DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CO-570

BRIAN K. WILLIAMS, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(FEL-5400-90)

(Hon. Harold L. Cushenberry, Jr., Trial Judge)

(Argued June 5, 2018 Decided April 11, 2019)

Mikel-Meredith Weidman, Public Defender Service, with whom *Samia Fam*, Public Defender Service, was on the brief, for appellant.

Sharon A. Sprague, Assistant United States Attorney, with whom *Jessie K. Liu*, United States Attorney, *Channing D. Phillips*, United States Attorney at the time of initial briefing, and *Elizabeth Trosman*, *Suzanne Grealy Curt*, *Angela N. Buckner*, *Patricia A. Heffernan*, and *Eric Hansford*, Assistant United States Attorneys, were on the brief, for appellee.

Before GLICKMAN, THOMPSON, and EASTERLY, *Associate Judges*.

Opinion for the court by *Associate Judge* GLICKMAN.

Dissenting opinion by *Associate Judge* EASTERLY at page 45.

GLICKMAN, *Associate Judge*: Appellant Brian Williams is serving a sentence of 62 years to life in prison for two murders and other offenses committed when he was 17 years of age. He appeals from the denial of a motion collaterally challenging the constitutionality of his conviction and sentence pursuant to D.C. Code § 23-110 (2012 Repl.) Appellant contends his sentence is "de facto" life without parole ("LWOP") and therefore unconstitutional and subject to correction under the Supreme Court's decisions in *Miller v. Alabama*[1] and *Montgomery v. Louisiana*.[2] *Miller* held that "mandatory life [imprisonment] without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments."[3] In so holding, as *Montgomery* subsequently clarified, *Miller* "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[4] All other offenders who were juveniles at the time of their crimes are entitled to "some meaningful opportunity to obtain release based on

[1] 567 U.S. 460 (2012).

[2] 136 S. Ct. 718 (2016).

[3] 567 U.S. at 465 (internal quotation marks omitted).

[4] *Montgomery*, 136 S. Ct. at 734; *see also Miller*, 567 U.S. at 479-80.

demonstrated maturity and rehabilitation."[5] *Montgomery* further held that this is a substantive rule of constitutional law that applies retroactively to prisoners whose sentences were final when *Miller* was decided.[6] Such prisoners, the Court held, "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."[7] Accordingly, because the sentencing court in the present case did not find appellant to be permanently incorrigible, he asks us to vacate his sentence and remand his case for resentencing.

The United States concedes that an aggregate term-of-years sentence for multiple offenses qualifies as "de facto" LWOP for purposes of *Miller* and *Montgomery* if it precludes parole consideration for a period of time clearly

---

[5] *Miller*, 567 U.S. at 479 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

[6] 136 S. Ct. at 734.

[7] *Id.* at 736-37.

exceeding the defendant's natural life expectancy.[8] The government argues, however, that the holdings of *Miller* and *Montgomery* are inapplicable to this case because they apply only to *mandatory* LWOP sentences (i.e., only when the sentencing court has no discretion to sentence the offender to less than LWOP or its equivalent), and not to *discretionary* LWOP sentences such as the sentence appellant received. There is a conflict in the lower courts over this issue, and on March 18, 2019, the Supreme Court granted the petition for certiorari in *Mathena v. Malvo* to settle it.[9] As we explain in this opinion, our disposition of this appeal makes it unnecessary to await the Supreme Court's ultimate decision in *Malvo*. We can assume, without deciding, that the Eighth Amendment principles enunciated in *Miller* and *Montgomery* apply regardless of whether the LWOP sentence is "mandatory" or "discretionary."

---

[8] Although the government argued otherwise in its briefs on appeal, it subsequently retracted its argument on that score at oral argument and in a letter pursuant to D.C. App. R. 28 (k).

[9] *See Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 2019 U.S. LEXIS 1905 (U.S. Mar 18, 2019) (No. 18-217).

The government also disputes appellant's claim that his aggregate sentence rendered him ineligible for parole for as long as, or longer than, his life expectancy. This is a factual question that the record before us does not resolve, though the period of appellant's ineligibility for parole does appear to be close to his expected life span.[10] For purposes of this appeal, we may assume, without deciding, that appellant's sentence as imposed was "de facto" LWOP.

The government's primary argument on appeal is that appellant is not entitled to the resentencing relief he requests, even assuming the applicability of *Miller* and *Montgomery*, because the Council of the District of Columbia has legislatively remedied the claimed Eighth Amendment infirmity in his sentence by

[10] It appears appellant may be eligible for parole when he is 75 years of age. The appropriate measure of his expected life span is a matter of some dispute and uncertainty. In his appellate briefing, appellant cites government statistics indicating that a man of his age in the United States has an expected life span of 79 years of age. Other courts have found the proper method of measuring a juvenile offender's life expectancy for Eighth Amendment purposes to raise serious constitutional issues and to require a more searching and individualized factual inquiry. *See, e.g.*, *Carter v. State*, 192 A.3d 695, 727 (Md. 2018); *United States v. Grant*, 887 F.3d 131, 149-150 (3d Cir. 2018). The inquiry was not pursued in the proceedings below, and the appellate briefs in this case do not explore the issues in depth. We need not resolve them in this case.

making him eligible for release from prison well before his current parole-eligibility date. We agree with the government on this latter point.

Montgomery held that *Miller* violations may be remedied legislatively by allowing juvenile offenders who received LWOP sentences "to be considered for parole, rather than by resentencing them."[11] Although the District prospectively abolished parole almost two decades ago, the Council adopted a comparable remedy for unconstitutional LWOP sentences in the Incarceration Reduction Amendment Act of 2016 (the "IRAA").[12] The IRAA permits a defendant who has served at least 20 years of imprisonment for an offense committed before his 18th birthday to apply to the court (instead of to a parole board) for relief from his sentence in light of his lesser culpability as a juvenile and his maturation and rehabilitation in prison. Because we conclude that the IRAA provides appellant with the requisite "meaningful opportunity" to obtain release from prison well

[11] 136 S. Ct. at 736.

[12] D.C. Law 21-238, §§ 301-06, 63 D.C. Reg. 15312, 15319-22 (eff. Apr. 4, 2017).

before the end of his natural life expectancy based on his maturation and rehabilitation, we deny his request for a resentencing.

I.

On March 11, 1990, appellant and three other men armed themselves with pistols and a shotgun and carried out a plan to rob two cocaine dealers. During the robbery, the two unarmed dealers were shot and killed while lying face down on the floor, and the wife of one of the victims was assaulted. The conspirators got away with 17 ounces of cocaine, which they divided up among themselves. When appellant was arrested, he told police he was at home with his girlfriend on the night of the murders; he later urged his girlfriend to lie to the grand jury in support of that alibi.

At appellant's trial in January 1992, the jury returned a verdict of guilty on fourteen counts, including multiple counts of first-degree felony murder while armed. This court affirmed appellant's convictions in 1995 and remanded the case

for vacatur of those convictions that were subject to merger.[13] This was done, and on July 28, 1995, the trial judge sentenced appellant to an aggregate sentence of 62 years to life in prison.[14] Appellant was seventeen years old when he committed the offenses. According to the Bureau of Prisons, he will not be eligible for parole until 2048, when he will be 75 years old.

On April 6, 2015, appellant filed a *pro se* motion presenting the claim that his sentence was unconstitutional under *Miller* because it was equivalent to a

---

[13] *See Williams v. United States*, 655 A.2d 310 (1995).

[14] Under the indeterminate sentencing regime then in effect in the District of Columbia, *see* D.C. Code § 24-403 (2001), the judge sentenced appellant to terms of imprisonment of 20 years to life for each of the two remaining felony murder counts; 15 years to life for armed robbery; five to 15 years for possession of a firearm during a crime of violence ("PFCV"); 20 months to five years for conspiracy; one year for carrying a pistol without a license ("CPWL"); one year for attempted subornation of perjury; and one to three years for obstruction of justice. The penalty for felony murder included a mandatory minimum term of 20 years, *see* D.C. Code § 22-2404 (1981), and armed robbery and PFCV carried mandatory minimum terms of five years, *see* D.C. Code § 22-3202 (1981). The judge designated the sentences to run consecutively, except for the sentences for attempted subornation of perjury and obstruction of justice, which were to run concurrently. One third of appellant's one-year sentence for misdemeanor CPWL, i.e., four months, is included in the calculation of his aggregate minimum term pursuant to D.C. Code § 24-408 (2001).

sentence of life without parole.[15] The government opposed the motion. On May 9, 2016, the trial judge ruled that appellant was not entitled to relief. The judge rejected appellant's Eighth Amendment claim on the grounds that he had not sentenced appellant under a statute mandating a life sentence without the possibility of parole and that he had taken appellant's youth into account.[16] Appellant timely noticed this appeal.[17]

---

[15] The motion was filed before the Supreme Court decided *Montgomery* in January 2016 and before the IRAA became law in April 2017.

[16] Although the judge considered appellant's youth, the record of appellant's sentencing confirms that he did not find appellant to be permanently incorrigible. Such a finding was not required under the law at the time.

[17] After receiving appellant's *pro se* brief and the government's brief in response, this court appointed counsel for appellant and called for supplemental briefing "addressing whether the sentence violated the Eighth Amendment and any other issues counsel considers appropriate." Although, in the trial court, appellant did present other claims besides his Eighth Amendment claim (which the trial judge also rejected), he has not pursued those other claims on appeal. We consider them to be abandoned and do not address them. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993).

II.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."[18] In the years since appellant was sentenced, the Supreme Court issued a series of four decisions applying this prohibition to the sentencing of offenders who were juveniles when their crimes were committed.

In the first of these decisions, *Roper v. Simmons*,[19] the Court held that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits imposition of the death penalty on an offender who was younger than 18 when he committed a capital crime. In so ruling, the Court set forth the premises for concluding that the most severe punishments are, or may be, disproportionately harsh when applied to juveniles because of their lessened culpability and greater prospects for maturation and rehabilitation. The Court identified "[t]hree general differences between juveniles under 18 and adults demonstrat[ing] that juvenile

---

[18] U.S. Const. amend. VIII.

[19] 543 U.S. 551 (2005).

offenders cannot with reliability be classified among the worst offenders."[20] First, as compared to adults, juveniles have "a lack of maturity and an underdeveloped sense of responsibility," causing them to act more impulsively and recklessly; second, juveniles are more vulnerable or susceptible to outside pressures and negative influences, "including peer pressure"; and third, they are more amenable to correction and reformation because their characters are "not as well formed" and their personality traits are "more transitory, less fixed."[21] While these characteristics may not be true of every juvenile under 18, the Court recognized that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[22]

---

[20] *Id.* at 569. The Court acknowledged that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* at 574. "[H]owever," the Court said, "a line must be drawn," and mainly because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," the Court concluded that 18 is "the age at which the line for death eligibility ought to rest." *Id.*

[21] *Id.* at 569-70.

[22] *Id.* at 573.

In the three decisions following *Roper*, the Court turned from the death penalty to consider the constitutionality of sentencing juveniles to what it called "the second most severe penalty permitted by law,"[23] life imprisonment without parole. The Court recognized this to be "especially harsh punishment for a juvenile [who] will on average serve more years and a greater percentage of his life in prison than an adult offender."[24] It came to the conclusion in these cases that LWOP sentences are almost always disproportionately severe and constitutionally

---

[23] *Graham v. Florida*, 560 U.S. 48, 69 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

[24] *Id.* at 70. As the Court explained,

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence. . . . [T]his sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'

Id. at 69-70 (citation omitted).

impermissible for offenders under 18 years of age because of their diminished culpability and greater receptivity to rehabilitation, and the dubiousness of making at the time of sentencing an "irrevocable judgment" that a juvenile offender is "incorrigible" and "forever will be a danger to society."[25]

In *Graham*, the first case in the LWOP trilogy, the Court held that for any "juvenile offender who did not commit homicide[,] the Eighth Amendment forbids the sentence of life without parole" without exception.[26] When a juvenile is sentenced to life for a non-homicide crime, the State must give him or her what the Court called a "meaningful" and "realistic opportunity to obtain release before the end of that term."[27] Two years later, the Court declared in *Miller* that "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses."[28] Although *Graham* had not absolutely proscribed LWOP sentences for juvenile homicide offenders,

---

[25] *Id.* at 72-74.

[26] *Id.* at 74.

[27] *Id.* at 75, 82.

[28] *Miller v. Alabama*, 567 U.S. 460, 473 (2012).

Miller held that the Eighth Amendment forbids a sentencing scheme under which LWOP is mandatory for *any* class of juvenile offenders, because "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."[29] The Court declared that before imposing life without parole on a juvenile offender in any homicide case, the sentencer is required "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[30]

In the third case, *Montgomery*, the Court clarified that "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole. . . . Even if a court considers a child's age before sentencing

---

[29] *Id.* at 479.

[30] *Id.* at 480. In view of "children's diminished culpability and heightened capacity for change," the Court opined that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" – "especially so because of the great difficulty [] noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 479-80 (quoting *Roper*, 543 U.S. at 573, and *Graham*, 560 U.S. at 68).

him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[31] *Montgomery* described *Miller*'s retroactive "substantive holding" as being "that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[32] *Miller* thus "bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[33]

In line with the government's concession in this case, numerous courts have understood *Miller* (and *Graham*) to apply not only to sentences that literally impose imprisonment for life without the possibility of parole, but also to lengthy term-of-years sentences (for one offense or for multiple offenses in the aggregate) that amount to "de facto" life without parole because they foreclose the

---

[31] *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Miller*, 567 U.S. at 469 (internal quotation marks omitted)).

[32] *Id.* at 735.

[33] *Id.* at 734.

defendant's release from prison for all or virtually all of his expected remaining life span.[34] We agree with that understanding.

Although *Miller* addressed only mandatory LWOP sentencing schemes, many courts have read it, especially after *Montgomery*, as equally applicable to discretionary LWOP sentences.[35] We apprehend that the recent grant of certiorari

---

[34] *See, e.g.*, *Carter v. State*, 192 A.3d 695, 725-34 (Md. 2018) (holding, *inter alia*, that a lengthy term-of-years sentence can be a life sentence for purposes of the Eighth Amendment, and that, depending on the particular circumstances, this may be true when the sentence comprises consecutive multiple sentences for multiple crimes); *United States v. Grant*, 887 F.3d 131, 142 (3d Cir. 2018) ("A term-of-years sentence without parole that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform is inherently disproportionate and therefore violates the Eighth Amendment under both *Miller* and *Graham*."); *State v. Ramos*, 387 P.3d 650, 660 (Wash. 2017) (holding that *Miller* applies to a "de facto" as well as a "literal" LWOP sentence, "[w]hether that sentence is for a single crime or is an aggregated sentence for multiple crimes").

