

Court of Appeals No. 12CA0066
Arapahoe County District Court No. 98CR2096
Honorable Marilyn Leonard Antrim, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Terrance Wilder,

Defendant-Appellant.

SENTENCE VACATED IN PART
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE RICHMAN
Terry, J., concurs
Taubman, J., specially concurs

Announced February 26, 2015

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Defendant-Appellant

¶ 1 Defendant, Terrance Wilder, stands convicted of first degree murder after deliberation (Count 1), second degree murder (Count 2), attempted first degree murder (Count 3), and conspiracy to commit first degree murder (Count 4). He appeals the trial court's order denying his motions for postconviction relief seeking resentencing on all convictions. We conclude that defendant's sentence on Count 1 must be vacated, and the case remanded for resentencing on that count consistent with the decision in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012). We do not reach his claim for resentencing on the other counts.

I. Background

¶ 2 In 1998, at the age of seventeen, defendant conspired to murder his codefendant's husband and landlord. Defendant and his codefendant invited the two men to the house they were renting from the landlord. The husband did not arrive, but the landlord arrived with a friend. After an argument, the codefendant shot both the landlord and his friend several times. Defendant and his codefendant then left the house. The landlord's friend died from the gunshot wounds. The landlord, however, did not die immediately. The landlord crawled into the house, where he was discovered by

another person who notified defendant that the landlord was still alive. Defendant returned to the house and killed the landlord by repeatedly bludgeoning his head with a baseball bat.

¶ 3 Defendant was convicted by a jury of first degree murder as to the landlord (a class 1 felony), second degree murder as to the landlord's friend (a class 2 felony), attempted murder and conspiracy to commit murder as to the husband (both class 2 felonies), and being an accessory to a class 1 or class 2 felony. In special interrogatories, a jury also found the presence of two sentencing aggravators: that defendant or his codefendant (1) possessed, used, or threatened use of a deadly weapon; and (2) caused the death or serious bodily injury of a person.

¶ 4 The trial court sentenced defendant to life without the possibility of parole on the class 1 felony, according to the mandatory sentencing statute in place at the time. In imposing the sentence, the judge emphasized the mandatory nature of the sentence, stating that the "charge of murder in the first degree requires that the Court impose a sentence that is required by law of life in prison without possibility of parole." It sentenced defendant to serve forty-eight-year terms for the three class 2 felonies,

consecutive to the life sentence and to one another.¹ Defendant was sentenced to serve twelve years for the accessory count, concurrent to the other sentences.

¶ 5 Following a direct appeal, a division of this court reversed defendant's accessory conviction and affirmed his remaining convictions. *People v. Wilder*, (Colo. App. No. 99CA1479, Aug. 16, 2001) (not published pursuant to C.A.R. 35(f)) (*Wilder I*).

¶ 6 Defendant then filed a pro se Crim. P. 35(c) motion, alleging that his convictions were unconstitutional because the trial court did not properly advise him of the right to testify, and that his trial counsel was ineffective for not objecting to the trial court's inadequate advisement. The postconviction court denied the motion in a summary order, and a division of this court affirmed the order on appeal. *People v. Wilder*, (Colo. App. No. 05CA2064, June 26, 2008) (not published pursuant to C.A.R. 35(f)) (*Wilder II*).

¹ In his reply brief, defendant describes his sentence as "a life sentence plus another consecutive ninety-six years in DOC." We perceive this statement to be a mistake, as defendant was sentenced to a life sentence plus three consecutive sentences totaling 144 years, as correctly stated in defendant's opening brief.

¶ 7 In 2011, defendant filed a second pro se Crim. P. 35(c) motion in which he asserted that his sentence to life without parole for the class 1 felony was unconstitutional under the Eighth Amendment and disproportionate given his juvenile status at the time he committed the crime. Defendant cited both case law and psychological literature indicating that juveniles are different from adults, and asserted that this difference must be considered when sentencing juvenile offenders. Defendant was appointed postconviction counsel, who supplemented defendant's motion with a Crim. P. 35(b) motion in which he argued for a reduction of sentence based on good behavior while incarcerated and stated that defendant was willing to comply with any conditions imposed by the court.

¶ 8 The postconviction court denied both motions without a hearing. In its written order, the postconviction court noted that the United States Supreme Court was then considering this issue, and invited defendant to file a second motion within ninety days of the announcement of any decision by the Supreme Court if it decided the issue differently. Defendant did not file any further motions. This appeal followed.

II. Constitutionality of Defendant's Sentence

¶ 9 On appeal, defendant asserts that (1) his mandatory sentence to life without the possibility of parole for the first degree murder conviction is unconstitutional and (2) the aggregate of his remaining convictions results in an unconstitutional de facto sentence to life without parole. We agree that defendant's mandatory sentence to life without parole is unconstitutional and must be vacated, but decline to reach his second contention.

A. Mandatory Life Sentence Without the Possibility of Parole

1. Preservation and Standard of Review

¶ 10 “The summary denial of a Crim. P. 35(c) motion for postconviction relief without a hearing presents a question of law we review de novo.” *People v. Rainer*, 2013 COA 51, ¶ 15 (*cert. granted* Dec. 22, 2014). We also review de novo “the constitutionality of a trial court’s sentencing determination.” *People v. Gutierrez-Ruiz*, 2014 COA 109, ¶ 19.

¶ 11 A court’s review of a Crim. P. 35(b) motion focuses on the fairness of the sentence in light of the purposes of the sentencing laws. A decision to reduce a sentence based on a Crim. P. 35(b)

motion generally remains within the sound discretion of the trial court. *People v. Dunlap*, 36 P.3d 778, 780 (Colo. 2001).

¶ 12 The People concede that the Supreme Court’s decision in *Miller* applies retroactively to defendant’s sentence and that defendant properly preserved for appellate review his challenge to the mandatory life without parole sentence. For purposes of this case, the majority accepts the People’s concession as to the retroactive application of *Miller*.

