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A MEANINGFUL OPPORTUNITY FOR RELEASE: *GRAHAM* AND *MILLER* APPLIED TO *DE FACTO* SENTENCES OF LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS

Abstract: Following the Supreme Court’s 2012 decision in *Miller v. Alabama*, that sentences of life without parole for non-incorrigible offenders who committed their crimes before the age of eighteen were unconstitutional, state and federal courts were left confused as to the decision’s parameters. In April 2018, the Third Circuit Court of Appeals, in *Grant v. United States*, ruled that a term of years sentence that exceeded the life expectancy of an offender who committed a crime as a juvenile constituted *de facto* life without parole, and was unconstitutional under *Miller*. This decision was in accordance with decisions by the Seventh, Ninth and Tenth Circuit Courts of Appeals. The Eighth Circuit Court of Appeals, however, held that *Miller* only applies to mandatory sentences of life without parole. This Comment argues that the Third Circuit better analyzed Supreme Court jurisprudence to find that *de facto* life without parole sentences for non-incorrigible juveniles were inconsistent with the Supreme Court’s jurisprudence. Meanwhile, the Eighth Circuit’s analysis fell short due to that court according insufficient weight to *Montgomery v. Louisiana*.

INTRODUCTION

Corey Grant’s story was a tragic, if not atypical one.¹ As a young boy, he grew up in a troubled household with an inattentive mother and often absentee father.² Being physically imposing even as a youth, Grant joined a drug gang in his hometown of Elizabeth, New Jersey.³ After participating in a fatal confrontation with rival drug dealers, Grant was sentenced to life in prison without the possibility of parole, despite being only sixteen-years-old at the time.⁴ Following the Supreme Court’s 2012 decision in *Miller v. Alabama*, Grant was able to get his sentence reconsidered, and was resentenced

¹ See Brief of Defendant-Appellant Corey Grant and Appendix Volume 1 of 3 at 5, *United States v. Grant*, 887 F.3d 131 (3d Cir.), *reh’g en banc granted, vacated*, 905 F.3d 285 (3d Cir. 2018) (No. 16-3820), 2017 WL 2266122 at *5 [hereinafter Brief of Appellant] (describing Grant’s childhood, growing up with a teenage mother who was addicted to drugs, and a father who was incarcerated).

² *Id.*

³ See *id.* at 8, 11 (describing the E-Port Posse and Grant’s usefulness to them).

⁴ *Grant*, 887 F.3d at 134.

such that he will likely be released at age seventy-two.⁵ He fears that by then he will be dead.⁶

Miller is the last case in a line of Supreme Court jurisprudence striking down the harshest penalties for offenders who committed crimes as juveniles.⁷ The *Miller* Court held that mandatory sentences of life without parole for juveniles capable of reform are unconstitutional under the Eighth Amendment.⁸ In the years following, federal courts have considered whether the rule promulgated in *Miller* applies to lengthy sentences that exceed an offender's life expectancy.⁹

In 2018, in *United States v. Grant*, the Third Circuit Court of Appeals ruled that a sixty-five year long sentence for a non-incorrigible juvenile homicide offender was an unconstitutional *de facto* life without parole sentence under *Miller*.¹⁰ Several other circuit courts have reached similar conclusions.¹¹ In *Grant*, however, the Third Circuit further expounded that, to comport with the spirit of the Supreme Court precedents announced in *Miller* and in 2010 in *Graham v. Florida*, there exists a presumption that a juvenile must be afforded a chance to obtain release before the age of sixty-five, which the court determined to be the national retirement age.¹²

The Third Circuit in *Grant* acknowledged that its decision split with the Eighth Circuit Court of Appeals' 2016 decision in *United States v. Jefferson*.¹³ In that case, the court refused to overturn a fifty year long sentence

⁵ *Id.* at 135, 147.

⁶ *See id.* at 147 (noting that according to *Grant*, he will be released at the same age as his life expectancy).

⁷ *See Miller v. Alabama*, 567 U.S. 460, 489 (2012) (finding mandatory life without parole sentences for juveniles unconstitutional under the Eighth Amendment); Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121, 1125–31 (2016) (chronicling iterative Supreme Court decisions striking down the most severe punishments available for juvenile sentencing under the Eighth Amendment).

⁸ *Grant*, 887 F.3d at 140; *see Miller*, 567 U.S. at 489 (finding that mandatory life sentences without parole for juveniles were disproportionate, and thus impermissible under the Eighth Amendment).

⁹ *Grant*, 887 F.3d at 142.

¹⁰ *Id.*; *see Miller*, 567 U.S. at 489 (finding that mandatory life sentences without parole for juveniles were disproportionate, and thus impermissible under the Eighth Amendment). Incorrigible juveniles are those who are not able to be reformed. *See Grant*, 887 F.3d at 134 (describing the holding of *Miller*).

¹¹ *Grant*, 887 F.3d at 145–47; *see also Budder v. Addison*, 851 F.3d 1047, 1056 (10th Cir. 2017) (finding a lack of material difference between a sentence that imprisons the defendant for life without parole, and one that is so long as to guarantee that the defendant will die before he is eligible for release); *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2015) (holding that, unless there was a significant increase in longevity, a 100-year sentence for a sixteen-year-old constituted *de facto* life without parole).

¹² *Grant*, 887 F.3d at 150.

¹³ *Id.* at 146.

for a youth convicted of murder who showed capacity for reform, concluding that *Miller* declared unconstitutional only mandatory sentences of life without parole.¹⁴ Therefore, the Eighth Circuit declined to consider whether the defendant's non-mandatory sentence amounted to a *de facto* life without parole sentence.¹⁵

Part I of this Comment describes the line of Supreme Court precedent leading up to the Third Circuit's decision in *Grant*, and summarizes the factual and procedural posture of that case.¹⁶ Part II provides an overview of the Third Circuit's decision and the decisions of other circuits.¹⁷ Part III argues that the Third Circuit's decision was a more natural extension of the Supreme Court's precedent, whereas the Eighth Circuit did not give appropriate weight to the Supreme Court's decision in *Montgomery v. Louisiana*, and thus misapplied the Supreme Court's precedent regarding juveniles sentenced to life without parole.¹⁸

I. THE SUPREME COURT'S INCREMENTAL CONTRACTION OF ELIGIBILITY FOR JUVENILE LIFE WITHOUT PAROLE AS IT APPLIES TO *GRANT*

A. Factual Background and Procedural Posture

In 1986, at age thirteen, Corey Grant joined the E-Port Posse ("Posse"), a gang that sold drugs in Elizabeth, New Jersey.¹⁹ Given his size,

¹⁴ *United States v. Jefferson*, 816 F.3d 1016, 1018–19 (8th Cir. 2016); *see also* Garza v. Frakes, No. 8:17CV474, 2018 WL 1710183, at *4 (D. Neb. Apr. 9, 2018) (affirming a ninety-year sentence for crimes committed by a 16 year old).

¹⁵ *Jefferson*, 816 F.3d at 1019.

¹⁶ *See infra* notes 19–70 and accompanying text.

¹⁷ *See infra* notes 71–93 and accompanying text.

¹⁸ *See infra* notes 94–120 and accompanying text.

