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State v. Shanahan Appellant's Brief Dckt. 45716

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. CHRISTOPHER T. SHANAHAN, Defendant-Appellant.	No. 45716-2018 **Jefferson County Case No. CR 1995-502**

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF JEFFERSON

HONORABLE ALAN C. STEPHENS, PRESIDING

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STATEMENT OF THE CASE

Nature of the Case

This is Christopher Shanahan's appeal from the District Court's denial of his motion to correct an illegal sentence.

Over 20 years ago, Christopher Shanahan was sentenced to life in prison, with 35 years fixed, for a murder he committed at age 15. He was prosecuted and sentenced as an adult, and the sentencing court did not consider the mitigating characteristics of youth in a way that the Eighth and Fourteenth Amendments require. He contends that his sentence is now illegal in light of the comprehensive changes in constitutional law related to juvenile sentencing that occurred after his judgment was final.

Statement of Facts and Course of the Proceedings

In the fall of 1995, Chris Shanahan was 15-years-old and in high school. (Appeal No. 23,965, PSI, p. 1.)[1] He along with two of his school friends, B.J. Jenkins and Tom Lundquist, went to a convenience store near Rigby with the intention of stealing money and running away to Las Vegas. (*Id*. at 1-2.). Once there, Mr. Shanahan fired one shot that killed Fidela Tomchak, a co-owner of the store who was stocking the cooler. (*Id*.) The teenagers stole about $200, some cigarettes, and beer. They then drove to Las Vegas, only to start back to Idaho a few days later. (*Id*. at 2.) They were stopped in Utah

[1] On March 26, 2018, this Court has ordered the record in Mr. Shanahan's direct appeal (Appeal No. 23,965, *State v. Shanahan,* (Jefferson County No. CR l995-502)), to be augmented to the record in this case.

and arrested. (Appeal No. 23,965, Tr., p. 1138, ln. 1-25, p. 1139, ln. 1-6.) Chris Shanahan confessed to law enforcement officers, waived extradition, and came back to Idaho to face charges along with his two co-defendants. (Appeal No. 23, 965, PSI, p. 2, Clerk's Rec., pp. 29-30.)

The State charged Mr. Shanahan with first degree murder, robbery, and the use of a firearm during the commission of an offense. (Appeal No. 23, 965, Clerk's Rec., pp. 29-30.) Because of the severity of the charges, he was automatically prosecuted as an adult, though he was not yet 16-years-old. Idaho Code § 20-509(1). The charge of first degree murder carried a possible death sentence. Idaho Code § 18-4004. (Appeal No. 23,965, p. 38.)

Eventually, Shanahan's attorneys reached an agreement with the prosecution. In exchange for entering guilty pleas to first degree murder and robbery, and testifying for the State against his co-defendants, the State agreed not to seek the death penalty, not to recommend a specific term of years, and to dismiss the weapons enhancement. (Appeal No. 23,965, p. 155A; Tr., p. 907, ln. 9-18.)

This agreement not to seek a death sentence was based on a false promise. Almost a decade before, the United States Supreme Court had held that the Eighth Amendment prohibited capital punishment against children who committed their crimes under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988). The threat of a death sentence, then, was an illusory but powerful one for a teenager. This seemed to

slip the notice of all parties, including Shanahan's counsel and even the judge. (Appeal No. 23, 965, Tr., p. 907, ln. 17-18.)

Before sentencing, Shanahan's counsel filed a motion for a sentencing hearing under the Juvenile Corrections Act. (Appeal No. 23, 965, Clerk's Rec., p. 156-57.) The trial court denied that motion, meaning that Idaho law – then and now – would require that Shanahan be treated "in all respects" as an adult. Idaho Code § 20-509(3). (Appeal No. 23, 965, Clerk's Rec., p.

The trial court next held an "aggravation and mitigation" hearing as it would in any death penalty case. At the outset, it noted that it did not think that a death sentence "would be an appropriate penalty" due to Shanahan's age. (Appeal No. 23, 965, Tr., p. 907, ln. 17-18.) All other dispositions, including life without parole, were on the table.