2. Legal Principles

a. United States Supreme Court Case Law

¶ 13 “The Eighth Amendment’s prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. That right, we have explained, flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.” *Miller*, 567 U.S. at ___, 132 S. Ct. at 2463 (citation and internal quotation marks omitted). In the spirit of this proportionality requirement, the Supreme Court has decided a series of cases based on the idea that “children are constitutionally different from

adults for purposes of [criminal] sentencing.” *Id.* at ___, 132 S. Ct. at 2464.

¶ 14 First, in *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Court held that the “Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”

¶ 15 Next, in *Graham v. Florida*, 560 U.S. 48, 74 (2010), the Supreme Court held that “for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.” In establishing this categorical ban, the Court recognized that juvenile offenders are less culpable than their adult counterparts due to their lack of maturity, underdeveloped sense of responsibility, increased vulnerability and susceptibility to negative influences and peer pressure, and less well-formed personal characteristics. *Id.* at 68 (citing *Roper*, 543 U.S. at 569). The Court stated: “An offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Id.* at 76.

¶ 16 However, the Court in *Graham* also noted that “[j]uvenile offenders who committed both homicide and nonhomicide crimes

present a different situation for a sentencing judge than juvenile offenders who committed no homicide.” *Id.* at 63. The Court explicitly limited its holding in *Graham* to juvenile offenders who committed solely nonhomicide offenses. *Id.*

¶ 17 In *Miller*, the Court expanded on its reasoning in *Graham*, citing the Court’s history of adopting “categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.” 567 U.S. at ___, 132 S. Ct. at 2463. The Court stated that “*Graham*’s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.” *Id.* at ___, 132 S. Ct. at 2465. Employing an analysis similar to that in *Graham*, the Court held that the Eighth Amendment “forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders,” including those convicted of homicide crimes. *Id.* at ___, 132 S. Ct. at 2469 (emphasis added). The Court again recognized that juveniles are different from adults, and held that “[s]uch a [mandatory] scheme prevents those meting out punishment from considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change.’” *Id.* at ___, 132 S. Ct. at 2460

(quoting *Graham*, 560 U.S. at 68, 74). The Court stressed that its prior cases have required “individualized sentencing for defendants facing the most serious penalties.” *Id.* at ___, 132 S. Ct. at 2460.

¶ 18 The Court again emphasized the dangers of mandatory sentencing as applied to juvenile offenders, noting the potential unfairness of imposing the same harsh penalty on younger and older juveniles, “the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.” *Id.* at ___, 132 S. Ct. at 2467-68. The Court explained how a scheme imposing mandatory life without parole, especially on juveniles convicted of the most serious crimes, precludes consideration of the offender’s “chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Id.* at ___, 132 S. Ct. at 2468. Finally, the Court noted that imposition of a sentence to mandatory life without parole negates the possibility of rehabilitation, even in those cases where the circumstances most strongly indicate its likelihood. *Id.*

¶ 19 Yet the Court also endeavored to clarify that its new rule merely prohibited the *mandatory* imposition of life without parole on juvenile offenders. *Id.* at ___, 132 S. Ct. at 2469 (“Although we do

not foreclose a sentencer’s ability to make [a determination that the juvenile’s crime reflects irreparable corruption] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”). The Court further cautioned that “we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.* The Court ultimately concluded:

Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, [sentencing schemes imposing mandatory life without parole for juvenile offenders] violate this principle of proportionality, and so the Eighth Amendment’s ban on cruel and unusual punishment.

Id. at __, 132 S. Ct. at 2475.

b. Colorado Cases

¶ 20 Several divisions of this court have analyzed *Miller’s* effect on Colorado’s current sentencing framework for juveniles convicted of

class 1 felonies. The applicable sentencing statute, section 18-1.3-401(1)(a)(V)(A), C.R.S. 2014,² divides felonies into six classes and prescribes legislatively imposed guidelines for trial judges to follow when sentencing. For class 1 felonies, the minimum sentence is life imprisonment. However, the statute then separates “life imprisonment” into different categories depending on the date the crime was committed.

¶ 21 Before 2006, “life imprisonment” was divided into two categories. § 18-1.3-401(4)(a). Those people who committed crimes between July 1, 1985, and July 1, 1990, would be sentenced to life with the possibility of parole after forty calendar years. But those, like defendant, who committed crimes on or after July 1, 1990, would be sentenced to life imprisonment without the possibility of parole.

¶ 22 In 2006, the legislature amended the statute to add sections 18-1.3-401(4)(b)(I) and (II), which created a third category of life imprisonment. See Ch. 228, sec. 2, § 18-1.3-401, 2006 Colo. Sess.

² Defendant was sentenced in 1999 to life without the possibility of parole under the mandatory statutory sentencing framework in place at the time.

Laws 1052. This category applies exclusively to juveniles who were convicted and sentenced as adults for crimes committed on or after July 1, 2006. The legislature imposed mandatory life imprisonment with the possibility of parole after forty years on this group of offenders.

¶ 23 We perceive three approaches that have developed in Colorado for interpreting and applying these statutes in response to *Miller*.

¶ 24 In *People v. Banks*, 2012 COA 157, ¶ 60 (*cert. granted* June 24, 2013), a division of this court concluded that in light of *Miller* the provision of section 18-1.3-401(1)(a) mandating a sentence of life without the possibility of parole for class 1 felonies was unconstitutional as applied to juvenile offenders. But the *Banks* division also determined that the statutes relating to sentencing for offenders convicted of class 1 felonies indicated the legislature’s “intent to impose the most serious penalty that is constitutionally permissible for such offenders.” *Id.* at ¶¶ 128-29. Thus, the division, persuaded by the severability argument advanced by the People, concluded that severing the unconstitutional portions of the statute left life with the possibility of parole after forty years as “the only statutorily authorized penalty” reflecting the legislature’s intent

to impose the most serious constitutional penalty. *Id.* The division stated that this result was further supported by legislative intent, as demonstrated by the 2006 amendment. *Id.* at ¶ 130.

