion. The majority, however, fails to recognize that the petitioner's PSI referred to, and the court in the present case *considered,* evidence that *Miller* credited as authoritative with respect to those factors, despite the lack of guidance from the Court Support Services Division.

In *Roper, Graham* and *Miller,* the court observed that scientific evidence and sociological studies had identified three general differences between juvenile offenders and adults that sentencing courts should consider in determining a juvenile offender's culpability and potential for reform. *Miller v. Alabama,* supra, 132 S.Ct. at 2464–65; *Graham v. Florida,* supra, 560 U.S. at 68–69, 130 S.Ct. 2011; *Roper v. Simmons,* supra, 543 U.S. at 569–70, 125 S.Ct. 1183. These are a juvenile's (1) propensity to act impetuously and [108]irresponsibly, (2) susceptibility to negative influences and outside pressures, including peer pressure, and (3) unformed character and transitory personality traits. *Roper v. Simmons,* supra, at 569–70, 125 S.Ct. 1183. In *Miller,* the court elaborated that sentencing courts may consider these "hallmark features," identified by scientific and sociological studies, by taking into account the offender's family and home environment, the circumstances of the offense, including the extent of the offender's participation and the effect of familial or peer pressure on his or her conduct, and the possibility of rehabilitation when suggested by the circumstances. *Miller v. Alabama,* supra, at 2468. It then considered these factors in the context of the two defendants in that case and concluded, with respect to the first defendant, that, "[a]t the least, a sentencer should look at such facts before depriving a [juvenile] of any prospect of release from prison"; id., at 2469; and, with respect to the second defendant, that, "once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty." Id.

In the present case, all of the factors described in *Miller* were addressed in the petitioner's PSI, which provided a detailed description of the petitioner's central role in the crime, his "lifetime of rebellion and defiance," and multiple attempts by his family, the educational system and law enforcement to address and control his behavior. The PSI thus took into account the petitioner's culpability and potential for reform, and indicated that he was highly culpable, given the nature of his participation in the homicide, and that his

potential for reform was low, given his consistent, out of control behavior beginning as early as the third grade and continuing thereafter. We must *presume* that sentencing courts consider the information in the PSI because of the statutory mandate in § 54–91a (a) that "[n]o defendant convicted of a crime, other than a capital[109] felony ... or murder with special circumstances ... the punishment for which may include imprisonment for more than one year, may be sentenced, or the defendant's case otherwise disposed of, *until a written report of investigation by a probation officer has been presented to and considered by the court* ...." (Emphasis added.) Indeed, if the majority deems this type of investigation and analysis insufficient under *Miller*, then the court's statement in *Riley* that sentencing authorities in Connecticut should consider evidence that *Roper*, *Graham* and *Miller* credited as authoritative with respect to the last two factors until the Court Support Services Division provides further guidance would be rendered meaningless. Additionally, any sentence of fifty years or more without the possibility of parole imposed on a juvenile offender will now be subject to review, regardless of the contents of the PSI and the sentencing court's on the record consideration of the offender's juvenile status.[14]

For the foregoing reasons, I respectfully dissent.

ESPINOSA, J., dissenting.

[110]I disagree with the majority that the decision of the United States Supreme Court in *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), applies under the facts of the present case. As I explained in my dissenting opinion in *State v. Riley*, 315 Conn. 637, 664, 110 A.3d 1205 (2015), *Miller* applies only to mandatory sentencing schemes. Accordingly, because Connecticut's sentencing scheme allows a judge to exercise discretion in determining whether to sentence a

14. The majority's assertion that PSIs prepared for juvenile offenders before *Miller* were deficient because the forms used did not include a field for the offender's age at the time of the offense is a classic example of elevating form over substance. As the majority itself concedes, the offender's age could be calculated quite easily from other information in the PSI, including the date of the offense and the offender's date of birth. I also categorically reject the majority's assertion that PSIs prepared before *Miller* were deficient because they did not require the probation officer to examine the *Miller* factors from the standpoint of the offender's juvenile status. All of the information in the PSIs of juvenile offenders before *Miller* was descriptive of the offender's juvenile character and history, and, therefore, such information could not be understood through any other lens but that of the offender's juvenile status.

