THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0104

State of New Hampshire

v.

Eduardo Lopez, Jr.

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough (South) Superior Court

BRIEF FOR THE DEFENDANT

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QUESTION PRESENTED

Whether the court unlawfully imposed a sentence constituting the *de facto* equivalent of lifetime imprisonment.

Issue preserved by the parties' pleadings, the hearing on the issue, and the court's order. S 2-41; AD 45-55; A3-A55.*

* Citations to the record are as follows:
"AD" refers to the attached supplement containing the decisions appealed;
"A" refers to the separate appendix containing relevant pleadings;
"S" refers to the consecutively-paginated transcript of the sentencing hearing held in December 2017 and January 2018.

STATEMENT OF THE CASE AND FACTS

Eduardo ("Eddie") Lopez was seventeen years old when, in 1991, he was arrested and charged with the first-degree murder of Robert Goyette, the first-degree assault of Roscoe Powers, the attempted first-degree assault of police officer Thomas McLeod, and the robbery of Powers. All charges arose out of events occurring on the night of March 23, 1991, in Nashua. Because the present appeal addresses only legal issues, this brief includes only a summary statement of the facts.

The evidence at trial established that around 9:00 p.m. on March 23, 1991, Lopez approached Powers on a Nashua sidewalk, pointed a gun at him, and asked for money. Powers fled, pursued by Lopez who, when Powers slipped and fell, fired a shot that struck Powers in the chest. Powers survived. Less than an hour later, Lopez approached Goyette as he sat in a car. Lopez pointed a gun, demanded money, and when Goyette refused and began to drive away, Lopez fired a shot that killed him. Lopez then fled. Around 10:00 p.m., Nashua police officer Thomas McLeod encountered Lopez and attempted to arrest him. A struggle ensued during which Lopez struck McLeod with a large stick. See State v. Lopez, 139 N.H. 309, 310-11 (1994) (summarizing facts).

Lopez was convicted after a trial. The trial court (Murphy, J.) sentenced Lopez, for first degree murder, to the statutorily-mandated term of life imprisonment without

possibility of parole. For the other offenses, the court imposed concurrent stand-committed sentences. On appeal, this Court affirmed Lopez's convictions. Id. at 311-13.

More than twenty years after Lopez's arrest and incarceration, the United States Supreme Court, in Miller v. Alabama, 567 U.S. 460 (2012), held unconstitutional the imposition on juvenile offenders of mandatory life without parole terms. While the Miller Court did not foreclose the possibility that a court could impose a sentence of life without parole on a juvenile offender as a matter of discretionary judgment, the Court observed that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 479.

Litigation followed on the question of whether the Miller rule applied retroactively. In the end, a decision of this Court, Petition of the State of New Hampshire, 166 N.H. 659 (2014), and then of the United States Supreme Court, Montgomery v. Louisiana, 577 U.S. __, 136 S. Ct. 718 (2016), resolved that question in favor of retroactivity.

In anticipation of Lopez's re-sentencing, the parties litigated substantive and procedural issues. The State announced that it did not intend to seek a sentence of life imprisonment without possibility of parole, but would ask the court to impose a cumulative term of fifty-one and a half years to life, structured as follows: a term of forty years to life for murder, a consecutive seven-and-a-half to fifteen years for

the first degree assault on Powers, and a consecutive four to eight years for the attempted first degree assault of McLeod. A4. Later, at the sentencing hearing, it became apparent that the court could not re-sentence Lopez for the non-homicide charges because they were initially ordered to run concurrently with his life-without-parole sentence and thus Lopez had already served those terms. S 358-59; AD 50 n.3. At that point, the State amended its sentencing request to ask that the court sentence Lopez to fifty-one and a half years to life for murder. S 350.

The defense argued that the State's proposed sentence constituted the *de facto* equivalent of lifetime imprisonment. A18-A27. Specifically, the defense contended that any sentence with a minimum period longer than thirty-five years constitutes the *de facto* equivalent of lifetime imprisonment. A24-A26. Under Miller and its progeny, the State, to obtain a *de facto* life sentence, would have to prove that Lopez was the rare irreparably corrupt juvenile for whom lifetime imprisonment is constitutionally permissible. A15-A24.

The State countered that its proposed term did not constitute the *de facto* equivalent of lifetime imprisonment. S 99; A35-A45. The State did not claim that it could or would show that Lopez was the rare irreparably corrupt child offender.

On December 13 and 14, 2017, the Hillsborough (South) Superior Court (Smukler, J.) convened a re-

sentencing hearing. As already noted, because Lopez had already fully served the concurrent stand-committed sentences on the non-homicide convictions, the court faced only a sentencing decision on the murder conviction. S 358-59. At the sentencing hearing, the defense presented evidence about Lopez's intoxication on the night of the crime, as well as evidence about his youth, family background, and record of conduct during the twenty-six years in which he had been incarcerated. The defense argued that the circumstances warranted a sentence of twenty-seven years to life. S 340.

The court ultimately sentenced Lopez to a term of forty-five years to life. S 358; AD 46. As for the disputed legal questions, the court agreed that a term of years could be so long as to amount to the *de facto* equivalent of life without parole, but ruled that the forty-five year minimum term imposed was not a *de facto* equivalent. AD 50-55. The court further concluded that, insofar as life-expectancy information factored into the legal analysis on the *de facto* question, it would use tables produced by the Centers for Disease Control (CDC), rather than information focused on prisoners. AD 52-55.

SUMMARY OF THE ARGUMENT

Properly interpreted, the relevant Supreme Court jurisprudence defines lifetime imprisonment not by reference to a defendant's actuarily-projected death, but rather as imprisonment lasting so long that it forecloses a realistic opportunity to seek reconciliation with society through a meaningful life outside of prison. A sentencing court therefore imposes the *de facto* equivalent of lifetime imprisonment when it pronounces a sentence that allows the earliest opportunity for release on parole when the prisoner has become too old to have a realistic opportunity to build a meaningful, post-prison life.

Here, the forty-five-year period of parole ineligibility would allow Lopez to be released on parole, at the earliest, at the age of sixty-two. Release at that age would not afford him a realistic opportunity to build a meaningful post-prison life. The Constitution permits no more than thirty-five years, as an upper limit on the period of parole ineligibility for a non-incorrigible juvenile offender. To pronounce a lawful longer sentence, a court must find the juvenile to be incorrigible.

Alternatively, if the definition of lifetime imprisonment is tied to a juvenile's actuarily-projected death, the court still erred, for it used life expectancy tables based on the general American population, rather than information focused on the life expectancy of long-term prisoners.

I. A STAND-COMMITTED SENTENCE WITH A MINIMUM TERM OF FORTY-FIVE YEARS CONSTITUTES THE *DE FACTO* EQUIVALENT OF LIFE IMPRISONMENT WITHOUT PAROLE, AND THUS CANNOT BE IMPOSED IN THE ABSENCE OF A FINDING OF INCORRIGIBILITY.

In Miller, the Supreme Court declared that a sentence of life imprisonment without possibility of parole would be appropriate only for "the rare juvenile offender whose crime reflects irreparable corruption." Miller, 567 U.S. at 479-80 (internal quotation and citation omitted). In Montgomery, the Court confirmed the point, writing that "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption." Montgomery, 136 S. Ct. at 726 (internal quotation and citation omitted).

