STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 2, 2018)

STATE OF RHODE ISLAND	:	
	:	
VS.	:	**NO. P1/14-1482AG**
	:	
JOSE LOPEZ	:	

DECISION

KRAUSE, J. On the day before Christmas, and just before his seventeenth birthday in 2013, Jose Lopez, with encouragement from two of his Chad Brown gang friends, murdered Ryan Almeida, a rival East Side gang member, in front of his mother's home. Shooting Almeida was retaliation for the East Side gang having killed Lopez's cousin six months earlier. Lopez's two cohorts pled guilty and testified for the state at his January 2015 jury trial. Lopez was convicted of first degree murder, discharging a firearm resulting in death, and conspiracy to commit murder. His motion for a new trial was denied on February 11, 2015.

As required by statute, this Court sentenced Lopez to a mandatory life term for first degree murder and an obligatory consecutive life sentence for the death-by-firearm offense. Over the state's objection, the Court suspended a ten-year consecutive term on the conspiracy count and imposed a like period of probation instead. Both life sentences are parolable. Lopez's conviction has been affirmed, *State v. Lopez*, 149 A.3d 459 (R.I. 2016), and the disturbing facts of the case, which the Supreme Court labeled "chilling," are fully set forth therein.

Through a motion under Rule 35, Super. R. Cr. P., Lopez complains that the two consecutive life terms are constitutionally infirm. He entreats this Court to vacate those sentences, hold a hearing in order to examine youth-related and other factors, and reconsider

imposition of the life terms because he was a juvenile when he killed Ryan Almeida. For procedural as well as substantive reasons, his request is denied.

I

Lopez's motion is void *ab initio* because it is procedurally flawed. The Rhode Island Supreme Court has held that a defendant may not utilize Rule 35 to advance a constitutional challenge to his sentence. *State v. Linde*, 965 A.2d 415, 417 (R.I. 2009) (*Linde II*).[1] Lopez maintains, however, that *Linde II* does not apply to his motion and that, even if it does, that case was wrongly decided by the Supreme Court and he is still entitled to relief. He is mistaken.

Rule 35(a) provides:

> **"**35. Correction, decrease or increase of sentence**.** (a) *Correction or reduction of sentence.* The court may correct an **illegal sentence** at any time. The court may correct a sentence **imposed in an illegal manner** and it may reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed, or within one hundred and twenty (120) days after receipt by the court of a mandate of the Supreme Court of Rhode Island issued upon affirmance of the judgment or dismissal of the appeal, or within one hundred and twenty (120) days after receipt by the court of a mandate or order of the Supreme Court of the United States issued upon affirmance of the judgment, dismissal of the appeal, or denial of a writ of certiorari. The court shall act on the motion within a reasonable time, provided that any **delay by the court in ruling on the motion** shall not prejudice the movant. The court may reduce a sentence,

[1] Eddie Linde's case has been considered by the Rhode Island Supreme Court three times and once in a federal forum. He was unsuccessful in his direct appeal from his second-degree murder conviction. *State v. Linde*, 876 A.2d 1115 (R.I. 2005) (*Linde I*). In his second entreaty, the Court refused to address, in the context of Rule 35, a constitutional challenge to his mandatory consecutive life sentence. *State v. Linde*, 965 A.2d 415 (R.I. 2009), *as amended* (Mar. 27, 2009) (*Linde II*). Subsequently, in an appeal from a failed postconviction relief application, the Supreme Court rejected his claim that the mandatory consecutive life term was unconstitutional under the Eighth Amendment to the federal constitution and article I, section 8 of Rhode Island's constitution. *Linde v. State*, 78 A.3d 738 (R.I. 2013) (*Linde III*). Lastly, the federal District Court rejected Linde's meritless *habeas* petition. *Linde v. Wall*, 2014 WL 2800786 (D.R.I. June 19, 2014) (*Linde IV*).

the execution of which has been suspended, upon revocation of probation." (Emphasis added.) [2]

An illegal sentence is "one that is not authorized by the statute establishing the punishment that may be imposed for the particular crime or crimes." *State v. Texieira*, 944 A.2d 132, 143 (R.I. 2008); *State v. Murray*, 788 A.2d 1154, 1155 (R.I. 2001) ("An illegal sentence is one that when imposed is at variance with the statute proscribing [*sic*] the punishment that may be imposed for the particular crime or crimes."). *See State v. DeCiantis*, 813 A.2d 986, 990-91 (R.I. 2003) (discussing the distinction between an illegal sentence and an illegally imposed sentence, and defining an illegal sentence as "one which has been imposed after a valid conviction but is not authorized under law" (internal quotation marks omitted), noting that the failure to provide the defendant his right of allocution under Rule 32 is an example of an illegally imposed sentence).