Insofar as the majority suggests that the PSI in the petitioner's case was deficient because it was submitted to the court two months after he entered his conditional plea of nolo contendere and tentatively agreed to a fifty year sentence, and because the court did not refer to the petitioner's age in its on the record comments at the sentencing hearing, the majority overlooks the well established principle that, "once the trial court order[s] the presentence investigation, the trial court's acceptance of the ... plea agreement necessarily [becomes] contingent upon the results of the [PSI]. Otherwise, the [PSI] would be little more than a nullity, and our law makes clear that [PSIs] are to play a significant role in [a court's determination of] a fair sentence. Simply put, any plea agreement must be contingent upon its acceptance by the court after [the court's] review of the [PSI]." (Internal quotation marks omitted.) *State v. Thomas*, 296 Conn. 375, 389, 995 A.2d 65 (2010). Accordingly, the majority's suggestion that the trial court imposed the petitioner's sentence without considering the PSI and the petitioner's juvenile status reflects a misunderstanding of the statutory directives; see General Statutes § 54–91a (a); and the practices that govern the decisions of sentencing courts.

juvenile offender to life without the possibility of parole, *Miller* does not apply at all to our sentencing scheme. Even if I had agreed with the majority in *Riley* that *Miller* applied to Connecticut's discretionary sentencing scheme; id., at 653, 110 A.3d 1205; I would not agree, however, that *Miller* applies in the present case for the simple reason that it applies only to sentences of life without the possibility of parole. Because the sentence of the petitioner, Jason Casiano, is one for a term of years—fifty years of incarceration—*Miller* does not apply. Accordingly, I would affirm the judgment of the habeas court granting the motion for summary judgment filed by the respondent, the Commissioner of Correction, and, therefore, I respectfully dissent.

As a threshold matter, because I conclude that *Miller* applies only to sentences of life without the possibility of parole, I need not address the question of whether *Miller* applies retroactively. I fully agree, however, with Justice Zarella's well reasoned analysis in his dissent in the present case explaining that *Miller* is not retroactive [111] because it did not announce a watershed rule of criminal procedure pursuant to *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Rather, as Justice Zarella explains, the implementation of *Miller* "represents an incremental step" in Connecticut's sentencing laws and procedures affording defendants the protection of due process. Justice Zarella's discussion of the statutory provisions governing the creation and utilization of the presentence investigation report is particularly enlightening, as it demonstrates that when the petitioner was sentenced in 1997, years before *Miller* was decided, our sentencing scheme already required judicial consideration of many of the factors that the United States Supreme Court focused on in *Miller*. Indeed, as Justice Zarella explains thoroughly, the sentencing judge in the present case considered the petitioner's presentence investigation report, which was very detailed, and described at length the petitioner's upbringing, his educational background, behavioral problems, previous offenses, his supportive and stable family environment, his leading role in the vicious murder of an innocent victim, and many of the other factors discussed in *Miller*. I conclude, based on Justice Zarella's detailed discussion of the petitioner's presentence investigation report and sentencing procedure, that the petitioner already has received every protection dictated by *Miller*. As I explain in this dissent, however, those protections, although required by Connecticut law and provided to the petitioner in the present case, are not mandated by the eighth amendment to the United States constitution.

The majority's application of *Miller* to the present case cannot be reconciled with the trilogy of cases governing the constitutional limits placed on the punishment of juvenile offenders, *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 75, 130 S.Ct. 2011, 176 L.Ed.2d [112] 825 (2010), and *Miller v. Alabama*, supra, 132 S.Ct. at 2458. The United States Supreme Court has limited the scope of those three decisions to the two most extreme punishments available under our criminal justice system—execution, and life without the possibility of parole. That narrow scope is evident in: (1) the structure of the trilogy, which reveals an unmistakable and carefully considered progression; (2) the substantive analysis in *Graham*, which limits the sentencing practice at issue in both *Graham* and *Miller* to life without the possibility of parole; and (3) the language that both *Graham* and *Miller* use in discussing the sentence of life without the possibility of parole. Moreover, as I explain in this

dissent, extending *Miller* to sentences for a lengthy term of years yields different results in different jurisdictions, calling into question the ability of courts to apply the rule in a manner comporting with principles of fundamental fairness. Finally, the majority's extension of *Miller* cannot be reconciled with Connecticut's statutes, which define the sentence of life without the possibility of release to preclude even the possibility that a defendant will be released from prison within his natural lifetime.