¶ 25 Thus, the *Banks* division affirmed the defendant’s sentence to life imprisonment, but vacated the sentence “to the extent [the defendant] is denied the possibility of parole” and remanded with instructions to modify the sentence to include a provision entitling the defendant to the possibility of parole after forty years. *Id.* at ¶ 131. Several divisions have followed the *Banks* approach in both published and unpublished opinions. *See, e.g., People v. Valles*, 2013 COA 84, ¶¶ 71-75.

¶ 26 A second approach adopted by a division of this court disagreed with *Banks* only insofar as it imposed a mandatory life sentence with parole after forty years without first requiring an individualized determination of whether life without parole would be appropriate for the particular juvenile being sentenced. *Gutierrez-Ruiz*, 2014 COA 109, ¶ 25. The division in *Gutierrez-Ruiz* concluded that the constitutional defect in sentencing juvenile offenders under section 18-1.3-401(4)(a) for commission of a class 1 felony

is not its length or the fact that he will not be eligible for parole. Instead, defendant's sentence of life without parole violates the Eighth Amendment because it was imposed without any opportunity for the sentencing court to consider whether this punishment is just and appropriate in light of defendant's age, maturity, and the other factors discussed in *Miller*.

Id. at ¶ 23.

¶ 27 The division in *Gutierrez-Ruiz* remanded the case with instructions to follow a two-step procedure. First, the trial court must make an individualized determination whether life without parole is appropriate for the particular juvenile. Second, if the trial court determines that life without parole is not appropriate, the court should follow the approach elucidated in *Banks* and impose a mandatory sentence of life with the possibility of parole after forty years.

¶ 28 Another division, in an unpublished opinion, determined that *Miller* did not invalidate section 18-1.3-401(1)(a)(V)(A) or (4)(a), because it did not categorically ban life without parole for juvenile homicide offenders, and the division was unpersuaded by the arguments urged by the People to either (1) sever the mandatory life without parole provision from the statute or (2) revive the previous

sentencing statute from 1985. *People v. Tate*, (Colo. App. No. 07CA2467, Sept. 13, 2012) (not published pursuant to C.A.R. 35(f) (*cert. granted* July 1, 2013)). Although *Tate*, as an unpublished opinion, is not binding precedent, we note it here because it is part of the framework that illustrates the different approaches divisions have taken on this issue, and it is one of the cases addressing this issue to which the supreme court has granted certiorari. *See also Jensen v. People*, (Colo. No. 13SC211, Dec. 12, 2013) (unpublished order).

3. Application

¶ 29 Here, defendant was convicted for crimes committed in 1998. Thus, the trial court sentenced him to life without the possibility of parole for the first degree murder conviction, under the mandatory provision of section 18-1.3-401(4)(a). The court stated that although it “gives me no pleasure to give you life in prison without the possibility of parole, . . . that is absolutely a mandatory [sentence], because that is what the law requires.”

¶ 30 To begin, we agree with the division in *Gutierrez-Ruiz* insofar as it held that *Miller* did not categorically bar the imposition of a life without parole sentence for a juvenile offender. Rather, as that

division stated, *Miller* requires an individualized determination of whether life without parole is appropriate given the particular qualities of the juvenile being sentenced, taking into consideration the following:

- the offender’s “chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences”;
- “the family and home environment” of the offender;
- “the circumstances of the homicide offense, including the extent of [the defendant’s] participation in the conduct and the way familial and peer pressures may have affected him [or her]”; and
- “that [he or she] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth.”

Miller, 567 U.S. at ___, 132 S. Ct. at 2468; see also *Gutierrez-Ruiz*, ¶¶ 23, 25.

¶ 31 Because the trial court sentenced defendant to mandatory life without the possibility of parole as was required by the law in 1999, it is clear that defendant’s sentence must be vacated and his case remanded to the trial court for an individualized determination

whether life without parole is an appropriate sentence. The more difficult question is how the trial court should proceed if it determines that life without parole is not appropriate for defendant's first degree murder conviction.

¶ 32 In the case before us, as in *Banks*, the People's severability argument proposed to sever, as applied to juveniles only, the sentence in section 18-1.3-401(4)(a) that imposed a mandatory life without parole sentence on those persons convicted of committing a class 1 felony after July 1990 and before July 2006. The People argued that doing so resulted in a statutory scheme that imposed a mandatory life sentence with the possibility of parole after forty years on all juveniles convicted of class 1 felonies after 1985, consistent with the legislative intent expressed in sections 18-1.3-401(4)(b)(I) and (II). Although this result was reached in *Banks* and considered in *Gutierrez-Ruiz*, we are not convinced by the severability analysis applied in those cases.

¶ 33 We are unaware of any case, nor did the People cite any case, that used Colorado's general severability statute, section 2-4-204, C.R.S. 2014, to render certain statutory language inapplicable as applied to a particular group of people. Using the severability

statute in this manner would merely create a juvenile exception that does not exist, because the statute would remain valid in its entirety as applied to adult offenders. Further, severing the life without parole portion of the statute would go further than *Miller* requires since *Miller* did not categorically ban the imposition of a life without parole sentence on juvenile offenders.

¶ 34 The People's revival argument proposed holding the entirety of section 18-1.3-401(4)(a) unconstitutional, and reviving the previously enacted statute in its stead. The prior statute was enacted in 1985, and also imposed a mandatory sentence of life with the possibility of parole after forty years on all persons convicted of class 1 felonies. We reject this argument because section 18-1.3-401(4)(a) does not contain any repeal language and it is uncertain whether the revival doctrine applies to a statute that was not held facially unconstitutional, but rather unconstitutional only as applied to a particular group of persons. We conclude that it is inappropriate to infer current legislative intent from a statute enacted decades before *Miller* was decided.

¶ 35 *Miller* does not categorically forbid imposition of a sentence to life without parole. Thus, the language of section 18-1.3-401(4)(a)

is unconstitutional only as applied to juveniles insofar as it *mandates* imposition of that sentence, and rendering that sentence per se unconstitutional expands *Miller* to an extent that neither the Supreme Court nor the Colorado legislature has yet demanded.