Lopez's notion that his consecutive life sentences are "illegal" is simply wrong. As prescribed by *Texieira* and *Murray*, those prison terms comport in every way with the sentencing statutes. First degree murder mandates a life sentence, and if that killing resulted from the

[2] The 120-day filing window in Rule 35 is not at issue. The Supreme Court affirmed Lopez's conviction on December 6, 2016 and returned the file to the Superior Court on December 21, 2016. Lopez filed his Rule 35 motion on April 3, 2017 and forwarded his supporting memorandum and appendices to this Court on August 1, 2017. The state filed its response on September 5, 2017. The subsequent six-month delay in reaching the motion is entirely attributable to Lopez. When the motion was filed in April of 2017, Lopez, through counsel, requested that a hearing on the motion be deferred until after January 1, 2018, so that a "Rule 9" law clerk, who is an out-of-state law student and had assisted counsel in preparing Lopez's pleading, could return to Rhode Island during school vacation and, in that capacity, present oral argument. *See* Art. II, Rule 9(c), R.I. Supreme Court. This Court acceded to the request, and Lopez, under oath, assented to this procedure orally in open court and in writing on January 10, 2018. A hearing on Lopez's motion was held on March 1, 2018 to accommodate the schedule of the law clerk as well as counsel for both parties, at which time Lopez again affirmed his consent to the Rule 9 procedure.

discharge of a firearm, a consecutive life sentence must follow.[3] Challenging the "legality" of those sentences under Rule 35 on constitutional grounds is plainly impermissible under *Linde II*:

> "[W]e never have countenanced a challenge to the constitutionality of a penal statute in the context of a Rule 35 motion; nor have we declared that a sentence imposed pursuant to an unconstitutional statute, which is not the case here, is illegal as contemplated by Rule 35 and we decline to do so now." *Linde II*, 965 A.2d at 417.

Even so, argues Lopez, the two consecutive life terms nonetheless transgress Rule 35 because they were allegedly "imposed in an illegal manner." The Court disagrees. The entirety of the manner by which sentence was imposed was assiduously followed. At its core, Lopez's quarrel is really not with any impermissible *manner* by which the life sentences were imposed; rather, it is the essence of the *punishment* he laments and which, he says, is constitutionally flawed. Pursuing that complaint under Rule 35, however, is precisely what *Linde II* precludes.[4]

Regardless of whether Lopez's claim is premised on a demand to correct a purportedly illegal sentence, or whether it is couched in terms of unbuttoning consecutive life sentences which he suggests were illegally imposed, it is the view here that under *Linde II* any professed distinction creates no room within Rule 35 to pursue alleged constitutional infirmities in those sentences. Accordingly, this Court "need not reach the merits of [Lopez's] constitutional

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[3] Lopez's initial parolable life sentence is required because he was convicted of first degree murder. Sec. 11-23-2. The second life term must be served consecutively pursuant to § 11-47-3.2(b)(3) and (c), which mandated the imposition of a consecutive life sentence if the defendant was convicted of discharging a firearm resulting in the death of the victim. That statute has since been renumbered (§ 11-47-3.2(b)(**4**)), but the sentencing mandate remains unchanged. Subsection (c) expressly provides that the defendant may be granted parole.

[4] *Linde II* also recognized that under Rule 35, Linde had the burden of proving that the consecutive life sentence was not authorized by § 11-47-3.2(b), citing *Texieira*, 944 A.2d at 143. Because the statute allows the trial court no discretion and, instead, mandates the imposition of a consecutive life sentence, Linde's, and perforce Lopez's, sentence cannot be deemed illegal under Rule 35. *Linde II*, 965 A.2d at 417.

challenges because they are 'not cognizable'" under Rule 35. *State v. Ciresi*, 151 A.3d 750, 755 (R.I. 2017) (quoting *Linde II*, 965 A.2d at 416).