¹⁹ *Grant*, 887 F.3d at 132. Grant reportedly came from a troubled background and had several run-ins with the law prior to this case. *See* Brief of Appellant, *supra* note 1, at *10–11 (describing Grant's previous arrest and detention record). The E-Port Posse ("Posse") was a drug-selling gang that operated in Elizabeth and parts of Newark in New Jersey. NEW JERSEY STATE COMMISSION OF INVESTIGATION, AFRO-LINEAL ORGANIZED CRIME 7 (1991). The Posse was created in 1987 by brothers Bilal and Robert Pretlow, and frequently used youths to carry out their operations. *See* Joseph F. Sullivan, *21-Year-Old Stands Trial Under Drug Kingpin Law*, N.Y. TIMES, Dec. 10, 1991 (reporting that Bilal Pretlow's short career started in 1987, and that his gang, the E-Port Posse frequently used youths in their crimes). The Pretlows established themselves in the cocaine trafficking business by sharply cutting the cost of cocaine, and by threatening anyone who sold drugs in Elizabeth without being part of the Pretlows' gang. *See* STATE OF NEW JERSEY COMMISSION OF INVESTIGATION, *supra*, at 7 (describing meeting in a diner where Bilal Pretlow warned other drug dealers in the region to refrain from selling drugs in Elizabeth); Sullivan, *supra* (attributing Bilal Pretlow's success partially to his reducing cocaine prices from \$20 per vial to \$10 per vial); Bilal was eventually arrested on state charges and sentenced to twenty years in state prison. Sullivan, *supra*. Following this, he was indicted on capital federal charges related to the slaying of a teenage girl who had discovered his drug operation. *See id.* (describing federal charges against Pretlow).

Grant acted as one of the Posse's "enforcers," despite his youth.²⁰ In August 1989, Grant and four companions encountered Dion Lee, a former member of the Posse who had left the gang to deal drugs on his own.²¹ Grant warned Dion Lee not to sell drugs on the Posse's turf unless he was working for them, and upon Lee's refusal, Grant hit him on the head with a gun.²² Lee then attempted to withdraw from the encounter, and as he did so, Grant and one of his companions shot Lee in the leg.²³

Later that month, Grant and another Posse member encountered Dion's brother, Mario Lee, who had also previously been warned against operating on the Posse's turf.²⁴ Lee attempted to run away from Grant and his companion, but Grant ordered his accomplice to shoot Lee to stop him from getting away.²⁵ The accomplice did as he was ordered, and fatally shot Mario Lee.²⁶

B. Procedural Posture

On January 25, 1991, the United States charged Grant under the Racketeer Influenced and Corrupt Organizations Act (RICO) for conspiracy, racketeering, conspiracy to possess with the intent to distribute cocaine, two counts of possession with the intent to distribute cocaine, and two counts of possession of a weapon in relation to a crime of violence and drug trafficking.²⁷ Despite being under eighteen at the time of his crimes, Grant was

²⁰ *Grant*, 887 F.3d at 135. Grant was evidently highly useful in his role as an enforcer, being physically large by the time he was sixteen-years-old. *See* Brief of Appellant, *supra* note 1, at 11. (explaining Grant's usefulness in physical confrontations).

²¹ *Grant*, 887 F.3d at 136; *see* Brief of Appellant, Corey Grant at 10–11, 6 F.3d 780 (Table) (3d Cir. 1993) (No. 92-5644), 1993 WL 13121358, at *13–14 (describing Grant's companions).

²² *Grant*, 887 F.3d at 136.

²³ *Id.* Grant denies pulling the trigger himself in this encounter, despite acknowledging that he knew others in the group were armed. *See* Brief of Appellant, *supra* note 1, at 13. (describing the encounter with Dion Lee).

²⁴ *Grant*, 887 F.3d at 136.

²⁵ *Id.*

²⁶ *Id.* at 135. It should be noted that under the sentencing guidelines, the punishment for soliciting another to commit first degree murder is equivalent to committing first degree murder oneself, provided that the solicitation resulted in death. U.S. SENTENCING GUIDELINES MANUAL § 2A1.5(c)(1) (U.S. SENTENCING COMM'N 1990).

²⁷ *Grant*, 887 F.3d at 135. The government also presented evidence that Grant was involved in at least two other murders, of which he was acquitted. Brief of Appellant, *supra* note 1, at 14. The Racketeer Influence and Corrupt Organizations Act (RICO) was enacted in 1970 to counter-act organized crime. Regan Gibson & Kevin Homiak, *Racketeer Influenced and Corrupt Organizations*, 50 AM. CRIM. L. REV. 1423, 1424 (2013). RICO's aim was to combine varied crimes committed in furtherance of a criminal organization into one federal crime. *See id.* (describing RICO's aims). To charge an individual under RICO, the individual must engage in more than one act of "racketeering activity." *See id.* (describing the elements of a RICO offense). "Racketeering activity" is broadly defined and includes many state felonies. *See id.* at 1427 (discussing "racketeering activity"). In cases where the sentence for an underlying state crime is life imprisonment, RICO also provides for a sentence of life imprisonment. *Id.* at 1458 n.255.

tried as an adult in February 1992.²⁸ The jury returned guilty verdicts on the RICO conspiracy, racketeering, drug possession, and gun possession charges.²⁹ It further found that Grant murdered Mario Lee and attempted to murder Dion Lee.³⁰ The United States District Court for the District of New Jersey denied Grant's departure motion and sentenced him to life without parole on the RICO counts.³¹ It also imposed a forty-year term-of-years sentence on the drug-trafficking counts to run concurrently with the life sentence, and a five-year sentence on the gun possession count to run consecutively.³² These sentences were within obligatory sentencing guidelines.³³ The Third Circuit then affirmed the sentence and the conviction.³⁴ Grant sought a writ of habeas corpus in 2006 and in 2008 filed a motion pursuant to 28 U.S.C § 2255.³⁵ Both were dismissed.³⁶

In 2012, following the Supreme Court's decision in *Miller*, Grant filed a second motion under § 2255 challenging his sentence as unconstitution-

²⁸ *Grant*, 887 F.3d at 136.

²⁹ *Id.*

³⁰ *Id.* Grant was reportedly offered multiple plea bargains by the government, ranging from ten-to-thirty years. See Brief of Appellant, *supra* note 1, at 14 (describing the government's pursuit of a plea bargain with Grant and Pretlow's attempt to pressure Grant, through his mother, to refuse a plea bargain). Grant declined these offers citing "loyalty and fear." *Id.*

³¹ *Grant*, 887 F.3d at 136. Section 3553 of Title 18 of the U.S. Code permits a sentencing court to depart from the sentencing guidelines if the offender presents circumstances not taken into account by the guidelines. See 18 U.S.C § 3553(b) (2012) (describing process for imposition of sentence).