After the State announced its intention to seek a stand-committed minimum term of fifty-one and a half years, the defense argued that a term of that length constituted the *de facto* equivalent of a lifetime sentence, and thus imposed on the prosecution the burden of demonstrating that Lopez was that rare child whose crime reflects his irreparable corruption. A6-A30. While the State did not contend that Lopez was irreparably corrupt, and did not dispute that a minimum term of years could be so long as to constitute the *de facto* equivalent of lifetime imprisonment,[1] the State

[1] The State cited authority for the proposition that the Miller/Montgomery rule applied only to sentences having the form of life imprisonment without possibility of parole, rather than to sentences specifying a minimum term of

argued that a fifty-one-and-a-half-year minimum term did not constitute the *de facto* equivalent of lifetime imprisonment. A31-A55.

The dispute thus focused on identifying the point at which a minimum term-of-years sentence becomes so long as to allow a court to impose it only on the rare, irreparably corrupt child offender. That dispute implicates an interpretive debate about the meaning of the Supreme Court's decisions in Graham v. Florida, 560 U.S. 48 (2010), Miller, Montgomery, and the other relevant cases described below.

The defense argument draws on various sources, including language in Montgomery declaring that most juvenile offenders are entitled to "hope for some years of life outside prison walls," Montgomery, 136 S. Ct. at 737, and on language in Graham, 560 U.S. at 79, speaking of most juvenile offenders as being entitled to a hope of demonstrating that they are "fit to rejoin society," and to "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," id. at 75. From these and other indications described below, the defense contends that a sentencing court errs if it defines the *de facto* equivalent of lifetime imprisonment by calculating Lopez's life expectancy and imposing a sentence that does not exceed it or

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years, no matter how long. A35-A40. However, the State seemed to offer that authority for informational purposes only, in that it did not actively advocate for that narrow reading of the rule.

approaches it so closely as to offer the hope of release only a few years before his actuarily-projected death. Rather, in the absence of a demonstration of a child offender's irreparable corruption, a court cannot impose a minimum term that contemplates release, at the earliest, when the defendant is too old to have a realistic hope of building a meaningful life outside prison.

The defense argued that a term requiring thirty-five years before parole eligibility established the upper boundary of what would not constitute the *de facto* equivalent of lifetime imprisonment. If sentenced to that term, Lopez would first become eligible for parole when he is approximately fifty-two years old. Any minimum term longer than that would, on the defense view, violate the Miller/Montgomery rule. A24-A26.

For its part, the State read the relevant cases more narrowly, arguing that they required only that the sentence not be so long as to foreclose any realistic hope of dying outside of prison. A40-A45. That view of the matter drew the State to emphasize the importance of life expectancy calculations. Id.

Accordingly, the interpretive dispute can be summarized as follows. The defense contends that, unless irreparably corrupt, a child offender is entitled to a sentence that offers at least the hope of living outside of prison – of eligibility for release at an age when one can realistically hope to build a meaningful life outside of prison. The State, more narrowly,

contends that the Constitution is satisfied by a sentence that offers the offender only the hope of dying outside of prison – of eligibility for release merely at an age before actuarily-predicted death. As noted above, the sentencing court sided with the State. AD 48-55.

In the interest of efficiency, this brief will not belabor two points discussed by the parties below but ultimately not decided adversely to Lopez by the sentencing court. First, as already noted, the sentencing court agreed with the principle that a term-of-years sentence can be so long as to constitute the *de facto* equivalent of lifetime imprisonment. AD 50-51.

Second, the parties disputed whether the relevant number for the *de facto* analysis was a sentence's stated minimum period of parole ineligibility, or rather a number defined as two-thirds of that stated minimum period. The State argued for using the lower number in the analysis given the theoretical possibility that, under RSA 651:20, the superior court could suspend the last third of the minimum. S 6-9, 28-30. In its final order on the issue, the trial court analyzed the question using the sentence's stated forty-five year term, without relying on the theoretical possibility of relief under RSA 651:20. AD 51-55. Because the trial court thus did not rely on RSA 651:20, this opening brief does not address that issue.

With those question thus set aside, the brief begins, in Section A below, by describing the relevant decisions of the

United States Supreme Court. Section B addresses other authorities – statutes enacted by legislatures in the wake of Miller and Graham, and decisions of other courts – that speak to the problem of identifying the point dividing a constitutionally-permissible term-of-years sentence from a sentence so long as to be the *de facto* equivalent of lifetime imprisonment. Finally, Section C advances an alternative argument focused on the sentencing court's use of life-expectancy information. Even if the sentencing court was correct to calculate the crucial point by reference to Lopez's opportunity to have a death, rather than a life, outside of prison, the court erred in emphasizing life-expectancy tables based on the general population, rather than on studies specific to prison populations.

A. The Supreme Court's decisions establish that the sentencing court erred in its approach to identifying the term of years that constitutes *de facto* lifetime imprisonment.

The insight on which Lopez's claim fundamentally rests is that children are qualitatively different from adults, from the point of view of the goals and purposes of the penological system. "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors,

especially in their earlier years, generally are less mature and responsible than adults." Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982). In recent years, in a series of transformative decisions, the Supreme Court has developed and clarified that insight.

In Thompson v. Oklahoma, 487 U.S. 815 (1988), only a plurality of the Court could conclude that the death penalty was categorically unconstitutional as imposed on defendants aged fifteen years at the time of the offense, and in Stanford v. Kentucky, 492 U.S. 361 (1989), a divided Court rejected the proposition that the Constitution bars the death penalty for sixteen- and seventeen-year-old offenders. That reluctance to treat juveniles differently from adults, however, yielded in Roper v. Simmons, 543 U.S. 551 (2005), in the face of the growing understanding of adolescent development. In Roper, the Court overruled Stanford and held the death penalty unconstitutional as applied to juvenile offenders.

Having thus decided the fate of the juvenile death penalty, the Court turned its attention to the sentence of life imprisonment without possibility of parole, as applied to juvenile offenders. In Graham, the Court held unconstitutional the imposition of that sentence for non-homicide offenses committed by children. In Miller, the Court held unconstitutional statutes enacting a mandatory sentence of life without parole as applied to juveniles convicted of homicide. In Montgomery, the Court held the rule of Miller to

apply retroactively. Montgomery, 136 S. Ct. at 736. After Montgomery, the Court granted *certiorari* and summarily remanded cases in which a pre-Miller/Montgomery sentencing court gave some consideration to the mitigating implications of youth, but imposed life without parole in ignorance of the constitutional principle that such sentences are permissible only for the rare irreparably corrupt child offender. See, e.g., Tatum v. Arizona, 580 U.S. __, 137 S. Ct. 11 (2016); Adams v. Alabama, 578 U.S. __, 136 S. Ct. 1796 (2016).

From these cases, several relevant principles emerge. First, a juvenile offender is significantly less culpable than an adult for the commission of an otherwise similar criminal act. "[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Eddings, 455 U.S. at 115 n.11 (quotation marks and citation omitted). Diminished culpability follows also from the fact that juveniles lack "the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635 (1979). They are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Roper, 543 U.S. at 569. As a result, the "susceptibility of juveniles to immature and irresponsible behavior means their 'irresponsible conduct is not as morally

reprehensible as that of an adult.'" Roper, 543 U.S. at 570 (quoting Thompson, 487 U.S. at 835).

Second, the more malleable nature of a child's character, as compared with an adult's, signifies the child's greater likelihood of rehabilitation. "[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." Roper, 543 U.S. at 570. "For most teens, risky or antisocial behaviors are fleeting; they cease with maturity as individual identity becomes settled." Id. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." Id.; see also Montgomery, 136 S. Ct. at 733 ("ordinary adolescent development diminishes the likelihood that a juvenile offender forever will be a danger to society"); Graham, 560 U.S. at 68 ("Juveniles are more capable of change than adults"). A "central intuition" of these cases is "that children who commit even heinous crimes are capable of change." Montgomery, 136 S. Ct. at 736.