Lopez's residual argument—that *Linde II* was somehow wrongly decided—has no legs whatsoever in the Superior Court. '"It is well settled that an opinion of [the Supreme Court] declares the law in Rhode Island and that law must be followed by the lower courts of our judicial system, regardless of whether that court or any of its judges agree or disagree with our holding."' *Motyka v. State*, 172 A.3d 1203, 1208 (R.I. 2017) (Indeglia, J., concurring) (quoting *Univ. of R.I. v. Dep't of Emp't and Training*, 691 A.2d 552, 555 (R.I. 1997)).[5]

Accordingly, for procedural reasons alone, Lopez's motion must fail. Nonetheless, even if Lopez could raise constitutional challenges under Rule 35, his arguments lack merit.

II

Lopez contends that a series of holdings by the United States Supreme Court which have eliminated the death penalty for juveniles and diminished a juvenile's exposure to a life without parole sentence should also be favorably extended to him because, he says, his consecutive, parolable life sentences amount to a *de facto* term of life without parole. He is mistaken.

[5] Lopez's acarpous insistence that this Court reconsider *Linde II's* holding ignores '"the authority of [the Supreme Court] which, under art. XII of the amendments to the Rhode Island [C]onstitution, is vested with the ultimate judicial power in the state as well as with a supervisory jurisdiction over all inferior courts and tribunals.' *Higgins v. Tax Assessors*, 27 R.I. 401, 63 A. 34 (1905). 'In the exercise of that broad authority we declare the law of this state, and it is incumbent upon those tribunals, even though they may disagree with the wisdom or soundness of our declarations, to follow the law as we announce it. *D'Arezzo v. D'Arezzo*, 107 R.I. 422, 267 A.2d 683 (1970). Such adherence to the precedents declared by the highest tribunal in the state is inherent in our system of jurisprudence. *See generally*, Roscoe Pound, *The Theory of Judicial Decision*, 36 Harv. L. Rev. 641 (1923). Without it there can be no stability in the legal order."' *State v. Presler*, 731 A.2d 699, 703 n.2 (R.I. 1999) (quoting *City of East Providence v. Shell Oil Co.*, 110 R.I. 138, 140-41, 290 A.2d 915, 916-17 (1972)).

Beginning in 2005, the United States Supreme Court examined the fundamental differences between juveniles and adults and concluded that juvenile offenders should not suffer the death penalty and that, unless entirely incorrigible, they do not deserve the second harshest penalty of life without the possibility of parole. *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012).

In *Roper*, a defendant was sentenced to death for a murder committed when he was seventeen years old. After outlining ways in which juvenile offenders differ from their adult counterparts, the Court banned the imposition of death sentences for juveniles. Five years later, in *Graham*, after considering the case of a sixteen-year-old who had been sentenced to life without parole for an armed burglary, the Court held that juveniles could not be sentenced to a nonparolable term for nonhomicide offenses.

In *Miller*, the Court examined an Eighth Amendment challenge by two fourteen-year-old offenders who had been ordered to serve mandatory life sentences without parole as a result of their murder convictions. The Supreme Court held that unless the trial court first considered mitigating circumstances, it could not impose the state's harshest penalty, a mandatory nonparolable life term, on a juvenile homicide offender.

Finally, in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), the Court extended *Miller* retroactively, holding that a nonparolable life sentence is unconstitutional for all juvenile offenders except for the rare one "whose crime reflects irreparable corruption" or "permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734 (quoting *Miller*, 567 U.S. at 479-80).

* * *

Roper, *Graham* and *Miller* targeted only the harshest and most severe sentences which can be imposed. *Graham*, 560 U.S. at 69 (noting that "life without parole is the second most

severe penalty permitted by law"); *Miller*, 567 U.S. at 460, 465, 475 (viewing a life without parole sentence as an "ultimate penalty * * * akin to the death penalty"). In *Graham*, the Court said: "The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable." *Graham*, 560 U.S. at 69. Manifestly, Lopez's *parolable* sentences are not "irrevocable," and, certainly, they do not approach Rhode Island's most severe sentence of life *without* parole. *See State v. Carpio*, 43 A.3d 1, 13 (R.I. 2012). Those nonparolable terms are designated for a finite assortment of first degree murders with particularized circumstances limned by § 11-23-2.[6] That extreme sentence was never in play in this case. Lopez was ordered to serve consecutive life sentences for first degree murder and for discharging a firearm resulting in the death of Ryan Almeida, both of which are parolable.[7]