At the hearing, Mr. Shanahan's counsel presented the testimony of two mental health experts, who testified about his psychological profile, which included significant immaturity, struggles from his parent's divorce and his father's emotional absence, and his peer influences and desire to impress Tom Lundquist. (Appeal No. 23, 965, Tr., pp. 956 – 1042; 1110 – 1164.)

The court later issued written Findings of the Court and Imposition of Sentence, also as required by cases potentially subject to a death sentence. Idaho Code § 19-2515. The court noted that it had "focused primarily on the age of the defendant in determining the death penalty was not an appropriate sentencing option," and that its

opinion remained unchanged. (Appeal No. 23, 965, Clerk's Rec., p. 190.) The only findings related specifically to Mr. Shanahan's young age were under a four-sentence analysis of "rehabilitation," however, where the court wrote that due to Chris's young age "there is hope that he may eventually become a contributing member of society." (*Id*. at 191In contrast, in the "deterrence" section, the court noted that "murders continue in our society and, alarmingly, they are all too often committed by teenagers." (*Id*.) The court concluded that "[t]he defendant's actions require a severe punishment even considering his age." (*Id*. at 192.) It sentenced him to life in prison for both murder and robbery, concurrent, with 35 years fixed for murder and 10 years fixed for robbery. (*Id*. at 193.)

At the time of Mr. Shanahan's sentencing, in the late 90s, the nation was at the peak of harsh one-size-fits-all criminal justice policies related to juvenile sentencing. *See*, *e.g*., Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 Fed. Sent. Rep. 260 (1998), available online at https://goo.gl/X2D1Ys. No less a public figure than then First Lady Hillary Clinton mentioned in 1996 how many juvenile offenders were "super predators." *See*, Youtube at https://goo.gl/A1sgMA. It was within that context that Mr. Shanahan was prosecuted and sentenced. The sentencing court did not assess whether this crime could have been partly due to the unique and transient qualities of adolescence, which include impulsivity, recklessness, and a failure to appreciate consequences; negative and outsized influence by peers; an

inability to negotiate with police and prosecutors; and a capacity for real change as the adolescent matures into young adulthood. (Appeal No. 23, 965, Clerk's Rec., pp. 185-93.) Had it done so, it could have checked off each of these categories for Christopher Shanahan. (*See*, *e.g.*, Appeal No. 45716, Clerk's Rec., pp. 41-74.)

Mr. Shanahan's counsel appealed. (Appeal No. 23, 965, Clerk's Rec. p. 198.) The Court of Appeals concluded that the trial court did not abuse its discretion in denying the motion for sentencing under the Juvenile Corrections Act. *State v. Shanahan*, 133 Idaho 896, 899, 994 P.2d 1059, 1062 (1999). Then the Court of Appeals found that the sentence was not "out of proportion" to the offense and it declined further analysis on a claim under the Cruel and Unusual Punishment Clause of the Eighth Amendment. 133 Idaho at 900, 994 P.2d at 1063. It also turned aside an argument that the sentence was excessive for similar reasons. 133 Idaho at 902, 994 P.2d at 1065.

Mr. Shanahan never filed a post-conviction petition or any other action seeking collateral relief until he filed his motion to correct an illegal sentence in 2017. The basis for the motion was that because of the revolution in constitutional juvenile sentencing law that had occurred since the late 1990s, his sentence now violated the Eighth and Fourteenth Amendments, specifically as interpreted by *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012) and *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016).

The District Court held oral argument and took it under advisement before later denying it in a written decision. (Appeal No. 45, 716, pp. 112-120.) Mr. Shanahan timely appeals to this Court.

ISSUES PRESENTED ON APPEAL

I.