Third, the Court has recognized the severity of a sentence of lifetime imprisonment, as exceeded only by the death penalty. Graham, 560 U.S. at 69. Lifetime imprisonment is "an especially harsh punishment for a juvenile," for the juvenile offender "will on average serve more

years and a greater percentage of his life in prison than an adult offender." Id. at 70.

The child offender's lesser culpability and greater potential for rehabilitation have important penological implications. The justifications of deterrence and punishment "apply with lesser force." Roper, 543 U.S. at 571-72. Because of a child's lesser culpability, "the case for retribution is not as strong with a minor as with an adult." Graham, 560 U.S. at 71. Likewise, "the same characteristics that render juveniles less culpable than adults suggest that juveniles will be less susceptible to deterrence." Id. at 72. And, as noted above, considerations of rehabilitation also favor the juvenile offender in comparison with an otherwise similarly situated adult offender.

The United States Supreme Court has not only recognized that juveniles differ from adults in the ways described above, but also has noted the magnitude of the difference, at least with respect to juveniles who are not irreparably corrupt. In Miller, the Court referred to "fundamental differences between juvenile and adult minds." Miller, 567 U.S. at 471-72 (emphasis added). See also id. at 471 (jurisprudence recognizes "three significant gaps between juveniles and adults"); Roper, 543 U.S. at 572-73 (describing differences between juvenile and adult offenders as "marked") (emphases added). Only on the basis of an understanding of the differences between juvenile and adult offenders as

momentous and consequential could the Court have written, as it did in Montgomery, that "the penological justifications for life without parole collapse in light of the distinctive attributes of youth." Montgomery, 136 S. Ct. at 734 (emphasis added).

It remains only to apply these principles to the dispute over how to identify the point at which a term-of-years sentence becomes the *de facto* equivalent of lifetime imprisonment. The answer appears in the nature and magnitude of the distinctions the Court has noted between juvenile and adult offenders. As described above, the adult-juvenile distinction implicates all the principal goals of sentencing – retribution, deterrence, and rehabilitation. Moreover, as also already noted, the penologically-relevant differences between juveniles and adults are substantial.

That being the case, the sentencing court's approach fails to honor the magnitude of the differences between juvenile and adult offenders. As already described, the sentencing court defined the *de facto* equivalent of lifetime imprisonment by reference to a defendant's life expectancy, allowing for the possibility of earliest release from prison only a few years before actuarily-projected death. That approach treats the juvenile offender too much like an adult offender.

Lopez acknowledges that there is some distinction between imprisonment for life without possibility of parole and imprisonment for life with the possibility of parole coming

only a few years before the defendant's projected death. But that distinction is too small fairly to reflect the jurisprudence in which the Supreme Court recognized non-irreparably-corrupt juvenile offenders as occupying a significantly different penological space from adult offenders.

The point holds particularly true in light of the extremely limited social and economic opportunities available to offenders who emerge, after decades of an imprisonment that began when they were children, into a world to which they bring few skills, few credentials, few connections, and the profound stigma of a murder conviction. When those obstacles are combined with advanced age, little more can be expected on release than a hard struggle for subsistence followed, within a few years, by death.

The Supreme Court's caselaw envisions a richer set of life opportunities for the reformed and paroled juvenile offender. In Graham, the Court diagnosed the problem with sentences of lifetime imprisonment in the fact that they "improperly den[y] the juvenile offender a chance to demonstrate growth and maturity." Graham, 560 U.S. at 73. "By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." Id. at 74. Summarizing the point, the Graham Court explained the distinction between the sentences of life imprisonment with, and without, possibility of parole as follows:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.

Id. at 79. See also id. ("The State has denied [Graham] any chance to later demonstrate that he is fit to rejoin society.....").

It makes little sense to speak of a demonstration of growth and maturity, of re-entering society, and of the chance of fulfillment outside prison walls, if all that the Constitution guarantees is eligibility to re-enter society at an age when too little time remains to forge a meaningful life. Only in this light can one properly understand the Graham Court's statement that courts must give juvenile offenders who are not irreparably corrupt "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75; see also Montgomery, 136 S. Ct. at 737 (noting that in the absence of irreparable corruption, a juvenile offender's "hope for some years of life outside prison walls must be restored").

Because the sentencing court's approach, which reads so narrowly the promise of Miller, Graham, and the other

cases, must be rejected, this Court must adopt an alternative approach to the problem of defining the point at which a term-of-years sentence becomes so long as to be the *de facto* equivalent of lifetime imprisonment. That alternative must keep faith with the Supreme Court's view of the nature and magnitude of the differences between juvenile and adult offenders. It must require eligibility for release at an age at which there remains a chance for fulfillment outside prison walls, a chance for reconciliation with society, and hope.

The sentencing court upheld as constitutional a forty-five year minimum sentence. That sentence would permit Lopez's release, at the earliest, at age sixty-two. For those who have lived their lives outside prison, many opportunities for fulfillment remain at the age of sixty-two. For those who have spent the preceding forty-five years in prison, however, very little can reasonably be expected of whatever years of life are left. The starting point simply comes too late.

Thus, the outer limit on the period of parole ineligibility must not be drawn beyond thirty-five years. That sentence would make Lopez eligible for parole, at the earliest, at age fifty-two. At that age, a juvenile offender can reasonably hope to build a life outside prison that demonstrates growth, maturity and rehabilitation, and offers a chance of fulfillment and reconciliation.

By the time Lopez is sixty-two, he will have reached an age at which the overwhelming proportion of non-incarcerated

people with children have already raised them to adulthood, or nearly so. Those non-incarcerated sixty-two year-olds will have an employment history and a credit record. If they wish to make a change – starting a new job, moving to a new city, beginning a new relationship – they will be able to do so, if at all, only because they stand on a foundation of education, social connections, and financial resources built over almost forty-five years of adulthood. That ability to make a new beginning does not exist for people who have spent those preceding forty-five years in prison, for they lack any semblance of the requisite foundation. More importantly, and in contrast with prisoners released in their forties or early fifties, the newly-released sixty-two year old has passed the age at which, in the time remaining, there can be a realistic hope of being able to construct that foundation.

Lopez does not claim, and the cases do not guarantee, a right of actual release at any point, much less while he is in his early fifties. He claims only, as a juvenile not found to be irreparably corrupt, the right to advocate at the parole board for his release at an age when he could still earn, by an honorable life, a meaningful measure of reconciliation with society. To rule otherwise would treat Lopez the same as, or rather, insufficiently differently from, the adult offender that he was not. See Miller, 567 U.S. at 477 ("And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offenses – but

really, as Graham noted, a *greater* sentence than those adults will serve").

B. Other authorities also support the defense interpretation of the Miller/Montgomery rule.

Further support for Lopez's position appears in statutes and in the better-reasoned state and lower federal court decisions. Those authorities converge on the view that non-irreparably corrupt child offenders should become eligible for release after no more than thirty-five years of imprisonment.