[35] *See, e.g.*, *Malvo v. Mathena*, 893 F.3d 265, 274 (4th Cir. 2018), *cert. granted*, 2019 U.S. LEXIS 1905 (U.S. Mar. 18, 2019) (No. 18-217) ("*Montgomery* . . . confirmed that, even though imposing a life-without-parole sentence on a juvenile homicide offender pursuant to a mandatory penalty scheme *necessarily* violates the Eighth Amendment as construed in *Miller*, a sentencing judge *also* violates *Miller*'s rule any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.'" (quoting *Montgomery*, 136 S. Ct. at 734)); *People v. Holman*, 91 N.E.3d 849, 861 (Ill. 2017) ("The greater weight of authority has concluded that *Miller* and *Montgomery* send an unequivocal message: Life

(continued…)

in *Malvo* means the Supreme Court is likely to clarify whether the constitutional principles articulated in *Miller* and *Montgomery* apply to discretionary as well as mandatory LWOP sentences imposed on juvenile homicide offenders. For present

---

(...continued)
sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics."); *Veal v. State*, 784 S.E.2d 403, 410 (Ga. 2016) ("We might . . . [have rejected] the merits of Appellant's *Miller* claim . . . [because] Georgia's murder sentencing scheme . . . does not under any circumstance *mandate* life without parole but gives the sentencing court discretion over the sentence to be imposed after consideration of all the circumstances in a given case, including the age of the offender and the mitigating qualities that accompany youth. . . . But then came *Montgomery*." (internal quotation marks and citations omitted)); *State v. Riley*, 110 A.3d 1205, 1213 (Conn. 2015) (holding that "the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate"); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) ("*Miller* does more than ban mandatory life sentencing schemes for juveniles . . . . In our view, whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment."); *but see, e.g.*, *Jones v. Commonwealth*, 795 S.E.2d 705, 722 (Va. 2017) ("[T]he whole point of *Miller* was to preclude a sentencing scheme from imposing a mandatory life-without-parole sentence because doing so would eliminate the sentencing court's discretion to impose anything less than that. Only in those nondiscretionary sentencing schemes are the offender's 'youth and attendant characteristics' truly irrelevant."); *Davis v. McCollum*, 798 F.3d 1317, 1321 (10th Cir. 2015) ("*Miller* said nothing about non-mandatory life-without-parole sentencing schemes and thus cannot warrant granting relief from a life-without-parole sentence imposed under such a scheme.").

purposes, we may assume *arguendo* an affirmative answer to that question; the answer makes no difference to our analysis and disposition of the present appeal.

Importantly, the Supreme Court's three LWOP decisions do not proscribe, and impose no restrictions on, sentencing juvenile offenders to "life *with* the possibility of parole."[36] The Court emphasized that the Eighth Amendment does not require States "to guarantee eventual freedom" to juvenile offenders who are ineligible for LWOP sentences.[37] The Eighth Amendment demands only that those offenders be afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[38] The corollary is that, consistent with the Constitution, "[t]hose prisoners who have shown an inability to reform will continue to serve life sentences."[39] Thus, providing a "meaningful" opportunity

---

[36] *Miller*, 567 U.S. at 465 (emphasis in the original).

[37] *Id.* at 479 (quoting *Graham*, 560 U.S. at 75).

[38] *Id.*; *see also Graham*, 560 U.S. at 82 ("A State need not guarantee the [juvenile] offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.").

[39] *Montgomery*, 136 S. Ct. at 736.

for reformed juvenile offenders to secure release from prison remedies the unconstitutionality of an LWOP sentence barred by *Miller* by turning it into a sentence that is constitutional because release is realistically possible after all.

The Court did not define what constitutes a "meaningful" opportunity to obtain release; essentially the only guidance it provided on that score was to say that "prisoners like Montgomery [a juvenile homicide offender serving an LWOP sentence] must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."[40]

The Court left it up to the States, "in the first instance, to explore the means and mechanisms for compliance" with this duty[41] and to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of

---

[40] *Id.* at 736-37.

[41] *Graham*, 560 U.S. at 75.

sentences."[42] It made clear in *Montgomery* that juvenile offenders serving unconstitutional LWOP sentences did *not* need to be resentenced to cure the Eighth Amendment violation in their sentences:

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. . . . Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment."[43]

---

[42] *Montgomery*, 136 S. Ct. at 735 (internal quotation marks and citation omitted)). "When a new substantive rule of constitutional law is established," the Court explained, "this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."

[43] *Id.* at 736.

As an example of a sufficient remedial alternative to resentencing, the Court cited a Wyoming statute making juvenile homicide offenders eligible for parole after 25 years.[44]

The Council of the District of Columbia responded to the constitutional imperatives declared in *Graham*, *Miller*, and *Montgomery* by passing the Incarceration Reduction Amendment Act of 2016 (the "IRAA").[45] The IRAA went into effect on April 4, 2017. It bans LWOP sentences and eliminates mandatory minimum prison terms for all offenders who were under 18 years of age when they committed their crimes.[46] In addition, the IRAA establishes a sentence review procedure intended to comply with the Supreme Court's LWOP decisions by

---

[44] *Id.* (citing Wyo. Stat. Ann. § 6-10-301 (c) (2013)).

[45] D.C. Law 21-238, §§ 301-06, 63 D.C. Reg. 15312, 15319-22 (eff. Apr. 4, 2017). *See* D.C. Council Comm. on the Judiciary, Rep. on Bill 21-683, the "Comprehensive Youth Justice Amendment Act of 2016," at 11-14 (Oct. 5, 2016) (hereinafter referred to as the "Judiciary Committee Report"). The IRAA is Title III of this legislation.

[46] D.C. Law 21-238, § 306 (a), codified as D.C. Code § 24-403.01 (c)(2) (2018 cum. supp.). The Judiciary Committee explained that the IRAA prohibits mandatory minimums because the rationale in "the *Miller* line of cases" for prohibiting mandatory LWOP sentences for juveniles tried as adults "applies equally to mandatory minimum sentences." Judiciary Committee Report at 12.

ensuring that all juvenile offenders serving lengthy prison terms have a realistic, meaningful opportunity to obtain release based on their diminished culpability and their maturation and rehabilitation.

The sentence review procedure is set forth in Section 306 (b) of the IRAA.[47] The Council modeled it on legislation enacted in Florida and Delaware and under consideration in Congress.[48] It provides that "[n]otwithstanding any other provision of law," the sentencing "court may reduce a term of imprisonment imposed upon a defendant for an offense committed before the defendant's 18th birthday" if the defendant "has served at least 20 years in prison" without having become eligible for release on parole.[49] This relief is available regardless of

---

[47] D.C. Code § 24-403.03 (2018 cum. supp.).

[48] *See id.* (citing Fla. Stat. § 921.1402, Del. Code tit. 11, § 4204(A), and the Sentencing Reform and Corrections Act of 2016, S. 2123, 114th Cong.). At least one other State, North Dakota, has since enacted a statute similar to the IRAA. *See* N.D. Cent. Code § 12.1-32-13.1. A comparable bill is pending in Congress. *See* Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. § 208 (2017).

[49] D.C. Code § 24-403.03 (a). The Sentencing Reform Amendment Act of 2000 abolished parole for all District of Columbia offenses committed on or after August 5, 2000, and replaced the former indeterminate sentencing regime under which appellant was sentenced with determinate sentencing, under which the

(continued…)

whether the imposed period of imprisonment without parole violated the Eighth Amendment under *Graham* and *Miller*.[50]

(…continued)
defendant receives a definite term of imprisonment followed by a specified period of supervised release. *See* D.C. Code § 24-24-403.01 (2012 Repl.). The IRAA applies to defendants sentenced under either sentencing regime. *See* D.C. Code § 24-403.03 (a)(1)(A), (B).

[50] The dissent contends that the IRAA sentence review procedure "was never intended" to afford a "*Miller*-compliant procedure for resentencing" juvenile defendants serving unconstitutional LWOP sentences. *Post* at 75. As a factual matter, we are not persuaded that this contention is correct. As we have noted, *Montgomery* held that juvenile offenders serving unconstitutional sentences are not necessarily entitled to resentencing; alternative relief may suffice, and the Judiciary Committee Report makes explicit that the IRAA sentence review procedure is intended to implement the Supreme Court's holding "that juveniles given life sentences must be given 'some realistic opportunity to obtain release' so that a juvenile defendant can 'demonstrate that he is fit to rejoin society.'" Judiciary Committee Report at 14 (quoting *Graham*, 560 U.S. at 79-82). In proposing this review procedure, moreover, the Committee noted that the Supreme Court had "left it to the states to 'explore the means and mechanisms for compliance'" with the Eighth Amendment and to determine "[w]hat a 'realistic opportunity to obtain release' should look like." *Id.* (quoting *Graham*, 560 U.S. at 75).

More important, however, what matters is not whether the Council specifically *intended* the IRAA sentence review procedure to remedy unconstitutional LWOP sentences, but whether this procedure *actually does* remedy them. For the reasons we set forth in this opinion, we are convinced that it does, just as if the Council had provided instead for across-the-board parole eligibility after twenty years for juvenile offenders serving LWOP sentences.

A defendant may apply for such relief by motion and submit supporting affidavits and documentation, and the court is required to hold a hearing on the motion.[51] At the hearing, the defendant and his counsel "shall be given an opportunity to speak on the defendant's behalf" and may be permitted to introduce evidence.[52]

The IRAA allows the court to reduce the term of imprisonment if it finds that "the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification."[53] This standard, in conjunction with the requirement that the defendant must have served at least 20 years of his prison term, is essentially equivalent to the standard for granting parole.[54] The 20-year waiting period is consistent with the 25-year waiting period

---

[51] § 24-403.03 (b)(1), (2).

[52] § 24-403.03 (b)(2).

[53] § 24-403.03 (a)(2).

[54] *See* D.C. Code § 24-404 (a) (authorizing release on parole if the Parole Commission finds "there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his or her release is not incompatible with the welfare of society, and that he or she has served the

(continued…)

for parole eligibility that the Supreme Court deemed constitutionally acceptable in *Montgomery*.

In determining whether sentence modification is warranted, the court is required to consider "[t]he defendant's age at the time of the offense;" "[w]hether the defendant has "demonstrated maturity, rehabilitation, and a fitness to reenter society;" and "[t]he diminished culpability of juveniles as compared to that of adults, and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences, which counsel against sentencing them to a lifetime in prison[.]"[55] The statute goes on to identify a number of specific factors bearing on the defendant's maturation, rehabilitative progress and amenability to reform, that the court must consider, including:

> (2) The nature of the offense and the history and characteristics of the defendant;

(…continued)
minimum sentence imposed or the prescribed portion of his or her sentence, as the case may be").

[55] *Id.* at § 24-403.03 (c)(1), (5), (10).

> (3) Whether the defendant has substantially complied with the rules of the institution to which he or she has been confined and whether the defendant has completed any educational, vocational, or other program, where available;
>
> * * *
>
> (7) Any reports of physical, mental, or psychiatric examinations of the defendant conducted by licensed health care professionals;
>
> (8) The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;
>
> (9) The extent of the defendant's role in the offense and whether and to what extent an adult was involved in the offense.[56]

The IRAA requires the court to issue a written opinion "stating the reasons for granting or denying the application[.]"[57] This requirement of a written opinion helps to ensure the effectiveness of appellate review, which is for abuse of

---

[56] § 24-403.03 (c). The court also is directed to consider information submitted by the United States Attorney and by (or on behalf of) the victim of the offense for which the defendant is imprisoned, and "[a]ny other information the court deems relevant to its decision." *Id*.

[57] § 24-403.03 (b)(4).

discretion.[58] If the court grants the application, it shall proceed to resentence the defendant under the sentencing regime that originally governed his sentence.[59] If a defendant's initial motion for a reduced sentence is denied, the IRAA provides the defendant with two further opportunities to obtain release. The defendant may file a second sentence reduction motion after five years; if that motion too is denied, he may file a third such motion after another five years. If that third motion is denied as well, no further motions under the IRAA are permitted.[60]

Although review under the IRAA is not denominated "resentencing," it would seem to equate to a resentencing in all but name. However we characterize it, the IRAA sentence review procedure provides a realistic, meaningful opportunity for all prisoners serving LWOP sentences for juvenile offenses to obtain release and "some years of life outside prison walls" based on demonstrated maturity and rehabilitation. For example, the court could render a prisoner in

---

[58] *Cook v. United States*, 932 A.2d 506, 507 (D.C. 2007).

[59] § 24-403.03 (e). Of course, the new sentence must conform to the requirements of the Eighth Amendment, including those articulated in *Graham*, *Miller*, and *Montgomery*.

[60] § 24-403.03 (d).

appellant's circumstances (one serving an indeterminate sentence) eligible for parole much earlier (or, indeed, immediately) by lowering the minimum terms imposed for each count of conviction and/or making his individual sentences run concurrently instead of consecutively; or the court could alter his sentence in various other ways and even reduce it to time served, effecting the prisoner's prompt release, based on its determination of his reformation and suitability for such relief. For prisoners serving determinate term-of-years sentences, the IRAA empowers the court to grant early release more directly by simply reducing the length of the prison term. The IRAA's provision of this opportunity for release does all the Supreme Court has said is necessary in its juvenile LWOP cases for such sentences to pass muster under the Eighth Amendment, for it was only the previous unavailability of such an opportunity that caused those sentences to contravene that Amendment. The IRAA thus furnishes a sufficient remedy for *Miller* violations. Because this remedy is available to appellant – in fact, we are informed that he already has applied in Superior Court for modification of his sentence pursuant to the IRAA – his § 23-110 claim is now moot. The sentence appellant is serving is now equivalent, for Eighth Amendment purposes, to a life sentence with parole eligibility – a sentence the Eighth Amendment permits.

Appellant and our dissenting colleague nonetheless assert that because the IRAA does not require parole consideration directly, it leaves the original, presumptively unconstitutional LWOP sentences "in place" and unaltered. *E.g.*, *post* at 47, 49, 68, 78, 79, 81. Perhaps that is so as a purely formal matter, but it is not so in reality or from the perspective of satisfying the requirements of the Eighth Amendment. There is no constitutional magic in the word "parole." In reality, the IRAA fundamentally transformed every LWOP sentence imposed in Superior Court for crimes committed by juvenile offenders, by effectively converting each such sentence into one with multiple realistic and meaningful possibilities of release while the offender still has years of life left. What was presumptively unconstitutional in those sentences therefore was not left "in place"; it was superseded by a new procedure providing all that the Eighth Amendment requires.

Simply put, by enacting the IRAA, the Council legislatively modified what were life sentences without the possibility of parole, changing them all into life sentences *with* a constitutional equivalent of parole. While the judicial hearing contemplated by the IRAA is not identical in all respects to a parole hearing, it serves the same purpose and requires judges to do what appellant would have

parole boards do: consider whether defendants ostensibly sentenced to life in prison for crimes committed as juveniles have earned back their liberty by demonstrating their capacity for reformation. The dissent objects that while parole provides the opportunity for outright release from prison to those found to deserve it, the IRAA only provides the opportunity for a reduction of sentence to deserving prisoners. *Post* at 47, 68–70. But this is quibble; the distinction the dissent draws between release and sentence reduction is of no constitutional significance, for as explained earlier, sentence reduction is an effective means for the court to provide for release.