Because of the material changes in constitutional law regarding the sentencing of juvenile offenders since the judgment was final in this case, Christopher Shanahan's life sentence, with 35 years fixed, now violates the Eighth Amendment's prohibition on cruel and unusual punishments.

II.

Failing to provide Mr. Shanahan with a new sentencing hearing at which the mitigating qualities of youth must be considered in a constitutionally relevant way, when other similarly situated defendants are given that relief, violates his right to equal protection of the law under the Fourteenth Amendment.

ARGUMENT

I.

Because of the material changes in constitutional law regarding the sentencing of juvenile offenders since the judgment was final in this case, Christopher Shanahan's life sentence, with 35 years fixed, now violates the Eighth Amendment's prohibition on cruel and unusual punishments.

1. Introduction

As a 15-year-old, Mr. Shanahan purportedly faced the death penalty before he pled guilty and was ultimately sentenced to life in prison with 35 years determinate. At sentencing, his youth was considered only tangentially and primarily in regard to whether a death sentence was warranted, which was not a constitutional option. He is a member of a class of juveniles whose crimes reflect the transitory immaturity of adolescence rather than irreparable corruption. Because he faced a possible death sentence and assuredly a possible life sentence, and because he now has an unacceptably high risk that he will spend a lifetime in prison, he was entitled to a hearing at which the court first assessed and weighed the mitigating qualities of youth as set out in *Miller* and *Montgomery*. The absence of consideration of those factors at sentencing means that his sentence violates the Eighth Amendment and is illegal. His sentence is also independently illegal because it is grossly disproportionate to the nature of the offense under the Eighth Amendment.

2. Standard of Review

Idaho Criminal Rule 35(a) provides that "[t]he court may correct a sentence that is illegal from the face of the record at any time." *Id*. An illegal sentence is one that is "in excess of a statutory provision or otherwise contrary to applicable law." *State v. Alsanea*, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003). A court has the authority under Rule 35 to correct an illegal sentence "[that] does not involve significant questions of fact or require an evidentiary hearing." *State v. Clements*, 148 Idaho 82, 85, 218 P.3d 1143, 1146 (2009).

The Idaho Supreme Court has recently noted that a prisoner who was sentenced before *Miller* and *Montgomery* can claim that his or her sentence is illegal in light of the change that those cases have brought. *See Johnson v. State*, 162 Idaho 213, 222, 395 P.3d 1246, 1257 (2017) (characterizing a claim based on a fundamental change in Eighth Amendment law as to juvenile sentencing as one alleging a potential "illegal sentence"); *see also Windom v. State*, 162 Idaho 417, 423, 398 P.3d 150, 156 (2017)("Windom did not have a claim under *Miller* until *Montgomery* was issued …")

Whether a sentence is illegal is a question of law over which this Court has free review. *State v. Draper*, 151 Idaho 576, 601, 261 P.3d 853, 878 (2011).

3. *Roper* to *Montgomery*: children are different from adults, and must be treated differently, under the Constitution

The Eighth Amendment prohibits punishments that are cruel or unusual. "[T]he Amendment must draw its meaning from the evolving standards of decency that mark

the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Perhaps nowhere has it undergone more of a shift in the last fifteen years than in how the Amendment now applies to juvenile sentencing. In the 1990s, when Christopher Shanahan was sentenced, the criminal justice system was at the high-water mark for treating juveniles who committed serious offenses the same as adults.

That has since changed radically. First, in *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), the Court held that the diminished culpability of children rendered the death penalty unconstitutionally disproportionate for child offenders as a class. 543 U.S. at 571. As it would in later opinions, the Supreme Court based its decision on key differences between youth and adults, including a "'lack of maturity and an underdeveloped sense of responsibility,'" which frequently leads to "'impetuous and ill-considered actions and decisions'"; an increased susceptibility to "negative influences and outside pressures" with a reduced ability to control or escape their environments; and a "more transitory, less fixed" character that is "not as well formed as that of an adult." *Id*. at 569-70 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

The Supreme Court next applied the same reasoning to strike down sentences of life without parole for non-homicide crimes. *Graham v. Florida*, 560 U.S. 48, 76 (2010). Relying on advances in scientific knowledge showing that an adolescent's brain does not fully develop until his mid-twenties, the Court held that, "[a]n offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take

defendants' youthfulness into account at all would be flawed." *Id*. at 76. The Court declared that states must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 75.