¶ 36 In addition, severing the final sentence in section 18-1.3-401(4)(a) as applied to juveniles leaves a statute with absolutely no sentencing scheme applicable to juvenile offenders who committed class 1 felonies between July 1, 1990, and July 1, 2006. To obtain the result promulgated in *Banks*, we would not only have to sever the final sentence of section 18-1.3-401(4)(a), but also the words “and before July 1, 1990” from the sentence before it.

¶ 37 We acknowledge that in 2006 the legislature amended section 18-1.3-401 to impose a mandatory sentence of life with the possibility of parole after forty years on juveniles who commit a class 1 felony after July 1, 2006. However, this provision was enacted before *Graham*, *Miller*, or any of the Colorado cases discussed in this opinion were issued. Thus, we cannot determine that, in the wake of the case law that has developed over the past five years, the Colorado legislature has demonstrated the intent to sentence every juvenile offender convicted of a class 1 felony to a

mandatory life sentence with the possibility of parole after forty years.

¶ 38 Further, although the *Banks* division interpreted these statutes to indicate the “intent to impose the most serious penalty that is constitutionally permissible for such offenders,” ¶ 128, we construe this statement as conflicting with the reasoning and the spirit of *Roper*, *Graham*, and *Miller*. *Miller*, in particular, stressed the potential unfairness and inappropriateness of imposing identical mandatory penalties on juveniles possessing markedly different characteristics from one another and having participated in an offense to significantly different degrees.³ *Miller*, 567 U.S. at ___, 132 S. Ct. at 2467 (“Such mandatory penalties, by their nature,

³ The present case demonstrates the difficulty with mandatory imposition of a life sentence on a juvenile offender absent individualized consideration. In sentencing defendant, the court stated, “[W]hile you’ve eventually made a statement where you admitted hitting him [the victim], wielding the baseball bat, after your father urged you to tell the truth, it gives me no pleasure to give you life in prison without the possibility of parole, but that is absolutely . . . mandatory, because that is what the law requires.” Thus, the court indicated that defendant’s accepting responsibility may have led the court to be more lenient in its sentencing decision, had it been given the authority to do so.

preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.”).

¶ 39 We recognize that “[t]he power to define crimes and prescribe punishments is vested exclusively in the legislature,” and the judiciary’s duty is only to impose sentences “within the legislatively mandated limits.” *People v. Montgomery*, 669 P.2d 1387, 1390 (Colo. 1983). However, given that the part of section 18-1.3-401(4)(a) applicable to defendant, who committed a class 1 felony in 1998, is unconstitutional as applied to him, the trial court is, in effect, left with no applicable legislative sentencing guidelines to apply on remand.

¶ 40 We recognize that this is an area for legislative action, but pending legislative action, it is incumbent on us to provide our interpretation of the most appropriate remedy to implement *Miller*.⁴

⁴ We recognize the General Assembly’s 2006 amendment constitutes legislative action that applies to this issue and indicates the legislature’s intent in 2006 for sentencing juvenile offenders convicted of felony 1 offenses committed after July 2006. But, we also note that the current legislative framework still leaves a gap regarding appropriate sentences to impose on juvenile offenders convicted of felony 1 murder who committed their offenses between 1990 and 2006. Defendant asserts that there are approximately fifty individuals confined in the Department of Corrections who

Due to our concerns with the imposition of another mandatory sentencing scheme adopted by the divisions in *Banks* and *Gutierrez-Ruiz*, we have determined to adhere to the following approach (also considered by the division in *Tate*) and remand to the trial court for an individualized sentencing determination based on the factors elucidated in *Miller*.

¶ 41 Provided that an individualized sentencing determination is made in accordance with the factors in *Miller*, on remand the trial court may re-impose the life sentence without parole, or it may impose a life sentence with a possibility of parole after a specified number of years, or a sentence that it determines is appropriate for this defendant. Although an open-ended sentencing approach provides little guidance for the minimum sentence that must be imposed, in making this sentencing determination the trial court should consider (1) the presumptive range that applies to the next lowest level felony: a class 2 offense with a presumptive range of twelve to twenty-four years, plus (2) the effect on the sentence of committed class 1 felonies as juveniles during this time period. Another publication estimates that there are forty-eight. See Hannah Garcia, *Two Years, No Cert, More Confusion*, L. Wk. Colo., Nov. 18, 2014, <http://perma.cc/B356-VHQA>.

any applicable extraordinary aggravating factors as provided in section 18-1.3-401(8).

¶ 42 In light of this conclusion, we need not separately address defendant's motion for reduction of sentence under Crim. P. 32(b).

B. Sentencing for Class 2 Felonies

¶ 43 The People assert that we should not consider defendant's challenge to his remaining term-of-years sentence, contending that he failed to present this argument to the trial court. We agree.

¶ 44 In his pro se Crim. P. 35(c) motion, defendant contested only his sentence to mandatory life without parole for the first degree murder conviction. He argued that the sentence is unconstitutional and disproportionate, and that it violates the Supreme Court's assertion in *Graham* that juveniles must be treated differently from adults in criminal sentencing. However, defendant limited his argument to the first degree murder conviction, and did not specifically contest his sentences for the class 2 felonies. He did not assert that the consecutive sentences for the class 2 felonies resulted in the functional equivalent of a life sentence without the possibility of parole in derogation of *Graham* or the subsequent line of Colorado cases. *See, e.g., People v. Lehmkuhl*, 2013 COA 98 (*cert.*

granted Dec. 22, 2014); *Rainer*, 2013 COA 51; *People v. Lucero*, 2013 COA 53 (*cert. granted* Dec. 22, 2014).

¶ 45 Defense counsel’s Crim. P. 35(b) motion likewise did not raise this issue.

¶ 46 We acknowledge defendant’s argument that it would serve the interests of judicial economy to consider this argument now, regardless of whether it was adequately raised below. Although we have discretion to do so, we will not do so under the circumstances presented here. The trial court did not consider the issue, indicating that it was not adequately presented in defendant’s postconviction motions. Also, the record here lacks argument, evidence, and factual findings regarding life expectancy and presumed parole date that were present in the preceding cases and which we would require to fully address the issue.