The dissent further objects that the IRAA judicial review procedure places the burden of proof on the defendant to show that he has reformed, rather than requiring the government to prove that his crime reflects permanent incorrigibility. *Post* at 73 n.22. This objection, which equally could be leveled against parole hearings, misapprehends what the Supreme Court held in *Miller* and *Montgomery*. Under those cases, a judicial prediction of permanent incorrigibility is necessary only to support the denial of any meaningful opportunity for release based on demonstrated maturation and rehabilitation. The IRAA, however, provides exactly that opportunity. Consequently, as *Montgomery* states, the burden is indeed on the

prisoner to "demonstrate the truth of *Miller*'s central intuition – that children who commit even heinous crimes are capable of change."[61]

The Supreme Court has repeatedly emphasized that it is the *opportunity* for eventual release, not the *actuality* of eventual release, that the Eighth Amendment demands. Life sentences for juvenile offenders are not in themselves unconstitutional, nor do they require any finding of incorrigibility to be constitutional, so long as the requisite opportunity for release exists. The Constitution does not guarantee that juvenile offenders will be released eventually or require a finding of incorrigibility as a condition of withholding release from those who fail to reform.

Furthermore, the Supreme Court did not say, nor in our view did it imply, that a parole hearing is the *only* constitutionally acceptable remedial alternative to vacating and relitigating the sentence *ab initio*.[62] While in *Montgomery* the

---

[61] *Montgomery*, 136 S.Ct. at 736.

[62] *Accord Carter v. State*, 192 A.3d 695, 708 (Md. 2018) ("There is no constitutional requirement that a state have a parole system *per se*, so long as the state provides a meaningful opportunity for release based on demonstrated

(continued…)

Supreme Court gave Wyoming's parole statute (allowing parole consideration after 25 years) as an example of an acceptable approach, the Court explicitly left it up to the States to devise appropriate procedures to vindicate the Eighth Amendment's requirements in this area.[63] If, as the Court held in *Montgomery*, the Eighth Amendment permits a State to remedy unconstitutional LWOP sentences by legislatively providing the opportunity for early release by a parole board, then surely the Eighth Amendment permits a State to remedy unconstitutional LWOP sentences by legislatively providing the opportunity for early release by a court. To reject the latter alternative simply because it is not denominated "parole" is to

---

(…continued)
maturity and rehabilitation."). In *Carter*, the Maryland Court of Appeals upheld the constitutionality of life sentences for crimes committed by juveniles under a system in which the ultimate decision to grant parole is made not by the State's Parole Commission, but by the Governor. This procedure satisfied the requirements of the Eighth Amendment because, by Executive Order having the force of law, the Governor must take into consideration the factors specific to juvenile offenders identified in the Supreme Court's LWOP decisions. *Id.* at 723-24.

[63] *See Montgomery*, 136 S.Ct. at 735; *see also Graham*, 560 U.S. at 75. While the District of Columbia is not a State, there is no reason it should not have the same flexibility as the States have to develop remedies for constitutional violations.

exalt form over substance without any grounding in Eighth Amendment jurisprudence.

Other States have enacted judicial sentence review procedures similar to that in the IRAA to provide juvenile offenders receiving life or long term-of-years prison sentences with the meaningful opportunity to obtain release mandated by *Graham* and *Miller*.[64] For example, Fla. Stat. § 921.1402 allows an offender serving such a sentence to apply for judicial review after 25 years and requires the sentencing court to hold a hearing on the application to determine "whether the sentence should be modified" in light of the offender's demonstrated maturity and rehabilitation. The Florida Supreme Court held that this provision satisfies *Miller*'s requirement that juvenile offenders be given a meaningful opportunity for

[64] See footnote 48, *supra*. The dissent implies that these States (Florida, Delaware, and North Dakota) deem the IRAA-like statutes inadequate to meet the requirements of the Eighth Amendment. *Post* at 84 n.31. This is not so, as we proceed to show in discussing the Florida law. We focus on Florida because that State's highest court has considered the constitutional adequacy of its IRAA counterpart. The Supreme Courts in Delaware and North Dakota have not yet had occasion to do so; in *Garcia v. State*, 903 N.W. 2d 503 (N.D. 2017), the North Dakota Supreme Court noted only that the retroactivity of its State's statute (which had just been enacted in 2017) was an open question. *Id.* at 513.

future release from incarceration.[65] In other words, the Court deemed the statutory provision of IRAA-type judicial review to be equivalent to the provision of parole review for purposes of complying with the Eighth Amendment as construed in *Miller* and *Montgomery*.[66]

---

[65] *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015). The Court remanded the case for Horsley to be resentenced, not because it found the judicial review procedure inadequate to remedy the lack of an opportunity for early release, but to address other defects in his original sentencing and properly determine whether his maximum sentence should remain life in prison or instead be a fixed term of no less than 40 years. *Id.* at 408. "Either way," the Court stated, Horsley "will receive a subsequent judicial review of his sentence after twenty-five years" pursuant to Fla. Stat. § 921.1402. *Id.* Thus, the constitutionality of Horsley's new sentence depended on the Court's conclusion that the statutory judicial review procedure fulfills the requirements of the Eighth Amendment with respect to providing an opportunity for early release. *See also Nelms v. State*, 2019 Fla. App. LEXIS 911 *4-5 (Fla. Dist. Ct. App. 2019) ("Nelms was sentenced to life in prison with judicial review after twenty-five years . . . . Because such a sentence offers an opportunity for release and cannot be found to be tantamount to a sentence of life in prison without the possibility of parole, Nelms' sentence does not violate *Graham*, *Miller*, and similar cases.").

[66] The dissent asserts that Florida and other States do not rely on their IRAA-type statutes to provide a *retroactive* remedy in lieu of resentencing for defendants who have already begun serving unconstitutional LWOP sentences. *Post* at 83. To the extent that may be so, it is immaterial. The important point is the equivalence for Eighth Amendment purposes of IRAA-type judicial review to parole review. The dissent concedes, as it must, that a State may choose to cure unconstitutional LWOP sentences retroactively without resentencing by making parole available; the essential equivalency of parole and IRAA review (which the dissent fails to rebut) means States may effect that cure by making IRAA-type judicial review available instead of parole. (If anything, as we discuss *infra*, the

(continued…)

In support of its counter-factual theme that the IRAA cannot remedy an unconstitutional LWOP sentence because it leaves that sentence unaltered, the dissent relies on, and largely echoes, a pre-*Montgomery* decision of the California Supreme Court, *People v. Gutierrez*.[67] In that case, the Court held that the potential for relief under California's "recall and resentencing" statute[68] – a statute similar, though not identical, to the IRAA – was not an adequate remedy for an LWOP sentence imposed on a juvenile offender pursuant to a statute that established an unconstitutional presumption in favor of life without parole.[69] The rationale articulated in *Gutierrez*, like that of the dissent in this case, is undermined

---

(…continued)
IRAA procedures actually are superior to parole procedures in ways that are critically important to fulfilling the Eighth Amendment's requirements.)

[67] 324 P.3d 245 (Cal. 2014).

[68] CAL. PENAL CODE § 1170 (d)(2) (West 2012) (amended 2018). The statute provides that a juvenile offender sentenced to LWOP may, after serving at least fifteen years of that sentence, submit to the sentencing court a petition for recall of the sentence and resentencing.

[69] *See Gutierrez*, 324 P.3d at 266-67. For present purposes, we need not address whether *Gutierrez* is distinguishable because of the unconstitutional presumption in favor of life without parole embodied in California law. But this was a significant feature in the Court's determination, for as it explained, "for juvenile offenders such as Gutierrez, the potential for relief under [the recall and resentencing statute] does not eliminate the serious constitutional doubts arising
(continued…)

by *Montgomery*'s subsequent holding that *Miller* violations can be cured without resentencing by providing the offender with the opportunity for release from prison based on a showing of maturation and rehabilitation.[70] When the California Supreme Court addressed the recall and resentencing statute after *Montgomery* was decided, in *In re Kirchner*,[71] it articulated a different rationale for concluding that the statutory remedy was insufficient to remedy a *Miller* violation. Specifically, the Court found the statute inadequate because, by its terms, it makes resentencing "unavailable to some juvenile offenders who are serving sentences that contravene

---

(…continued)
from a presumption in favor of life without parole . . . because the same questionable presumption would apply at resentencing." *Id.* at 266. In contrast, there is no such presumption in IRAA sentence reduction proceedings; the presumption under the IRAA is to the contrary. See footnote 73, *infra*.

[70] For example, the *Gutierrez* court rejected the concept of providing "an after-the-fact corrective" to an unconstitutional LWOP sentence, reasoning that "it is doubtful that the potential to recall a life without parole sentence based on a future demonstration of rehabilitation can make such a sentence any more valid when it was imposed." *Id.* at 267. But as discussed above, *Montgomery* held that providing such an opportunity does what is necessary to remedy the initial unconstitutionality of the sentence by removing its only objectionable feature.

[71] 393 P.3d 364 (Cal. 2017). In the interim, the Court decided *People v. Franklin*, 370 P.3d 1053 (2016), in which it held, consistent with *Montgomery*, that a new statute entitling a juvenile offender serving an LWOP sentence to a parole hearing after 25 years "rendered moot any infirmity" in the LWOP sentence (and thus remedied the presumed constitutional violation without the need for resentencing). *Id.* at 1060.

Miller," and it fails to "require consideration of all relevant evidence bearing on the *Miller* factors . . . as part of the resentencing inquiry."[72] The IRAA differs from the California law; it is subject to neither of these defects.

Ultimately, even if a few other State courts have rejected their States' judicial review mechanisms as an alternative to resentencing juvenile offenders serving unconstitutional LWOP sentences, that is of little moment. In *Montgomery*, the Supreme Court held that resentencing is not the only acceptable means of remedying the Eighth Amendment violation, and that it suffices for a State to make consideration for release on parole meaningfully available to such offenders in lieu of resentencing them. The critical question before us, therefore, is how judicial review under the IRAA compares with parole consideration. We think it compares quite favorably.

We certainly do not see that the judicial hearing required by the IRAA is inferior to a parole hearing from the defendant's point of view, or in terms of meeting the concerns expressed in *Miller* and *Montgomery* that the differences

---

[72] *Id.* at 372.

between children and adults be taken fully into account to avoid disproportionately harsh sentences for juvenile offenders. The IRAA judicial hearing is superior to a parole hearing in those respects, for one reason because the IRAA explicitly requires judges to give individualized consideration to the factors specific to juveniles that "counsel *against* sentencing them to a lifetime in prison."[73] In addition, the formal judicial hearing envisioned by the IRAA provides defendants significant procedural guarantees, in contrast to the "minimal" procedures that the Constitution requires in parole proceedings.[74] These include a fuller opportunity to

---

[73] D.C. Code § 24-403.03 (c)(10) (emphasis added). Ignoring this explicit statutory language, as well as the IRAA's total ban on the imposition of LWOP sentences on juvenile offenders, *see id.* § 24-403.01 (c)(2), the dissent inexplicably asserts that "[b]y requiring the movant to serve twenty years of his sentence before he may seek review," the IRAA "assumes the legality of the sentence the movant asks to be reviewed." *Post* at 72. If anything, the IRAA assumes that an LWOP sentence for a juvenile offender is presumptively unconstitutional. Furthermore, the dissent's fallacious assertion would apply equally (if not more so) to a remedial statute providing for a parole hearing, but requiring the offender to serve twenty years before being entitled to it – the very kind of relief that *Montgomery* held (and the dissent concedes) would cure a *Miller* violation.

[74] *See Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (holding that the Constitution requires no more in a parole hearing than "an opportunity to be heard" and "a statement of the reasons why parole was denied[,]" and rejecting a "some evidence" requirement as a component of due process applicable to parole denials); *see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 14 (1979) ("Procedures designed to elicit specific facts . . . are not necessarily appropriate to a Nebraska parole determination. Merely because a statutory

(continued…)

present relevant evidence (and, by implication, to challenge the government's evidence) with the assistance of counsel,[75] and a written, structured decision by the judge that is subject to more stringent constitutional and statutory requirements and is more fully reviewable on appeal.[76]

(…continued)
expectation exists cannot mean that in addition to the full panoply of due process required to convict and confine there must also be repeated, adversary hearings in order to continue the confinement.").

[75] Whether to permit the parties to present evidence at the hearing on an IRAA motion is left to the judge's discretion, *see* D.C. Code § 23-403.03 (b)(2). If there is no dispute or uncertainty about the material facts, or if the parties are unable to proffer probative evidence, an evidentiary hearing is presumably unnecessary. But an evidentiary hearing may be necessary for the judge to render a decision based on reliable and complete information. Moreover, since the defendant bears the burden under *Montgomery* of demonstrating his maturation and rehabilitation, he must be given a fair and adequate opportunity to do so by presenting probative evidence and challenging opposing evidence bearing on the disputed or unresolved issues before the judge. *See Grant v. United States*, 509 A.2d 1147, 1155-56 (D.C. 1986).

[76] Decisions to deny parole are typically highly discretionary and appellate review of those decisions is correspondingly quite limited. *See e.g.*, *Greenholtz*, 442 U.S. at 9-10 (noting that parole release decisions depend on a "discretionary assessment of a multiplicity of imponderables," "may be made for a variety of reasons and often [involve] no more than informed predictions" (internal citations and quotation marks omitted)); *McRae v. Hyman*, 667 A.2d 1356, 1361 (D.C. 1995) (explaining that "because the statute and regulations vest in the Board substantial discretion in granting or denying parole[,] they lack the mandatory character which the Supreme Court has found essential to a claim that a regime of parole gives rise to a liberty interest" (internal punctuation omitted)); *Bogan v.*
(continued…)

Appellant objects that the IRAA commits the motion for reduction of sentence to the judge's discretion "with no guidance to judges about how to weigh the enumerated factors."[77] Even if this were so, the Supreme Court did not suggest in *Montgomery* that the Eighth Amendment requires such precision to guide parole[78] or any other procedure for remedying a *Miller* violation. It is common for decisions of constitutional magnitude to be based on a judge's discretionary consideration of multiple factors without preordained weights assigned to them; many such decisions are not amenable to such advance fine-tuning, and sentence reduction in this context is surely one of them. The factors to be considered are too many and vary too greatly from individual to individual for any predetermined formula to govern their weighing and balancing, and rigid adherence to such a formula would run counter to the essence of the evaluation of each juvenile's

---

(…continued)
District of Columbia Bd. of Parole, 749 A.2d 127, 129 (D.C. 2000) ("We do not review the merits of the Board's decision in denying parole, and are limited to a review of the procedures used by the Board in reaching its decision." (quoting *Smith v. Quick*, 680 A.2d 396, 398 (D.C. 1996)).

[77] Reply Brief at 15.

[78] As discussed above, decisions granting or denying parole may be and typically are highly discretionary and imprecise; the Constitution does not require them to be otherwise. See footnote 76, *supra*.

unique characteristics, degree of culpability, and prospects for reformation required by the Eighth Amendment.

We reject appellant's assertions that judicial review in the IRAA context is therefore "illusory" and that "[a]s long as a judge holds an IRAA hearing, allows the defendant to present evidence, and issues a written order, the refusal to reduce a sentence that should never have been imposed will be, for all practical purposes, unreviewable."[79] The judge is obligated to accord the prisoner a fair hearing and to make findings and conclusions supported by the record with respect to the pertinent factors enumerated in the IRAA. Thus, the judicial exercise of discretion, in an IRAA proceeding as in other areas, is reviewable for compliance with constitutional and other legal requirements and for abuse under well-established standards of reasonableness;[80] it is far more amenable to review, we would add, than a parole board decision to deny parole. Although (as appellant points out) this court has observed that "[g]enerally, sentences within statutory limits are

---

[79] Reply Brief at 18-19.