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[6] Section 11-23-2 allows life without parole sentences for first degree murders committed (1) while perpetrating another capital offense; (2) risking death to others (*e.g.*, with an explosive device); (3) murder for hire; (4) involving torture or aggravated battery; (5) killing a judicial or law enforcement officer; (6) committed while incarcerated; or (7) committed in connection with certain narcotics offenses. Even in those instances, however, life without parole is not automatically imposed. The trial justice, after a sentencing hearing devoted to exploring aggravating and mitigating circumstances, has discretion to impose or not to impose a life without parole term, and the Supreme Court, unlike its usual deferential review of sentences, is obligated to consider *de novo* a life without parole term and may reduce it to a parolable life sentence. *See* §§ 12-19.2-1 *et seq.*; *Page v. State*, 995 A.2d 934, 948 (R.I. 2010).

[7] Sections 11-23-2 and 11-47-3.2(c). *See* note 3, *supra*. Lopez was acquitted of unlawfully carrying a pistol without a license. That acquittal, he asserts, "demonstrates that the jurors did not believe that [Jose] shot Ryan." Def. Mem. at 1. That dubitable averment is meritless. Indeed, later in his memorandum he concedes that it is only a possibility that one of his confederates shot Ryan Almeida. *Id.* at 31. In any event, in denying Lopez's new trial motion, this Court expressed its view that the acquittal on that isolated firearm offense, a charge to which *both* of his codefendant's had already pled guilty and which was disclosed to the jury when they testified (notably, there was only one gun used that night), was most likely a verdict compromise. (Trial Tr. 18, Feb. 11, 2015.) The Court renews that sentiment here. *See State v. Allessio*, 762 A.2d 1190, 1191 (R.I. 2000) (recognizing "that the jury may reach compromises through a variety of motivations, including leniency"); *State v. Tully*, 110 A.3d 1181, 1193 (R.I. 2015) ("jury has broad power to compromise"). After all, the jury did convict Lopez of having *discharged* the firearm which resulted in Almeida's death. In denying the new trial motion, this Court concluded, as did the jury, that Lopez had given patently false testimony at trial and had lied

Lopez says he will be 52 when he is first eligible for parole after having spent 35 years in prison. That is inaccurate. He will only be 47.[8] At that age Lopez can, according to life expectancy calibrations, expect to live another 35 years.[9] There is no persuasive reason, other than unpredictable health vicissitudes which can arise at any time during one's life, to conclude that Lopez will be unable to engage in major life activities for several more years if he is released at that age.[10] *See People v. Perez*, 154 Cal. Rptr. 3d 114, 119-20, 214 Cal. App. 4th 49, 57-58

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when he denied shooting Almeida. The Supreme Court agreed, stating that the weight of the evidence "clearly established that **defendant was the shooter**." *Lopez*, 149 A.3d at 465 (emphasis added).

[8] At the time of sentencing, the Court estimated that Lopez would have to serve 35 years before becoming eligible for parole. Sentencing Tr. 17, Apr. 2, 2013. Lopez continues to assume so, as well; and, he has pegged his earliest parolable age at 52. However, G.L. 1956 § 13-8-13(d) provides that "in the case of a prisoner sentenced consecutively to more than one life term for crimes occurring after June 30, 1995, the [parole] permit may be issued only after the prisoner has served not less than **fifteen (15) years consecutively on each life sentence**." (Emphasis added.) Lopez was arrested when he was seventeen, and he is entitled to incarceration credit against that 30-year aggregate period. *See* § 12-19-2(a) ("in the case of a person sentenced to a life sentence, the time at which he or she shall become eligible to apply for parole shall be reduced by the number of days spent in confinement while awaiting trial and while awaiting sentencing"). Sentenced at age 18, and with credit for the prior year of incarceration, Lopez will be eligible for parole at age 47, not 52. And, at age 47, Lopez will not, as he predicts, be considered an "older inmate," an age which starts, according to his own cited prison commentators, at 50. Def. Mem. at 19.

[9] *See* National Vital Statistics Reports, Vol. 66, No. 3 (April 11, 2017), United States Department of Health and Human Services, Table 11, gauging the life expectancy of a forty-seven-year-old Hispanic male to span about another 35 years.