When interpreting the Cruel and Unusual Punishments Clause, the Supreme Court has often looked to state practice as manifested in legislative action. See, e.g., Miller, 567 U.S. at 482-84 (interpreting "evolving standards of decency" standard associated with the Cruel and Unusual Punishments Clause by reference to state statutes); Roper, 543 U.S. at 564-67 (same). Many states responded to Graham, Miller and Montgomery by enacting statutes conferring parole eligibility, after the passage of a specified period of years, on juveniles previously sentenced to lifetime imprisonment, or who would, were they adults, face lifetime imprisonment.[2] Most such statutes support Lopez's position

[2] See, e.g., Arizona – parole eligibility at either 25 years or 35 years, depending on whether victim was younger than 15 (Ariz.Rev.Stat. §13-751(A)(2)); Arkansas - parole eligibility at either 25 or 30 years, depending on whether offense was first degree or capital murder (A.C.A. §5-10-101(c)(1)(B) (capital); A.C.A. §5-10-102(c)(2) (first degree)); California – establishing system of youth offender parole

on the crucial question, because they set parole eligibility after a period more in line with Lopez's proposal than with the forty-five-year term pronounced by the sentencing court. See People v. Contreras, 411 P.3d 445, 455-56 (Cal. 2018) (citing statutes in support of conclusion that Miller promises, to non-irreparably-corrupt juvenile offenders, more than merely the opportunity for geriatric release); State v. Null, 836 N.W.2d 41, 72 & n.8 (Iowa 2013) (same); cf. RSA 651-A:7 (New Hampshire statute establishing parole eligibility after eighteen years, for life sentences as to which no minimum term is specified).

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hearings, and parole eligibility after 25 years for juveniles sentenced to life without parole (Cal. Pen. Code §3051(b)(4)); Colorado – parole eligibility at 40 years (C.R.S.A. §17-22.5-104; §18-1.3-401(b)), but creating specialized program for juveniles convicted as adults enabling earlier parole opportunity after 30 years (C.R.S.A. §17-34-102(8)(b)); Connecticut – parole eligibility at 30 years (C.G.S.A. §54-125a(f)(1); Delaware – eligibility of juveniles to petition for sentence modification retroactively set at 30 years (11 Del. C. 4204A); District of Columbia – eligible for sentence reduction after 15 years (D.C. Code Ann. §24-403.03(a)(1)); Florida – parole eligibility at 25 years, unless juvenile has certain previous convictions (Fla. Stat. Ann. §921.1402(2)(a)); Kansas – eligibility of persons sentenced to life with possibility of parole at 25 years (K.S.A. §21-6620 & §21-6618); Kentucky – parole eligibility at 25 years (KRS §640.040(1)); Louisiana – parole eligibility at 25 years, with programming requirements (La. R. S. §15:574.4(J)); Massachusetts – parole eligibility at no less than 20 years and no more than 30 years for first degree murder (M.G.L.A. 119 §72B & M.G.L.A. 279 §24); Missouri – parole eligibility at 25 years (Mo. Ann. Stat. . §558.047(1)); New Jersey – parole eligibility at 30 years (N.J.S.A. §2C:11-3(b)(5); North Carolina – 25 years (N.C.Gen.Stat.Ann. §15A-1340.19A); North Dakota – eligible for judicial review of sentence after 20 years (N.D. Cent. Code §12.1-32-13.1); Oregon – parole eligibility after 30 years (O.R.S. §161.620 & §163.105(1)(c) & §137.707); Washington – eligibility to petition for release after 20 years (R.C.W.A. §9.94A.730); West Virginia – parole eligibility at 15 years (W. Va. Code Ann. §61-11-23); Wyoming – parole eligibility at 25 years (Wyo. Stat. Ann. §6-10-301(c)). But see Nevada – parole eligibility at 20 years; not applicable where two or more victims (N.R.S. §213.12135); Texas – parole eligibility at 40 years (V.T.C.A. §508.145(b) & §12.31(a)(1)).

Support for Lopez's position can be found in the decisions of courts, as well as legislatures. See, e.g., Roper, 543 U.S. at 564-65 (interpreting "evolving standards of decency" standard associated with the Cruel and Unusual Punishments Clause by reference to actual sentencing practice). A study tracking the post-Montgomery sentencing outcomes for juveniles formerly sentenced to life without parole reveals that, of the approximately 1,700 resentenced juveniles, the median sentence nationally sets the period of parole ineligibility at twenty-five years.[3]

Also, a number of appellate courts have held that lengthy term-of-years prison sentences imposed by trial courts constitute the *de facto* equivalent of lifetime imprisonment.[4] Because the sentences at issue imposed longer periods of parole ineligibility than Lopez faces, those

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[3] See Campaign for the Fair Sentencing of Youth, *Tipping Point: A Majority of States Abandon Life-Without-Paro/e Sentences for Children* (2018) at 2, available at https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf.

[4] See, e.g., McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016) (sentence setting earliest parole eligibility after 100 years); Moore v. Biter, 725 F.3d 1184, 1191-92 (9th Cir. 2013) (earliest eligibility after 127 years); Budder v. Addison, 851 F.3d 1047, 1056-57 (10th Cir. 2017) (131.75 years); People v. Caballero, 282 P.3d 291, (Cal. 2012) (110 years); People v. Contreras, 411 P.3d 445, 454-55 (Cal. 2018) (50 years); Casiano v. Comm'r of Correction, 115 A.3d 1031 (Conn. 2015) (50 years); Peterson v. State, 193 So.2d 1034 (Fla.App. 2016) (56 years); People v. Buffer, 137 N.E.3d 763 (Ill. 2019) (50 years; and drawing *de facto* line at 40 years); State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013) (35 years); Null, 835 N.W.2d at 71 (52.5 years); Carter v. State, 192 A.3d 695, 725-36 (Md. 2018) (50 years); State v. Zuber, 152 A.3d 197, 211-13 (N.J. 2017) (55 and 68 year sentences); State v. Moore, 76 N.E.3d 1127, 1139-40 (Ohio 2016) (77 years); White v. Premo, 443 P.3d 597, 605 (Or. 2019) (54 years); Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014) (45 years).

courts had no need to decide whether a forty-five-year term constitutes the *de facto* equivalent of lifetime imprisonment.

Some courts, even while recognizing that a term-of-years sentence could constitute the *de facto* equivalent of lifetime imprisonment, have upheld sentences as long or longer than the one imposed on Lopez as not being the *de facto* equivalent of lifetime imprisonment.[5] Thomas is typical of these, in that it does not offer extensive analysis. In Thomas, the court relied on the fact that the Constitution does not guarantee actual release to juvenile offenders. Thomas, 78 So. 3d at 646-47. That observation, though correct as far as it goes, has little bearing on the disputed question here: whether the Constitution promises non-irreparably-corrupt juveniles only eligibility for a chance at geriatric[6] release, or rather eligibility for release at an age when there remains a chance for fulfillment outside prison walls and reconciliation with society.

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[5] See, e.g., Thomas v. State, 78 So. 3d 644 (Fla.App. 2011) (50 years not *de facto* life); Ira v. Janecka, 419 P.3d 161, 170 (N.M. 2018) (46 years).

[6] The brief uses this adjective here because of the impact of incarceration on health and mortality. "Several studies . . . state that a prisoner's physiological age averages 10 – 15 years older than his or her chronological age...." U.S. Dep't of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, 1-2 (2016) (available at https://oig.justice.gov/reports/2015/e1505.pdf). The National Commission on Correctional Health Care uses 55 years as its threshold for "elderly" inmates, as distinct from the Census Bureau's use of age 65 years. Tina Chiu, *It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release*, at 4 (2010) (available at https://www.vera.org/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy_downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf).

Still other courts have upheld a lengthy term-of-years sentence on the view that a term of years, no matter how long, is not covered by the rule of Miller and Montgomery.[7] These cases offer no guidance, given the proper rejection by the sentencing court here of that view. See Casiano, 115 A.3d at 1045 ("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").