³² *Grant*, 887 F.3d at 136. Grant was sentenced pursuant to the 1991 Federal Sentencing Guidelines Manual ("Sentencing Guidelines"). *Grant v. U.S.*, No. 12-6844, 2014 WL 5843847, at *5 (D.N.J. Nov. 12, 2014). Section 5K2.0 of the Sentencing Guidelines allows the defendant to seek a departure from them in situations where the court can determine that the United States Sentencing Commission ("Sentencing Commission") failed to take into account the specific circumstances of the given offender when creating the guidelines. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (U.S. SENTENCING COMM'N 1991). The Sentencing Guidelines later state that youth is ordinarily irrelevant to determining if a departure should be allowed. *Grant*, 2014 WL 5843847 at *5. A term-of-years sentence is a sentence for a fixed number of years, contrasting with a life sentence. See *McKinley*, 809 F.3d at 911 (describing McKinley's sentence).

³³ *Grant*, 887 F.3d at 136. In 1990, the Sentencing Guidelines prescribed life imprisonment or death as the punishment for first degree murder, including when the murder was accomplished through solicitation of another to commit the murder. United States Sentencing Commission, *Guidelines Manual*, §§ 2 A1.1, 2A1.5 (Nov. 1990).

³⁴ See *Grant*, 6 F.3d 780 (Table) (affirming Grant's conviction without opinion).

³⁵ *Grant*, 887 F.3d at 136.

³⁶ *Id.* Habeas corpus is defined as "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." *Habeas Corpus*, BLACK'S LAW DICTIONARY (10th ed. 2014). Section 2241 of Title 28 of the U.S. Code, in relevant part, allows district judges to grant writs of habeas corpus within their jurisdictions. 28 U.S.C. § 2241 (2012), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008). Section 2255 allows a prisoner who believes that his sentence is unconstitutional, illegal, or otherwise subject to collateral attack to "move the court which imposed the sentence to vacate, set aside, or correct the sentence." *Id.* § 2255.

al.³⁷ This challenge succeeded, and the district court ordered that Grant be re-sentenced.³⁸

For the purposes of resentencing, the district court only reviewed the RICO charges, for which Grant had received mandatory life sentences.³⁹ The court ruled that Grant was not incorrigible, and thus, relying on *Miller*, overturned the sentence of life without parole.⁴⁰ Seeking to impose a sentence that provided for appropriate punishment, the court sentenced Grant to sixty years imprisonment for the RICO charges, for a total of sixty-five years without parole.⁴¹ Under this resentencing Grant would be released at age seventy-two if he were granted good time credit, an age that Grant argued would be equivalent to his life expectancy.⁴² Grant then appealed, and the Third Circuit ruled that his new sentence was still unconstitutional under *Miller*, holding that defendants such as Grant should have a chance for release before retirement age.⁴³ Following this, the *en banc* Third Circuit vacated the court's initial opinion and judgment pending the *en banc* court's decision.⁴⁴

C. Status of the Law

The Eighth Amendment of the Constitution prohibits the imposition of cruel and unusual punishments, and affirms that punishment must be proportional to the crime at hand.⁴⁵ This concept of proportionality is generally interpreted through “evolving standards of decency” that are not stagnant, but rather change over time.⁴⁶ In coming to its conclusions in *Graham* and

³⁷ *Grant*, 887 F.3d at 136. Section 2255 provides that a second motion “must be certified . . . by a panel of the appropriate court of appeals to contain” *inter alia*, “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255. In *Miller v. Alabama*, decided in 2012, the Court held that mandatory life without parole sentences for juveniles were unconstitutional under the Eighth Amendment. 567 U.S. at 489.

³⁸ *Grant*, 887 F.3d at 136; *see also Grant*, 2014 WL 5843847, at *6 (ordering Grant's resentencing).

³⁹ *Grant*, 887 F.3d at 136.

⁴⁰ *Id.* at 137.

⁴¹ *Id.*

⁴² *Id.* Section 3624 allows certain prisoners who follow prison rules and maintain good disciplinary records to receive credit towards the service of their sentence beyond the amount of days actually served. 18 U.S.C. § 3624.

⁴³ *Grant*, 887 F.3d at 137, 143, 150.

⁴⁴ Order Sur Petition for Rehearing En Banc, 905 F.3d 285 (3d Cir. 2018).

⁴⁵ U.S. CONST. amend. VIII; *see Kelly Scavone, Note, How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439, 3445 (2014) (discussing origins of the Eighth Amendment and the narrow proportionality principle).

⁴⁶ *See Scavone, supra note 45*, at 3446 (quoting *Miller*, 567 U.S. at 469); *see also John R. Mills et al., Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 539 (2016) (discussing the Court's application of “evolving standards of decency” to determine whether a punishment is proportionate). To determine whether

Miller, the Supreme Court merged two lines of precedent—one requiring individual sentencing considerations before imposing the death penalty, and the other striking down overly harsh sentences for offenders with diminished culpability such as juveniles and intellectually disabled persons.⁴⁷

In 2005, in *Roper v. Simmons*, the Supreme Court held that executing individuals who were under the age of eighteen at the time of their crimes constituted a violation of the Eighth and Fourteenth Amendments.⁴⁸ The Court reasoned that, due to their diminished maturity and greater susceptibility to change, minors have lessened culpability as compared to adults.⁴⁹ The Court further held that both of the two legitimate penological justifications for the death penalty, retribution and deterrence, apply to minors with lesser force than adults.⁵⁰ In light of that realization and the principle that

a punishment comports with the “evolving standards of decency,” the court ascertains whether a national consensus exists against a punishment. *Mills et al.*, *supra*, at 539. If such a consensus does exist, the court exercises its own judgment to assess the proportionality of a punishment. *Id.*

⁴⁷ See Scavone, *supra* note 45, at 3446–47. The Court had previously found that the death penalty was inappropriate for offenders with diminished culpability, such as those with intellectual disabilities. See *Miller*, 567 U.S. at 470 (noting that the court has previously overturned sentencing practices in cases where the severity of sentences did not account for diminished culpability of offenders). Prior to this, the Court had also overturned mandatory death sentences. *Id.* Although in 2002, in *Atkins v. Virginia*, the Supreme Court did not provide a substantive definition of intellectual disability, instead leaving the issue to the states, it did utilize the definition provided in the American Association of Mental Retardation for guidance. Natalie Cheung, Note, *Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard*, 23 HEALTH MATRIX 317, 319 (2013) (describing *Atkins*' standards for mental disability); see also *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (tasking the states with determining an appropriate constitutional test). The American Association on Intellectual and Development Disabilities, currently defines “intellectual disability” as “characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills . . . originat[ing] before the age of 18.” Cheung, *supra*, at 322. In 2010, in *Graham v. Florida*, a case that preceded *Miller*, the Supreme Court drew a comparison between the death penalty and life in prison without parole. See *Graham v. Florida*, 560 U.S. 48, 69 (2010) (drawing similarities between death and life without parole).

⁴⁸ *Roper v. Simmons*, 543 U.S. 551, 578 (2005). In 2005 the United States was the only country that officially retained the death penalty for juvenile offenders. *Id.* at 575.