¶ 47 The division in *Rainer* specifically noted the presence of life expectancy data in the record, ¶ 67, and the division in *Lucero* noted that the defendant conceded his life expectancy was seventy-five years, which presumably did not conflict with the People’s life expectancy argument, ¶ 13. In *Lehmkuhl*, ¶ 13, the division relied

on life expectancy tables provided in section 13-25-103, C.R.S. 2012.

¶ 48 In this case, however, we have no basis for determining defendant's life expectancy. Section 13-25-103 was repealed in 2014, and section 13-25-102, C.R.S. 2014, now directs courts to rely on United States census information to determine life expectancy. Although we could take judicial notice of census information, the particular table that would apply to defendant has not been identified by the parties.

¶ 49 Moreover, the parties disagree about defendant's life expectancy. Defendant argues that statistical tables do not reflect the shorter life expectancy of prison inmates. Thus, we are unable to decide this issue without a factual finding of defendant's life expectancy.

¶ 50 In addition, in *Rainer* and *Lucero*, the parties agreed on the defendant's first parole eligibility date, and the first parole eligibility date specifically appeared in the record in *Lehmkuhl*. *Rainer*, ¶¶ 36, 67; *Lucero*, ¶ 12; *Lehmkuhl*, ¶ 13. Here, we lack both an agreement on defendant's first parole eligibility date and any evidence in the record of the date. We also lack legal argument and factual findings

by the trial court on whether we should consider the effect any earned time or good time credits would have on defendant's first parole eligibility date, as argued by defendant on appeal. Again, absent factual findings on defendant's first parole eligibility date, this issue cannot be decided.

¶ 51 Because defendant did not present the issue to the trial court and we lack necessary factual findings, we decline to address it on appeal.

III. Conclusion and Directions

¶ 52 On remand, the trial court must first make an individualized determination based on factual findings whether life without parole is appropriate for defendant's Count 1 conviction. If the court determines that the sentence is appropriate, the sentence on Count 1 will stand affirmed, subject to defendant's right to appeal that determination. If the court determines that life without parole is inappropriate, the sentence on Count 1 will be vacated and the court should impose an individualized sentence that takes into consideration the factors elucidated in *Miller* and discussed in this opinion, again subject to defendant's and the People's right to appeal.

¶ 53 Although we decline to address defendant’s appellate argument with regard to the sentencing on his class 2 felony convictions, our opinion should not be considered a reflection on its merits. Additionally, defendant should not be precluded from raising this issue on remand, should he choose to do so. The law on this issue was still developing in Colorado at the time defendant filed his postconviction motion, as the trial court recognized. *See* Crim. P. 35(c)(VI)(a) (referring to claims based on a “new rule of constitutional law that was previously unavailable”).

¶ 54 The case is remanded for resentencing on Count 1 consistent with this opinion.

JUDGE TERRY concurs.

JUDGE TAUBMAN specially concurs.

JUDGE TAUBMAN specially concurring.

¶ 55 I concur with the conclusion that the life sentence without parole of defendant, Terrance Wilder, is unconstitutional. I further agree that the appropriate remedy is to vacate Wilder's sentence and remand the case to the trial court for an individualized sentencing determination based on the factors identified in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012). However, I write separately in order to address the following three points.

¶ 56 First, although I authored the majority opinion in *People v. Valles*, 2013 COA 84, ¶ 74, ___ P.3d ___, ___, I now believe that the best remedy to implement the holding in *Miller* is a remand to the trial court for an individualized sentencing hearing. Second, I explain why, notwithstanding the People's concession, I believe *Miller* applies retroactively. Third, I emphasize that on remand, the trial court should consider whether Wilder's aggregate 144-year sentence for his class 2 convictions is unconstitutional in light of the holdings in *People v. Rainer*, 2013 COA 51, ¶ 69, ___ P.3d ___, ___, (cert granted Dec. 22, 2014); *People v. Lucero*, 2013 COA 53, ¶ 2, ___ P.3d ___, ___, (cert granted Dec. 22, 2014); and *People v. Lehmkuhl*, 2013 COA 98, ¶ 13, ___ P.3d ___, ___, (cert granted Dec. 22, 2014).

I. *People v. Valles*

¶ 57 First, I authored the opinion in *Valles*, which followed *People v. Banks*, 2012 COA 157, ¶ 60, __ P.3d __, __ (*cert granted* June 24 2013), and affirmed the juvenile defendant’s sentence as to life imprisonment but vacated it to the extent that he was denied the possibility of parole. *Valles*, ¶¶ 71-75, __ P.3d at __; *Banks*, ¶ 60, __ P.3d at __. There, the division remanded the case to the trial court to modify the sentence by adding a provision for the possibility of parole after forty years. *Valles*, ¶¶ 71-75, __ P.3d at __.

¶ 58 While *Valles* argued that *Banks* was wrongly decided and requested that the division remand for the individualized determination we adopt here, his arguments contained only conclusory assertions, unsupported by legal authority and citation. *Id.* at ¶ 73 n.7, __ P.3d at __ n.7. As a result, the division declined to consider *Valles*’ argument. Having fully considered the issues in *Wilder*’s case, I now believe that the best remedy to implement the Supreme Court’s holding in *Miller v. Alabama* is not that set forth in *Banks* and *Valles*, but that set forth by the majority here.

II. Retroactivity of *Miller v. Alabama*

¶ 59 Second, the majority accepts the People’s concession that

Miller applies retroactively. Notwithstanding the People’s concession, I write separately to explain why I believe *Miller* applies retroactively. See *People v. Corral*, 174 P.3d 837, 839 (Colo. App. 2007) (appellate court is not bound by a party’s concessions).

¶ 60 In *Edwards v. People*, 129 P.3d 977, 983 (Colo. 2006), the Colorado Supreme Court adopted the test devised in *Teague v. Lane*, 489 U.S. 288 (1989), for determining when a new rule of constitutional law should be applied to cases on collateral review. According to *Teague*, decisions that establish new constitutional rules apply to all criminal cases pending on direct review. *Id.* at 304; see also *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). However, where a conviction is final, the new rule is not applied retroactively to cases on collateral review except in two instances. *Summerlin*, 542 U.S. at 351.