The better-reasoned appellate decisions support Lopez's contention that the *de facto* equivalent of lifetime imprisonment is not measured by whether the defendant is first eligible for release a few years before dying of old age. In Casiano, the Connecticut Supreme Court emphasized the analytical relevance of major life activities:

> 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

[7]See, e.g., Atkins v. Crowell, 945 F.3d 476, 478-79 (6th Cir. 2019); Lucero v. People, 394 P.3d 1128, 1130 (Colo. 2017); Adams v. State, 707 S.E.2d 359 (Ga. 2011).

> diminished prospects for his quality of life for the few years he has left.

Casiano, 115 A.3d at 1046-47. The promise only of a chance at geriatric release offers little more than the hope for a death outside of prison:

> 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. . . . 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.

Id.

A sentence allowing only for the hope of release at such an advanced age conflicts with the logic and spirit of Miller. As the Connecticut Supreme Court further declared:

> 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.

Id. at 1047. See also Null, 836 N.W.2d at 71 ("The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by Graham"); Moore, 76 N.E.3d at 1144-45 ("Null made clear that courts should not undertake fine line-drawing to determine how close to the mark a sentencing court can come to a defendant's life expectancy"); Bear Cloud, 334 P.3d at 142 (citing and following Null).

Likewise, the California Supreme Court ruled that while the United States Supreme Court has not yet defined the *de facto* equivalent of lifetime imprisonment, "the language of Graham suggests that the high court envisioned more than the mere act of release or a *de minimis* quantum of time outside of prison." Contreras, 411 P.3d at 454. Rather, "Graham spoke of the chance to rejoin society in qualitative terms – 'the rehabilitative ideal' – that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry." Id. The Supreme Court's language referring to a chance for reconciliation, the right to reenter the community and the opportunity to reclaim one's value and place in society, "all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement." Id.

Finally, some practical and conceptual considerations weigh against the trial court's life-expectancy-centered interpretation of the Miller rule. First, by their nature, life expectancy tables mark a median life span for a given demographic group, such that half of the people in the group will die before reaching the projected age, and half will outlive it. To the extent that the life-expectancy-centered interpretation rests on an assumption that most offenders will live to the date of their life expectancy, that assumption ignores the substantial proportion of people who die before reaching their life expectancy. See Contreras, 411 P.3d at 451 ("we do not believe the outer boundary of a lawful sentence can be fixed by a concept that *by definition* would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders") (emphasis in original); State v. Zuber, 152 A.3d 197, 214 (N.J. 2017) ("[j]udges . . . should not resort to general life-expectancy tables when they determine the overall length of a sentence" because "tables rest on informed estimates, not firm dates").

Second, courts have criticized life expectancy tables when used for this purpose. See, e.g., Contreras, 411 P.3d at 449 (describing "actuarial approach" as "practically and conceptually problematic"); see also Cummings & Colling, *There is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. Davis J. Juvenile L. & Policy 267

(2014). One concern, expressed by the Contreras court, arises from the demographic fact that females have a longer life-expectancy than males, and certain racial groups have a longer life expectancy than others. Contreras, 411 P.3d at 449-50. That being the case, the life-expectancy-centered approach would seem, without penological justification, to countenance longer sentences for female juveniles than for males, and for members of the longer-lived racial groups.

Third, the life-expectancy-centered approach, if faithfully followed on an individualized basis, makes the sentencing decision uncomfortably dependent on factors both hard to gauge and hard to justify. A sentencing court intent on pronouncing a sentence close to a juvenile offender's life expectancy will often struggle to discern the mostly unknown and unknowable future medical conditions of the individual offender. And even if an individual juvenile's life expectancy were knowable, a court could hardly justify giving significant importance to such morally-irrelevant circumstances as whether the offender will develop diabetes. See Null, 836 N.W.2d at 71 ("we do not believe the determination of whether the principles of Miller or Graham apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates").

For all these reasons, the trial court erred in adopting a life-expectancy-centered interpretation of the point at which a lengthy term of years becomes *de facto* lifetime imprisonment.

This Court must accordingly remand for resentencing, with instructions that the court, in the absence of a finding of irreparable corruption, impose a sentence consistent with the principles of Graham, Miller, and their progeny. Such a sentence could not exceed thirty-five years, given the principle that non-irreparably-corrupt juveniles must become eligible for parole at an age when, if released, they can still earn, by an honorable life, a meaningful measure of reconciliation with society.

C. Alternatively, if this Court adopts a life-expectancy-centered interpretation of the doctrine, it must still remand because the trial court erred in calculating life expectancy.

The parties here disputed not only the doctrinal significance of life-expectancy information, but also, if significant, how life expectancy should be gauged. Life expectancy tables present information about demographic groups. A table can cover an entire population or narrower sub-groups defined by gender, race, socio-economic status, or any other identified characteristic.

Here, the State argued that the court should use the broad-based tables published by the Centers for Disease Control (CDC). S 23-28. The CDC table indicates that the life expectancy for a forty-three year-old American (Lopez's age at resentencing) is eighty-one years across races and genders,

and about the same for an Hispanic male. S 27; AD 52; A53, A55. The defense argued that the court should rely on information about the life expectancy of long-term prisoners, and cited a study based on Michigan prisoners. A29-A30.

The parties argued the question in pleadings and at the start of the sentencing hearing. S 2-41; A6-A55. In a written order, the court agreed with the State in preferring the CDC tables. AD 53-54. The court noted that the CDC table has been recognized by courts as reliable for various purposes. Also, in assessing life expectancy, the CDC table uses the person's current age. The court further found fault in the fact that the study of Michigan long-term prisoners provided no information as to cause of death and drew upon "a small population sample in a different State and in a different prison system." AD 53. Instead, the court relied on the CDC table, which reflects a population consisting overwhelmingly of people who are not in any prison system at all. While acknowledging that the CDC tables do not account for any reduction in life expectancy attributable to the experience of long-term incarceration, the court concluded that the CDC table constitutes "the most reliable" option. AD 54.

In treating the CDC tables as the best source of demographic information, the court erred. An analogy illustrates the point.

The temperature of a bathtub-full of hot water encompasses, and to some degree reflects, the cooling

influence of a glass of ice-cold water poured into it. However, because of the difference in volume, a thermometer reading after the glass is emptied into the bathtub will register only a tiny change from that registered before the glass was poured. One errs, however, if one concludes that the two sources of water, pre-mixture, had essentially the same temperature. If one seeks high-quality information about the temperature of the water in the glass, one will not get it by measuring the temperature of the water in the bathtub, post-pour.

To be sure, the temperature of the water in one glass does not necessarily serve as a useful proxy for the temperature of the water in another. However, if one has good reason to think both glasses contain water from a common source, or water that experienced similar environmental influences, one can reasonably estimate the temperature in one glass by measuring the temperature in the other. Translated into the terms of this analogy, the court's error consisted in its assumption that the post-pour measurement of hot water in the bathtub proves that the pre-pour water in the glass was also hot.[8]

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[8] According to the United States Census Bureau, the United States' total population as of 2018 was approximately 327 million people. See https://data.census.gov/cedsci/table?q=United%20States&g=0100000US&tid=ACSDP1Y2018.DP05. In that same year, according to the Bureau of Justice Statistics, the total prison population was about 1.4 million. See https://www.bjs.gov/content/pub/pdf/p18.pdf. Prisoners thus represent about 0.0044 of the population, or four-tenths of one percent. Only about 182,200, or 1.7% of prisoners, are serving sentences for murder. See id. at Table 14. By any measure, prisoners serving long sentences are a vanishingly-small proportion of the total population.