Two years later, in *Miller v. Alabama*, the Court took yet another step, holding that mandatory sentences of life without parole for juveniles who have committed homicide offenses also violates the Eighth Amendment. *Miller*, 567 U.S. ___, 132 S.Ct. 2455 (2012).

In reaching that conclusion, the Court echoed the principles it had outlined in *Roper* and *Graham*, noting that "children are constitutionally different from adults for purposes of sentencing" and they "have diminished culpability and greater prospects for reform." 132 S.Ct. at 2464. It determined that sentencing courts must consider and give effect to the mitigating qualities of youth, listing several factors that make up these unique qualities (the "*Miller* factors"):

- Impulsivity, recklessness, and the failure to appreciate risks and consequences;
- Family and home environment;
- The outsized impact of negative peer influences and pressures;
- An inability to deal with police officers or prosecutors (including in plea negotiations), or the incapacity to assist defense attorneys, meaning that the juvenile might have faced a lesser offense; and
- An ability to change as the child matures into adulthood.

132 S.Ct., at 2467-68.

The Court stressed that, given these factors, it is only the "rare juvenile offender whose crime reflects irreparable corruption" that should stay in prison for life. *Miller*, 132 S.Ct. at 2469.

Miller is retroactive to cases that were final before it was decided. *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718, 734 (2016). Specifically, the *Montgomery* Court held that, "[i]n light of what this Court has said in *Roper*, *Graham*, and *Miller* … [juvenile lifers] 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." *Id*.

4. Mr. Shanahan is a member of the class to which a *Miller* hearing was required

There are both substantive and procedural components to the *Miller*/*Montgomery* rule. The substantive part is that a mandatory sentence of life in prison on a juvenile violates the Eighth Amendment. The procedural component is a logical extension of the substantive one; any child who *faces* a possible sentencing of life in prison must *first* have proper consideration of the mitigating qualities of youth and an assessment whether the child is irreparably corrupt. Mr. Shanahan certainly faced a possible sentence of life in prison, but the sentencing court did not assess and weigh the *Miller* factors.

The State argued below, and might choose to argue again, that Mr. Shanahan's case falls outside of *Miller* and *Montgomery* because he did not *receive* a sentence of life

in prison without the possibility of parole. It is true that he is eligible for parole after serving 35 years. But imposing 35-years on a fifteen-year-old child is so lengthy in relative terms, and the risk is unacceptably high that Mr. Shanahan may die in prison without being given an opportunity for release, that *Miller* and *Montgomery* apply. Other jurisdictions have recognized this in persuasive opinions.

For instance, in *State v. Zuber*, 152 A.3d 197 (N.J. 2017), the New Jersey Supreme Court held that sentences that are the functional equivalent to life sentences, even if parole is technically available in old age, are unconstitutional in the absence of consideration of the *Miller* mitigating factors. *Id*. at 213 ("judges must evaluate the *Miller* factors when they sentence a juvenile to a lengthy period of parole ineligibility"). Iowa has reached the same conclusion. *State v. Null*, 836 N.W.2d 41, 71-73 (Iowa 2013) (applying *Miller* to reverse a sentence that allowed parole eligibility at age 69).

The Washington Supreme Court has applied these same principles to even shorter prison terms. *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017). In *Houston-Sconiers*, the two defendants were sentenced on several counts of robbery to terms of 26 and 31 years of "flat time," meaning that they must serve at least that amount of time before release. Id. at 415-16. Like Mr. Shanahan, those defendants would first be eligible for parole later in middle age. Nevertheless, the Washington Supreme Court reversed the sentences and held that *Graham* and *Miller* required the trial court to account for the defendants' youth before sentencing them to such lengthy terms. Id. at 420-21.