[10] The General Assembly has explained that the term "major life activities" means mobility, self-care, communication, receptive and/or expressive language, learning, self-direction, capacity for independent living, or economic self-sufficiency. Sec. 11-5-10.2(c)(2). Even at age 52, five years beyond the age at which Lopez thought he is first statutorily eligible for parole, his life expectancy would be 82, as predicted by the life tables referenced in the previous margin note.

Graham noted that a juvenile's sentence must offer, *inter alia*, a "chance for fulfillment outside prison walls [and a] chance for reconciliation with society. 560 U.S. at 79. There is no question that, whether paroled at age 47 or 52, Lopez will have ample opportunity to accomplish those goals.

(Cal. App. 4 Dist. 2013) (holding that a juvenile convicted of sexual assaults and sentenced to 30 years to life; and eligible for parole at age 47, is an age which "by no stretch of the imagination can [] be called a 'functional' or 'de facto' LWOP, and therefore neither *Miller* [nor] *Graham* apply"). *Cf.*, *People v. Contreras*, ___ P.3d ___, No. S224564, 2018 WL 1042252 (Cal. Supreme Ct. Feb. 26, 2018) (holding that two juveniles' sentences of 50 and 58 years to life constituted a *de facto* life without parole sentence, where the juveniles had committed nonhomicide offenses and, unlike Lopez, would not be parole eligible until ages 64 and 74, respectively).[11]

In support of his expansive application of *Miller*, Lopez relies on *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1046 (Conn. 2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016); *State v. Null*, 836 N.W.2d 41, 45 (Iowa 2013); *State v. Zuber*, 152 A.3d 197, 201 (N.J. 2017), *cert. denied sub nom. New Jersey v. Zuber*, 138 S. Ct. 152 (2017); and *Bear Cloud v. State*, 334 P.3d 132, 141-44 (Wyo. 2014). In those homicide cases, the juvenile offenders are expected to serve as many as 45 to 68 years in prison, and, most notably, their life expectancies after their earliest parole release dates are from zero to 10 years. As earlier noted, however, that is not at all Lopez's situation. Whether at age 47 or even 52, Lopez will be much younger than those defendants when he is initially parole eligible. Casiano will be about 67; Null in his late 60's; Bear Cloud, 61; Zuber and his codefendant will be 72 and 85, respectively.

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[11] The California Supreme Court's slim majority decision (4-3 split) was careful to distinguish and emphasize that it did not encincture juveniles who had committed murders, or had even intended a homicidal result. The California Court said, quoting *Graham* and *Roper*:

> "Further, the high court underscored that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. . . . Although an offense like robbery or rape is 'a serious crime deserving serious punishment,' those crimes differ from homicide crimes in a moral sense." *Contreras*, ___ P.3d ___, 2018 WL 1042252, *7.

The very fact that Lopez may be paroled within 30 years (assuming good behavior, *see* Part III, *infra*) forecloses any notion he harbors that he is being subjected to a *de facto* life without parole term. *See Perez, supra.* Indeed, the *Montgomery* Court noted that even a life-without-parole *Miller* violation may be obviated by affording parole opportunities to compliant juvenile homicide offenders instead of resentencing them:

> "Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. . . . Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Montgomery*, 136 S. Ct. at 736.

Notably, several courts have refused to extend *Miller* to cases where a juvenile is sentenced to anything less than a mandatory life without parole term. *See, e.g., Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017) (concluding that *Graham* and *Miller* do not apply to aggregated terms of years, including the cumulative 84-year sentence which that juvenile defendant received); *Ouk v. State*, 847 N.W.2d 698, 701 (Minn. 2014) (holding that a mandatory sentencing scheme of life imprisonment with parole eligibility after 30 years "does not violate the rule announced in *Miller* because it does not require the imposition of the harshest term of [] life imprisonment without the possibility of release"); *James v. United States*, 59 A.3d 1233, 1237-39 (D.C. 2013) (finding constitutional a juvenile's sentence requiring him to serve a mandatory minimum of 30 years before parole eligibility because "[t]he legislature has already taken appellant's—and other future offenders'—youth into account by precluding a sentence of life imprisonment without opportunity for release from being imposed upon juvenile offenders"). *See also Starks v. Easterling*, 659 F. App'x 277, 280 (6th Cir. 2016) (affirming a juvenile defendant's mandatory parolable sentence for felony murder "[b]ecause the Supreme Court has