⁴⁹ *Id.* at 569–70. The Court drew special attention to the fact that minors are more impressionable than adults, and more likely to succumb to peer pressure and other outside influences. *Id.*

⁵⁰ *Id.* at 571. The Court has held that, generally, punishments should be underpinned by a legitimate penological justification. See *Gregg v. Georgia*, 428 U.S. 153, 182–83 (1976) (noting that punishments must be at least somewhat justified by legitimate penological purposes). The Court often refers to four such justifications: retribution, deterrence, incapacitation, and rehabilitation. See *Ewing v. California*, 538 U.S. 11, 25 (2003) (describing examples of possible theories of penological justification). Retribution is the theory that punishment is justified because criminals deserve punishment. See ARTHUR W. CAMPBELL, *THE LAW OF SENTENCING* § 2:5 (3d ed., 2018) (discussing retributive theory). Deterrence seeks to prevent further commission of crimes. See *id.* § 2.2 (discussing deterrent rationale). Incapacitation refers to the physical prevention of the ability of the punished individual to commit further crimes. See *id.* § 2.3 (discussing incapacitation rationale). Finally, rehabilitation refers to the goal of preventing crime by reforming the criminal. See *id.* § 2.4 (discussing rehabilitative rationale). The Court has previously noted that only two

the death penalty is reserved for those offenders who are the most culpable, the Court held that the death penalty is inappropriate for juvenile offenders.⁵¹

Five years later, in 2010, the Court held in *Graham* that the Eighth Amendment bars sentencing juvenile offenders to life without parole for non-homicide offenses.⁵² The Court reasoned that, as it had previously found juveniles are less culpable than adults, and because defendants who do not kill are less culpable than murderers, juveniles who do not commit homicide have an even further diminished culpability.⁵³ The Court also stated that life without parole sentences share many characteristics with death sentences, denying defendants the hope that they will ever leave prison.⁵⁴ In addition, the Court held that, similar to death sentences, life without parole sentences for juveniles are unsupported by the legitimate penological justifications of retribution, deterrence, incapacitation, and rehabilitation.⁵⁵ The Court then noted that a national consensus had developed against the practice of sentencing juveniles to life without parole.⁵⁶ Accordingly, reasoning that juveniles should not lose the opportunity for personal emotional growth, the Court categorically held that life without parole sentences were unconstitutional for juvenile non-homicide offenders.⁵⁷

legitimate penological objectives are applicable to the death penalty—retribution and deterrence. See *Gregg*, 428 U.S. at 183 (describing social purposes of the death penalty).

⁵¹ *Roper*, 543 U.S. at 578.

⁵² *Graham*, 560 U.S. at 82; see also Krisztina Schlessel, Note, *Graham's Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity" for Release*, 40 FLA. ST. U. L. REV. 1027, 1034 (2013) (describing *Graham* and *Roper's* reasoning for the determination that children are different from adults for constitutional purposes). Schlessel demonstrates that, even prior to the Court's subsequent decision in *Miller*, it was already recognized that exceedingly long term-of-years sentences post *Graham* presented constitutional conundrums. See Schlessel, *supra*, at 1038 (describing the diverging responses of courts throughout the country to lengthy term-of-years sentences post *Graham*); see also Mark T. Freeman, Comment, *Meaningless Opportunities: Graham v. Florida and the Reality of De Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 963 (2013) (arguing that *de facto* life without parole sentences will be held unconstitutional under the eighth amendment following *Graham*).

⁵³ See *Graham*, 560 U.S. at 69 (stating that juvenile non-homicide offenders have doubly reduced moral culpability, especially when compared to adult homicide offenders).

⁵⁴ *Id.* Compare *id.* (noting the similarities between the death penalty and life without parole), with Craig S. Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 37 (2012) (disputing the similarity between the death penalty and all other punishments).

⁵⁵ *Graham*, 560 U.S. at 74. The Court in *Graham* opined that the lessened culpability of juvenile non-homicide offenders causes retribution to be insufficient to justify such a sentence. *Id.* at 71. Further, the diminished capacities of juveniles cause them to be less susceptible to deterrence. *Id.* at 72. Incapacitation is also insufficient to justify life without parole for juveniles as it requires a determination of the juvenile's incorrigibility and "incorrigibility is inconsistent with youth." *Id.* at 73. Finally, the sentence of life without parole, similarly to the death penalty, entirely abandons rehabilitation as a penological goal. *Id.* at 74.

⁵⁶ *Id.* at 67.

⁵⁷ *Id.* at 79, 82.

In 2012, in *Miller*, although refusing to proclaim a categorical rule, the Court found that sentencing schemes that included mandatory life without parole for juvenile homicide offenders also violated the Eighth Amendment.⁵⁸ The Court interpreted *Graham* to insist that “youth matters” in determining the appropriateness of life without parole.⁵⁹ Accordingly, the Court held that mandatory life without parole prevents a sentencing court from taking a juvenile defendant’s youth into account when considering sentencing, and goes against *Graham*’s central principle that, due to their unique characteristics, children are less culpable and must be treated differently from adults.⁶⁰ In addition, relying on its holding in *Graham* that life sentences for juveniles are, in many ways, analogous to the death penalty, the Court applied the series of cases that required individualized sentencing for death penalty defendants to mandatory life without parole for all juveniles, including homicide offenders.⁶¹ It held that, for constitutional purposes, children are different from adults in much the same way as the death penalty is different from all other punishments.⁶² In doing so, the Court noted that mandatory life without parole schemes, by their nature, preclude a sentence from taking account of an offender’s age, and thus are more likely to result in a disproportionate punishment.⁶³ Although refusing to outright bar life without parole for juvenile defendants, the Court stated that after *Miller*, life without parole should be uncommon for juvenile offenders, and required sentencing courts to account for the differences between adults and children.⁶⁴

Next, in 2016, in *Montgomery v. Louisiana*, the Court held *inter alia* that *Miller* announced a rule of substantive law that applied retroactively.⁶⁵

⁵⁸ *Miller*, 567 U.S. at 489.

⁵⁹ *Id.* at 483

⁶⁰ *Id.* at 474. The *Graham* Court noted that psychological studies had shown significant differences between the functioning of juvenile and adult brains. 560 U.S. at 68. It pointed out that juveniles are more likely to change than are adults and are therefore unlikely to be irreparably corrupt. *Id.* Finally, the court pointed out that the differences between children and adults, namely the greater impulsiveness of children, their diminished understanding of long-term consequences, and their mistrust of adults, presented unique challenges in their representation. *Id.* at 78.

⁶¹ *Miller*, 567 U.S. at 470; see *Graham*, 560 U.S. at 69–70 (describing similarities between sentences of death and life without parole).

⁶² *Miller*, 567 U.S. at 481. The court stated that “if . . . ‘death is different,’ children are different too.” *Id.*

⁶³ See *id.* at 479 (noting that if youth is not relevant to a sentencing scheme, the risk of punishment that is disproportionate becomes too serious).

⁶⁴ *Id.* at 480. See generally Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 580 (2015) (discussing whether a jury finding of incorrigibility might be necessary for a sentence of life without parole under *Miller*).