The structure of the trilogy of cases reveals the measured steps that the Supreme Court has taken in marking the limits that the eighth amendment places on the punishments that may be imposed on juvenile offenders. The court took its first and biggest step in *Roper*, categorically barring the imposition of the death penalty as to all juveniles. *Roper v. Simmons*, supra, 543 U.S. at 568, 125 S.Ct. 1183. After *Roper*, however, the steps have become increasingly smaller. This progression makes sense, because in *Graham* and *Miller* the court essentially has been defining the outer limits of the rule that it announced in *Roper*, that the principles justifying the imposition of the most extreme punishments apply differently to children. Id., at 570–71, 125 S.Ct. 1183.

[13] In *Roper*, *Graham*, and *Miller*, the court calibrated the breadth of its rules quite carefully by controlling the specific variables affected by each incremental change. That is, the rule in each of the three decisions was defined by three variables—the type of punishment affected by the rule, the class of juveniles to which the rule would apply, and the type of bar imposed by the rule, categorical or one merely imposing procedural limits. In each decision, the court meticulously delineated the extent to which each of the variables would be affected by the articulated rule. First, the court in *Roper* set forth a bar on the execution of any juvenile offender. Id., at 568, 125 S.Ct. 1183. Although the court's rule was broad in the sense that it imposed a categorical bar, and applied it to all juveniles, it was also extremely narrow in that its scope was limited to one type of punishment—execution. Id. The step that the court took in *Graham* was smaller. The court in *Graham* extended the application of the bar only to include one additional type of sentence, the second most extreme punishment available in our criminal justice system, a sentence of life without the possibility of parole. *Graham v. Florida*, supra, 560 U.S. at 74, 130 S.Ct. 2011. The court in *Graham* also limited the subset of juveniles to which the extended categorical bar applied, confining its rule to juveniles convicted of crimes other than homicide. Id. Finally, in *Miller* the court prohibited the mandatory imposition of life imprisonment without the possibility of parole on juveniles convicted of homicide. *Miller v. Alabama*, supra, 132 S.Ct. at 2460. *Miller* is the only one of the three decisions that does not impose a categorical bar, and instead merely implements a procedural limit on the imposition of life without the possibility of parole. Id. The rule in *Miller* applies to the smallest subset of juveniles affected by the trilogy—juvenile homicide offenders. As I explain in this dissenting opinion, the rule affects only one type of punishment, the mandatory [14] imposition of a sentence of life without the possibility of parole. *Miller* represents the smallest step taken in the trilogy, and the court's desire to keep its footprint small is justified considering that *Miller* governs only the worst group of juvenile offenders, those who have committed homicides.

The very cautious, incremental approach that the court has taken in applying the principle that children are different for

sentencing purposes supports the conclusion that in both *Graham* and *Miller*, when the court limited its holding to sentences of life without the possibility of parole, it meant what it said. A sentence of life without the possibility of parole is one that ensures that a defendant will die in prison. Extending the scope of these two decisions to apply to sentences that are the "functional equivalent" of life without the possibility of parole ignores the structured and considered approach that the court has taken in the trilogy of cases.

The substantive analysis in *Graham* does not support applying either *Graham* or *Miller* to sentences for a lengthy term of years. I begin with what is undisputed: *Graham* and *Miller* govern the same punishment. The majority and I disagree, however, on precisely what that punishment includes. I conclude that the punishment governed by both cases is a sentence of life without the possibility of parole; the majority contends that both cases also govern sentences for a lengthy term of years. Because *Graham* and *Miller* govern the same punishment, the court's analysis in *Graham* is relevant to our understanding of whether *Miller* properly may be extended to include sentences for a lengthy term of years.

It is highly significant, therefore, that the court in *Graham* did not consider any nationwide statistics regarding the imposition of sentences for a lengthy term of years on juveniles. In *Graham*, the court explained [115] that because it was adopting a categorical rule, it would follow its traditional approach: "The [c]ourt first considers objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against *the sentencing practice at issue* .... Next, guided by the standards elaborated by controlling precedents and by the [c]ourt's own understanding and interpretation of the [e]ighth [a]mendment's text, history, meaning, and purpose ... the [c]ourt must determine in the exercise of its own independent judgment whether *the punishment in question* violates the [c]onstitution." (Citations omitted; emphasis added; internal quotation marks omitted.) *Graham v. Florida*, supra, 560 U.S. at 61, 130 S.Ct. 2011. In order to determine whether a particular practice violates the eighth amendment, thus requiring the imposition of a categorical bar, the court surveys the nationwide statistics *relating to the sentencing practice at issue.* The survey is part of the analysis—if the court has not performed the survey, it has not made any determination that the sentencing practice violates the eighth amendment.