Yet another example even closer to home is *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (*Bear Cloud III*). There, the defendant was convicted of murder and associated felonies when he was 16 years old. The trial court sentenced him to an aggregate term of life in prison with parole eligibility when he would be 61. *Id*. at 136.

The Wyoming Supreme Court held, in relevant part, that the defendant's aggregate sentence was a functional life sentence. *Id*. at 144. In doing so, it quoted *Null* for the proposition that application of precise life expectancy tables was not necessary: "we do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *Id*. (quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013).[2]

The California Supreme Court has also rejected strict reliance on actuarial average life expectancies to determine when a sentence nears a "life" sentence for a juvenile offender. *People v. Contreras*, 4 Cal.5th 349, 363 (Cal. 2018) ("[a]n opportunity to obtain release does not seem 'meaningful' or 'realistic' within the meaning of *Graham* if

[2] Below, the State cited a companion case to *Bear Cloud*, *Sen v. State*, 390 P.3d 769 (Wyo. 2017) in which the Wyoming Supreme Court held that a 35-year sentence was not a de facto life sentence. *Id*. at 777. What is notable about that case, however, is (1) the defendant had already received consideration of the *Miller* factors on remand, *id* at 774-75, and (2) Wyoming inmates are eligible for good time credits, up to 1/3 off the minimum term, *id* at 773 (35 years "excluding good time"); Wyo. Stat. § 7-13-420; WDOC P&P #1.500. It appears that Sen could be released as soon as after serving as few as 23 years.

the chance of living long enough to meet that opportunity is roughly the same as a coin toss."). Illinois has recognized that given the harsh realities of prison life, the possibility of release at an age that may not be a full life expectancy is still sufficient to trigger *Miller* scrutiny. *People v. Buffer*, 75 N.E.3d 470 (Ill. Ct. App. 2017); *see also State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (parole eligibility in non-homicide case at age 52 "effectively deprived [Pearson] any chance of an earlier release and the possibility of leading a more normal adult life.")

To be sure, opinions from other state courts reaching different conclusions can be found. *See*, *e.g.*, *Bear Cloud III*, 334 P.3d at n. 10 (listing cases). The linchpin of the cases cited here, though, is the common-sense notion that the possibility of few years out of prison later in life does not comport with the essential promise of *Graham* and *Miller*. Mr. Shanahan will be incarcerated for a full 35 years - encompassing his teenage years, young adulthood, prime adulthood, early middle age, and entering late middle age - before even having a glimmer of hope for release at age 50. Prison years are hard years. Statistically he will be much "older" than his chronological age.

Roper, *Graham*, *Miller*, and *Montgomery* lead in a straight line to the conclusion that juveniles sentenced as adults, whose crimes reflect transient immaturity, are a constitutionally distinct class and must be treated differently than adults for purposes of the Eighth and Fourteenth Amendments. Mr. Shanahan is a member of that class. The Constitution requires that sentencing courts consider and give mitigating weight to

the "*Miller* factors" in that context. That did not happen. *Miller* is retroactive, and Mr. Shanahan's sentence is illegal.

The court below seems to have accepted the argument that a lengthy enough determinate portion of a sentence on a juvenile offender could implicate *Miller*, but nonetheless concluded that Mr. Shanahan's youth and mental health were taken into consideration before he was sentenced. (Appeal No. 45, 716, pp. 118-19.) The court analogized Mr. Shanahan's case to the *Johnson* case (i*d*. at 119), where the Idaho Supreme Court held that Ms. Johnson received sufficient consideration of the mitigating qualities of youth even though her sentencing occurred before *Miller. Johnson v. State,* 162 Idaho 213, 222, 395 P.3d 1246, 1257 (2017).