⁶⁵ See *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (holding that because *Miller* caused life without parole to be unconstitutional for a whole class of people, it announced a substantive rule of constitutional law, thus was retroactive). *Inter alia* typically means “[a]mong other things.” *Inter Alia*, BLACK’S LAW DICTIONARY (10th ed. 2014). Prior to this decision, state courts

The Court further ruled that following *Miller*, non-incorrigible juvenile offenders constitute a class for whom life without parole is a disproportionate and therefore unconstitutional punishment under the Eighth Amendment.⁶⁶

Finally, on March 18, 2019, the Supreme Court granted certiorari in *Mathena v. Malvo*.⁶⁷ *Mathena* is an appeal from a Fourth Circuit Court of Appeals decision that held, *inter alia*, that *Montgomery*'s holding requires a determination of incorrigibility before a life without parole sentence could be imposed on a juvenile offender.⁶⁸ In that case, the Fourth Circuit held that *Montgomery*'s ruling that *Miller* is violated whenever a life without parole sentence is imposed on a non-incorrigible juvenile was fundamental to the holding, and accordingly not dicta.⁶⁹ In granting certiorari, the Supreme Court will likely be called upon to confirm whether the Fourth Circuit properly interpreted *Montgomery*, or whether the holding of *Miller* applies only to *mandatory* sentences of life without parole.⁷⁰

II. THE THIRD CIRCUIT HOLDS *DE FACTO* LIFE WITHOUT PAROLE UNCONSTITUTIONAL

State courts and legislatures have reacted in several ways to effectuate the Supreme Court's 2012 ruling in *Miller v. Alabama*.⁷¹ Congress, however, has yet to enact any legislation doing so, and, accordingly, the matter has

were split on the retroactivity of *Miller*, with fourteen state supreme courts ruling that it applied retroactively, while another seven ruled that it did not. See Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT 1, 3 (Oct. 22, 2017), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [<https://perma.cc/CLH5-L7R3>] (describing differences in state court holdings regarding the retroactivity of *Miller*).

⁶⁶ *Montgomery*, 136 S. Ct. at 734. *Montgomery*'s holding resulted in the nearly 2,100 juveniles across the United States serving mandatory sentences of life without parole receiving the ability to challenge their sentences as unconstitutional. See Rovner, *supra* note 65, at 3 (noting number of juveniles whose sentences are unconstitutional).

⁶⁷ *Mathena v. Malvo*, No. 18-217, 2019 WL 1231751 (U.S. 2019).

⁶⁸ *Malvo v. Mathena*, 893 F.3d 265, 275 (4th Cir. 2018).

⁶⁹ See *id.* at 284 (dismissing petitioner's argument that *Montgomery*'s statement on unconstitutionality of life without parole for non-incorrigible juveniles was dicta).

⁷⁰ See *id.* (finding that the *Montgomery* interpretation of the *Miller* rule was not dicta).

⁷¹ *United States v. Grant*, 887 F.3d 131, 142, *reh'g en banc granted, vacated*, 905 F.3d 285 (3d Cir. 2018); see, e.g., *State v. Ragland*, 836 N.W.2d 107, 122 (Iowa 2013) (finding that defendant's sentence, commuted by the governor to sixty years without parole, was the functional equivalent of a mandatory LWOP sentence and therefore unconstitutional); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (finding that a term of years sentence of 110 years for a juvenile convicted of a non-homicide offense was unconstitutional); see also Mills et al., *supra* note 46, at 554 (showing various forms of state abolition of juvenile life without parole sentences following *Miller v. Alabama*). Many states have simply abolished the possibility of sentencing juveniles to life without parole, whereas some others have added parole eligibility to all life sentences for juveniles. See *Grant*, 887 F.3d at 141–42 (describing state legislative responses).

fallen to the circuit courts.⁷² In 2018, in *United States v. Grant*, therefore, the Third Circuit Court of Appeals was required to determine whether sentences for non-incorrigible juveniles, which amount to *de facto* life without parole, are unconstitutional following *Miller*.⁷³

In its initial opinion in *Grant*, the Third Circuit held that a term-of-years sentence that was longer than a non-incorrigible juvenile's expected lifespan was unconstitutional under the Eighth Amendment.⁷⁴ In reaching this holding, the court noted three distinct reasons.⁷⁵ First, *Miller* categorically allowed life without parole sentences only for incorrigible juvenile homicide offenders.⁷⁶ Second, the penological justifications barring actual life without parole sentences for most juveniles apply with equal force to *de facto* life without parole sentences.⁷⁷ Finally, it opined that *de facto* life without parole is irreconcilable with *Miller's* holding that non-incorrigible juveniles must be afforded a legitimate chance of being released from prison.⁷⁸ The court noted that *Miller's* holding was partially premised on the fact that sentences of death and life without parole are in many ways similar, and not on the formal designation of the sentence.⁷⁹ Rather than specifying a distinct approach for measuring a defendant's life expectancy, the court held that, prior to imposing a term of years sentence that runs the risk

⁷² *Grant*, 887 F.3d at 142. The federal system abolished parole as of 1984, effectively equating all life sentences with life without parole sentences. *See id.* (noting congressional abolition of federal parole); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 1837, 2027 (repealing 18 U.S.C. §§ 4201–4218).

⁷³ *Grant*, 887 F.3d at 142. *De facto* life without parole sentences are those sentences that meet or exceed the defendant's life expectancy. *See id.* at 145 (discussing other courts' treatment of *de facto* life sentences for juveniles). Such sentences are also known as "virtual life without parole." *See Scavone, supra* note 45, at 3442 (describing *de facto* or virtual life without parole sentences).

⁷⁴ *Grant*, 887 F.3d at 142.

⁷⁵ *Id.*

⁷⁶ *Id.* at 143. In the instant case, the United States District Court for the District of New Jersey had previously ruled that *Grant* was not incorrigible, and this was not challenged on appeal. *Grant*, 887 F.3d at 137. In 2012, in *Miller*, the Supreme Court noted, that in light of the Court's reasoning and decisions in both *Roper v. Simmons* in 2005 and *Graham v. Florida* in 2010, situations that allowed for the imposition of life without parole on juveniles would be rare. *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

⁷⁷ *Grant*, 887 F.3d at 143. Specifically, the court noted that without adequate penological justifications, a sentence cannot be proportionate under the Eighth Amendment. *Id.* at 144. As the analysis that juveniles are inherently both less receptive to deterrence, and less culpable than are adults underpins the court's disavowal of mandatory life without parole sentences, logically this same reasoning must apply to *de facto* life without parole sentences. *See id.* at 138 (discussing penological justifications for life without parole and *de facto* life without parole).

⁷⁸ *Id.* at 140 (finding that juveniles must be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

⁷⁹ *Id.* at 143. The court noted that both the comparison between life without parole and the death penalty, and the fact that spending one's life behind bars is an especially severe sentence, hold true regardless of whether a sentence is officially labeled as life without parole or as a lengthy term of years' sentence. *Id.*

of meeting or exceeding the defendant's mortality, the court must conduct an evidentiary hearing in order to ascertain the defendant's expected life span.⁸⁰

The court then proceeded to discuss how to effectuate *Miller* and *Graham v. Florida*'s mandate of a "meaningful opportunity for release," opining that a non-incorrigible juvenile offenders must be afforded an opportunity for release early enough in their lives that they may still achieve personal growth and re-enter society.⁸¹ The court recognized the difficulty of determining a constitutionally acceptable age at which a non-incorrigible juvenile must be afforded a meaningful opportunity for release, noting in particular that relying on actuarial tables or life expectancy data created possible constitutional issues.⁸² Accordingly, the court avoided these issues and held that in order to be constitutional under the Eighth Amendment, there is a rebuttable presumption that a non-incorrigible juvenile must be afforded a meaningful opportunity for release before the age of retirement.⁸³

Following *Grant*, the Third Circuit voted to allow the government's petition for rehearing *en banc*, and in doing so, vacated the initial opinion and judgment.⁸⁴ After the rehearing, the *en banc* court issued an order holding the appeal pending the Supreme Court's judgment in *Mathena v. Malvo*.⁸⁵

Other courts have considered the issue of *de facto* life without parole sentences for juveniles.⁸⁶ The Seventh, Ninth, and Tenth Circuit Courts of

⁸⁰ *Id.* at 149.