Accordingly, in order to determine whether *Graham*, and therefore *Miller*, properly may be extended to sentences for a lengthy term of years, one need only examine the court's review of the "sentencing practice at issue" in *Graham.* Id. A quick review of *Graham* reveals that the court did not include sentences for a lengthy term of years in its review of the nationwide statistics. Id., at 62–67, 130 S.Ct. 2011. Because the court was very careful to state that its determination of whether the eighth amendment categorically bars a "sentencing practice" depends on this review, it is illogical to extend *Graham* beyond the sentencing practice for which the court performed the review. The majority provides no explanation for its conclusion that *Graham*, and therefore *Miller*, apply to sentences for a lengthy term of years, notwithstanding [116] the Supreme Court's failure to review any statistics regarding the imposition of such sentences on juveniles. The majority simply concludes that, as a matter of policy, *Graham* should be extended to include these sentences. That approach omits a key analytical foundation that the Supreme

Court has followed in decisions imposing categorical bars, including *Graham*.

The language of both *Graham* and *Miller* confirms that the court confined the scope of those decisions to sentences of life without the possibility of parole. In *Graham*, for instance, the court likened the sentence of life without the possibility of parole to the death penalty, observing both that "life without parole is the second most severe penalty permitted by law," and that "life without parole sentences share some characteristics with death sentences that are *shared by no other sentences*." (Emphasis added; internal quotation marks omitted.) *Graham v. Florida*, supra, 560 U.S. at 69, 130 S.Ct. 2011. Neither of these two statements makes sense if we read *Graham* and *Miller* to extend to sentences that are the "functional equivalent" of life without the possibility of parole. Clearly, the Supreme Court views the two sentences—execution and life without the possibility of parole—as distinct from all other available punishments within our criminal justice system. The court explained: "The [s]tate does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.... [T]his sentence 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 convict], *he will remain in prison for the rest of his days*." (Citation omitted; emphasis
117 added; internal quotation marks omitted.) Id., at 69–70, 130 S.Ct. 2011. These statements clarify that the court defined the sentence that it was addressing in *Graham*, and subsequently in *Miller*, very narrowly, to include only a sentence of life without the possibility of parole. A sentence for a lengthy term of years, such as the fifty year sentence that the petitioner in the present case received, albeit a harsh punishment, does not even remotely fit the description in *Graham* of a sentence of life without the possibility of parole. As one court explained, a sentence of life without the possibility of parole, unlike a sentence for a term of years, is by definition "mutually exclusive with eventual release." *Ellmaker v. State*, Docket No. 108,728, 2014 WL 3843076, *10 (Kan.App. August 1, 2014) (decision without published opinion, 329 P.3d 1253 [(Kan.App.2014)]).

The language used in *Miller* confirms that the court carefully limited the extent of its holding to sentences of life without the possibility of parole. In the introductory portion of the opinion, the court indicated that it viewed the phrase "life without the possibility of parole" as synonymous with a sentence that ensures that a defendant will die in prison. That is, the court specifically remarked that in each of the two cases that it had before it, the sentencing authority had no discretion to impose less than "life imprisonment without the possibility of parole," which, the court explained, meant that in both cases, "[s]tate law mandated that each juvenile die in prison...." *Miller v. Alabama*, supra, 132 S.Ct. at 2460. The court subsequently referred to the sentence as the "harshest possible penalty" that can be imposed on juveniles. Id., at 2469. The use of the superlative indicates that the court had in mind a single sentence—life without the possibility of parole—not a range of sentences that could be interpreted to constitute the "functional equivalent" of a sentence of life without the possibility of parole. The court in *Miller* reiterated a very telling
118 observation that it first expressed in

Graham, noting that a life sentence is actually a greater punishment for a juvenile than it is for an adult, because the juvenile likely will spend a longer time in prison. Id., at 2468; see also *Graham v. Florida,* supra, 560 U.S. at 70, 130 S.Ct. 2011. That comparison would not have the same meaning, and the likelihood of a juvenile serving more time than an adult would decrease, if *Miller,* and *Graham,* were extended to apply to sentences for a lengthy term of years.