[80] *See generally Johnson v. United States*, 398 A.2d 354, 363-67 (1979).

unreviewable aside from constitutional considerations,"[81] that observation has little bearing here, where not only are "constitutional considerations" and the Supreme Court's articulation of the relevant requirements of the Eighth Amendment at the forefront, but also the IRAA itself clearly sets forth the criteria that the court must consider.

Finally, appellant objects that the availability of IRAA relief evaporates after three unsuccessful tries, creating the possibility that a defendant whose sentence violated *Miller* would have to spend his entire life in prison even if he eventually might, on a fourth (or later) attempt, have been able to demonstrate that he is rehabilitated and deserving of release. Appellant states that, in contrast, District of Columbia prisoners who are eligible for parole may be reconsidered for parole on an annual basis. That may be so, but as the government rejoins, when the Supreme Court said States could remedy *Miller* violations by permitting the defendant to be considered for parole, it did not describe what the parole scheme had to look like or imply that it needed to be as generous as the District's scheme in providing

---

[81] *Saunders v. United States*, 975 A.2d 165, 167 (D.C. 2009) (internal quotation marks and citation omitted).

repeated opportunities for parole reconsideration. Parole practices and procedures are not uniform throughout the United States; some jurisdictions restrict the frequency or number of parole hearings quite significantly, as much or more than the restriction on sentence reduction motions set by the IRAA.[82] And appellant's argument that three chances are not enough to provide a meaningful opportunity to attain demonstrable maturity and rehabilitation is unpersuasive, given that the prisoner has twenty years in which to make progress before he can take the first of those chances, another five years in which to make further progress before he can take the second chance, and yet another five years before he can take his third chance. Moreover, the prisoner can wait to move for reduction of his sentence if he needs more time to make the showing of his rehabilitation and suitability for return to society. That a prisoner may fail to reform over the course of at least

[82] *See, e.g.*, *Van Ackeren v. Neb. Bd. of Parole*, 558 N.W.2d 48, 51-52 (Neb. 1997) (prisoner not entitled to annual parole hearing after board's denial of parole is final); Mont. Code § 46-23-201(5) (requiring prisoners convicted of a sexual or violent offense to wait six years after being denied parole before petitioning for it again); 37 Tex. Admin. Code § 145.12(2) (inmates serving life sentences required to wait ten years after being denied parole before next parole consideration); Utah Admin. Code R. R671-316(3) (same).

thirty years and may file motions that are premature does not mean he has been denied what the Eighth Amendment requires.[83]

For the foregoing reasons, we affirm the Superior Court's denial of appellant's § 23-110 motion for relief from his sentence, without prejudice to his right to seek a reduction of his sentence pursuant to the IRAA.

So ordered.

[83] In any event, the lawfulness of the IRAA's three-motion limit is a hypothetical question not presented in this appeal, and it does not affect our decision. If this court were to conclude, in an appeal actually presenting the issue, that the statutory preclusion of a fourth motion is incompatible with the Eighth Amendment, the preclusion provision would be severed and its invalidity would not affect the validity of the other provisions or applications of the statute. *See* D.C. Code § 45-201 (2012 Repl.).

EASTERLY, *Associate Judge*, dissenting: In 1992, Brian Williams was sentenced to an aggregate term of at least six decades in prison for a double murder and related crimes he committed at age 17. Although he was resentenced in 1995, his minimum term of incarceration is still 62 years. Pursuant to his 1995 sentence, Mr. Williams remains in prison today and will not become eligible to be released from prison until he is 79 years old—at or very near the end of his life. Mr. Williams is serving a sentence that violates his rights under the Eighth Amendment. He is entitled to habeas relief.

In a trio of decisions—*Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)—the Supreme Court interpreted the Eighth Amendment to generally bar sentences that condemn juvenile offenders to die in prison; only an exceptionally rare subset who are both convicted of homicide and proven irreparably corrupt may be so sentenced. In *Montgomery*, the Court clarified that this Eighth Amendment right not to be sentenced to die in prison is a substantive right; that it renders unconstitutionally imposed sentences void and unenforceable; and that it must be retroactively enforced in state court habeas proceedings. The Majority

Opinion alternately assumes and agrees that whether a juvenile offender's sentence to die in prison is mandatory or discretionary, eponymous or de facto, the juvenile offender's Eighth Amendment rights are implicated. I would so hold. Moreover, because life expectancy statistics endorsed by both Mr. Williams and the government project that Mr. Williams will die in his mid to late 70s, I would hold that Mr. Williams' 62-year sentence is unconstitutional and void and grant him the habeas relief to which he is entitled under D.C. Code § 23-110: a new, constitutionally-compliant sentence.

Yet the Majority Opinion rejects Mr. Williams' entitlement to a new, lawful sentence and affirms the trial court's denial of his § 23-110 motion. My colleagues in the Majority conclude that, even if Mr. Williams' sentence was unconstitutional at the time it was imposed, his request for habeas relief in the form of resentencing has been "moot[ed]" by the enactment of D.C. Code § 24-403.03, a provision of the Incarceration Reduction Amendment Act of 2016 (IRAA). They reason that D.C. Code § 24-403.03—which authorizes a court to review a juvenile offender's sentence no earlier than twenty years after its imposition, to consider a nonexclusive list of factors, and then to determine solely in its discretion whether to reduce the sentence—"effectively convert[ed]" Mr. Williams' unconstitutional

sentence into a constitutional one by giving Mr. Williams all he is entitled: an opportunity for release. For multiple reasons, I cannot agree.

First, it is wrong to say that the violation of a substantive right is cured solely with a procedural remedy. Mr. Williams' right under the Eighth Amendment not to be sentenced to die in prison is not fulfilled by giving him access to sentence review under D.C. Code § 24-403.03. It is fulfilled by giving him a constitutional sentence—one that gives him "hope for some years of life outside prison walls." *Montgomery*, 136 S. Ct. at 737.

Second, it is wrong to say Mr. Williams' unconstitutional sentence has been "effectively" fixed by D.C. Code § 24-403.03 and only remains in place "as a purely formal matter." It is no mere formality that the only basis for Mr. Williams' current imprisonment is the 1995 sentencing order that requires him to spend the rest of his life in prison. This sentencing order is entirely unchanged by the existence of a statutory procedure that only allows a juvenile offender at a future point in time to request sentence review—as opposed to authorizing him, after service of a minimum sentence term, to request release. Indeed, under the Majority Opinion's logic, the existence of any future sentence review procedure

would relegitimize the practice, condemned in *Graham* and *Miller*, of sentencing juvenile offenders to die in prison without ensuring at the outset that they meet the strict constitutional criteria for imposition of such sentences.

Third, it is wrong to say that § 24-403.03's twenty-years-in-the-future, discretionary sentence review procedure protects the substance of Mr. Williams' Eighth Amendment rights, even belatedly. This statute, which was never intended as a *Montgomery* fix, does not require a court to discern if a juvenile offender is one of those rare few incorrigibles who may be lawfully sentenced to die in prison, much less require it to resentence a corrigible juvenile offender to something less than life imprisonment. Thus, as a statutory matter, a corrigible juvenile offender unconstitutionally sentenced to die in prison could seek review under § 24-403.03, be denied discretionary relief, and remain subject to an unconstitutional sentence.

Unquestionably, the Supreme Court in *Montgomery* gave states flexibility in curing the violation of juvenile offenders' substantive rights under the Eighth Amendment. States do not have to individually "relitigate" now-void sentences to life imprisonment; they may instead categorically replace juvenile offenders' unconstitutional sentences to die in prison with parolable or lesser term-of-years

sentences. But the Council of the District of Columbia has not done this, and the flexibility the Supreme Court gave the states does not authorize the District's courts to hold unconstitutional sentences in place and rely on a years-in-the-future, discretionary sentence review mechanism like D.C. Code § 24-403.03 as a constitutional cure-all. Our court will stand alone in the nation in holding that it does.

By withholding from Mr. Williams the relief that he is due—a new, constitutionally-compliant sentence—the Majority Opinion flouts the Supreme Court's directives, renders our habeas review inadequate, and negatively distinguishes us from other jurisdictions. The denial of Mr. Williams' § 23-110 motion should be reversed, not affirmed.

I. Because Mr. Williams' Substantive Rights Under the Eighth Amendment Were Violated, He Is Entitled to Habeas Relief.

A. Juvenile Offenders Have a Substantive Eighth Amendment Right Not to be Sentenced To Die in Prison.

In a trilogy of cases, *Graham*, *Miller*, and *Montgomery*, the Supreme Court held that the Eighth Amendment generally prohibits sentencing juveniles to die in

prison. For juveniles who commit nonhomicide offenses, life without parole sentences are barred entirely, per *Graham*. *Ante* at 13. For the vast majority of juveniles who commit homicide offenses, life without parole sentences are likewise barred, per *Miller* and *Montgomery*; such sentences are authorized only in the exceptionally rare case where the government has proved that the juvenile is irreparably corrupt. *Id*. at 14–15. These limits on juvenile sentencing are founded in a recognition that juveniles are developmentally distinct and thus "constitutionally different from adults." *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 471). Because juveniles are both less culpable for their behavior and more receptive to rehabilitation, their criminal conduct is in all likelihood the product of "unfortunate yet transient immaturity." *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479); *see also ante* at 15. Accordingly, there is almost never a legitimate penological justification to sentence juvenile offenders to die in prison. They must receive sentences that give them "hope for some years of life outside prison walls."[1] *Montgomery*, 136 S. Ct. at 737.

[1] This language describes the *sentence* to which a juvenile offender is constitutionally entitled. My colleagues in the Majority initially acknowledge that *Graham*, *Miller*, and *Montgomery* impose constitutional limits on sentencing *(continued…)*

The Supreme Court's opinion in *Montgomery* is the culmination of its Eighth Amendment jurisprudence to date regarding the sentencing of juvenile offenders, and understanding its holding—that the Eighth Amendment substantively proscribes all sentences that condemn juvenile offenders to die in prison (excepting those of homicide offenders proved before sentencing to be

---

(…continued)
juvenile offenders, *ante* at 13–15, but then shift focus. They latch on to language from *Graham* quoted in *Miller* that prospectively mandates how a juvenile offender must be constitutionally sentenced—i.e., a juvenile offender's sentence must provide "some meaningful opportunity to obtain release based on maturity and rehabilitation," *ante* at 18 (quoting *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75)); *see also ante* at 31—but they disassociate the "meaningful opportunity to obtain release" requirement from the act of sentencing. My colleagues then conclude that with respect to juvenile offenders seeking habeas relief from unconstitutional sentences, this free-floating "meaningful opportunity to obtain release" may take the form of future, discretionary sentence review. In this way, my colleagues determine that a juvenile offender's actual sentence to die in prison, memorialized in a Judgment and Commitment Order, raises no constitutional concern. *Ante* at 18–20.

The Majority Opinion's determination that the actual sentence imposed by a court is immaterial for the purposes of an Eighth Amendment analysis cannot be reconciled with the Supreme Court's decisions in *Graham*, where the court held that the petitioner's sentence violated the Eighth Amendment because it "guarantee[d] he w[ould] die in prison," 560 U.S. at 79; in *Miller*, which held that "sentencing scheme[s]" that require homicide juvenile offenders to die in prison are "forbid[den]," 567 U.S. at 479; and last but not least in *Montgomery*, which, as I explain, held that a juvenile offender's Eighth Amendment right not to be sentenced to die in prison is a substantive constitutional right, 136 S. Ct. at 734.

incorrigible)—is critical to the correct analysis of Mr. Williams' appeal.[2] Like Mr. Williams, Mr. Montgomery was taken into custody at age 17 for a homicide offense and was sentenced to die in prison. After his conviction was final, he sought to challenge his sentence on Eighth Amendment grounds in state habeas proceedings. Whether he could prevail on this claim in post-conviction proceedings turned on whether the Supreme Court's decision in *Miller* constituted "a new substantive rule of constitutional law"—i.e., a "rule[] prohibiting a certain category of punishment for a class of defendants because of their status or offense"—that retroactively applied to his sentence. 136 S. Ct. at 728–29.

To answer this question, the Court in *Montgomery* first confirmed that the retroactivity rules set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (requiring retroactive application of all substantive constitutional rules, but not all procedural constitutional rules), applied in state collateral review proceedings. 136 S. Ct. at

---

[2] Whether, *once a juvenile offender has been lawfully sentenced*, the Eighth Amendment imposes substantive limits on the actual punishment he may receive is a legitimate but distinct question not raised in this case. *See, e.g.*, *Brown v. Precythe*, 2018 WL 4956519, *7–10 (W.D. Mo. Oct. 12, 2018) (endorsing the view of other courts that a paroling authority must provide juvenile offenders whose unconstitutional sentences were converted to parolable sentences with a meaningful opportunity to be released from prison and holding that certain of Missouri's paroling authority's policies and procedures did not do this).

729–32. The Court explained that these retroactivity rules were themselves constitutionally compelled under the Supremacy Clause because "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Id*. at 731. A state court engaged in collateral review consequently

> has no authority to leave in place a conviction or sentence that violates a substantive rule. . . . A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids.

Id. In short, the Court determined that "[i]n adjudicating claims under its collateral review procedures[,] a State may not deny a controlling right asserted under the Constitution . . . ." *Id.* at 732.

The Court then confirmed that its Eighth Amendment bar on sentencing juvenile offenders to die in prison is a substantive rule.[3] 136 S. Ct. at 734. The

[3] This was really only a question as to the holding in *Miller*. *Graham*'s absolute bar on sentencing juvenile nonhomicide offenders to die in prison was clearly a substantive rule, as it "place[d a] certain . . . punishment[]" for a certain

(continued…)

Court explained that although *Miller* "did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*[,]" it "did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734. The recognition in *Miller* that there might be some subset of juveniles for whom life without parole "could be a proportionate sentence" was immaterial. *Id.* Rather,

> [l]ike other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.

Id. (internal quotation marks omitted); *see also id*. ("Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence.").[4]

(…continued)
class of offenders "altogether beyond the State's power to impose." 136 S. Ct. at 729*; see also id.* at 727 (explaining that Louisiana's collateral review courts, post-*Graham*, allowed state prisoners "whose sentences had long been final" to seek resentencing on Eighth Amendment grounds for this reason).

[4] In determining that *Miller* had announced a substantive rule, the Court acknowledged that "*Miller*'s holding has a procedural component . . . requir[ing] a sentencer to consider a juvenile offender's youth and attendant characteristics *before* determining that life without parole is a proportionate sentence." 136 S. Ct.
(continued…)

Having confirmed that Mr. Montgomery's sentence as a juvenile offender to die in prison was unconstitutional under *Miller* and void under *Teague*, the Court reversed the Louisiana Supreme Court's affirmance of Mr. Montgomery's sentence, *id.* at 737, and on remand, that court directed that Mr. Montgomery be resentenced in compliance with *Miller*, *see State v. Montgomery*, 194 So.3d 606, 606–07 (La. 2016). Mr. Williams suffered the same Eighth Amendment violation as Mr. Montgomery and he is entitled to the same relief.