⁸¹ *Id.* at 147. The court noted that its expansive view meant that such a meaningful opportunity must be more than the chance to leave prison right before one dies. *Id.* It opined that a juvenile must presumptively be offered a chance for "fulfillment outside prison walls," "reconciliation with society," "hope," and "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.*

⁸² *Id.* at 149. Specifically, the court noted that life expectancy tables rely on characteristics such as race, gender, and income to determine the life expectancy of any given individual. *Id.* Therefore, were the court to rely solely on these tools, it could result, for instance, in wealthier defendants who have a greater life expectancy than poorer defendants, receiving longer sentences as a result. *See id.* (discussing possible sentencing disparities between defendants with different life expectancies based on factors such as race, education, and socio-economic class).

⁸³ *Id.* at 150. To reach the conclusion that a juvenile offender should be afforded a meaningful opportunity for release before the age of retirement, the court considered a number of factors. *Id.* It noted that there are no studies that assisted the court in setting the age at which an offender must be afforded such an opportunity. *Id.* However, utilizing the traditional understanding of retirement as a time in one's life at which one is determined to have contributed to society sufficiently that it becomes acceptable to leave the workforce, the court determined that release before this age would be appropriate as it would allow the offender to contribute to society. *Id.* The court also noted that this approach addresses the Supreme Court's concern in *Graham* that juveniles sentenced to life without parole are often denied vocational opportunities while serving their sentences. *Id.* at 151.

⁸⁴ Order Sur Petition for Rehearing En Banc, 905 F.3d 285 (3d Cir. 2018).

⁸⁵ Order, USA v. Grant, No. 16-3820 (3d Cir. 2019).

⁸⁶ *See Grant*, 887 F.3d at 145–47 (documenting federal appellate court response to *de facto* life without parole sentences); *see also, e.g., Budder v. Addison*, 851 F.3d 1047, 1059–60 (10th

Appeals have reached similar conclusions as the Third Circuit and have ruled that *de facto* life without parole sentences pose the same constitutional problems as actual life without parole sentences.⁸⁷ Those courts relied mainly on the reasoning that the justifications upon which *Graham* and *Miller* are based apply with equal force to both *de facto* and *de jure* life without parole sentences.⁸⁸ In addition, these courts noted that the rules promulgated under *Graham* and *Miller* did not depend on the linguistic label of a sentence under state law to reach their holdings, but instead, on the distinct difference in the severity of life without parole and all other lesser sentences.⁸⁹ These courts did not issue guidance for when juvenile offenders must be given a meaningful opportunity for release, but merely stated that it was unconstitutional for them to be in prison beyond their natural life expectancy.⁹⁰ The Eighth Circuit Court of Appeals, however, refused to promulgate a similar rule.⁹¹ The court reasoned in 2016 in *United States v. Jefferson* that *Miller* did not establish a categorical rule against life sentences for juveniles

Cir. 2017) (holding that 155-year sentence for juvenile convicted of non-homicide offense violated categorical rule proclaimed in *Graham*); *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (finding that 600 month sentence for juvenile homicide offender was not mandatory and therefore was constitutional); *McKinley v. Butler*, 809 F.3d 908, 914 (7th Cir. 2016) (holding that juvenile murderer's sentence of two consecutive fifty-year terms was unconstitutional without consideration of youth); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) (holding that 254-year sentence that would have allowed for parole after 127 years and two months for juvenile convicted of non-homicide crimes was unconstitutional).

⁸⁷ See *Grant*, 887 F.3d at 145–47 (discussing circuit courts' holdings); see also *Budder*, 851 F.3d at 1059–60 (holding that 155-year sentence for juvenile convicted of non-homicide offense violated categorical rule proclaimed in *Graham*); *Jefferson*, 816 F.3d at 1019 (finding that 600 month sentence for juvenile homicide offender was not mandatory and therefore was constitutional); *McKinley*, 809 F.3d at 914 (holding that without consideration of characteristics of youth, juvenile murderer's sentence of two consecutive fifty-year terms was unconstitutional); *Moore*, 725 F.3d at 1194 (holding that 254-year sentence that would have allowed for parole after 127 years and two months for juvenile convicted of non-homicide crimes was unconstitutional).

⁸⁸ *Grant*, 887 F.3d at 146; see also *Budder*, 1041 F.3d at 1056 (holding that there was no difference between a term of years sentence that would imprison a defendant for the rest of his life and a sentence formally designated as life without parole) (quoting *Graham*, 560 U.S. at 113 n.11); *McKinley*, 809 F.3d at 911 (noting that the logic of *Miller* applies to term-of-years sentence because the sentence is too long for the defendant to possibly survive beyond it).

⁸⁹ *Grant*, 887 F.3d at 143–44; see also *Moore*, 725 F.3d at 1191–92 (holding that, as *Moore* will not be able to seek parole before his death, there is no difference between his sentence of 254 years, and a sentence of life without parole).

⁹⁰ See, e.g., *Budder*, 851 F.3d at 1059 (holding that a sentence that would require the defendant to serve 131.75 years before parole eligibility violated the Eighth Amendment following the Supreme Court's holding in *Graham*); *McKinley*, 809 F.3d at 911 (finding *Miller* applicable to juvenile sentenced to two consecutive fifty-year terms).

⁹¹ *Jefferson*, 816 F.3d at 1019. This case involved a youth who had committed numerous crimes before the age of eighteen, including the fire-bombing murder of five innocent children. *Id.* at 1017. He was sentenced to life without parole in 1998 but re-sentenced pursuant to *Miller*, to 600 months in prison. *Id.* at 1017–18. At resentencing, the district court held that *Jefferson* was not incorrigible, and that his rehabilitation had been an “extraordinary success.” *Id.* at 1020.

convicted of homicide offences, and pronounced a ban only on *mandatory* life without parole sentences for juveniles convicted of homicide, purposely leaving discretionary life sentences untouched.⁹² As an individualized sentencing hearing had been conducted, the court concluded that it did not need to reach the issue of *de facto* life sentences following *Miller*.⁹³

III. MONTGOMERY'S INFLUENCE: MORE THAN JUST RETROACTIVITY

The Third Circuit Court of Appeals' interpretation of *Miller v. Alabama* in 2018 in *United States v. Grant* should be affirmed by the *en banc* court because it is a natural extension of Supreme Court precedent as it applies to lengthy term-of-years sentences for juveniles that exceed their natural life expectancy, with special attention paid to the spirit of the Supreme Court's holdings.⁹⁴ In addition, the articulated framework focusing on the age of retirement provides a novel and effective way to effectuate the Court's mandate that a non-incorrigible juvenile defendant should be given a meaningful opportunity for release and possible re-entry into society.⁹⁵

As an initial matter, the Supreme Court should affirm the Fourth Circuit Court of Appeals' 2018 decision in *Malvo v. Mathena*.⁹⁶ As the Fourth Circuit properly recognized, the Supreme Court's 2016 finding in *Montgomery v. Louisiana* that *Miller* declared the unconstitutionality of life without parole for non-incorrigible juveniles was indispensable to its holding that *Miller* was to be applied retroactively.⁹⁷ This is because, although substantive rules of constitutional law apply retroactively to final judg-

⁹² See *id.* at 1018–19 (refusing to consider petitioner's theory that his sentence constituted *de facto* life without parole due to his sentence being discretionary).