¶ 61 First, new substantive rules apply retroactively. *Id.* Such rules “narrow the scope of a criminal statute . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.” *Id.* at 352; see also *People v. Johnson*, 142 P.3d 722, 725 (Colo. 2006). They apply retroactively “because they necessarily carry a

significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.” *Summerlin*, 542 U.S. at 352 (internal quotation marks omitted).

¶ 62 In *Summerlin*, the Supreme Court explained that substantive rules “alter[] the range of conduct or the class of persons that the law punishes,” whereas procedural rules “regulate only the manner of determining the defendant’s culpability.” *Id.* at 353.

¶ 63 Second, retroactive effect is given to “watershed rules of criminal procedure.” *Id.* at 352 (internal quotation marks omitted). As a general rule, new procedural rules do not apply retroactively because they “do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.” *Id.* This definition of procedural rules applies equally to new rules that change the manner of determining a defendant’s sentence. See *Lambrix v. Singletary*, 520 U.S. 518, 539 (1997); *Sawyer v. Smith*, 497 U.S. 227, 241 (1990). Nonetheless, retroactive effect is given “to only a small set of watershed rules of criminal procedure

implicating the fundamental fairness and accuracy of the criminal proceeding.” *Summerlin*, 542 U.S. at 352 (internal quotation marks omitted).

¶ 64 Therefore, to determine whether *Miller* should be applied retroactively, we must consider whether the holding in *Miller* should be characterized as substantive or procedural. Neither the United States Supreme Court nor the Colorado Supreme Court has decided whether *Miller* applies retroactively; however, the Colorado Supreme Court recently granted certiorari to decide this issue. *See People v. Vigil*, (Colo. No. 14SC495, Oct. 27, 2014) (unpublished order) (certiorari granted to determine whether *Miller* is to be applied retroactively to cases on collateral review).¹

¶ 65 The majority of state supreme courts to consider the issue

¹The United States Supreme Court granted certiorari in *Toca v. Louisiana*, 574 U.S. __, __ 135 S. Ct. __, __ (2014), to decide whether *Miller* is to be retroactively applied. That case was dismissed as moot, 547 U.S. __ (2015), after the petitioner, George Toca, entered into a plea agreement with prosecutors and was released from prison. *See* Letter from Donna Andrieu et al. and Bryan A. Stevenson et al., Attorneys for Respondent and Petitioner in *Toca v. Louisiana*, No. 14-6381, to Scott S. Harris, Clerk, Supreme Court of the United States (Feb. 2, 2015) (on file in the Clerk of the United States Supreme Court’s case file).

have held that *Miller* applies retroactively. *People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013); *Diatchenko v. Dist. Attorney*, 1 N.E.3d 270, 281 (Mass. 2013); *Jones v. State*, 122 So. 3d 698, 702 (Miss. 2013); *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014); *Petition of State*, 103 A.3d 227 (N.H. 2014); *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014); *State v. Mares*, 335 P.3d 487, 501 (Wyo. 2014). Another two intermediate state appellate courts have reached the same conclusion. *In re Rainey*, 168 Cal. Rptr. 3d 719, 724 (Cal. Ct. App. 2014), *superseded by In re Rainey*, 172 Cal. Rptr. 3d 651 (Cal. 2014); *Toye v. State*, 133 So. 3d 540, 547 (Fla. Dist. Ct. App. 2014).

¶ 66 To be sure, a sizeable minority of state supreme courts have concluded that *Miller* does not apply retroactively. *State v. Tate*, 130 So. 3d 829, 838 (La. 2013); *People v. Carp*, 852 N.W.2d 801, 814 (Mich. 2014); *Chambers v. State*, 831 N.W.2d 311, 331 (Minn. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013). Further, at least two intermediate state appellate courts have reached this same conclusion. *State v. Duncan*, No. CR-13-0879, 2014 WL 4387707 (Ala. Crim. App. Sept. 5, 2014); *Geter v. State*,

115 So. 3d 375 (Fla. Dist. Ct. App. 2012); *Gonzales v. State*, 101 So. 3d 886 (Fla. Dist. Ct. App. 2012).

¶ 67 In addition, the majority of federal circuit courts of appeal have effectively concluded that *Miller* applies retroactively for the purpose of permitting a prisoner to file a second habeas corpus petition. Some circuits have specifically concluded that *Miller* applies retroactively. *In re Simpson*, 555 F. App'x 369, 370 (5th Cir. 2014); *In re Pendleton*, 732 F.3d 280, 282 (3d Cir. 2013). Others have accepted prosecutors' concessions that *Miller* applies retroactively. *Evans-Garcia v. United States*, 744 F.3d 235, 238 (1st Cir. 2014); *Johnson v. United States*, 720 F.3d 720, 720-21 (8th Cir. 2013); *Stone v. United States*, No. 13-1486 (2d Cir. June 7, 2013); *Wang v. United States*, No. 13-2426 (2d Cir. July 16, 2013); *Williams v. United States*, No. 13-1731 (8th Cir. Aug. 29, 2013). However, two circuits have concluded that *Miller* does not apply retroactively. See *In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013); *Craig v. Cain*, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013).

¶ 68 Additionally, while I am unaware of a formal United States Justice Department policy on the issue, federal prosecutors in

published cases have taken the position that *Miller* is substantive and therefore retroactive. See, e.g., *Evans-Garcia*, 744 F.3d at 238 (accepting government’s concession that *Miller* applies retroactively); *Johnson*, 720 F.3d at 721 (“The government here has conceded that *Miller* is retroactive”); *Wang*, No. 13-2426, slip op. at 2 (relying in part on government concession to conclude *Miller* is retroactive). Significantly, in *Stone v. United States*, the United States Attorney’s office in the Eastern District of New York submitted a lengthy brief affirmatively arguing that *Miller* created a new substantive rule and should be applied retroactively. See Gov’t’s Response to Petitioner’s Motion for Reconsideration of Order Denying Motion for Leave to File a Second Motion Pursuant to 28 U.S.C. § 2255 at 10-11, *Stone v. United States*, No. 13-1486 (2d Cir. May 30, 2013).