After reviewing the sentencing record, the district court in the present case noted that "[b]ecause the sentencing court heard testimony regarding Defendant's age and mental health, this Court must deny Defendant's motion." (Appeal No. 45,716, p. 119.) This analysis is shortsighted and flawed. A sentencing court must do more than simply consider chronological age, youth, or mental health generally.

Johnson illustrates the point. There, mental health experts had testified at her 2005 sentencing hearing specifically "about the developmental state of an adolescent's brain compared to an adult and how youth are more prone to impulsivity and more likely to be able to be rehabilitated." *Johnson v. State*, 162 Idaho 213, 223, 395 P.3d 1246, 1258 (2017). The Idaho Supreme Court found that the trial court "clearly considered

Johnson's youth and all its attendant characteristics and determined, in light of the heinous nature of the crime, that Johnson, despite her youth, deserved life without parole." 162 Idaho at 224, 395 P.3d at 1259. "Drs. Craig Beaver and Richard Worst testified at the sentencing hearing about the developmental state of an adolescent's brain compared to an adult and how youth are more prone to impulsivity and more likely to be able to be rehabilitated." *Id*. "Dr. Beaver's testimony was approximately forty pages. Dr. Worst's testimony was approximately sixty-eight pages." *Id*. at n.9; *see also Adamcik v. State*, __ Idaho ___, 408 P.3d 474, 488 (2017) (relying on *Johnson* to find that "the sentencing judge specifically took Adamcik's youth — and its attendant characteristics — into account and determined that Adamcik's crimes were not the result of transient immaturity and that he would likely kill again if released from prison.").

Nothing to that extent occurred here. It is true that, at sentencing, Mr. Shanahan's counsel presented evidence from mental health experts. Dr. Peter Heinbecker testified that Mr. Shanahan was immature, impulsive, and that he was a follower and wanted to impress Tom Lundquist. (Appeal No. 23, 965, Tr., pp. 1123-30.) Dr. John Casper testified that he had treated Mr. Shanahan, who was struggling to deal with an unpredictable role model in his father, for depression and that this crime was completely out of character for him. (*Id*. at Tr., pp. 996-1004.) Dr. Heinbecker added that Mr. Shanahan likely did not understand the impact that it had on the victim's family

and the community. (Id. at Tr., p. 1146, ln. 3-10.) He testified that Mr. Shanahan had a good chance to be rehabilitated and could be a productive member of society. (Tr., p. 1145, ln. 15-16.)

But, in 1997, Idaho law required the sentencing court to treat Chris Shanahan as an adult offender in all respects. The sentencing court went only so far as to say the death penalty, which was constitutionally impermissible anyway, would be off the table because of Mr. Shanahan's young age. (Appeal No. 23, 965, Clerk's Rec., p. 185.) In its findings under a heading for "rehabilitation," the sentencing court noted that "there is hope that he may eventually become a contributing member of society." (*Id*. at 191.) In the "deterrence" section, it wrote that "murders continue in our society and, alarmingly, they are all too often committed by teenagers." (*Id*.) The court concluded that "[t]he defendant's actions require a severe punishment even considering his age." (*Id*. at 192.)

Contrary to the district court's conclusion, then, the record shows that the sentencing court viewed the testimony as a description of Christopher Shanahan vis-à-vis other adult offenders who committed murder, rather than giving it significant weight as showing the transitory attributes and characteristics of youth. It court looked at the evidence more as an uncertain curiosity on which it couldn't depend and that paled in comparison to the seemingly inexplicable nature of this crime. (Appeal No. 45, 716, Clerk's Rec., pp. 188-191.) It did not consider that these attributes made Mr. Shanahan significantly less culpable. It did not consider that, as an adolescent, he had a

much greater likelihood for rehabilitation in a much shorter time frame. It made no finding of permanent incorrigibility.

