Certification of Word Count 1879

COURT OF APPEALS, STATE OF COLORADO
101 W. Colfax Avenue # 800
Denver, CO 80202

Denver County District Court
Hon. Sheila Rapapport
No. 05CR 4700

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff - Appellee,
v.
TENARRO BANKS
Defendant - Appellant.

Marsha Levick, Esq. (PA Attorney No. 22535)
Lauren Fine, Esq. (PA Attorney No. 311636)
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
T: (215) 625-0551

Case Number: 08CA105

***AMICUS CURIAE* ON BEHALF OF DEFENDANT-APPELLANT**
of Opinion by Judge Graham, Casebolt and Furman, JJ concurring
Published opinion issued September 27, 2012

Juvenile Law Center (JLC) writes in support of Defendant-Appellant's argument that this Court's imposition of a sentence of life imprisonment with the possibility of parole after forty years misapprehends the Supreme Court's holdings in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) and *Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010).

1. *Miller* Reaffirms the Court's Recognition that Children Are Fundamentally Different from Adults and Categorically Less Deserving of the Harshest Forms of Punishments

Justice Kagan, writing for the majority in *Miller,* was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham* v. *Florida,* 130 S. Ct. 2011, 2026-27, 2029-30 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Miller* at 2460. The Court grounded its holding "not only on common sense...but on science and social science as well," *id.* at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted "that those [scientific] findings –of transient rashness, proclivity for risk, and inability to assess consequences

–both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 2464-65 (quoting *Graham,* 130 S. Ct., at 2027, *Roper,* 543 U.S., at 570)). Importantly, the Court specifically found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." *Id.* at 2465. Accordingly, the Court emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.*

Miller held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.,* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. Although this Court has recognized that life without parole is not a constitutional sentencing option, the imposition of life with the possibility of parole after a minimum of forty years imprisonment similarly does not pass constitutional muster. Together, *Graham* and *Miller* require that Tenarro Banks be offered an

opportunity for release during his lifetime that is meaningful and realistic.

2. *Miller* Requires the Sentencer to Make an Individualized Sentencing Determination Based on a Juvenile's Overall Culpability

Miller requires that a sentencer, not a parole board, make an individualized determination of the juvenile's level of culpability and then impose the appropriate sentence. *Miller* faulted "mandatory penalty schemes [that] prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller,* 132 S. Ct. at 2458 This Court's sentencing scheme is unconstitutional because the trial court (the sentencer) is denied any opportunity to consider factors related to the juvenile's overall level of culpability.

Miller sets forth specific factors that the sentencer, at a minimum, should consider: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected

him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* at 2468. This process was not followed in Appellant's case. For example, Mr. Banks had no opportunity to argue that he deserved a less severe sentence in light of his young age, peer pressures exerted upon him, or any other factor that would demonstrate a reduced level of culpability and capacity for rehabilitation.

Because the mandatory sentencing scheme imposed by this Court deprives the sentencer of the opportunity to consider the juvenile's age and related characteristics, the sentencing scheme, as applied to juvenile offenders, is unconstitutional and Appellant's sentence imposed pursuant to this scheme must be vacated. In determining an appropriate and individualized sentence, the trial court should consider any mitigating evidence, based on the *Miller* factors. [1]

---

[1] The Supreme Court of this state has recognized that imposing an adult punishment on a child should be rare, and serves purposes particular to the youthful nature of the juvenile offender, in addition to serving the larger goals of the criminal justice system ("punishment, deterrence and retribution"). *See Bostelman v. People*, 162 P.3d 686, 691-92 (Colo. 2007). The court has explained that:

(Continued)

3. This Court's Sentence Deprives Appellant of a Meaningful Opportunity for Release as Required By *Miller* and *Graham*

The possibility of parole after a minimum of forty years imprisonment does not render the sentence constitutional, as it neither allows the court to impose an individualized sentence (as required by *Miller*), nor does it provide a meaningful opportunity for release (as required by *Graham,* 130 S. Ct. at 2030). Appellant was 15 years old when he committed the crime for which this Court has recommended a sentence. He will be approaching the latter stages of his life before he is even first granted an opportunity to go before the state parole board.[2] This does not comport with the lynchpin of *Graham* and *Miller* that juveniles are categorically less culpable than adults who commit similar

---

> 'it is in the best interest of a child to have a limited exposure to an adult penal institution, regardless of the offense he has committed, in order to give him some indication of what he will face should he violate the law after he has become an adult.' [...T]his exposure to the adult punishment system can have severe consequences and contrasts remarkably from the predominantly civil remedial goal of the Children's Code[...].

Id. (internal citations omitted).

[2] Although under the Colorado constitution, the Governor has the "power to grant reprieves, commutations and pardons after conviction" for first degree murder, Colo. Const. art. IV, § 7, this does not provide a *meaningful* opportunity for release, which is one of the fundamental tenets of the Supreme Court's *Graham*

(Continued)

offenses. *See, e.g., Miller* at 2464 (noting that "juveniles have diminished culpability and greater prospects for reform"). In other words, juveniles who commit first degree murder are categorically less culpable than adults who commit first degree murder.[3] Therefore, it is illogical to set such a categorically

---

decision.