¶ 69 In these cases, the debate over *Miller*’s retroactivity centers on whether the decision merely establishes new procedures for trial courts to follow before sentencing a juvenile to life without the possibility of parole, or whether it establishes a substantive prohibition on mandatory life sentences without the possibility of parole for juveniles. I agree with those courts that have concluded that the holding in *Miller* is both substantive and procedural and

should be applied retroactively because of the substantive component of its holding. *Mantich*, 842 N.W.2d at 729 (*Miller*'s holding "does not neatly fall into the existing definitions of either a procedural rule or substantive rule."); *Mares*, 335 P.3d at 506 ("[C]ategorizing the *Miller* holding as substantive or procedural is difficult because the holding has aspects of both.").

¶ 70 In my view, *Miller* contains two new rules of constitutional law, one substantive and the other procedural. First, the Court held that mandatory life sentences without the possibility of parole are unconstitutional for juveniles. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469. Therefore, *Miller* narrows the scope of criminal statutes by placing a particular class of persons, juveniles, "beyond the State's power to punish" with mandatory life without parole sentences. See *Summerlin*, 542 U.S. at 351-52. To that extent, the holding in *Miller* is substantive.

¶ 71 Prior decisions prohibiting the imposition of capital punishment on specific classes of individuals are instructive. See *Miller*, 567 U.S. at ___, 132 S. Ct. at 2466-67 (comparing life without parole to death sentences). The Supreme Court has held that the Eighth Amendment "places a substantive restriction on the State's

power” to impose the death penalty on mentally disabled offenders, juveniles, and those charged with nonhomicide crimes. *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (internal quotation marks omitted); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); see also *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008). These are substantive rules that are applied retroactively because they lower defendants’ statutory maximum punishment. *E.g.*, *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (“The Supreme Court’s decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect, as has the Court’s decision in *Roper*.” (citation omitted)). *Miller* is no less substantive. It abolishes a mandatory punishment and replaces it with a discretionary procedure.

¶ 72 Both *Miller* and those decisions categorically prohibiting the imposition of capital punishment on specific classes of individuals require a change in the range of available punishments for a class of defendants. Therefore, applying *Miller* retroactively “ensures that juvenile homicide offenders do not face a punishment that our criminal law cannot constitutionally impose on them.” *Diatchenko*, 1 N.E.3d at 281.

¶ 73 I recognize that *Miller* does not categorically bar life without the possibility of parole for juvenile offenders. 567 U.S. at ___, 132 S. Ct. at 2471. However, *Miller* does prohibit mandatory life sentences without the possibility of parole, a categorical bar that must be applied retroactively.

¶ 74 Second, *Miller* also sets forth a new procedural rule. It requires courts to consider certain factors before sentencing a juvenile to life without parole. *Id.* at ___, 132 S. Ct. at 2469. Specifically, sentencing courts must consider “how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* Factors to consider include the juvenile’s “diminished culpability and heightened capacity for change.” *Id.* In this sense, *Miller* resembles those decisions modifying the procedures for the imposition of the death penalty that the supreme court has declined to apply retroactively. *See Summerlin*, 542 U.S. at 353 (holding that the rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002), that a jury, not a judge, must determine aggravating factors necessary for the imposition of the death penalty, is procedural); *Lambrix*, 520 U.S. at 539-40 (holding that the rule announced in *Espinosa v. Florida*, 505 U.S. 1070

(1992), that where a state places capital-sentencing authority in two actors rather than one, neither can weigh invalid aggravating circumstances, is procedural); *Sawyer*, 497 U.S. at 241-42 (holding that the rule announced in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that the Eighth Amendment prohibits capital punishment by a sentencer who falsely believes that responsibility for determining the appropriateness of capital sentence rest elsewhere, is procedural); *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990) (holding that petitioner’s proposed rule prohibiting an “anti-sympathy” jury instruction would be procedural).

¶ 75 Therefore, *Miller* is also procedural because it “altered the permissible methods by which the State [can] exercise its continuing power . . . to punish juvenile homicide offenders by life imprisonment without the possibility of parole.” *Tate*, 130 So. 3d at 838.

¶ 76 Those courts that recognize *Miller* as part procedural and part substantive have concluded that its holding should apply retroactively. *See Mares*, 335 P.3d at 507 (“We are more persuaded, however, by the analyses of those courts that have concluded that the rule announced in *Miller* is, despite its procedural aspects, a

substantive rule.”); *Mantich*, 842 N.W.2d at 731 (“[T]he *Miller* rule [is] more substantive than procedural.”); *Davis*, 6 N.E.3d at 722 (concluding that *Miller* is both procedural and substantive but should be applied retroactively because its procedural aspects are the result of its substantive change in the law); *Ragland*, 836 N.W.2d at 115 (same). I agree with these decisions and therefore conclude that *Miller*’s procedural and substantive holdings apply retroactively. In contrast, the above-noted death penalty cases modified only the procedures necessary to impose the death penalty and therefore were properly held not to apply retroactively. See, e.g., *Summerlin*, 542 U.S. at 353.

¶ 77 I further conclude that *Miller*’s procedural component constitutes a “watershed rule of criminal procedure.” In order to qualify as “watershed,” a new rule must meet two requirements: (1) it must be necessary to prevent an impermissibly large risk of an inaccurate result and (2) it must “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal quotation marks omitted).

¶ 78 First, the mandatory imposition of life without parole

sentences for juveniles, with no opportunity for an individualized determination, posed an impermissibly large risk of inaccurate sentencing. The *Miller* Court recognized that given “children’s diminished culpability and heightened capacity for change . . . appropriate occasions for sentencing juveniles to [life without parole] will be uncommon.” 567 U.S. at ___, 132 S. Ct. at 2469. In doing so, the Court cast doubt on the reliability and accuracy of mandatory life without parole sentences for juveniles. Because sentences that were once mandatory in many jurisdictions will be rare under *Miller*’s new procedures, I conclude that prior to *Miller*, mandatory life without parole schemes for juveniles posed an impermissibly large risk of inaccurate sentencing.