As a matter of logic, the court erred. There is no sound reason to suppose that New Hampshire prisoners live much longer lives than prisoners in other states. The court therefore should have gauged Lopez's life expectancy as much shorter than thirty-eight more years, and much more in line with the estimates supported by the prisoner-based studies.

For these reasons, some courts have noted serious concerns with a CDC measurement of life expectancy that is drawn on a population that, overwhelmingly, has not experienced incarceration, much less long-term incarceration. See, e.g., Casiano, 115 A.3d at 1045-46 ("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 also Contreras, 411 P.3d at 450-51 ("it is not obvious why the definition of life expectancy should ignore other group-based differences that may be relevant to a particular juvenile defendant. . . . [Amicus] highlights the relevance of one variable in particular: incarceration"); Null, 836 N.W.2d at 71 ("It may be, as some have suggested, that long-term incarceration presents health and safety risks that tend to decrease life expectancy as compared to the general population"). This Court likewise should not assume that long-term incarceration has no negative effect on life expectancy.

Therefore, even if, contrary to the argument presented in Sections A and B above, it adopts the life-expectancy-

centered approach to defining the *de facto* equivalent of lifetime incarceration, this Court must still remand for re-sentencing, because the sentencing court significantly overestimated Lopez's life expectancy.

CONCLUSION

WHEREFORE, Mr. Lopez respectfully requests that this Court vacate his sentence and remand for resentencing, consistent with the principles described in this brief.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is, in part, in writing and that part is appended to the brief.

This brief complies with the applicable word limitation and contains approximately 7,779 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Christopher M. Johnson
Christopher M. Johnson

DATED: August 17, 2020

A D D E N D U M

ADDENDUM – TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

The State of New Hampshire

v.

Eduardo Lopez, Jr.

No. 1993-CR-0621

ORDER

In 1991, the defendant, Eduardo Lopez, Jr., then seventeen years old, shot and killed Robert Goyette during an attempted robbery. As a result, the defendant stood indicted of first degree murder. In 1993, a jury returned a verdict of guilty. Pursuant to RSA 630:1-a, III, the defendant received a statutorily-mandated sentence of life imprisonment without the possibility of parole. In June 2012, the United States Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. 460, 479 (2012). Arguing that *Miller* must be applied retroactively, the defendant requested resentencing via a petition for a writ of *habeas corpus*. *See Lopez v. Gerry*, Merrimack Cnty. Super. Ct., No. 217-2013-CV-00085. The trial court agreed that *Miller* applied retroactively and granted the defendant's petition. The New Hampshire Supreme Court affirmed. *Petition of State of N.H.*, 166 N.H. 659, 662 (2014). In 2016, the United States Supreme Court also held that *Miller* applied retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (effectively affirming the New Hampshire Supreme Court's decision).

In accordance with these cases, the court convened a resentencing hearing on December 13 and 14, 2017, at which it heard the testimony of Drs. Stuart Gitlow and Antoinette Elizabeth Kavanaugh. The court also considered input from Mr. Goyette's family members, Officer Thomas Mac-

Leod, the defendant's family members, and the defendant himself. Following the hearing, the parties submitted additional memoranda outlining the reasons for their proposed sentencing recommendations. After considering the record, the nature and circumstances of the underlying crime, the characteristics of the defendant, and the traditional sentencing factors, the court imposes a sentence of forty-five years to life. The court has stated its reasons for that sentence on the record at this day's hearing. The parties, however, have made certain legal arguments that are better addressed in writing. The purpose of this order is to address those issues.

Defendant's Motion to Bar Use of Acquitted Conduct at Sentencing

The defendant was indicted on two alternative counts of first degree murder. The first indictment alleged that the defendant "purposely caused the death of Robert Goyette [ ] by shooting him in the head with a .25 caliber handgun." When instructing the jury regarding this charge, the court (*Murphy*, J.) stated: "To prove that the Defendant acted purposely requires ... proof that the Defendant specifically intended or desired to cause the victim's death. And, secondly, the State must prove, beyond a reasonable doubt that the Defendant's act[ ], in [ ] causing the death[ ] [was] deliberate and premeditated." Tr. Transcript Vol. VI at 8. The jury returned a verdict of not guilty on this charge. In light of that verdict, the defendant argues that, for the purposes of sentencing, the "Court may not consider any argument that [he] acted purposely in killing Robert Goyette." Def.'s Mot. ¶ 3 (citation omitted). In response, the state argues that the jury could have found that the defendant acted "purposely" in that he intended to cause Mr. Goyette's death, but not with "the requisite premeditation and deliberation" that is also required in first degree murder cases. State's Obj. Mot. ¶ 7. Therefore,

the state maintains that it "is free to argue ... that the defendant acted purposely, *i.e.*, acted with the conscious object to kill [Mr.] Goyette when he tried to rob him and killed him." *Id.* ¶ 12.[1]

"A judge exercises wide discretion in choosing the sources and types of evidence on which to rely in imposing sentence." *State v. Cobb*, 143 N.H. 638, 660 (1999) (quotation omitted). Indeed, a "trial court may consider evidence of pending charges, as well as charges that have fallen short of conviction, in determining sentencing." *State v. Cote*, 129 N.H. 358, 374 (1987) (citations omitted). It is, however, improper and "an abuse of discretion to consider offenses for which the defendant has been acquitted." *Cobb*, 143 N.H. at 660 (citation omitted). In this case, the defendant was acquitted of the first degree murder indictment alleging a purposeful mental state. While it is entirely plausible that the jury could have found beyond a reasonable doubt that the defendant's conscious object was to kill Mr. Goyette, but that he did not act with premeditation as required under the murder statute, such a distinction necessarily requires the court to "invade the inner sanctum of the jury to determine what percentage of probability they may have assigned to the various proofs before it." *Cote*, 129 N.H. at 374. Put differently, the state's argument calls for the court to speculate as to how the jury may have reached its acquittal verdict. Under *Cote*, this is improper because "a criminal defendant [cannot] rightly be punished" where "the jury may have been convinced as to most elements of the offense, and yet remained unconvinced as to one or more other elements." *Id.* at 375. For these reasons, the court has given no weight to the "purposeful" evidence presented by the state at the hearing. *See State v. Coppola*, 130 N.H. 148, 156 (1987) (holding that "trial judge should [ ] either have sustained the objection to receipt of the evidence [of acquitted conduct], or have indicated that he would

[1] The state also observed that, "under federal law, a judge may consider conduct underlying an acquitted charge to the extent the government proves the conduct by a preponderance of the evidence." State's Obj. n. 3, citing *United State v. Watts*, 519 U.S. 148 (1997). This court, however, is not applying federal law. New Hampshire courts cannot consider conduct underlying a charge where the defendant has been acquitted of that charge. *State v. Cote* 129 N.H. 358, 376 (1987), *see also State v. Gibbs*, 157 N.H. 538, 541 (2008) ("*Cote* provides greater protection than that provided to a defendant in United States v. Watts."). Therefore, *Watts* has no bearing on this court's analysis.

give it no weight"). Instead, the court's sentencing decision is based solely on the "knowingly" *mens rea* indictment on which the defendant was actually convicted.

De Facto Life Sentence[2]

In *Miller*, the Supreme Court "determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery*, 136 S. Ct. at 734 (quotation omitted). The Court, however, did not categorically "foreclose a sentencer's ability to" impose a life sentence on a juvenile convicted of homicide. *Miller*, 567 U.S. at 480. It cautioned that before imposing such a punishment, the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* The Supreme Court observed that under this circumstance the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 479; *see, e.g., State v. Spader*, Hillsborough Cnty. Super. Ct. N. Dist., No. 216-2010-S-240-245 (Order of Apr. 26, 2013 at 21) (sentencing the defendant, who was a juvenile at the time he committed murder, to life without parole after finding that he was "uniquely and persistently malevolent and, as such, [was] an 'uncommon' example under the *Miller* analysis").