[3] In addition to *Graham* and *Miller's* recognition of the mitigating factors of youth, detailed both here and in Defendant-Appellant's petition, the notion that youthful offenders should be held to a lesser degree of culpability for the same crime committed by an adult is well established in academic literature. As one expert notes,

> criminal law arrays actors' culpability and blameworthiness along a continuum from a premeditated killer for hire at one end to the minimally responsible actor barely capable of discerning right from wrong at the other end, even though each caused the same harm. [...]Youthfulness affects the actor's abilities to reason instrumentally and freely to choose behavior, and locates an offender closer to the diminished responsibility end of the continuum than to the fully autonomous free-willed actor.

Barry C. Feld, *Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 500-501 (2003). Feld further argues, "[e]very other area of law recognizes that young people have limited judgment, are less competent decision-makers because of their immaturity, and require greater protection than do adults. Applying the same principle of diminished responsibility in the criminal law requires...shorter sentences for youths than for adults convicted of the same offenses." *Id.* at 498-499. *See also* David A. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (not) to Punish Minors for Major Crimes*, 82 Tex. L. Rev. 1555, 1557-58 (2004); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on*

(Continued)

Immaturity, Capacity, and Diminished Responsibility, in Youth On Trial: A Developmental Perspective On Juvenile Justice 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[T]he criminal law needs to make sense as a language of moral desert, punishing only those who deserve condemnation, punishing the guilty only to the extent of their individual moral desert, and punishing the range of variously guilty offenders it apprehends in an order that reflects their relative blameworthiness."). Further, in the case of *State v. Kennedy*, 957 So.2d 757, 784, 2005-1981, n.31 (La. 2007) (reversed on other grounds), the Louisiana Supreme Court likened youth to mental retardation in terms of reduced culpability and diminished capacity:

> Intellectual deficits and adaptive disorders of the former, and a lack of maturity and a fully developed sense of responsibility of the latter, tend to diminish the moral culpability of the mentally retarded and juvenile offender, with important societal consequences. Retribution 'is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity[,]' *Roper,* 543 U.S. at 571, 125 S.Ct. at 1196, or by reason of the 'diminished capacities to understand and process information' of the mentally retarded. *Atkins v. Virginia,* 536 U.S. 304, 318-319, 122 S. Ct. 2242, 2251 (2002). For the same reasons, the mentally retarded and the juvenile offender 'will be less susceptible to deterrence.' *Roper,* 543 U.S. at 571, 125 S. Ct. at 1196; *see Atkins,* 536 U.S. at 320, 122 S. Ct. at 2251 ('[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable ... that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.').

high threshold for parole to even be considered, since the legislature has set the minimum sentence much lower for less culpable *adult* murderers.[4] This approach also ignores the United States Supreme Court's concern in *Graham* and *Miller* that juveniles sentenced to life, because of their young age, serve longer sentences than adult murderers who receive the same sentence. *See, e.g., Graham v. Florida*, 130 S. Ct. at 2028 ("Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."). Although the Colorado Supreme Court has determined that "age is [not] a relevant consideration in conducting a proportionality review," *Valenzuela v. People*, 856 P.2d 805 (Colo., 1993), the proportionality test is wholly different as a result of *Graham* and *Miller*, which came many years later. *Graham* and *Miller* dictate that not only is age relevant, but that the characteristics associated with youth development are relevant. *See, e.g.,* Miller, 132 S. Ct. at 2468. A 40-year minimum sentence fails to acknowledge that, though a youth may be deserving of a harsh sentence, it should be less harsh than the sentence for an adult who commits the same serious crime.

---

[4] The minimum sentence for second degree murder is 16 years, Colo. Rev. Stat. Ann. § 18-1.3-406 (West 2002), or substantially lower than the sentence imposed (Continued)

WHEREFORE, Juvenile Law Center respectfully requests that this Court withdraw its previous opinion, vacate Mr. Banks' sentence and remand this matter to the district court for a sentencing hearing consistent with the dictates set forth by the Supreme Court in *Miller v. Alabama*.

Respectfully submitted this 7th day of November, 2012.

Marsha Levick, Esq. (PA Attorney # 22535)
Lauren Fine, Esq. (PA Attorney No. 311636)
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
Telephone: (215) 625-0551

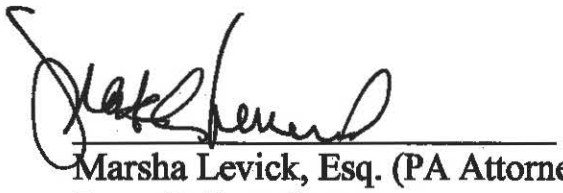
---

on Appellant here. *See also* Colo. Rev. Stat. Ann. § 18-3-103 (West 2002).

CERTIFICATE OF MAILING

I certify that on the 12th day of November, 2012 I dispatched, by first-class mail, the foregoing Petition for Rehearing to:

Elizabeth Rohrbough
Appellate Division
Office of the Colorado Attorney General
1525 Sherman Street, 7th Floor
Denver, Co 80203



Marsha Levick, Esq. (PA Attorney # 22535)
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
Telephone: (215) 625-0551

CERTIFICATE OF COMPLIANCE

I, Marsha Levick, Esq., certify that the foregoing brief complies with all requirements of C.A.R. 28 and C.A.R. 32.

Marsha Levick, Esq.
Counsel of Record for Amicus Curiae
JUVENILE LAW CENTER
1315 Walnut St.
Suite 400
Philadelphia PA 19107
(215) 625-0551

Dated: November 7, 2012.