¶ 79 Second, *Miller* established the specific factors to be considered before a court may impose a life without parole sentence on a juvenile. Prior to *Miller*, the Eighth Amendment did not require an individualized hearing for juveniles facing sentences of life without parole. After *Miller*, sentencing courts must consider “how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* *Miller* created a right to individualized sentencing previously unrecognized by most states

and the federal government.

¶ 80 I conclude that these new factors “constitute a previously unrecognized bedrock procedural element[]” which, according to *Miller*, are “essential to the fairness” of any sentencing hearing. *Whorton*, 549 U.S. at 421; *Miller*, 567 U.S. at ___, 132 S. Ct. at 2468 (“[I]n imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.”). The imposition of these new factors “effect[s] a profound and sweeping change” to the sentencing procedures for juveniles. *Whorton*, 549 U.S. at 421 (internal quotation marks omitted). They replace the mandatory sentencing schemes previously in place in a majority of states, and form the “bedrock” procedures for all sentencing courts considering lifetime without parole for a juvenile offender.

¶ 81 I recognize that the supreme court has repeatedly held that new rules altering the procedures for the imposition of the death penalty do not fall into *Teague*’s narrow “watershed rule” exception. *See Summerlin*, 542 U.S. at 355-58; *Lambrix*, 520 U.S. at 539-40; *Sawyer*, 487 U.S. at 241-42; *Saffle*, 494 U.S. at 494-95. While, like *Miller*, the new rules considered in those cases created new procedural requirements, none was as fundamental as *Miller*. The

rules considered in *Summerlin*, *Lambrix*, *Sawyer*, and *Saffle* merely modified pre-existing procedures for the imposition of the death penalty. *Summerlin*, 542 U.S. at 355-58; *Lambrix*, 520 U.S. at 539-40; *Sawyer*, 487 U.S. at 241-42; *Saffle*, 494 U.S. at 494-95. *Miller* is a “watershed rule” because it established procedures—where before there were none—to be followed before a juvenile can be sentenced to life without parole.

¶ 82 I also recognize that only one state appellate court has concluded that *Miller* announced a new “watershed rule” of criminal procedure, and its decision was abrogated by a higher authority. *See People v. Williams*, 982 N.E.2d 181, 196 (Ill. App. Ct. 2012), *abrogated by People v. Davis*, 6 N.E.2d 709 (Ill. 2014). However, because *Miller* (1) explicitly cast doubt on the accuracy and reliability of mandatory life without parole sentences for juveniles, and (2) established procedures for courts considering lifetime without parole sentences for juvenile offenders, I conclude that *Miller*’s new procedural rule is a “watershed rule of criminal procedure.”

¶ 83 Accordingly, I conclude that *Miller* announced a new constitutional rule that is both substantive and procedural. I

further conclude that the decision applies retroactively to cases on collateral review.

III. Sentencing for Class 2 Felonies

¶ 84 Finally, if, on remand, the trial court determines that the appropriate sentence for Wilder’s class 1 conviction is not life without the possibility of parole, it should consider whether Wilder’s sentence for the class 1 conviction and his 144-year sentence for his class 2 felonies are functionally equivalent to a life sentence without parole.

¶ 85 In *Graham v. Florida*, 560 U.S. 48, 75 (2010), the Supreme Court held that the Eighth Amendment categorically prohibits sentencing a juvenile convicted of a nonhomicide crime to life imprisonment without the possibility of parole. In *Rainer*, a division of this court concluded that the “rule announced in *Graham* is a new substantive rule that should be applied retroactively to all cases involving juvenile offenders under the age eighteen at the time of the offense, including those cases on collateral review.” ¶ 21, __ P.3d at __.

¶ 86 The division relied on Center for Disease Control (CDC) life expectancy data to conclude that Rainer’s sentence was the

functional equivalent to life without parole, and therefore unconstitutional, because it did not offer him a meaningful opportunity to obtain release before the end of his expected life span. *Id.* at ¶¶ 38, 66, __ P.3d at __.

¶ 87 In *Lucero*, a different division addressed a cruel and unusual punishment challenge to an eighty-four-year sentence for conspiracy to commit first degree murder, attempted first degree murder, and two counts of second degree murder, all committed when the defendant was fifteen years old. ¶ 2, __ P.3d at __. Because Lucero would be eligible for parole when he was fifty-seven years old, and his life expectancy was seventy-five years, the division held that he had a meaningful opportunity for release during his lifetime, and therefore his sentence was not unconstitutional. *Id.* at ¶¶ 12-13, __ P.3d at __.

¶ 88 Finally, in *Lehmkuhl*, another division affirmed the district court's use of statutory mortality tables to conclude that Lehmkuhl's sentence was constitutional because he would become eligible for parole when he was 67 years old, and his life expectancy was 78.2 years. ¶ 13, __ P.3d at __; *see also* Ch. 317, sec. 1, § 13-25-103, 2002 Colo. Sess. Laws 1354-58 (statutory mortality tables).

The division rejected Lehmkuhl's argument that the district court erred in applying statutory mortality tables instead of CDC life expectancy data. *Lehmkuhl*, ¶¶ 14-17, __ P.3d at __. The division also denied the argument, which was unsupported by data or legal authority, that Lehmkuhl's life expectancy is shorter than that indicated by CDC data because the life expectancy of a person incarcerated is lower than that of the general population. *Id.* at ¶ 18, __ P.3d at __.

¶ 89 Here, Wilder contends that his aggregate 144-year sentence for second degree murder, attempted murder, conspiracy to commit murder, and accessory to the commission of a class 1 or 2 felony, all class 2 felonies, is unconstitutional under *Graham*. On remand, the trial court should consider this argument in light *Rainer*, *Lucero*, and *Lehmkuhl*. Specifically, the court should consider the evidence of Wilder's life expectancy and determine whether his aggregate 144-year sentence, together with the sentence imposed on remand for his class 1 felony murder conviction (unless it is life without the possibility of parole), leaves him a meaningful opportunity for release during his lifetime.