not yet explicitly held that the Eighth Amendment extends to juvenile sentences that are the functional equivalent of life, and given the fact that lower courts are divided about the scope of *Miller*"); *see Veal v. State*, ___ S.E.2d ___, 2018 WL 699296 (Ga. Supreme Court, No. S17A1758, Feb. 5, 2018) refusing to relax a juvenile's eight consecutive life sentences plus 60 years, and agreeing with other jurisdictions which hold that "*Miller* and *Montgomery* do not apply to cases that do not involve LWOP sentences but nevertheless involve sentences that [allegedly] are the functional equivalent to a life sentence without the opportunity for parole," citing *Starks v. Easterling*, *supra, Bell v. Nogan,* 2016 WL 4620369 (D.N.J. Sept. 6, 2016), and *People v. Sanchez,* 2013 WL 3209690 (Cal. Ct. App. June 25, 2013). *See Demirdjian v. Gipson,* No. 09-56453, 2016 WL 4205938, at *13 (9th Cir. Aug. 10, 2016) and *Benjamin v. Walker*, No. 06-0692, 2015 WL 164817, at *11 (C.D. Cal. Jan. 11, 2015), both holding that *Miller* and its related decisions are inapplicable to cases where the juvenile defendant was not sentenced to life without the possibility of parole; *Com. v. Okoro*, 26 N.E.3d 1092, 1099 (Mass. 2015) (upholding mandatory parolable sentences for juveniles because *Miller* only applied to mandatory life without parole cases).[12]

[12] *See State v. Brown*, 331 P.3d 781, 796-97 (Kan. 2014) (declining to hold mandatory life-with-parole sentences unconstitutional as applied to juvenile offenders because "*Miller's* rationale is inapplicable" to a sentence of 20 years prior to parole eligibility); *State v. Tran*, 378 P.3d 1014, 1021-22 (Haw. 2016), *cert. denied*, 2016 Haw. LEXIS 327 (2016) (upholding the constitutionality of a statute mandating "life" terms for juveniles convicted of first degree attempted murder because of a meaningful opportunity for release through the parole system); *Ellmaker v. State*, 2014 WL 3843076, at *10 (Kan. Ct. App. Aug. 1, 2014) (rejecting defendant's argument that a "hard 50 sentence" is unconstitutional because he has a chance of being released from prison after the sentence); *State v. Imel*, 2015 WL 7373800, at *2-3 (Ariz. Ct. App. Nov. 20, 2015) (explaining that *Miller's* holding was based on an analogy with capital punishment and holding constitutional a juvenile's life sentence which is parolable). *See also Collins v. State*, 189 So. 3d 342, 342 (Fla. Ct. App. 2016) (55-year sentence with parole eligibility after 52 years does not violate *Graham*); *United States v. Mathurin*, 868 F.3d 921, 934-36 (11th Cir. 2017) (57-year sentence which could be reduced to about 50 years with good time credits does not violate *Graham*.

Quite apart from all of those instructive authorities, Lopez's reliance on *Casiano* and *Zuber* has also been eroded by decisions from the very jurisdictions which gave rise to those cases. Recently, the Appellate Division of the New Jersey Superior Court rejected the applicability of that state's *Zuber* decision to the case of a juvenile who was sentenced to 40 years, with parole eligibility after 34 years at age 53 ("Unlike in *Zuber*, defendant's sentence is not a life sentence or its practical equivalent."). *See State v. Fitch*, 2017 WL 4183276, at *16 (N.J. Super. Ct. App. Div. Sept. 22, 2017).

Since *Casiano*, a Connecticut appellate court has upheld sentences similar to Lopez's and disallowed the same challenge which Lopez advances here. Citing *Montgomery*, that intermediate court of appeals held that a juvenile defendant's 35-year sentence, with parole eligibility after 21 years, did not violate constitutional principles, noting that "[n]othing in *Riley* or *Casiano* remotely suggests, however, that in light of the subsequent passage of [the Connecticut statute granting parole eligibility] and the United States Supreme Court's decision in *Montgomery*, parole eligibility is not a constitutionally adequate remedy for Connecticut juvenile offenders whose sentences may have violated *Miller*." *State v. Williams-Bey*, 164 A.3d 9, 12, 22 (Conn. App. Ct. 2016), *remanded on procedural grounds*, *State v. Williams-Bey*, 164 A.3d 31 (Conn. App. Ct. 2017), *cert. granted on substantive grounds*, 169 A.3d 793 (Mem.) (Conn. July 10, 2017).