Reading *Miller* broadly, to apply to sentences for a lengthy term of years, is not only contrary to the structure and language of the court's juvenile sentencing trilogy, as conceded by the majority, it also results in the unpredictable and inconsistent application of the protections of *Miller.* This is, in fact, precisely what has happened across the country, due to several factors, including a split as to whether *Graham* and *Miller* apply at all to such sentences, disagreement as to whether the decisions apply to aggregate sentences, and the different conclusions that courts have arrived at as to what precisely constitutes the functional equivalent of a life sentence. See, e.g., *Bunch v. Smith,* 685 F.3d 546, 551 (6th Cir.2012) (*Graham* does not apply to eighty-nine year aggregate sentence, notwithstanding that defendant's "sentence may end up being the functional equivalent of life without parole"), cert. denied sub nom. *Bunch v. Bobby,* —— U.S. ——, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013); *Orr v. United States,* Docket No. 3:98–CR–00322 (GCM), 2013 WL 6478198, *2–3, 2013 U.S. Dist. LEXIS 173101, *6 (W.D.N.C. December 10, 2013) (forty-six year sentence not functional equivalent of life without possibility of parole); *People v. Caballero,* 55 Cal.4th 262, 267–68, 282 P.3d 291, 145 Cal.Rptr.3d 286 (2012) (110 year sentence is functional equivalent of life without parole under *Graham*); *People v. Lucero,* —— P.3d ——, ——, Docket No. 11CA2030, 2013 WL 1459477, *1, 3 (Colo. App. April 11, 2013) (*Graham* does not apply to sentence of eighty-four$_{119}$ years with parole eligibility after forty years), cert. granted, Docket No. 13SC624, 2014 WL 7331018 (Colo. December 22, 2014); *Mediate v. State,* 108 So.3d 703, 706–707 (Fla.App.2013) (*Graham* does not apply to 130 year aggregate sentence); *Thomas v. State,* 78 So.3d 644, 646 (Fla.App.2011) (*Graham* does not apply to concurrent sentences of fifty years); *Brown v. State,* 10 N.E.3d 1, 8 (Ind.2014) (*Miller* applies to sentences that are functional equivalent of life, and requires court to revise aggregate sentence of 150 years to "a total aggregate sentence of eighty years imprisonment"); *State v. Null,* 836 N.W.2d 41, 71 (Iowa 2013) (recognizing that defendant's sentence of fifty-two and one-half years is "not technically a life-without-parole sentence" but holding that "such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections"); *Ellmaker v. State,* supra, 2014 WL 3843076, *10 (*Miller* does not apply to sentence of fifty years not imposed pursuant to mandatory sentencing scheme). This uneven application of *Miller* cannot be reconciled with eighth amendment principles.

It is highly problematic, indeed, for courts to rely on concepts such as life expectancy, as the majority has in the present case, in order to determine whether a sentence for a lengthy term of years constitutes the functional equivalent of a sentence of life without the possibility of parole. How does one determine what a juvenile's life expectancy is? Like other courts across the country, the majority relies on mortality tables, which are traditionally broken down by gender and race. See, e.g., *Orr v. United States,* supra, 2013 WL 6478198, *3, 2013 U.S. Dist. LEXIS 173101, *7; *People v. Rainer,* Docket No. 10CA2414, 2013 WL 1490107, *6 (Colo.

App. April 11, 2013), cert. granted, Docket No. 13SC408, 2014 WL 7330977 (Colo. December 22, 2014); *State v. Ragland*, 836 N.W.2d 107, 119 (Iowa 2013); see also *People v. Caballero*, supra, 55 Cal.4th at 267 n. 3, 145 Cal.Rptr.3d 286, 282 P.3d 291 (relying on juvenile's[120] natural life expectancy, which court observes "means the normal life expectancy of a healthy person of [the] defendant's age and gender living in the United States"). Relying on such classifications in order to determine whether a given sentence violates the eighth amendment suggests that a Caucasian girl should be treated differently than an African–American boy.