The circumstances of this case are more like *Windom v. State* than *Johnson*. *Windom v. State*, 162 Idaho 417, 398 P.3d 150 (2017). In *Windom*, the Supreme Court reversed the defendant's sentence of life without parole under the *Miller* rationale. Windom's youth was considered in a broad sense as mitigating. But it was not given the individual weight and assessment that *Miller* and *Montgomery* require in considering the differences between adolescent and adult development, and well as to determine whether Windom was one of the very few juveniles who is irreparably corrupt and could never be rehabilitated.

The Idaho Supreme Court noted that *Montgomery* "made it clear that '*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.'" *Windom*, 162 Idaho at 423, 398 P.3d at 156 (quotation omitted). While there was some mention and weighing of youth and mental health, it was not sufficient to comply with the Eighth Amendment. *Id*. at 157-58.

As in *Windom*, the sentencing court in this case did not view the evidence through the lens of the more advanced science showing juveniles as a class are less culpable and more adaptable to change than adults. Nor did it filter the evidence through the more recent law that has established those as significant mitigating

qualities. Mr. Shanahan was not afforded the right to a constitutionally adequate *Miller* hearing at which the attributes of youth were considered and given mitigating weight, as required by the Eighth and Fourteenth Amendments.

5. Even with parole eligibility, there is an unconstitutional risk that Mr. Shanahan could serve the rest of his life in prison

In *Montgomery*, the Supreme Court held that the *Miller* rule was retroactive to prisoners who had been sentenced before *Miller* was decided, but the Court noted that this did not require the States to relitigate sentences in every case. *Montgomery*, 136 S.Ct. at 736. Instead, a state "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id*. Even if this Court were to determine that parole eligibility after 35 years is not the equivalent of a life sentence, the risk is still unacceptably high that Mr. Shanahan may remain in prison for life.

To comply with the Eighth Amendment, a state would need to channel parole commissioners' discretion and require them to consider the *Miller* factors. Other states have done so. *See, e.g*. Cal. Pen. Code § 3051 and§ 4801 (allowing juvenile offenders an earlier opportunity for parole and requiring the parole board to consider the *Miller* factors). Idaho has not enacted any new statutes or any new parole procedures for juveniles in response to *Miller*.

Its current regulations focus on the facts of the crime, rehabilitation, and risk to the community, but do not contain specific guidelines requiring assessing and applying

any mitigating weight for juvenile characteristics. IDAPA 50.01.01.250. The Commission has complete discretion to ignore those factors altogether. Nothing prevents the Commission from simply relying on the heinousness of the crime, a fact that will never change, to deny parole. Decisions by the Commission are almost unreviewable in court except to determine whether it was supported by a rational basis. *Banks v. State*, 128 Idaho 886, 888–89, 920 P.2d 905, 907–08 (1996). A long line of cases in Idaho, moreover, has held that there is no liberty interest in parole and that due process does not apply to parole hearings. *See, e.g., Hays v. Craven*, 131 Idaho 761, 764, 963 P.2d 1198, 1201 (Ct. App. 1998).

As the courts of New Jersey, Washington, California, and Iowa, to name a few, have already wisely acknowledged, the possibility of a few years out of prison in late middle or old age after serving decades of hard years in a best-case scenario should not save a sentence from an Eighth Amendment violation. Parole review in Idaho after 35 years in prison does not offer a constitutionally adequate substitute under the Eighth and Fourteenth Amendments.[3]

[3] Mr. Shanahan's only other option, seeking a commutation or a pardon, is entirely at the whim of the executive and lacks any guiding standards. *See Graham v. Florida*, 560 U.S. 48, 64 (2010) (noting that the "remote possibility" of clemency "does not mitigate the harshness of the sentence."). In fact, Mr. Shanahan has sought a commutation to shorten his fixed time, but the request was ultimately denied by the Governor.

6. Mr. Shanahan's sentence is grossly disproportionate and violates the Eighth Amendment

Regardless how the Court resolves the previous argument, Mr. Shanahan asserts that his sentence is unconstitutionally disproportionate to the offense given the attendant characteristics of youth present in this case. The Eighth Amendment contains a narrow proportionality principle that "does not require strict proportionality between crime and sentence" but does forbid "extreme sentences that are `grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in judgment).