III

Although the Almeida murder was the most serious offense which Lopez committed before adulthood, it was not his first. By the time of the murder, Lopez's juvenile record already included possession of a stolen motor vehicle, possession with intent to deliver a controlled substance, possession of a sawed-off shotgun, and felony and misdemeanor assaults. He was on

probation at the time of the Almeida murder. To date, Lopez has forfeited 71 days of good time credit for several disciplinary infractions while incarcerated for, *e.g.*, fighting, disorderly conduct, and disobeying orders. Whether he can refrain from committing additional infractions while imprisoned seems questionable, but given that his earliest parolable age is as low as 47, Lopez has every incentive to behave himself while incarcerated. *See Graham*, 560 U.S. at 79. "[I]t is totally within Defendant's own power to shorten the sentence imposed." *Mathurin*, 868 F.3d at 935.

Further, the United States Supreme Court recently, within the confines of a *habeas* petition, has unanimously held that the application of normal parole factors in Virginia's "geriatric release" program do not unreasonably transgress *Graham*'s rule against denying parole for juveniles in nonhomicide offenses. *Virginia v. LeBlanc*, ___ U.S. ___, 137 S. Ct. 1726 (2017) (*per curiam*). Noting that it had not yet decided that a release program like Virginia's failed to satisfy the Eighth Amendment, because that question had not yet been presented, the Court nevertheless said:

> "And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham's* requirement that juveniles convicted of nonhomicide crime have a meaningful opportunity to receive parole. The geriatric release program instructs Virginia's Parole Board to consider factors like the 'individual's history . . . and the individual's conduct . . . during incarceration,' as well as the prisoner's 'interpersonal relationships with staff and inmates' and "[c]hanges in attitude toward self and others.' *** Consideration of these factors could allow the Parole Board to order a former juvenile offender's conditional release in light of his or her 'demonstrated maturity and rehabilitation'" 137 S. Ct. at 1729.

Those "normal parole factors" are not at all inconsistent with Rhode Island's stated statutory parole purposes or the criteria for release by the Parole Board. Secs. 13-8-14 - 14.1; *see* R.I. Parole Board Guidelines (adopted 2016). Lopez's untimely and barren assertion that Rhode

Island's Parole Board will fail to consider all relevant factors in his eventual parole equation is simply empty vaticination.

IV

Lastly, although the disturbing facts of this case are not especially germane to this Decision, it is noteworthy that, like many other unlawful firearm shootings earmarked for the Gun Court Calendar, the instant case bears all of the unsettling gang related hallmarks which the General Assembly condemned and which principally prompted enactment of that special Calendar in 1994. *See* G.L 1956 § 8-2-15.1. In codifying the Gun Court Calendar, the General Assembly announced the following findings and policy declarations:

> (a) Findings and declarations. The General Assembly finds that:
> (1) There has been significant growth in the use of firearms in the commission of violent crimes.
> (2) Many of the gun shootings are drug or **gang related** and endanger law abiding citizens.
> (3) Many of the gun offenses are committed while individuals are free **on bail** for other offenses.
> (4) The growing number of gun related offenses constitutes a burden upon the state of Rhode Island and threatens the domestic tranquility of the state and its people, especially residents of the urban areas where these crimes are most prevalent.
> (5) In order to deter the use of firearms in the commission of violent crime, and to protect the law abiding public, there must be swift disposition of gun related offenses in our courts, and **there must be the certain prospect of prison terms for those who are convicted of such crimes.**
> (b) Declaration of policy. It is hereby declared to be the policy of the state of Rhode Island to provide maximum safety and security to its people from the unlawful gun related violence and intrusion upon their persons and property by expediting the processing and disposition of such cases and, unless otherwise provided, **imposing prison terms that must be served**. (Emphasis added.)[13]

More recently, in a further effort to curb and punish gang violence, in 2014 the General Assembly enacted a Criminal Street Gang Enhancement statute, which exacts even greater jail sentences (additional ten-year prison terms) for miscreants, like Lopez, who persist in engaging

[13] Although not on bail when he murdered Ryan Almeida, Lopez was on probation and had already amassed an ominous criminal record. *See*, Part III, *supra*.

in criminal conduct associated with gang activity. *See* GL 1956 §12-19-39.