Based on the foregoing, the defendant asserts that unless the court makes the requisite findings to support the imposition of a sentence of life without parole, it cannot impose a sentence that leads to the same result—a *de* facto life without parole sentence. The defendant further argues that any minimum sentence exceeding thirty-five years constitutes such a *de facto* life without parole sentence. Def.'s Mot. ¶¶ 40, 45. Finally, the defendant contends that there is a presumption against life without parole sentences for juveniles—both *de facto* and *de jure*—and that the state must rebut that presumption beyond a reasonable doubt. *Id.* ¶ 16. The state disagrees. It relies on the analysis of a minority of cases that have rejected the *de facto* life sentence doctrine under *Miller*. *See* State's Obj. ¶

[2] "A *de facto* life sentence is defined as one that exceeds the defendant's life expectancy." *Peterson v. State*, 193 So.3d 1034, 1036 n.4 (Fla. Dist. Ct. App. 2016).

10 (collecting cases). The state argues that, even if the court were to recognize the *de facto* life sentence doctrine, its proposed sentence of 51.5 years to life is not such a sentence. Therefore the court need not conduct the full *Miller* analysis. *Id.* ¶ 18. Finally, the state contends that "a presumption, which the State must overcome beyond a reasonable doubt, is neither constitutionally required nor procedurally necessary to effectuate the mandate of *Miller*." *Id.* ¶ 26.

"The Supreme Court has not yet decided the question whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole." *United States v. Cobler*, 748 F.3d 570, 580 n. 4 (4th Cir. 2014). Numerous other courts, however, "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." *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1044 (Conn. 2015).

An apparent majority of those courts have held that "a lengthy term of years [should] be considered the equivalent of a life sentence and that *Miller* sentencing protections relating to life sentences for juveniles apply to such lengthy terms of imprisonment." *State v. Cardeilhac*, 876 N.W.2d 876, 889 (Neb. 2016); *see, e.g., McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (*Miller* "cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life"); *State v. Zuber*, 152 A.3d 197 (N.J. 2017); *Casiano*, 115 A.3d 1031; *Henry v. State*, 175 So.3d 675 (Fla. 2015); *Brown v. State*, 10 N.E.3d 1 (Ind. 2014); *Bear Cloud v. State*, 334 P.3d 132, 141–42 (Wyo. 2014) ("[T]he *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's diminished culpability and greater prospects for reform when [ ] the aggregate sentences result in the functional equivalent of life without parole."); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) ("[W]e believe that while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections."); *People v. Caballero*, 282 P.3d 291 (Cal. 2012); *but see State v. Ali*,

895 N.W.2d 237 (Minn. 2017) (holding that *Miller* did not apply to the "functional equivalent" of life imprisonment without parole sentences); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017); *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016), *State v. Brown*, 118 So.3d 332 (La. 2013); *Adams v. State*, 707 S.E.2d 359 (Ga. 2011).[3]

The rationale for such a rule is clear: one "cannot ignore the reality that a seventeen year-old sentenced to life without parole and a seventeen year-old sentenced to 254 years with no possibility of parole, have effectively received the same sentence. Both sentences deny the juvenile the chance to return to society." *Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013). "Defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation. The label alone cannot control...." *Zuber*, 152 A.3d at 212; *see also State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) ("[T]he rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole."); *People v. Nunez*, 125 Cal.Rptr.3d 616, 624 (Ct. App. 2011) ("Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label, as the trial court did, is arbitrary and baseless."). The court is persuaded by those authorities. It recognizes that a lengthy prison sentence for a term-of-years with no chance for parole is the functional equivalent to a life sentence. Therefore, the court agrees with the defendant that the imposition of a *de facto* life sentence would require the court to find, under *Miller*, that he is "the rare juvenile of-

[3] Many of these cases address whether consecutive sentences for multiple crimes constitute *de facto* life sentences where, in the aggregate, they exceed the defendant's life expectancy. In this case, the defendant has already served the sentences imposed on his non-homicide convictions. Therefore, he may only being resentenced on the murder conviction. While the court recognizes that there are various factual differences between these cited cases and instant case, it nonetheless finds them instructive. *See Zuber*, 152 A.3d at 197 ("To be clear, we find that the force and logic of Miller's concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; and to homicide and non-homicide cases.").

fender whose crime reflects irreparable corruption" and not "transient immaturity." *Montgomery*, 136 S. Ct. at 734 (quotation omitted).

Having found that *Miller* protections would apply to a *de facto* life sentence, the next issue is whether the forty-five year minimum sentence in this case is a *de facto* sentence. On one end of the spectrum, sentences exceeding any reasonable life expectancy for the offender are clearly the functional equivalent of life sentences.[4] On the other, sentences less than thirty-five years are generally not considered *de facto* life sentences for juveniles,[5] a position with which the defendant's argument aligns. Courts have reached different conclusions regarding sentences in between these two extremes.[6] The obvious difficultly in trying to define what constitutes a *de facto* life sentence in any given case is that "it is impossible to determine precisely how long any one person has to live." *Springer v. Dooley*, No. 3:15–CV–03008–RAL, 2015 WL 6550876, at *7 (D.S.D. Oct. 28, 2015).

To resolve this issue, both parties urge the court to look to life expectancy estimates. Some courts disfavor the use of life-expectancy tables in setting sentences. *See, e.g., Zuber*, 152 A.3d at 214 ("Judges, however, should not resort to general life-expectancy tables when they determine the overall length of a sentence. Those tables rest on informed estimates, not firm dates, and the use of factors like race, gender, and income could raise constitutional issues."); *Null*, 836 N.W.2d at 71 ("We do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determin-

[4] *See, e.g., McKinley*, 809 F.3d at 911 (100 year sentence); *Brown*, 10 N.E.3d at 8 (150 year sentence was effective life sentence); *Caballero*, 282 P.3d at 295 (110 year sentence with eligibility for parole after 100 years); *Floyd v. State*, 87 So.3d 45 (Fla. Dist. Ct. App. 2012) (80 year sentence with opportunity for release at 85).

[5] *See, e.g., People v. Reyes*, 63 N.E.3d 884 (Ill. 2016) (32 years was not a *de facto* life sentence); *James v. United States*, 59 A.3d 1233 (D.C. 2013) (30 year murder sentence did not implicate *Miller*); *State v. Springer*, 856 N.W.2d 460 (S.D. 2014) (where defendant was eligible for parole after 33 years, he did not receive a *de facto* life sentence).