Montgomery built on *Miller*, which built on *Graham*, which was an extension of *Roper*. The legal landscape has changed dramatically, and the logical progression of these cases is now clear. Mr. Shanahan contends that the Eighth Amendment requires that all juvenile offenders who were, or will be, prosecuted and sentenced as adults must have consideration of the mitigating qualities of youth before sentence is imposed. Otherwise, there is an intolerably high risk that their sentences, or whatever length, will be based on unconstitutional factors.

Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). If the mitigating qualities of youth as expressed in those cases had been considered, Mr. Shanahan would not be serving 35 years to life. His characteristics fit squarely with all of the factors that *Miller*

described: immaturity, impulsivity, recklessness, outsized influence of peer pressure, a failure to appreciate the wrongfulness of the conduct, an inability to deal with police and prosecutors, and a strong capacity for change. In the ensuing years, that latter point has been borne out. He is completely rehabilitated and is little risk to re-offend if released. (Appeal No. 45716, Clerk's Rec., pp. 41-74.) His sentence is grossly disproportionate to the offense in light of what we now know about the science of juvenile crime and the law that reflects that science. It violates the Eighth Amendment and is illegal for that reason alone.[4]

II.

Failing to provide Mr. Shanahan with a new sentencing hearing at which the mitigating qualities of youth must be considered in a constitutionally relevant way, when other similarly situated defendants are given that relief, violates his right to equal protection of the law under the Fourteenth Amendment.

As with the last issue, this Court's standard of review is de novo. *State v. Draper*, 151 Idaho 576, 601, 261 P.3d 853, 878 (2011).

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws,"

[4] Mr. Shanahan raised an Eighth Amendment argument on direct appeal based on disproportionality, but this is a new claim based on the material changes in the law since that time.

which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U. S. 202, 216 (1982).

Mr. Shanahan is in a class that consists of juvenile offenders whose crimes reflect the transient immaturity of youth and who faced, or currently face, a potential sentence of life in prison without the possibility of parole. Going forward, all members of that class in Idaho and across the country who have yet to be sentenced will receive full consideration of the *Miller* factors. And looking back, all offenders who previously received an expressed sentence of LWOP also now have an opportunity to convince a factfinder of their rehabilitation and potentially receive a significantly reduced sentence. Those individuals will have committed crimes that initially called for a more serious punishment and yet they will be permitted to argue that their sentence should have parole eligibility even earlier than Mr. Shanahan's. Currently, that opportunity for a new hearing is being denied to Mr. Shanahan.

One example from Idaho is Windom. He killed his mother at age 16, received a fixed life sentence, and his case has since been remanded for consideration under Miller. *Windom v. State*, 162 Idaho 417, 423, 398 P.3d 150, 156 (2017). He has an opportunity to convince a judge that his fixed time should be even less than Mr. Shanahan's. Mr. Shanahan is being treated differently and denied a fundamental right under the Eighth Amendment – a *Miller* hearing - that is granted to Mr. Windom, to all others serving juvenile LWOP across the county, and to all juvenile defendants with

pending or future cases facing a potential life sentence. This violates his right to equal protection of the law.

Although Mr. Shanahan raised this issue in the district court, it failed to address it. That is reason enough for this Court to remand for consideration of the issue. If it does not, however, it should find that the disparate treatment of similarly situated defendants with respect to a fundamental right violates the equal protection clause of the Fourteenth Amendment.

CONCLUSION

Mr. Shanahan requests that this Court reverse the district court's order and remand for further proceedings.

Respectfully submitted on this 15th day of August, 2018.

Craig Durham
Attorney for Appellant

CERTIFICATE OF SERVICE

This Brief has been served on the following on this 15th day of August, by filing through the Court's e-filing system and by placing copies in the United States Mail, postage pre-paid and addressed to:

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