B. Mr. Williams' Substantive Sentencing Rights Under the Eighth Amendment Were Violated.

Just like Mr. Montgomery's sentence, Mr. Williams' sentence violates the Eighth Amendment bar on sentencing juvenile offenders to die in prison. The only

---

(…continued)
at 734 (emphasis added). Accordingly, the court held that "a hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Id*. at 735 (internal quotation marks and citations omitted). The Court cautioned, however, that this hearing "*does not replace* but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id*. (emphasis added). As a corollary, *Montgomery* made clear that when a juvenile offender faces a sentence condemning him to die in prison, this hearing must take place at sentencing, not at some point thereafter. *Id.* at 733–36.

distinction between the two cases is that Mr. Williams received a life sentence by virtue of an aggregation of sentences the trial court imposed in its discretion. As the Majority Opinion acknowledges, the trial court never took any evidence or made any finding that Mr. Williams was irreparably corrupt so as to authorize the imposition of such a sentence consistent with the Eighth Amendment.[5]

In line with the government's concession and the decisions of numerous other state courts, the Majority Opinion agrees that *Miller* (and *Graham*) "apply not only to sentences that literally impose imprisonment for life without the possibility of parole, but also to lengthy term-of-years sentences (for one offense or

[5] The Majority Opinion notes that "the judge considered [Mr. Williams'] youth." *Ante* at 9 n.16. Mr. Williams argues, however, that to the extent the trial court considered his youth, it misapprehended it as an aggravating factor. In any event, mere "consideration" of youth is insufficient to render Mr. Williams' sentence constitutional. *See Montgomery*, 136 S. Ct. at 734 ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.") (internal quotation marks omitted); *see also Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (explaining that it was not enough for the sentencing court "generally to have considered Appellant's age and perhaps some of its associated characteristics" where the court did not "make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*.").

for multiple offenses in the aggregate) that amount to 'de facto' life without parole because they foreclose the defendant's release from prison for all or virtually all of his expected remaining life span." *Ante* at 15–16. The Majority Opinion further assumes without deciding that *Miller* and *Montgomery* apply to Mr. Williams' sentence to die in prison even though it was not mandatorily imposed. *Id.* at 18. But my colleagues in the Majority unnecessarily sidestep a determination that Mr. Williams was unconstitutionally sentenced based on its assessment that we do not possess the facts to resolve with sufficient precision whether Mr. Williams' period of ineligibility for parole under his aggregate sentence is "close to his expected life span." *Id.* at 5. We know all we need to know in this case to make this determination.

The Majority Opinion acknowledges that Mr. Williams was sentenced to an aggregate of 62 years to life in prison for offenses he committed at age 17. *Ante* at 8. In his pro se § 23-110 motion, Mr. Williams argued that this sentence condemned him to die in prison. He relied on his understanding that "[t]he life expectancy for a black man is in [his] 70s." In its Opposition to Mr. Williams' § 23-110 motion, the government did not contest his assertion and, as Centers for

Disease Control and Prevention (CDC)[6] statistics cited by both Mr. Williams and the government on appeal demonstrate, Mr. Williams was correct.[7]

Mr. Williams is now 46 years old. According to the CDC, 45-year-old men[8] in the United States are expected to live an additional 34.2 years (to age 79.2); this figure drops to 31.4 years (76.4) for "Black" men and drops again to 31.2 years

---

[6] The CDC is a division of the United States Department of Health and Human Services. *See CDC Organization*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/about/organization/cio.htm (last visited April 2, 2019).

[7] Because these statistics show that Mr. Williams will remain in prison until at or very near the end of his life, we need not consider in this case arguments against using life expectancy statistics because they provide too little protection against disproportionate sentences for juvenile offenders. *See Carter v. State*, 192 A.3d 695, 725–30, 734 n.54 (Md. 2018) ("[A]nother way of describing life expectancy is as the likely date of one's death. Withholding eligibility for parole—not release on parole—until the likely date of the defendant's death is just another way of saying 'life without parole' and is not consistent with a 'hope for some years of life outside prison walls.'" (emphasis omitted)); *see also People v. Contreras*, 411 P.3d 445, 451 (Cal. 2018) (noting that by definition only 50 percent of people live past the average national life expectancy, and "[a]n opportunity to obtain release does not seem 'meaningful' or 'realistic' within the meaning of *Graham* if the chance of living long enough to make use of that opportunity is roughly the same as a coin toss.").

[8] Both Mr. Williams and the government directed the court to this statistical table. *See* E. Arias, M. Heron, & J. Xu, 66 National Vital Statistics Reports No. 4 (Aug. 14, 2017), Table A, https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_04.pdf (last visited April 2, 2019).

(76.2) for "non-Hispanic Black men."[9] This figure would presumably drop even lower if the CDC further disaggregated data for non-Hispanic Black men, like Mr. Williams, who are living in prison.[10] Contrast these life expectancy figures with one number—79—the age Mr. Williams, incarcerated at 17, would have to reach to become eligible for parole under his aggregate minimum sentence of 62 years.[11] *See ante* at 8 & n.14.

---

[9] Because all of these statistics substantiate Mr. Williams' Eighth Amendment claim, see note 7 *supra*, we need not delve into the debate about the potential unfairness of using demographic data to calculate the life expectancy of a particular defendant. *See State v. Zuber*, 152 A.3d 197, 214 (N.J. 2017).

[10] Data indicate time in prison significantly reduces life expectancy because it exposes prisoners to increased health and safety risks. *See Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1046 (Conn. 2015) (collecting cases and data indicating federal prisoners' life expectancy is shortened due in part to prisoners' exposure to violence and disease; that child offenders serving life without parole sentences in Michigan have an average life expectancy of 50.6 years; and that New York prisoners experience a two-year decline in life expectancy for each year they are incarcerated).

[11] The Majority Opinion relies on the government's representation that Mr. Williams could have a slightly earlier parole eligibility date, at age 75. *Ante* at 8. Even if that were the correct number, it would not affect Mr. Williams' plain entitlement to relief. That said, the government's representation is based on a Bureau of Prisons figure that is not part of the record and appears to include a computation of "good time" credits. For our purposes, such credits are immaterial because they can be revoked at any time before a prisoner's release. The court-imposed sentence is what matters. *See Pepper v. United States*, 562 U.S. 476, 501 n.14 (2011) (quoting *Barber v. Thomas*, 560 U.S. 474, 482 (2010)); *see also Bear Cloud v. State*, 334 P.3d 132, 136 & n.3 (Wyo. 2014) (declining to consider good

(continued…)

Thus if the question is whether Mr. Williams' aggregate minimum sentence gives him any "hope for some years of life outside prison walls," *Montgomery*, 136 S. Ct. at 737, the honest answer is no.[12] The government's argument to the contrary is premised on a distorted understanding of what it means to have a sentence that gives some "hope" of living "some years of [one's] life outside prison." *Id.* It argues that "even when parole eligibility takes decades—beyond a person's average life expectancy—the *possibility* of parole means that the offender still has some hope for release" (emphasis in original). But the possibility of being released on parole beyond one's life expectancy if one is so lucky as to beat the odds of death does not give a defendant "hope" in the sense that the Supreme

---

(…continued)
time in assessing whether a juvenile offender received an unconstitutional sentence to life imprisonment).

[12] *See, e.g.*, *Casiano*, 115 A.3d at 1047–48 (holding that a 50-year sentence for felony murder with no possibility of release until the defendant is in his mid-60s is the functional equivalent of life without parole); *Carter*, 192 A.3d at 734–35 (holding that a 100-year aggregate sentence with parole eligibility after 50 years, when defendant will be 67, is equivalent to life without parole); *Zuber*, 152 A.3d at 201–02 (holding that 68- and 55-year sentences with no possibility of release until ages 85 and 72, respectively, are the functional equivalent of life without parole); *Bear Cloud*, 334 P.3d at 142–44 (holding that an aggregate 45-year sentence with no possibility of release until age 61 is the functional equivalent of life without parole).

Court, focused on juveniles' corrigibility and ability to learn to become productive members of society, meant in *Montgomery*.[13]

On the record before us, we must conclude that Mr. Williams' Eighth Amendment right as a juvenile offender not to be sentenced to die in prison was violated.

C. Mr. Williams Is Entitled to Habeas Relief Under D.C. Code § 23-110.

Mr. Williams is in precisely the same position as Mr. Montgomery before he prevailed in the Supreme Court. Mr. Williams is being held in prison pursuant to a life without parole sentence that violates the Eighth Amendment, and he has been

[13] The government also warns this court of the perils of getting into the "actuary business" and raises the fearful specter of "the slippery slope." But such an argument mistakenly "presumes that courts are unable or unwilling to make the kinds of reasoned distinctions that it is precisely in the nature of courts to make." *Rong Yao Zhou v. Jennifer Mall Rest., Inc.*, 534 A.2d 1268, 1277 n.7 (D.C. 1987); *see also Irwin v. Gavit*, 268 U.S. 161, 168 (1925) (Holmes, J.) (rejecting concerns about "where to draw the line" because "[t]hat is the question in pretty much everything worth arguing in the law"). In any event, this is not a hard case. While there may well be line-drawing challenges down the road, the potential prospect of struggling to set the minimum boundary of a de facto life without parole sentence should not cause us to disregard the obvious conclusion that Mr. Williams was (and is still) effectively sentenced to die in prison.

wrongly denied habeas relief. As the Supreme Court explained in Mr. Montgomery's case, a juvenile offender's unconstitutional sentence to die in prison is void. See Section I.A *supra*. Such a sentence is without legal force "from the start"; it is "a nullity." *Brown v. United States*, 795 A.2d 56, 61 (D.C. 2002) (considering a sentencing challenge under the Double Jeopardy Clause); *see also, e.g.*, *Veal*, 784 S.E.2d at 409–11 (concluding that appellant's sentence, imposed in violation of *Miller* and *Montgomery*, is not merely "voidable," but "void"). The Supreme Court further held in Mr. Montgomery's case that the Louisiana courts reviewing his state collateral review petition were obligated under the Supremacy Clause to enforce his Eighth Amendment right not to be sentenced as a juvenile offender to life without parole and to afford him relief from his unconstitutional sentence. See Section I.A *supra*.

In Mr. Williams' case, there is no conflict between state law and federal constitutional rights, and thus no need to look to the Supremacy Clause. As a federal city, the District of Columbia is subject to the legislative oversight of Congress, and in fact Congress drafted the District's local habeas statute, D.C. Code § 23-110 (2012 Repl.). District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 608–09 (1970). This

statute directs D.C. prisoners to seek relief in D.C. courts from sentences imposed in violation of federal constitutional rights. Section (a) provides that "[a] prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that . . . the sentence was imposed in violation of the Constitution of the United States . . . may move the court to vacate . . . the sentence."[14] Furthermore, the statute plainly commands that a motion thereunder be granted if a D.C. prisoner establishes that his constitutional rights have been violated. Section (c) states that "[i]f the [habeas] court finds that . . . there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, *the court shall vacate and set the judgment aside and shall* discharge the prisoner, *resentence him*, grant a new trial, *or correct the sentence*, as may appear appropriate." *Id.* (emphasis added). Under § 23-110, Mr. Williams is entitled to habeas relief in the form of a new sentence.

[14] Unlike state prisoners who may seek collateral review in state court and then, if need be, in federal court, D.C. prisoners may not seek habeas relief in federal court "unless it also appears that the remedy by motion [under this section] is inadequate or ineffective to test the legality of his detention." *See* D.C. Code § 23-110(g).

II. The Sentence Review Procedure Afforded Under D.C. Code § 24-403.03 Does Not Cure the Violation of Mr. Williams' Substantive Eighth Amendment Rights, and No Other Jurisdiction Has Relied On a Similar Statute To Forgo the Resentencing Required Under *Montgomery*.

Notwithstanding the plain language of § 23-110 and Mr. Williams' clear entitlement to relief thereunder, the Majority Opinion upholds the trial court's denial of his § 23-110 motion. *Ante* at 44. My colleagues in the Majority reason that Mr. Williams' habeas claim is "now moot" by virtue of the enactment of IRAA, or more specifically D.C. Code § 24-403.03 (2018 Supp.). *Ante* at 28. They assert that D.C. Code § 24-403.03 "effectively convert[s]" lengthy sentences with no realistic and meaningful possibility of release "into one with multiple realistic and meaningful possibilities of release," and thus fulfills "the constitutional imperatives declared in *Graham*, *Miller*, and *Montgomery*[.]" *Ante* at 29, 21.

The Majority Opinion is mistaken. D.C. Code § 24-403.03 (reproduced at Appendix A) is not a constitutional cure-all. It does not give Mr. Williams the substantive relief to which he is entitled now: a constitutional sentence. At most, it provides Mr. Williams with a procedure to have his sentence reviewed and reduced in the future, and it does not as a statutory matter even guarantee that his Eighth

Amendment rights will be fulfilled at that point, because it leaves wholly to the court's discretion whether to reduce his sentence. By denying Mr. Williams the relief that he is constitutionally due, we flout the Supreme Court's Eighth Amendment directives (see Section I.A *supra*); undermine the adequacy and effectiveness of our habeas review[15] (see Section I.C *supra*); and negatively distinguish ourselves from other jurisdictions, where juvenile offenders with unconstitutional and void sentences to die in prison have received new, constitutionally compliant sentences (see Section II.B(2) *infra*).

---

[15] If this court closes off habeas review, D.C. prisoners have another option: they can go to federal court to enforce their constitutional rights. See note 14 *supra* (discussing D.C. Code § 23-110(g)); *see also Ibrahim v. United States*, 661 F.3d 1141, 1146 (D.C. Cir. 2011) (acknowledging that subsection (g) provides a "safety valve" when the District's courts bar review under § 23-110 of a federal constitutional claim); *Williams v. Martinez*, 586 F.3d 995, 999–1000 (D.C. Cir. 2009) (explaining that "[§] 23-110(g) divests federal courts of jurisdiction only over habeas petitions by prisoners who . . . have an effective [§] 23-110 remedy available to them," and holding that D.C. prisoners may seek federal habeas review of ineffective assistance of appellate counsel claims because such claims may not be raised in a § 23-110 motion); *see also id*. at 999 (explaining that the safety valve of § 23-110(g) is triggered even if the prisoner could not seek relief under § 23-110 but had "another means to seek his release"). Given the Majority Opinion's determination that D.C. Code § 24-403.03 "moot[s]" a § 23-110 petition raising an Eighth Amendment challenge under *Graham*, *Miller*, and *Montgomery*, the District's juvenile offenders seeking relief from their unconstitutional sentences would seem to have no other choice but to go to federal court.

A. D.C. Code § 24-403.03 Does Not Cure the Violation of Mr. Williams' Eighth Amendment Rights.

The Majority Opinion states that the enactment of D.C. Code § 24-403.03 "effectively convert[ed]" Mr. Williams' unconstitutional sentence into a constitutional one, and that this "transform[ation]" "equate[s] to a resentencing in all but name." *Ante* at 29, 27. According to my colleagues in the Majority, this is so because the discretionary sentence review procedure afforded under D.C. Code § 24-403.03 gives Mr. Williams "an opportunity" to seek release via resentencing. *Ante* at 27–28. Therein lies a fatal flaw in the Majority Opinion's logic. D.C. Code § 24-403.03 only gives Mr. Williams more procedure: the opportunity to seek eventual review of his unconstitutional sentence. *Ante* at 29 (asserting that D.C. Code § 24-403.03's "new procedure provid[es] all that the Eighth Amendment requires"). But giving Mr. Williams more procedure in the form of sentence review does not cure his substantive Eighth Amendment violation.[16] Mr.