[6] *Compare, e.g., Zuber*, 152 A.3d at 212–13 (parole eligibility after 55 years was not officially "life without parole" but was "sufficient to trigger the protections of *Miller*"); *Casiano*, 115 A.3d at 1044 (50 year sentence without possibility of parole is subject to *Miller*); *Null*, 836 N.W.2d at 71 (52.5 year sentence is "sufficient to trigger *Miller*-type protections"); *Ragland*, 836 N.W.2d 107 (defendant entitled to *Miller* hearing where governor commuted his life sentence to 60 years); *Bear Cloud*, 334 P.3d at 142 (parole eligibility after 45 years imprisonment constituted *de facto* life sentence) *with Thomas v. State*, 78 So.3d 644, 646 (Fla. Dist. Ct. App. 2011) (50 year sentence was not functional equivalent of life without parole); *Ellmaker v. State*, No. 108,728, 2014 WL 3843076, at *10 (Kan. App. Ct. Aug. 1, 2014) ("[W]e reject Ellmaker's assertion that a hard 50 [year] sentence on a juvenile offender is the functional equivalent of a life sentence without parole.").

ing precise mortality dates."). Because both parties have urged the court to look at life expectancy tables—albeit different ones—the court will assume without deciding that such an analysis is appropriate for a very limited purpose. Specifically, the court will not use the life-expectancy tables to "determine" an appropriate sentence; rather, it will consider them as one factor in evaluating whether the forty-five year minimum imposed this day constitutes a *de facto* life sentence, thereby triggering the need for a *Miller*-type analysis.

As indicated above, the parties disagree as to which life expectancy estimate is most appropriate. The state points the court to the 2014 Centers for Disease Control and Prevention ("CDC") National Vital Statistics tables. These tables reflect the projected life expectancy for the general population and do not take into account the effects of imprisonment. One CDC table shows that a 43 to 44 year-old male—the defendant's current age—is expected to live an additional 38 years. Another race-specific CDC table projects that a Hispanic 43 to 44 year-old male would live another 38.4 years. Both the generic male and Hispanic male tables show that if the defendant lives until sixty-two years of age—his age when he becomes parole eligible—his life expectancy would be at least an additional 20 years (20.2 years under the generic male table and 22.0 years under Hispanic male table).[7] In contrast, the defendant points the court to a document apparently authored by the American Civil Liberties Union ("ACLU") of Michigan entitled "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences." *See* Def.'s Mot. Unmarked Attachment. This document references a study showing that "the average life expectancy" for "Michigan adults incarcerated for natural life sentences in Michigan" is 58.1 years. (Citation omitted). The document further states that, "[l]ooking at Michigan youth who were punished with a natural life sentence, the average life expectancy is 50.6

[7] The State only provided the first page of each table with its pleading. The first page only shows projections through the ages of 60-61. The second page, however, shows the projected life expectancy for ages 62-63. *See* Elizabeth Arias, et al., *National Vital Statistics Reports*, Vol. 66, No. 4, Tables 2 & 11 (Aug. 14, 2017), *available at* https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_04.pdf. The court has taken judicial notice of these tables. *See, e.g., People v. Hernandez*, 181 Cal.Rptr.3d 87, 90 n.11 (App. Ct. 2014), vac'd on other grounds, 381 P.3d 219 (Cal. 2016) (taking judicial notice of National Vital Statistics Reports in deciding that sentence exceeded life expectancy).

years." (Citation omitted). Based primarily on the life expectancy figures referenced in this document, the defendant contends that any sentence exceeding thirty-five years must be considered a *de facto* life sentence.

Upon review, the court is persuaded that the CDC tables are authoritative on the issue of life expectancy. The figures in the ACLU document are entitled to considerably less weight. First, the CDC tables have been recognized as reliable by the New Hampshire Supreme Court. *See* Super Ct. Civ. R. 37(e) (CDC tables are "admissible as evidence to prove life expectancy" in civil cases). Second, the CDC table does not merely cite the average life expectancy of a particular person. Unlike the ACLU document, the CDC table takes into account the current age of the person. *See State v. Zuber*, 126 A.3d 335, 347 (N.J. Super. App. Div. 2015), rev'd on other grounds, 152 A.3d 197 (N.J. 2017) ("Since committing his crimes, defendant had survived three decades' worth of risks, and had reached the age of forty-eight at the time of the [resentencing hearing]. His motion should be decided based on his age at the time of the hearing."). Third, several other courts that have addressed juvenile sentencing issues under *Miller* and *Graham* have relied on the CDC tables, further lending weight to their reliability in this context. *See, e.g., State v. Moore*, 76 N.E.3d 1127, 1134 (Ohio 2016) (looking to CDC life expectancy table to determine that defendant received "a sentence that extends beyond [his] life expectancy"); *Casiano*, 115 A.3d at 1046 (recognizing the CDC life expectancy as a "general figure"); *Beach v. State*, 348 P.3d 629, 650 (Mont. 2015) (*Wheat*, J., dissenting) (looking to CDC statistics in determining that the defendant's "sentence exceeded his life expectancy at the time of sentencing"). Fourth, the ACLU document lacks many essential details regarding the inmates' causes of death. It is also based on a small population sample in a different State and in a different prison system. Finally, as stated above, it does not take into account the prisoner's current age and the fact that a prisoner, like the defendant, has survived nearly thirty years of "risks" while in the prison system. *See United States v. Bullion*, 466 F.3d 574, 576 (7th Cir. 2006) (rejecting 58 year-old defendant's use of the at-birth 77 year life expectancy figure because "[r]emaining life expectancy increases

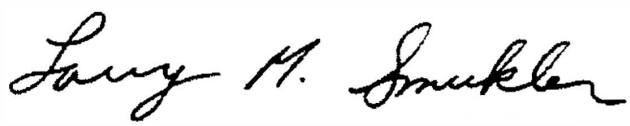
with every year one lives, and in fact the life expectancy of the average 58-year-old American is not 77 but 84").

The court is not ignoring the fact that the CDC tables do "not account for any reduction in life expectancy due to the impact of spending the [ ] majority of one's life in prison." *Casiano*, 115 A.3d at 1046; *Null*, 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"). In fact, many courts appear to accept the premise that incarceration has a measureable effect on life expectancy. *See, e.g., 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"). Others have identified factors that may increase life span, such as guaranteed food, housing, and healthcare unavailable to some segments of the general population. *See Zuber*, 126 A.3d at 348 n.16 ("prisons are obligated to supply inmates with steady nourishment, access to free medical care, and secure housing which, while not perfect, may be superior to what they had outside of prison"). The court acknowledges that any life expectancy analysis is imperfect, particularly when applied to one individual. A myriad of factors and events cause some to live lives that exceed the average while others, like Robert Goyette, die at an age that is considerably younger than the average. Short of convincing data that considers all material factors that may affect the life span of a New Hampshire inmate, the court cannot find that the effects of incarceration will reduce the defendant's life expectancy from over 38 additional years (under the CDC tables) to only seven years (as suggested by the ACLU document). What the court can say is that the CDC data is the most reliable alternative presented. Based on this data, a forty-five year minimum is not a *de facto* life sentence.

In sum, the sentence imposed by the court, which gives the defendant a meaningful opportunity for release at sixty-two years of age, is not a *de facto* life sentence. *See e.g. State v. Smith*, 892 N.W.2d 52, 66 (Neb. 2017) ("[B]ecause Smith will be parole eligible at age 62, we do not agree that

his sentence represents a geriatric release or equates to no chance for fulfillment outside prison walls, because in today's society, it is not unusual for people to work well into their seventies and have a meaningful life well beyond age 62 or even at age 77.") (quotations omitted); *Angel v. Commonwealth*, 704 S.E.2d 386, 401–02 (Va. 2011) (consecutive life sentences were not *de facto* life sentences because the defendant could petition for conditional release at age 60). Because the court is not imposing a *de facto* or a *de jure* life sentence, it need not find that the defendant is the "rare," "irreparably corrupt [ ]" type of juvenile deserving of such a sentence under *Miller*. *Montgomery*, 136 S. Ct. at 734 (quotation omitted). The court also need not decide whether the state would bear the burden of proving that characteristic beyond a reasonable doubt.

So ORDERED.



Date: January 30, 2018

LARRY M. SMUKLER
PRESIDING JUSTICE