The majority also relies on statistics that demonstrate that a person who is incarcerated has a lower life expectancy than that enjoyed by the general population. I observe that the majority relies on statistics supplied by The Campaign for the Fair Sentencing of Youth, an advocacy group. See Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited May 26, 2015). Additionally, a consideration of demographic factors and their influence on life expectancy is problematic because there are many variables, rendering it difficult to predict the effect that a single variable will have on any particular juvenile. For instance, is it not relevant, in considering the effect that incarceration has on the relative life expectancy of a juvenile, to consider that juvenile's background? Although incarceration may lower the life expectancy for an advantaged juvenile, it very well may increase the life expectancy of a juvenile who comes from a disadvantaged economic class and background. See *Boneshirt v. United States*, Docket No. CIV 13–3008(RAL), 2014 WL 6605613, *11 (D.S.D. November 19, 2014) (rejecting petitioner's reliance on statistics demonstrating short life expectancies for Native American males on basis that many demographic variables resulting in lower life expectancy, such as "alcohol-related deaths and poor access to healthcare on and near reservations," would be mitigated[121] by petitioner's incarceration). I do not agree that our application of eighth amendment protection to juveniles should vary depending on race, gender and demographic factors. Such a rule violates principles of fundamental fairness.

Finally, I observe that the majority's rule is not reconcilable with General Statutes § 53a–35b, which defines the sentence of life without the possibility of release in a manner that makes it clear that our legislature understands that sentence to be fundamentally distinct even from a life sentence. Section 53a–35b provides: "A sentence of life imprisonment means a definite sentence of sixty years, unless the sentence is life imprisonment without the possibility of release, imposed pursuant to subparagraph (A) or (B) of subdivision (1) of section 53a–35a, in which case the sentence shall be imprisonment for the remainder of the defendant's natural life." As Justice Zarella observes in his dissent in the present case, it is well established that this court defers "to the broad authority that legislatures possess in determining the types and limits of punishment for crimes." *State v. Heinemann*, 282 Conn. 281, 311, 920 A.2d 278 (2007); see also *State v. Reynolds*, 264 Conn. 1, 79, 836 A.2d 224 (2003) (recognizing that it is "the prerogative of the legislature to set public policy through its statutory enactments"), cert. denied, 541 U.S. 908, 124 S.Ct. 1614, 158 L.Ed.2d 254 (2004). Accordingly, at the very least, even if I agreed with the majority that *Miller* should be extended to

sentences for a lengthy term of years, our legislature has drawn a clear line, designating sixty years as the length of time it deems to constitute a "life" sentence. The majority offers no explanation for its failure to defer to the legislature's determination that a sentence of life without the possibility of parole is a punishment of a different type and character from a sentence for a lengthy term of years.

For the foregoing reasons, I respectfully dissent.

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STATE of Connecticut

v.

Thomas STOVALL.

No. 19167.

Supreme Court of Connecticut.

Argued Oct. 28, 2014.

Decided April 28, 2015.

Background: Defendant was convicted in the Superior Court, Judicial District Fairfield, Rodriguez, J., of possession of narcotics with intent to sell within 1,500 feet of a public housing project. Defendant appealed. The Appellate Court, Robinson, J., 142 Conn.App. 562, 64 A.3d 819, affirmed in part, reversed in part, and remanded. Defendant petitioned for certification to appeal, which was granted.

Holding: The Supreme Court, Vertefeuille, J., held that insufficient evidence existed that defendant intended to sell narcotics at some location within 1,500 feet of a public housing project, even though there was evidence that defendant intended to store and package narcotics for sale in apartment in public housing project.

Affirmed in part, reversed in part, and remanded with direction.

Espinosa, J., dissented and filed opinion.

1. Criminal Law ⚿1144.13(2.1, 5), 1159.2(7)

In reviewing a sufficiency of the evidence claim, appellate courts apply a two-part test: (1) appellate courts construe the evidence in the light most favorable to sustaining the verdict, and (2) appellate courts determine whether, upon the facts so construed and the inferences reasonably drawn therefrom, the trier of fact reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt.

2. Criminal Law ⚿559

In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence.

3. Criminal Law ⚿559

In evaluating evidence, the trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical.

4. Criminal Law ⚿312, 568

Intent is generally proven by circumstantial evidence and thus is often inferred from conduct and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom.

5. Constitutional Law ⚿4694
Criminal Law ⚿561(1)

Due process requires that the state prove each element of an offense beyond a reasonable doubt; thus, insufficiency of the evidence to support a jury's ultimate findings on each element of an offense re-