[16] Accordingly, the Majority Opinion's detailed explication of the reasons the procedure offered under § 24-403.03 "is superior" to a parole hearing, *ante* at 37–39, is beside the point. This analysis skips over the first step required by the Eighth Amendment: ensuring that a defendant has a constitutional sentence. Only once a constitutional sentence is in place do the attributes and relative merits of a parole or parole-like process become a concern. See note 2 *supra*.

Williams is entitled to much more than an *opportunity* to have his constitutional rights fulfilled. He is entitled to a constitutional sentence.[17] See Section I.A *supra*.

Yet my colleagues in the Majority posit that, simply by virtue of D.C. Code § 24-403.03's existence, the substantive nature of the unconstitutional sentence Mr. Williams actually received—the sentence that is holding him in prison—has changed. In their view, Mr. Williams' 62-year sentence only remains in place "as a purely formal matter." *Ante* at 29.

To state the obvious, when a juvenile offender like Mr. Williams has been unconstitutionally sentenced to die in prison and seeks sentence review under D.C.

---

[17] The Majority Opinion acknowledges this when it states that if a juvenile offender successfully obtains relief under the discretionary sentence review afforded by D.C. Code § 24-403.03, *then* the sentence must comply with *Graham*, *Miller*, and *Montgomery*. *Ante* at 27 n.59. But my colleagues in the Majority ignore the fact that, until that point, the juvenile offender never proven to be incorrigible will be serving an unconstitutional sentence. *See People v. Gutierrez*, 324 P.3d 245, 266 (Cal. 2014) (discussed in Section II.B *infra*). They also ignore the likelihood that keeping a juvenile offender's unconstitutional sentence to life imprisonment in place until a § 24-403.03 hearing would have the perverse effect of limiting a prisoner's future ability to demonstrate rehabilitation in such a proceeding. *See Graham*, 560 U.S. at 74 (explaining that lengthy sentences limit the rehabilitative opportunities available to an incarcerated juvenile offender and thus bear on an offender's ability to obtain eventual release).

Code § 24-403.03, he is seeking review of the sentence he has—i.e., his unconstitutional sentence. The only decision the trial court is authorized to make upon receipt of a motion for sentence review under D.C. Code § 24-403.03 is whether to give him a new sentence or to hold his old sentence in place (by denying the motion). D.C. Code § 24-403.03(e). But if his sentence had in fact been "transformed" into one that gave him some hope for years of life outside prison, the decision would not be whether to resentence him—it would be whether to release him from prison or continue to incarcerate him.

The Majority Opinion conflates the decision to grant or deny a motion for a new sentence with the decision to grant or deny release from prison when it asserts that Mr. Williams' substantive Eighth Amendment violation is cured because sentence review under D.C. Code § 24-403.03 gives him the opportunity for release. *Ante* at 27–28; see also notes 1 & 2 *supra*. But the idea that an unconstitutional sentence is somehow rendered constitutional by the mere availability of a later sentence review procedure cannot be reconciled with Supreme Court precedent.

First, the Supreme Court in *Graham* considered and rejected the proposition that a juvenile defendant's sentence could be altered and rendered constitutional by the possibility that some procedure outside the sentence (clemency) might shorten his imprisonment. 560 U.S. at 70. Second, looking to the existence of a later sentence review procedure to substantively cure an unconstitutional sentence contradicts swaths of Eighth Amendment jurisprudence holding that where a substantive sentencing bar is categorical for a class of defendants, persons falling within that class must be identified *before* the sentence is imposed to prevent them from being subjected to an unconstitutional sentence. *Montgomery*, 136 S. Ct. at 734. The untenable implication of the Majority Opinion's analysis is that courts may disregard such categorical bars before sentencing and subject defendants to unconstitutional sentences, provided some after-the-fact (and perhaps far in the future) sentence review is available. Thus, for example, courts could continue to indiscriminately sentence juvenile offenders to serve life sentences in violation of *Graham* and *Miller*, or ignore a capital defendant's *Atkins* claim at the time of sentencing, as long as the defendant had some opportunity to have his sentence reviewed post-conviction. Third, the Majority Opinion entirely misses the point when it asserts that, because "[t]here is no constitutional magic in the word 'parole,'" it is immaterial that D.C. Code § 24-403.03 does not "directly" make a

juvenile offender eligible for release. *Ante* at 29; *see also id*. at 34 n.66 (asserting the "essential equivalency" of parole and IRAA review).[18] A fundamental premise of *Graham*, *Miller*, and *Montgomery* is that a defendant's sentence *is* constitutionally significant. A sentence that permits a juvenile offender to be released at a time when he can hope to live some years outside of prison (either by directing eligibility for parole or imprisonment for a shorter term of years) is constitutionally legitimate; a sentence that does not is unconstitutional and void. See Section I.A *supra*.

Section 24-403.03 does not fulfill the substantive right that Mr. Williams possesses right now to a constitutional sentence under the Eighth Amendment. Further, the discretionary review available to a juvenile offender under § 24-403.03 after he serves a minimum of twenty years of his sentence does not afford him the

[18] The Majority Opinion injects more confusion into its Eighth Amendment analysis when it likens the delay in the availability of sentence review under D.C. Code § 24-403.03 to what it calls the "waiting period for parole eligibility that the Supreme Court deemed constitutionally acceptable in *Montgomery*." *Ante* at 24–25. *Montgomery* does not say and in no way suggests that states may institute a "waiting period" of any length of time before they do what *Montgomery* requires and give a new constitutional sentence to a juvenile offender who is serving an unconstitutional sentence to die in prison.

protection he is due under the Eighth Amendment, even belatedly. See note 4 *supra*. Section 24-403.03 was enacted as part of the IRAA, a broad package of reforms meant to "ensure that the District continue[d] its progress toward adopting . . . best practices" in the administration of juvenile justice.[19] Within the IRAA, attention was diffused over a range of subjects, including record-sharing, a mediation pilot program, research into the root causes of juvenile crime, and elimination of mandatory minimums. Committee Report at 44. These reforms were seemingly inspired by the same body of research regarding juvenile development that provided the foundation for the Court's decisions in *Graham*, *Miller*, and *Montgomery*. But with only one exception,[20] IRAA's various

---

[19] *See* D.C. Council, Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016" ("Committee Report") at 3 (Oct. 5, 2016). The Majority Opinion repeatedly refers to the IRAA when it means § 24-403.03.

[20] The only provision that sought to directly implement the Supreme Court's Eighth Amendment jurisprudence was D.C. Code § 24-403.01(c)(2) (2018 Supp.), which prospectively banned life without parole sentences for juveniles. This was a separate initiative from the sentence review procedure; as the legislative history reflects, neither provision made reference to the other. *See* Committee Report at 11–12 (discussing the prospective life without parole sentencing ban) and Appendix B (discussing the sentence review procedure). The prospective life without parole sentencing ban was also largely a formal gesture, since the Council had already banned this sentence for juvenile offenders convicted of first- and second-degree murder fifteen years earlier, nine years before the Supreme Court

(continued…)

provisions, including § 24-403.03, had nothing to do with ensuring juvenile offenders were sentenced in compliance with the dictates of the Eighth Amendment.

By its plain text, § 24-403.03 merely establishes an all-purpose mechanism to take a second look at juvenile offenders' sentences to see if, in a court's discretion, a reduction might be warranted. See Appendix A *infra*;[21] *see also ante* at 22–23 (acknowledging that a juvenile offender need not claim he is sentenced in violation of the Eighth Amendment to obtain sentencing relief under § 24-403.03). By requiring the movant to serve twenty years of his sentence before he may seek review, D.C. Code § 24-403.03(a)(1), this mechanism assumes the legality of the sentence the movant asks to be reviewed. It allows a defendant to file "an application for a sentence modification." D.C. Code § 24-403.03(b)(1). It directs the trial court to "consider" a myriad of factors, D.C. Code § 24-403.03(c), some of

---

(…continued)
decided *Graham*. *See* Committee Report at 12 (acknowledging that the penalty remained available for just three crimes).

[21] The Majority Opinion's assertion notwithstanding, § 24-403.03 contains no "presumption" regarding "life without parole" sentences. *Ante* at 35 n.69. It does not address them.

which may bear on the constitutional question of corrigibility, but others of which either are unlikely to inform such an assessment or clearly do not, *see*, *e.g.*, D.C. Code § 24-403.03 (c) (2), (4), (6), (11) (directing, *inter alia*, consideration of "[t]he nature of the offense"; "[a]ny report or recommendation received from the United States Attorney"; "[a]ny statement . . . by a victim of the offense . . . or by a family member of the victim"; and "[a]ny other information the court deems relevant"). Corrigibility is never identified as a dispositive concern that mandates vacatur of a sentence of life imprisonment without parole and imposition of a constitutionally-compliant sentence. Rather the statute leaves the ultimate decision to grant any sentencing relief to the court's discretion. D.C. Code § 24-403.03(a) (providing that a trial court "*may* reduce a term of imprisonment" if, after "considering" the broad array of enumerated factors, it finds "the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification" (emphasis added)); *see also ante* at 27–28 (acknowledging sentencing relief could be denied, and giving examples of the sentencing relief a court "could" provide in its discretion).[22] The result is that, at

[22] D.C. Code § 24-403.03 also would seem to place the burden on the juvenile offender to show he is eligible for reduction of his (unconstitutional) sentence. The Majority Opinion justifies this burden-shifting by observing that *(continued…)*

least as a statutory matter, a corrigible juvenile offender unconstitutionally sentenced to die in prison could be denied a discretionary sentence reduction after a § 24-403.03 hearing and remain incarcerated pursuant to an unconstitutional sentence.

(…continued)
individuals who seek release on parole bear the burden to establish they should be released into the community. *See ante* at 30–31. But the analogy is inapt. The Majority Opinion compares Mr. Williams to individuals with constitutional, parolable sentences. An individual with an unconstitutional sentence to die in prison cannot be made to bear the burden to show that the sentence should not be left in place. That burden falls to the government. *See, e.g.*, *Davis v. State*, 415 P.3d 666, 681 (Wyo. 2018) ("A faithful application of *Miller* and *Montgomery* requires . . . a presumption against imposing a life sentence without parole, or its functional equivalent, on a juvenile offender"); *Commonwealth v. Batts*, 163 A.3d 410, 452–55 (Pa. 2017) (placing the burden on the Commonwealth to prove beyond a reasonable doubt that a juvenile is irreparably corrupt so as to authorize imposing a life without parole sentence).

The Majority Opinion's assertion notwithstanding, *see ante* at 31–33, the Supreme Court never suggested otherwise in *Montgomery*. When the Court stated that juvenile offenders would be paroled if they "demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change," 136 S. Ct. at 736—it was referring to juvenile offenders with corrected, constitutional sentences, *id*. (explaining that "[e]xtending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions" because "prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition . . . .").

The inadequacy of D.C. Code § 24-403.03 as drafted to provide Mr. Williams with a *Miller*-compliant procedure for resentencing is no accident. As the legislative history reveals, the statute was never intended to serve this function. See Appendix B *infra*. The first of the three paragraphs of the section in the Judiciary Committee's report discussing this provision begins with an acknowledgment of the Supreme Court's decision in *Graham* prospectively banning life sentences for nonhomicide juvenile offenders; then it pivots to note that "several states . . . have taken this opportunity to establish or strengthen sentence review provisions for juveniles sentenced to lengthy terms."[23] Committee Report at 14. The second paragraph then explains that other jurisdictions have set

[23] This initial reference to *Graham* is the foundation for the Majority Opinion's assertion that the Committee Report "makes explicit" the Council's intent to make § 24-403.03 the exclusive remedy for juvenile offenders who had received unconstitutional life sentences. *Ante* at 23 at n.50. But it is incongruous to interpret the Committee Report's citation to *Graham* in this manner. As noted above, the Supreme Court in *Graham* addressed the *prospective* sentencing of nonhomicide juvenile offenders to life imprisonment and never discussed what to do with nonhomicide juvenile offenders who had already been sentenced to life imprisonment in violation of the Eighth Amendment. The Judiciary Committee obviously was aware of this fact because it noted that *Graham* "left it to the states to 'explore the means and mechanisms for compliance' as long as they do not make 'the judgment *at the outset* that those offenders never will be fit to reenter society.'" Committee Report at 14 (quoting *Graham*, 560 U.S. at 79–82) (emphasis added).

up discretionary sentence review mechanisms for juvenile offenders, highlighting Florida—which resentences juvenile homicide offenders who were unconstitutionally sentenced to life without parole under a separate statute, and *in addition* allows them to seek a sentence reduction under its sentence review statute. See note 32 *infra*. The third paragraph explains that "a similar sentence review mechanism" is established in D.C. Code § 24-403.03. The Committee Report never mentions the Supreme Court's expansion of constitutional limitations on the sentencing of juvenile offenders in *Miller* and *Montgomery*, much less the need to fix previously-imposed unconstitutional sentences as required by *Montgomery*. Thus, both in what it says and does not say,[24] the Committee Report makes clear that the Council's sole objective in enacting D.C. Code § 24-403.03 was to provide

[24] Also conspicuously absent from the Committee Report are the government's views regarding § 24-403.03, because the United States Attorney's Office submitted no testimony whatsoever regarding any provision in the IRAA or the Comprehensive Youth Justice Amendment Act. *See* Committee Report at 40–41 (listing representatives from the Office of the Attorney General and the Public Defender Service as the only government witnesses). Although the government now maintains that D.C. Code § 24-403.03 is the District's chosen constitutional cure for defendants serving life sentences rendered unconstitutional by *Graham*, *Miller*, and *Montgomery*, it never indicated to the Council that it understood the statute to serve this critical function.

an all-purpose review mechanism for juvenile offenders serving lawful albeit lengthy sentences.

In an apparent concession, the Majority Opinion ultimately asserts that "what matters is not whether the Council specifically *intended*" § 24-403.03 "to remedy unconstitutional LWOP sentences, but whether [the statute] *actually does* remedy them." *Ante* at 23 n.50 (emphasis in original). The Majority Opinion commits triple error by (1) disregarding the statute Congress enacted requiring the District's courts to correct unconstitutional sentences, § 23-110, see Section I.C *supra*; (2) exercising policymaking power reserved to the legislature to select a different statute for juvenile offenders seeking relief from their unconstitutional and void sentences to die in prison; and (3) choosing D.C. Code § 24-403.03 as the remedial mechanism, even though it does not provide the substantive cure to which these juvenile offenders are entitled under the Eighth Amendment as interpreted by the Supreme Court in *Montgomery*.

The Majority Opinion is mistaken that the procedure in § 23-403.03 provides Mr. Williams with relief from his substantively unconstitutional sentence. That sentence remains unconstitutional and void.