⁹³ *Id.* at 1019. The Eighth Circuit Court of Appeals held that the resentencing court had appropriately applied the Supreme Court's precedent that "children are constitutionally different." *Id.*

⁹⁴ See generally *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (holding that *Miller v. Alabama* made life without parole unconstitutional for most juveniles); *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (holding that life without parole for juveniles would be rare in light of the Court's opinion); *United States v. Grant*, 887 F.3d 131 (3d Cir.), *reh'g en banc granted, vacated*, 905 F.3d 285 (3d Cir. 2018) (holding that *de facto* life without parole sentences are inappropriate for non-incorrigible juveniles).

⁹⁵ See *Graham v. Florida*, 560 U.S. 48, 75 (2010) (requiring that juvenile offenders not convicted of homicide be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"); *Grant*, 887 F.3d at 147 (determining the necessary aspects of a "meaningful opportunity for release").

⁹⁶ See *Malvo v. Mathena*, 893 F.3d 265, 274 (4th Cir. 2018) (finding that *Miller* could apply to both discretionary and mandatory sentences of life without parole for juvenile offenders).

⁹⁷ See *Montgomery*, 136 S. Ct. at 734 (holding that *Miller* caused life without parole to be unconstitutional for "a class of defendants because of their status," namely, non-incorrigible juvenile defendants); *Miller*, 567 U.S. at 479 (holding that following the ruling, sentences of life without parole for juveniles would be rare because of the difficulty of finding juveniles to be incorrigible).

ments, mere constitutional rules of criminal procedure do not.⁹⁸ The Court has held that substantive rules include those that invalidate a type of punishment for a specific category of offenders.⁹⁹ If *Miller*'s holding was limited to only proscribing *mandatory* life without parole sentences for juveniles, then *Miller* would have announced only a procedural rule, which would not have had retroactive effect.¹⁰⁰ Accordingly, the Court's language in *Montgomery* recognizing the unconstitutionality of life without parole sentences for non-incorrigible juveniles cannot have been dicta.¹⁰¹

It follows then, that the Eighth Circuit Court of Appeals' interpretation of the Supreme Court's precedents in *Graham v. Florida*, *Miller*, and *Montgomery* did not accord sufficient weight to the district court's judgment that the defendant in *United States v. Jefferson* was not incorrigible.¹⁰² The Eighth Circuit premised its decision on the fact that the sentencing court had not imposed a mandatory life without parole sentence, and had amply taken account of the defendant's youth when prescribing a sentence.¹⁰³ The substantive rule announced in *Montgomery*, however, specifically noted that merely taking youth into account is not enough.¹⁰⁴ Instead, *Montgomery* made clear that life without parole is unconstitutional for the entire class of

⁹⁸ See *Montgomery*, 136 S. Ct. at 728 (noting that though rules of criminal procedure do not apply retroactively to final convictions, substantive rules of constitutional law do).

⁹⁹ See *id.* (holding that rules that proscribe a punishment for a "class of defendants because of their status or offense" are substantive rules of constitutional law); *Penry v. Lynaugh*, 492 U.S. 302, 329–30 (1989) (describing situations in which new constitutional rules are to have retroactive effect), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁰⁰ See *Montgomery*, 136 S. Ct. at 728 (noting that procedural rules are not applied retroactively).

¹⁰¹ See *id.* (holding that only substantive rules of constitutional law apply retroactively); *Malvo*, 893 F.3d at 274 (holding that *Montgomery*'s statement regarding the application of *Miller* was not dicta); see also Erin Dunn, Comment, *Montgomery v. Louisiana: An Attempt to Make Juvenile Life Without Parole a Practical Impossibility*, 32 *TOURO L. REV.* 679, 693–94 (2016) (noting that the Supreme Court's broad interpretation of the *Miller* rule in *Montgomery v. Louisiana* caused *Miller* to be applicable retroactively).

¹⁰² See *United States v. Jefferson*, 816 F.3d 1016, 1018–19 (8th Cir. 2016) (holding that, as *Miller* did not categorically prohibit imposing life without parole on juvenile offenders, the court did not need to consider whether *Miller* applied to defendant's *de facto* life sentence). In 2015, in *United States v. Jefferson*, the United States District Court for the District of Minnesota found that the defendant's conduct during his prison term went against a sentence of life without parole. No. CRIM 97-256 04 MJD, 2015 WL 501968, at *8 (D. Minn. Feb. 5, 2015), *aff'd*, 816 F.3d 1016.

¹⁰³ See *Jefferson*, 816 F.3d at 1019–21 (holding that the district court appropriately considered the defendant's youth when determining his sentence).

¹⁰⁴ *Montgomery*, 136 S. Ct. at 734 (stating that a sentence of life without parole is unconstitutional for children whose crimes reflect "transient immaturity," even if an individualized sentencing process is conducted); see also Alice Reichman Hoesterey, *Confusion in Montgomery's Wake: State Responses, the Mandates of Montgomery, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 *FORDHAM URB. L.J.* 149, 179 (2017) (arguing that *Montgomery* made clear that *Miller* imposed a categorical bar on life without parole for non-incorrigible juveniles).

non-incorrigible juvenile defendants.¹⁰⁵ In *Jefferson*, the court had already concluded that the defendant was not incorrigible.¹⁰⁶ Accordingly, under *Miller* and *Montgomery*, the option to impose a sentence of life without parole was unavailable to the resentencing court.¹⁰⁷ Therefore, the Eighth Circuit should have evaluated Jefferson's contention that his sentence amounted to *de facto* life without parole on its own merits.¹⁰⁸

In its initial opinion, the Third Circuit, along with the Seventh, Ninth, and Tenth Circuit Courts of Appeals appropriately applied this standard to its case.¹⁰⁹ As the United States District Court for the District of New Jersey had previously determined that the defendant in *Grant* was not incorrigible, the court properly evaluated whether his lengthy term of years sentence contravened *Miller*.¹¹⁰ *Miller* and *Graham*'s mandates do not focus on the terminology underpinning the sentences that they overturned.¹¹¹ Instead the focus is on concepts such as the denial of hope as a result of a life without parole sentence, the inability of a juvenile sentenced to life without parole to ever re-enter society and achieve personal fulfillment, and the near-guarantee that one sentenced to life without parole will die in prison.¹¹² A lengthy term of years sentence that exceeds the natural lifespan of a defendant and dooms them to die in prison violates the same constitutional principles as a true life

¹⁰⁵ *Montgomery*, 136 S. Ct. at 734 (finding that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth"); see Brandon Buskey, *Reaction to Montgomery v. Louisiana: The Supreme Court Offers Hope to Juveniles Sentenced to Die in Prison, and a Little to Adults as Well*, 41 HARBINGER 175, 176 (2016) (discussing the alterations that *Montgomery* made to the Court's original holding in *Miller*, specifically that, following *Montgomery*, *Miller* applied to more than just mandatory sentences of life without parole").