The statute which is the basis of Lopez's consecutive life sentence (§11-47-3.2 *et seq*.) has withstood all manner of attack over the years. The Rhode Island Supreme Court has flatly rejected various double jeopardy claims and held that it invites no merger with the predicate felony for sentencing purposes. *State v. Monteiro*, 924 A.2d 784, 792-94 (R.I. 2007) (first degree murder); *State v. Feliciano*, 901 A.2d 631, 647-48 (R.I. 2006) (same); *State v. Rodriguez*, 822 A.2d 894, 904-08 (R.I. 2003) (same); *Linde I*, 965 A.2d at 416 n.1 (second degree murder); *State v. Marsich*, 10 A.3d 435, 442 (R.I. 2010) (robbery); *State v. Stone*, 924 A.2d 773, 778-81 (R.I. 2007) (assault with a dangerous weapon). That statute has also survived myriad other constitutional challenges. *Linde III*, 78 A.3d at 742-44 (Eighth Amendment/Due Process claim of cruel and unusual punishment); *Sosa v. State*, 949 A.2d 1014, 1016-17 (R.I. 2008) (separation of powers); *State v. DeJesus*, 947 A.2d 873, 884-86 (R.I. 2008) (equal protection); *Monteiro*, 924 A.2d at 792-96 (cruel and unusual punishment, separation of powers, as well as double jeopardy).

In addressing the purpose and scope of the statute, and approving its mandatory consecutive life sentence, the Supreme Court, in language applicable here, said in *Monteiro*:

> "In the present case, we are confronted with a mandatory sentence—this is a case of first-degree murder in which an innocent bystander was killed as a result of gun violence by a member of a street gang. In addition to a mandatory sentence of life imprisonment for first-degree murder, a mandatory consecutive life term was imposed because defendant committed the murder with a firearm. The record portrays a daylong gun battle on the streets and playgrounds of the city of Providence. After defendant declared his intention to kill a member of a rival gang, he fired his weapon on three separate occasions, culminating in the death of an innocent party. After reviewing this record, we are satisfied that this crime is precisely the type of gun violence that the Legislature intended to address when it provided for a mandatory consecutive sentence of life imprisonment for using a firearm while committing murder." *Monteiro*, 924 A.2d at 795.

Juvenile offenders in Rhode Island who deliberately and with premeditation shoot and kill another person, although sentenced to two statutorily mandated consecutive life terms, are nevertheless legislatively entitled to the normal benefits of a parole process which entitles to them to be considered for release after having served 30 years. Assuming proper inmate decorum and a demonstrated maturity and rehabilitation, those offenders, like Lopez, who will be initially eligible for release by, say, age 50, are simply not entitled to greater clemency and further diminution of their parolable sentences simply because they chose to kill a man when they were 17 instead of 18 years old. To widen the parole gates beyond what is presently and sensibly afforded, quite apart from doing scant justice to civilized society, would in no way reflect the heretofore clearly stated intention of the General Assembly to *enhance* the sentences of gang affiliated crimes, not diminish them.

Against every conceivable challenge, the Rhode Island Supreme Court has upheld the constitutionality of a mandatory consecutive life sentence imposed pursuant to §11-47-3.2. So too, where, as here, there are normal parole factors in place, not a single Justice of the United States Supreme Court has yet issued a clarion call to reconfigure a juvenile offender's parolable life term for having committed murder, and the overwhelming weight of authority since *Miller* and *Montgomery* in other jurisdictions, as inventoried in Part II, *supra*, is consonant with that position.

The United States Supreme Court has said that permitting juvenile offenders who have demonstrated maturity and rehabilitation to be considered for parole ensures that they will not be forced to serve disproportionately long sentences. *Montgomery*, 136 S. Ct. at 736. Rhode Island has been compliant with that principle long before the Supreme Court expressed that sentiment.

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For all of the foregoing reasons, this Court denies Lopez's Rule 35 motion. It is procedurally barred; and, in any event, it ultimately fails on its merits.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Jose Lopez**
CASE NO:	**P1/14-1482AG**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 2, 2018**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
For Plaintiff:	**John M. Moreira, Esq.** **David Bonzagni, Esq.**
For Defendant:	**Jeffrey D. Peckham, Esq.** **Kara J. Maguire, Esq.**