B. The Majority Opinion Is Blazing an Unauthorized New Trail.

The Majority Opinion takes the position that it is authorized to hold Mr. Williams' unconstitutional sentence in place and offer him only a discretionary sentence review mechanism because (1) the Supreme Court in *Montgomery* "left it up to the states to devise appropriate procedures to vindicate the Eighth Amendment's requirements in this area," *ante* at 32; and (2) other jurisdictions are doing the same, *id*. at 33–34. The Majority Opinion misinterprets *Montgomery*: It does not require States to "relitigate" individual, unconstitutional sentences, but it does require them to replace juvenile offenders' unconstitutional and void sentences with sentences that comply with the Eighth Amendment. And the Majority Opinion is mistaken about other jurisdictions' responses to *Montgomery*. No state supreme court has relied on a discretionary sentence review statute to avoid resentencing juvenile offenders unconstitutionally sentenced to die in prison. Rather, the one state supreme court that has squarely considered whether a sentence review statute suffices as a remedy for a juvenile offender unconstitutionally sentenced to die in prison has held that it cannot.

1. The Supreme Court did not authorize states to forgo resentencing of juvenile offenders serving unconstitutional life without parole sentences.

To the extent that the Majority Opinion takes the position that resentencing is not required to cure Eighth Amendment violations as defined by *Graham*, *Miller*, and *Montgomery*, it is mistaken. Although the Supreme Court in *Montgomery* gave states some leeway in crafting a remedy for substantively unconstitutional sentences imposed on juvenile offenders, this leeway was expressly limited to allowing states to determine *how* to replace these individuals' unconstitutional and void sentences. The Supreme Court did not authorize states to offer some lesser procedural remedy, like a discretionary sentence review procedure, and in the meantime hold juvenile offenders' unconstitutional sentences in place.

Before it broached the topic of remedy, the Court in *Montgomery* had already explained that the bar on life without parole sentences is substantive, and sentences imposed in violation of substantive rights are "void." 136 S. Ct. at 731. The Court had further cautioned that "[f]idelity to th[e] important principle of federalism . . . should not be construed to demean the substantive character of the

federal right at issue." *Id.* at 735. Against that backdrop, the Court stated that "[g]iving *Miller* retroactive effect . . . does not require States to relitigate sentences . . . in every case where a juvenile offender received mandatory life without parole." *Id*. at 736. It offered an alternative: In lieu of individual resentencing proceedings, states could—like Wyoming—simply decide to categorically resentence all of these defendants via legislation: "A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by [individually] resentencing them. *See, e.g.*, WYO. STAT. ANN. § 6-10-301(c) (2013)."[25] *Id.* The court concluded that either individual resentencing or categorical resentencing "ensures that juveniles whose crimes reflected only transient immaturity . . . *will not be forced to serve a disproportionate sentence* in violation of the Eighth Amendment." *Id*. (emphasis added).

[25] Unlike D.C. Code § 24-403.03, Wyoming's statute *does* serve as a mechanism to categorically convert unconstitutional nonparolable sentences into constitutional parolable sentences, because it contains express, mandatory "conversion" language that D.C. Code § 24-403.03 does not: It provides that "*[a] person sentenced to life imprisonment* for an offense committed before the person reached the age of eighteen (18) years *shall be eligible for parole* after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration . . . ." WYO. STAT. ANN. § 6-10-301(c) (2013) (emphasis added).

Montgomery does not authorize the Majority Opinion's holding. It makes no sense that it would. Giving states the leeway the Majority Opinion claims would negate the rest of the Supreme Court's opinion declaring that a sentence condemning a juvenile offender to die in prison is substantively unconstitutional and void. See Section I.A *supra*.

2. *Other states are not relying on discretionary sentence review statutes in lieu of resentencing to cure juvenile offenders' unconstitutional life sentences.*

It should be a red flag that no other state supreme court has interpreted *Montgomery* to authorize it to forgo resentencing and hold in place sentences that violate juvenile offenders' substantive Eighth Amendment rights under *Graham*, *Miller*, and *Montgomery*. Instead, states addressing Eighth Amendment sentencing violations have acknowledged their responsibility to resentence such juvenile offenders, either categorically (through legislation[26] and court decisions[27]) or individually.[28]

[26] See note 25 *supra*; *see also* ARK. CODE ANN. § 16-93-621 (West 2017); CAL. PENAL CODE § 3051 (West 2016) (amended 2018); COLO. REV. STAT. ANN. *(continued…)*

(…continued)
§§ 18-1.3-401(4)(b), (c) (West 2018); CONN. GEN. STAT. ANN. § 54-125a(f) (West 2016); 2013 Del. Legis. Serv. Ch. 37, S.B. No. 9 § 6 (West); LA. CODE CRIM. PROC. ANN. art. 878.1 (West 2017); MICH. COMP. LAWS ANN. § 769.25(7) (West 2014); NEV. REV. STAT. ANN. § 213.12135 (West 2015); N.C. GEN. STAT. ANN. §§ 15A-1340.19B, C (West 2012); W.VA. CODE ANN. § 62-12-13b (West 2015). Some of these provisions additionally dictate individualized resentencing for defendants convicted of certain crimes, or provide individualized resentencing at the request of the prosecutor or defendant.

[27] *See, e.g.*, *Commonwealth v. Brown*, 1 N.E. 3d 259, 268 (Mass. 2013) (requiring appellant challenging life without parole sentence under *Miller* to "be sentenced" under first-degree murder statute, but prohibiting application of parole ineligibility provision therein and explaining "what remains . . . is a mandatory sentence of life in prison with the possibility of parole"); *Jackson v. State*, 883 N.W.2d 272, 274 (Minn. 2016) (reviving a statute that "require[s] a sentence of life imprisonment with the possibility of release after 30 years" for all juvenile offenders who had been sentenced to mandatory life without parole); *Lewis v. State*, 428 S.W.3d 860, 864 (Tex. Crim. App. 2014) (acknowledging appellate court's use of TEX. PENAL CODE § 12.31(a) (2013) (authorizing life imprisonment rather than life without parole to reform unconstitutional nonparolable sentences into constitutional parolable sentences)).

[28] *See, e.g.*, *Betton v. State*, 2018 WL 1980780, at *5–6 (Ala. Crim. App. April 27, 2018) (applying *Ex parte Henderson*, 144 So.3d 1262 (Ala. 2013), in resentencing *Miller* defendant); *Harris v. State*, 547 S.W.3d 64, 70–71 (Ark. 2018); *In re Kirchner*, 393 P.3d 364, 373–75 (Cal. 2017); *Horsley v. State*, 160 So.3d 393, 406 (Fla. 2015); *Veal*, 784 S.E.2d at 412; *Windom v. State*, 398 P.3d 150, 158 (Idaho 2017); *People v. Holman*, 91 N.E.3d 849, 864 (Ill. 2017); *State v. Roby*, 897 N.W.2d 127, 148 (Iowa 2017); *Phon v. Commonwealth*, 545 S.W.3d 284, 307–09 (Ky. 2018); *Carter*, 192 A.3d at 735–36; *Jones v. State*, 122 So.3d 698, 701–03 (Miss. 2013); *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 62 (Mo. 2017); *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014); *Petition of State*, 103 A.3d 227, 230, 236 (N.H. 2014); *Zuber*, 152 A.3d at 202; *State v. Long*, 8 N.E.3d 890, 899 (Ohio 2014); *Stevens v. State*, 422 P.3d 741, 747–49, 751 (Okla. Crim. App. 2018); *Batts*, 163 A.3d at 435–60; *Aiken v. Byars*, 765 S.E.2d 572, 573, 544
(continued…)

To be sure, other states have enacted discretionary sentence review statutes like D.C. Code § 24-403.03. *See, e.g.*, CAL. PENAL CODE § 1170 (West 2012) (amended 2018); *see also ante* at 22 n.48 (noting the District's statute was modeled on Delaware and Florida's law, and that North Dakota has followed suit). But no court from these states has upheld the use of these statutes for the purpose of legislatively fixing sentences rendered unconstitutional under *Graham*, *Miller*, and *Montgomery*. These sentence review statutes are a complement to, not a substitute for, the resentencing required under *Montgomery*. California and Florida make this clear. They both require resentencing for juvenile offenders unconstitutionally sentenced to die in prison,[29] *and* permit discretionary sentence review thereafter.[30]

(…continued)
(S.C. 2014); *Davis*, 415 P.3d at 696; *cf. State v. Valencia*, 386 P.3d 392, 395–96 (Ariz. 2016) (remanding *Miller* defendant for hearing on corrigibility, which if proven would require resentencing).

[29] CAL. PENAL CODE § 3051 (West 2016) (amended 2018); *Horsley*, 160 So.3d at 405–09 (applying FLA. STAT. ANN. § 921.1401 (West 2014) retroactively).

[30] *Kirchner*, 393 P.3d at 374 & n.12 (explaining that, after resentencing, the state's sentence review statute, CAL. PENAL CODE § 1170, would "provide[] a mechanism that allow[ed] a second, third, and perhaps even a fourth look *at a lawful sentence of life without parole*") (emphasis added); *Horsley*, 160 So.3d at 405–09 (applying FLA. STAT. ANN. § 921.1402 (West 2014) retroactively).

The Majority "focus[es] on Florida,"[31] which it asserts "considered the constitutional adequacy of its [D.C. Code § 24-403.03] counterpart" in *Horsley v. State*, 160 So.3d 393 (Fla. 2015). *Ante* at 33 n.64. This was not the question in *Horsley*. In that case, the Florida Supreme Court was trying to decide which of three options would "remedy th[e] federal constitutional infirmity for those juvenile offenders whose sentences are now unconstitutional, under *Miller*, in violation of the Eighth Amendment," 160 So.2d at 399: (1) "revival" of a statute that would convert these sentences into life sentences with the possibility of parole after 25 years, *id.* at 400; (2) individualized resentencing, *id.*; or (3) retroactive

[31] The Majority Opinion acknowledges that the Supreme Courts of Delaware and North Dakota have not upheld their respective sentence review statutes as an "adequate" remedy for substantive sentencing violations under the Eighth Amendment. *See ante* at 33 n.64. The Delaware Supreme Court is unlikely ever to do so because Delaware passed a different statute that retrospectively and prospectively requires *Miller* defendants convicted of first-degree murder to be sentenced to not less than 25 years without parole. DEL. CODE tit. 11 § 4209A; 2013 Del. Legis. Serv. Ch. 37, S.B. No. 9 § 6 (West). After its enactment, Delaware adopted a "Case Management Plan" to resentence all *Miller* defendants serving mandatory life without parole sentences to constitutional sentences. *State v. Evans*, 2013 WL 7046372, at *2 (Del. Super. Ct. Nov. 25, 2013). And in considering the case of Barry Garcia, the sole defendant in North Dakota understood to have a potential *Miller* claim, the North Dakota Supreme Court recently acknowledged—without reference to the state's newly-minted sentence review statute—that if it found that Mr. Garcia's youth was not properly considered at his original sentencing, his sentence would "violat[e] . . . the Eighth Amendment." *Garcia v. State*, 903 N.W. 2d 503, 510 (N.D. 2017).

application of a new law, *id*. at 401, that "provid[ed] judicial discretion and term-of-years sentencing options" for juvenile offenders as well as "subsequent judicial review," *id.* at 405. The court determined that the third option was the proper remedy: resentencing within legislated boundaries *and* additional judicial review. *Id.* at 405.[32] Thus Florida has not opted to deny resentencing to juvenile offenders

[32] Accordingly, as the Majority Opinion acknowledges, the court remanded the case so that Mr. Horsley could be resentenced under the now-retroactive new law, which additionally provided him with subsequent judicial review of his sentence. 160 So.2d at 408; *ante* at 34 n.65. The Majority Opinion asserts that Mr. Horsley was resentenced because of "other defects in his original sentenc[e]." *Ante* at 34 n.65. The "defects" my colleagues in the Majority seem to reference are the factors that subjected Mr. Horsley to a life without parole sentence (i.e., the features that made him a *Miller* defendant), and the passage in *Horsley* to which they cite explains how Mr. Horsley might be *resentenced* under the individualized sentencing statute, either to another life term or to a term of years. My colleagues also assert that the court never found "the judicial review procedure inadequate" to remedy the juvenile offender's Eighth Amendment violation. *Id.* But, as explained above, the court never considered the judicial review procedure as anything more than an adjunct to the initial resentencing requirement. Lastly, my colleagues' reliance on a recent intermediate appellate decision, *Nelms v. State*, 2019 WL 318495 (Fla. Dist. Ct. App. Jan. 23, 2019), as evidence that Florida is exclusively relying on its sentence review statute to cure unconstitutional sentences to die in prison is misplaced. As the court noted in *Nelms*, "after the [habeas] court found that [Mr.] Nelms' 1985 sentence violated *Miller* . . . , the remedy was to resentence him pursuant to [the sentencing statute deemed retroactive in *Horsley*], which the court did." *Id.* at *2; *see also id*. (explaining "[i]t is settled that resentencing in accordance with [the sentencing statute retroactively applied in *Horsley*] is the appropriate remedy for a sentence that violates *Miller*"). Mr. Nelms was resentenced to life imprisonment *with* the possibility of parole. *Id*. at

(continued…)

serving unconstitutional and void sentences to die in prison and to instead rely solely on a discretionary sentence review statute. It cannot provide the District a source of support for this approach.

California's consideration of this issue, on the other hand, cannot be summarily dismissed as distinguishable. *See ante* at 35–37. The California Supreme Court has expressly considered whether courts can forgo resentencing and rely on discretionary sentence review alone to remedy the violation of Eighth Amendment rights of juvenile offenders serving sentences to die in prison. It has concluded that courts cannot do this.

The California Supreme Court first examined how its sentence review statute interacted with juvenile offenders sentenced to die in prison in *People v. Gutierrez*, 324 P.3d 245 (Cal. 2014), a post-*Graham* and -*Miller*, but pre-*Montgomery*, direct appeal decision. The government had argued that the state's sentence review statute, CAL. PENAL CODE § 1170(d)(2) (West 2012) (amended

---

(…continued)
*1; *see also id*. at *2. *In addition*, consistent with *Horsley*, he was eligible to seek discretionary judicial review after serving 25 years of his sentence. *Id.* at *1.

2018), eliminated any constitutional concern with a statutory presumption in favor of life without parole for certain juvenile offenders, and specifically that the availability of future review effectively altered the defendant's sentence. *Id*. at 267. The court squarely rejected this argument, explaining that a life without parole sentence "remains *fully effective* after the enactment of [the sentence review statute]. . . . That is why [the sentence review statute] sets forth a scheme for *recalling* the sentence and *resentencing* the defendant." *Id*. at 266 (emphasis in the original). The court also rejected the argument that the sentence review statute gave juvenile offenders all to which they were constitutionally entitled. *Id*. at 267. Precisely like the Majority Opinion in this case, *see, e.g.*, *ante* at 18 & n.37, the government had relied on *Miller*'s "cf." citation to language in *Graham* discussing the need to ensure juvenile offenders have a "meaningful opportunity to obtain release." 324 P.3d at 267. The California Supreme Court was unpersuaded:

> . . . *Graham* spoke of providing juvenile offenders with a "meaningful opportunity to obtain release" as a constitutionally required alternative to—not as an after-the-fact corrective for—"*making the judgment at the outset* that those offenders never will be fit to reenter society." (*Graham*, at p. 75, 130 S. Ct. 2011, italics added.) Likewise, *Miller*'s "cf." citation to the "meaningful opportunity" language in *Graham* occurred in the context of prohibiting "imposition of that harshest prison sentence" on juveniles under a mandatory scheme.