¹⁰⁶ See *Jefferson*, 2015 WL 501968, at *9 (finding that Jefferson has experienced "extraordinary success" in prison treatment programs).

¹⁰⁷ See *id.* (finding that Jefferson could be rehabilitated and thus did not deserve life in prison); see also Dunn, *supra* note 101 at 704 (arguing that, in *Montgomery*, the majority rewrote the holding of *Miller*, requiring courts to determine whether a juvenile is incorrigible, rather than merely taking into account the juvenile's youth).

¹⁰⁸ See *Montgomery*, 136 S. Ct. at 734 (holding life without parole unconstitutional for non-incorrigible juvenile offenders); *Jefferson*, 816 F.3d at 1019 (declining to consider Jefferson's contention that he was sentenced to *de facto* life without parole).

¹⁰⁹ See *Grant*, 887 F.3d at 135 (noting that the court must afford special attention to the distinction between incorrigible juvenile offenders and others); see also Hoesterey, *supra* note 104, at 179 (arguing that the holdings of *Miller* and *Montgomery* apply to both *de facto* and *de jure* sentences of life without parole).

¹¹⁰ See *Grant*, 887 F.3d at 143–46 (discussing application of Supreme Court precedents to juvenile offenders that are capable of reform).

¹¹¹ See *id.* at 145–46 (noting that courts in other circuits agreed that *Miller* and *Graham* were premised on more than the linguistic label of life without parole).

¹¹² See *Graham*, 560 U.S. at 70 (noting that, like death sentences, life without parole sentences deprive the offender of any chance of rejoining society or reaching personal fulfillment).

without parole sentence does.¹¹³ Accordingly, the court correctly interpreted such a sentence to be unconstitutional following *Miller* and *Graham*.¹¹⁴

Finally, the broad approach of the initial opinion of the Third Circuit to effectuating the Supreme Court's mandate of a meaningful opportunity for release properly considers the spirit and intent behind the Court's opinions in *Graham* and *Miller*.¹¹⁵ In paying special attention to the Court's language in *Graham*, the Third Circuit's initial opinion departs from a purely mechanical understanding of that case's categorical rule.¹¹⁶ *Graham*'s concern with the limitations of a life without parole sentence, combined with its focus on a defendant's ability to achieve self-fulfillment clearly demonstrates an intent that non-incorrigible juveniles have an opportunity to participate in society beyond living out the last few years of their lives following release.¹¹⁷ The court's focus on age of retirement affords a means of consistently realizing this mandate, while avoiding arbitrary line drawing as well as the possible constitutional implications of relying on life expectancy data.¹¹⁸ In addition, as the court adopted only a rebuttable presumption, this standard still allows a sentencing court considerable discretion to alter sen-

¹¹³ See *Grant*, 887 F.3d at 143–44 (concluding that, as with life without parole sentences, a *de facto* life without parole sentence for a non-incorrigible juvenile offender cannot be justified by legitimate penological objectives). A juvenile offender sentenced to such a long term must spend the rest of his or her natural life in prison and will likely die in prison just as one who is sentenced to life without parole. See *Budder v. Addison*, 851 F.3d 1047, 1050 (10th Cir. 2017) (holding that juvenile homicide offender who was sixteen-years-old at the time of his crime would have been required to serve at least 131.75 years before the possibility of release).

¹¹⁴ See *Grant*, 887 F.3d at 145 (holding that there is no meaningful opportunity for release when serving a *de facto* life without parole sentence).

¹¹⁵ See *id.* at 148 (adopting a broader standard for “meaningful opportunity for release”).

¹¹⁶ See *id.* at 150 (holding that, to realize *Graham*'s mandate of “a meaningful opportunity for release,” one must be afforded “‘hope’ and a chance for ‘fulfillment outside prison walls,’ ‘reconciliation with society,’ and ‘the opportunity to achieve maturity of judgment and self-recognition of human worth and potential’” (quoting *Graham*, 560 U.S. at 79)); see also Hoesterey, *supra* note 104, at 179 (arguing that the difference in the terminology of a term-of-years sentence should not hold *Miller* and *Montgomery*'s holdings inapplicable).

¹¹⁷ See *Graham*, 560 U.S. at 74 (noting that, in many prisons, inmates serving life without parole sentences are often excluded from rehabilitative programs such as treatment and vocational opportunities, exacerbating the disproportionality of the sentence for youths); *Grant*, 887 F.3d at 147 (noting that *Graham* conveyed that the Supreme Court's intention was that juvenile offenders receive more than physical release from prison just before death).

¹¹⁸ See *Grant*, 887 F.3d at 150 (noting the difficulty of determining the age at which one can still meaningfully reenter society). See generally Adele Cummings & Stacie Nelson 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. JUV. L. & POL'Y 267, 272 (2014) (discussing the constitutional deficiencies of using life expectancy tables to determine appropriate sentences).

tences as needed, given extraordinary circumstances.¹¹⁹ Accordingly, the Third Circuit's initial opinion should be affirmed by the *en banc* court.¹²⁰

CONCLUSION

The Third Circuit's initial opinion in *United States v. Grant* correctly applied Supreme Court precedent announced in *Graham*, *Miller*, and *Montgomery* to hold that term of years sentences exceeding natural life expectancy for non-incorrigible juveniles are unconstitutional. The court properly effectuated those rulings and provided a clear framework for lower courts to follow by creating a rebuttable presumption that non-incorrigible offenders who committed their crimes as juveniles should be afforded a meaningful opportunity for release before the age of retirement. Meanwhile, the Eighth Circuit did not give enough weight to the Supreme Court's statement in *Montgomery* that made clear that *Miller* created a rule of substantive law, holding sentences of life without parole unconstitutional for all non-incorrigible juveniles. The Supreme Court should affirm the Fourth Circuit's decision in *Mathena*, and definitively clarify that *Montgomery* and *Miller* require a determination of incorrigibility before a life without parole sentence can be imposed on a juvenile offender. If the Court does so, *Jefferson* should be overruled, and the Third Circuit *en banc* should affirm the Third Circuit's initial opinion in *Grant*.

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¹¹⁹ See *Grant*, 887 F.3d at 152 (adopting the national age of retirement as only a rebuttable presumption, leaving discretion to courts to deviate in extraordinary cases).

¹²⁰ See *id.* at 145 (finding that *de facto* life without parole sentences for juveniles violate *Graham* and *Miller*).