(*Miller*, at p. ——, 132 S. Ct. at p. 2469.) Neither *Miller* nor *Graham* indicated that an opportunity to recall a sentence of life without parole 15 to 24 years into the future would somehow make more reliable or justifiable the imposition of that sentence and its underlying judgment of the offender's incorrigibility "at the outset." (*Graham*, at p. 75, 130 S. Ct. 2011.)

Indeed, the high court in *Graham* explained that a juvenile offender's subsequent failure to rehabilitate while serving a sentence of life without parole cannot retroactively justify imposition of the sentence in the first instance: "Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate *because that judgment was made at the outset.*" (*Graham, supra*, 560 U.S. at p. 73, 130 S. Ct. 2011, italics added.) By the same logic, it is doubtful that the potential to recall a life without parole sentence based on a future demonstration of rehabilitation can make such a sentence any more valid when it was imposed. If anything, a decision to recall the sentence pursuant to section 1170(d)(2) is a recognition that the initial judgment of incorrigibility underlying the imposition of life without parole turned out to be erroneous. Consistent with *Graham*, *Miller* repeatedly made clear that the sentencing authority must address this risk of error by considering how children are different and how those differences counsel against a sentence of life without parole "*before* imposing a particular penalty." (*Miller, supra*, 567 U.S. at p. ——, 132 S. Ct. at p. 2471, italics added; see *id.* at pp. ——, ——, 132 S. Ct. at pp. 2469, 2475.)

Gutierrez, 324 P.3d at 267.[33]

After *Montgomery*, the California Supreme Court revisited the subject of sentence review in *People v. Franklin*, 370 P.3d 1053 (Cal. 2016), and upheld a different statute, CAL. PENAL CODE § 3051 (West 2016), as a remedy for juvenile offenders challenging their unconstitutional sentences to die in prison on direct appeal. *Franklin*, 370 P.3d at 1063. This statute operated to categorically resentence certain juvenile offenders by mandating that they "shall be eligible for release on parole" after serving a term that varies depending on the underlying crime. CAL. PENAL CODE § 3051(b)(3). The court explained that this categorical resentencing statute "effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." *Franklin*, 370 P.3d at 1063. By contrast, the court noted that § 1170, the sentence review statute it had analyzed in *Gutierrez*,

[33] The Majority Opinion, *ante* at 35 n.69, suggests *Gutierrez* is distinguishable because the California Supreme Court observed that any resentencing under the sentence review statute would incorporate a presumption (under a different California statute) in favor of a life without parole sentence. 324 P.3d at 266. But the court independently rejected, on the grounds discussed in detail above, the government's argument that the mere existence of its sentence review statute obviated the need to resentence juvenile offenders unconstitutionally sentenced to die in prison.

had "no similar [reforming] effect on a juvenile offender's LWOP sentence," which under that statute "remains *fully effective*." *Id.* (quoting *Gutierrez*, 324 P.3d at 266 (emphasis in original)).[34]

Finally, in *In re Kirchner*, 393 P.3d 364 (Cal. 2017), the California Supreme Court was asked to determine if its understanding that its discretionary review statute did *not* provide a cure for juvenile offenders unconstitutionally sentenced to die in prison extended to juvenile offenders seeking post-conviction relief. An intermediate appellate court had "acknowledged *Gutierrez*'s determination that the prospect of resentencing under [the sentence review statute] represents an inadequate response to the concerns implicated by a court's failure" to provide a constitutional sentence to a juvenile offender, but had regarded "a collateral challenge to a sentence, rather than a direct appeal," as distinguishable. *Id.* at 371. The California Supreme Court reversed, and, consistent with *Gutierrez* (and

[34] *Franklin*'s reaffirmation of *Gutierrez* refutes the Majority Opinion's suggestion that the California Supreme Court, post-*Montgomery*, felt compelled to reassess its analysis of its sentence review statute in *Gutierrez*. *See ante* at 35–36.

Franklin), held that § 1170 was not an adequate remedy at law that would obviate habeas relief.[35] *Id.* at 365, 373.

The California Supreme Court determined that discretionary sentence review under § 1170 "was not designed to provide a remedy for" *Miller* error and was "not well suited to serve this purpose" for two key reasons. First, the court explained that the statutory "recall and resentencing process anticipates the lawfulness of a sentence of life without parole potentially subject to recall under its terms." *Id.* at 372; *see also id.* at 365 (explaining the discretionary resentencing statute was "designed to revisit *lawful* sentences of life without parole") (emphasis in the original). Second, the court explained that § 1170 did not actually guarantee that a juvenile offender who had been unconstitutionally sentenced would receive a new, constitutional sentence.[36] *Id.* at 373 (explaining that "under *Miller*, prior to

---

[35] The Majority Opinion asserts that *Kirchner* "articulated a different rationale for concluding that [its sentence review statute] was insufficient to remedy a *Miller* violation." *Ante* at 36. The Majority Opinion misreads *Kirchner* and in particular misses the question presented: whether the court would follow its direct appeal precedent (*Gutierrez*) or establish a different remedy for juvenile offenders seeking post-conviction relief.

[36] The Majority Opinion emphasizes the California Supreme Court's observation that the sentence review statute was flawed in yet another respect

(continued…)

sentencing a juvenile offender to life without parole, a court *must* give proper consideration to" corrigibility factors enumerated in *Gutierrez*, and that "the *possibility* of consideration [of the factors enumerated in *Gutierrez* under § 1170] is not the same as the certainty that *Miller* and *Montgomery* demand"[37] (emphasis in original)); *id.* at 373 (explaining that "in crucial respects, [§ 1170] is different from statutes that automatically provide a timely parole hearing to juvenile offenders sentenced to terms that otherwise might raise Eighth Amendment

---

(…continued)
because it limited the class of juvenile offenders who could seek relief thereunder, 393 P.3d at 372, and seeks to distinguish *Kirchner* on this basis. *Ante* at 35–37. But eligibility to seek relief was not one of the court's "fundamental[]" concerns. *Id*. at 373. By the time the California Supreme Court issued its decision, rewritten legislation was pending, *see Kirchner*, 393 P.3d at 369 n.4; CAL. PENAL CODE § 3051 (West 2018), and in any event the petitioner in *Kirchner was* eligible to seek discretionary sentence review, 393 P.3d at 365 (acknowledging that "petitioner conceivably could avail himself of" discretionary sentence review).

[37] Within this context, the California Supreme Court noted that its sentence review statute directed that courts "may consider" certain enumerated but nonexclusive factors. 393 P. 3d at 370. The Majority Opinion attempts to distinguish *Kirchner* on this basis, alluding to the fact that the District's statute directs that trial courts "shall" do so. *Ante* at 36–37. But *Kirchner*'s critique of California's sentence review statute applies equally to D.C. Code § 24-403.03, because neither statute makes the assessment of a juvenile offender's corrigibility mandatory or dispositive in granting or refusing relief. Just like CAL PENAL CODE § 1170, sentence review in D.C. ultimately leaves to the judge's discretion whether to correct the sentence of a defendant entitled to a constitutional sentence, regardless of the court's findings related to corrigibility.

concerns. By simply transforming the affected sentences to life with parole terms, those laws avoid the *Miller* issues associated with the earlier sentences."); *see also id*. at 374 (recognizing "the *possibility* that a resentencing that accounts for the *Miller* factors will occur under [§ 1170] does not represent an adequate substitute for the timely and certain resentencing hearings that *Miller* . . . and *Montgomery* . . . require" for juvenile offenders unconstitutionally sentenced to die in prison).

Accordingly, the court in *Kirchner* concluded that discretionary sentence review afforded under § 1170 "does not constitute an adequate remedy for *Miller* error that would displace habeas corpus proceedings," and reversed and remanded "the matter . . . for a resentencing consistent with *Montgomery*, . . . *Miller*, . . . and *Gutierrez*." *Id*. at 375. The Majority Opinion incorrectly dismisses California's persuasive body of precedent in *Gutierrez*, *Franklin*, and *Kirchner*.

My colleagues in the Majority declare that other states have relied on "judicial sentence review procedures similar to [§ 24-403.03] to provide juvenile offenders" sentenced to die in prison the relief they are due under *Graham*, *Miller*, and *Montgomery*, *ante* at 33–34, when that is demonstrably not the case. When

they are unable to support that proposition, they seek to obscure the singularity of their holding by asserting that it "is of little moment" "even if a few other State courts have rejected their States' judicial review mechanisms as an alternative to resentencing juvenile offenders serving unconstitutional LWOP sentences[.]" *Ante* at 37. The reality is this: The District of Columbia Court of Appeals will be the first and only state supreme court to conclude that a discretionary sentence review procedure like D.C. Code § 24-403.03 addresses and cures Eighth Amendment injury for a juvenile offender unconstitutionally sentenced to die in prison. As a result of the Majority Opinion, the District will stand embarrassingly alone in refusing to address and correct juvenile offenders' unconstitutional and void sentences.

* * *

Mr. Williams is serving a 62-year aggregate sentence for an offense he committed at age 17. By the terms of his sentence, he is ineligible for parole until he is 79 years old. He is serving a sentence to die in prison. For all but the rare incorrigible juvenile offender, which Mr. Williams was never determined to be, the

Eighth Amendment, as interpreted by *Graham*, *Miller*, and *Montgomery*, bars such a sentence and renders it void. Per *Montgomery*, Mr. Williams has a substantive Eighth Amendment right to a new sentence. Per D.C. Code § 23-110, it is our responsibility to vindicate that right. The review procedure afforded by D.C. Code § 24-403.03 does not relieve us of that obligation or transform Mr. Williams' unconstitutional sentence into a constitutional one. Because the denial of Mr. Williams' § 23-110 motion should be reversed, I respectfully dissent.

APPENDIX A

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment for violations of law committed before 18 years of age.

(a) Notwithstanding any other provision of law, the court may reduce a term of imprisonment imposed upon a defendant for an offense committed before the defendant's 18th birthday if:

(1) (A) The defendant was sentenced pursuant to § 24-403 and has served at least 20 years in prison and not yet become eligible under § 24-403.04 for release on parole from the sentence imposed; or

(B) The defendant was sentenced pursuant to § 24-403.01 or was committed pursuant to § 24-903, and has served at least 20 years in prison; and

(2) The court finds, after considering the factors set forth in subsection (c) of this section, that the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.

(b) (1) A defendant convicted as an adult of an offense committed before his or her 18th birthday may file an application for a sentence modification under this section. The application shall be in the form of a motion to reduce the sentence. The application may include affidavits or other written material. The application shall be filed with the sentencing court and a copy shall be served on the United States Attorney.

(2) The court may direct the parties to expand the record by submitting additional written materials related to the motion. The court shall hold a hearing on the motion at which the defendant and the defendant's counsel shall be given an opportunity to speak on the

defendant’s behalf. The court may permit the parties to introduce evidence.

(3) The defendant shall be present at any hearing conducted under this section unless the defendant waives the right to be present. Any proceeding under this section may occur by video teleconferencing and the requirement of a defendant's presence is satisfied by participation in the video teleconference.

(4) The court shall issue an opinion in writing stating the reasons for granting or denying the application under this section.

(c) The court, in determining whether to reduce a term of imprisonment pursuant to subsection (a) of this section, shall consider:

(1) The defendant's age at the time of the offense;

(2) The nature of the offense and the history and characteristics of the defendant;

(3) Whether the defendant has substantially complied with the rules of the institution to which he or she has been confined and whether the defendant has completed any educational, vocational, or other program, where available;

(4) Any report or recommendation received from the United States Attorney;

(5) Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;

(6) Any statement, provided orally or in writing, provided pursuant to § 23-1904 or 18 U.S.C. § 3771 by a victim of the offense for which

the defendant is imprisoned, or by a family member of the victim if the victim is deceased;

(7) Any reports of physical, mental, or psychiatric examinations of the defendant conducted by licensed health care professionals;

(8) The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

(9) The extent of the defendant's role in the offense and whether and to what extent an adult was involved in the offense;

(10) The diminished culpability of juveniles as compared to that of adults, and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences, which counsel against sentencing them to a lifetime in prison; and

(11) Any other information the court deems relevant to its decision.

(d) If the court denies the defendant's 1st application under this section, a court shall entertain a 2nd application under this section no sooner than 5 years after the date that the order on the initial application becomes final. If a sentence has not been reduced after a 2nd application, a court shall entertain a 3rd and final application under this section no sooner than 5 years following the date that the order on the 2nd application becomes final. No court shall entertain a 4th or successive application under this section.

(e) Any defendant whose sentence is reduced under this section shall be resentenced pursuant to § 24-403, § 24-403.01, or § 24-903, as applicable.

APPENDIX B

D.C. Council, Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016" (Oct. 5, 2016), Section "F. Age-Appropriate Sentencing"

Subsection c. *Establishing a Sentence Review Procedure for Juveniles*

In *Graham*, the Supreme Court held that juveniles given life sentences must be given "some realistic opportunity to obtain release" so that a juvenile defendant can "demonstrate that he is fit to rejoin society."[67] The Court left it to the states to "explore the means and mechanisms for compliance" as long as they do not make "the judgment at the outset that those offenders never will be fit to reenter society."[68] What a "realistic opportunity to obtain release" should look like has been the subject of nationwide discussion.[69] Several states, including those without parole, have taken this opportunity to establish or strengthen sentence review provisions for juveniles sentenced to lengthy terms.

In 2014, Florida enacted a provision that, with certain exceptions, allows a court to review the sentence of a juvenile charged as an adult for an offense committed as a juvenile after 15, 20, or 25 years depending on the length of the original sentence.[70] Delaware likewise created a judicial review mechanism to review the sentences of offenders who committed crimes prior to their eighteenth birthday after 20 or 30 years, depending on the crime.[71] At the Federal level, legislation is under consideration that would require a sentence review for

---

[67] *Graham v. Florida*, 560 U.S. 48, 79-82 (2010).

[68] *Id.* at 75.

[69] *See, e.g.*, Rebecca Lowry, The Constitutionality of Lengthy Term-of Years Sentences for Juvenile Non-Homicide Offenders, 88 ST. JOHN'S LAW REV. 3:9 (2015).

[70] FLA. STAT. § 921.1402.

[71] 11 DEL. C. § 4204A.

defendants convicted as an adult for an offense committed as juvenile after they served 20 years.[72]

The Committee Print adopts a similar sentence review mechanism for the District of Columbia. The bill permits the court to reduce a term of imprisonment imposed upon a defendant convicted as an adult of offenses committed prior to the defendant's 18th birthday if they have served 25 years in prison after a motion by the defendant. The court can take into consideration a number of factors, including the defendant's age at the time of the offense, the defendant's compliance with the rules of the institution in which they have been confined, the recommendations of the United States Attorney, whether the defendant has demonstrated maturity and rehabilitation, any statement from the victim, and any other information the court deems relevant to its decision. If the defendant's initial application is unsuccessful, they may make a second application five years after the order on the first application, and a third and final application five years after the order on the second application.

[72] Sentencing Reform and Corrections Act of 2016, 114th Congress, (S.2123).