No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2020

LAYW THOMAS, Petitioner

v.

COMMONWEALTH OF KENTUCKY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has refined how sentencing for juveniles must comport with the Eighth Amendment, culminating in its decisions in *Miller v. Alabama,* 567 U.S. 460 (2012) and *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016). Other well-established Fourteenth Amendment requirements exist for a valid guilty plea. Petitioner, Layw Thomas, pled guilty to murder in one indictment, and robbery, assault and wanton endangerment in a second indictment. He was 17 years old when the crimes were committed. In exchange for his guilty pleas, the prosecutor offered 20 years on the murder and a total of 12 years on the robbery case, to run concurrently for 20 years. However, both offers included a form "hammer clause" that raised his sentences to the maximum for all charges, run consecutively, if he failed to appear at sentencing. Thomas was released on his own recognizance with an ankle monitor to live in Tennessee with his mother after the plea in the murder case. He did not appear for sentencing. After he was returned for sentencing, the trial court imposed a life sentence plus 50 years because of the hammer clause. After the Kentucky Court of Appeals vacated that judgment and remanded the case for re-sentencing, the trial court imposed the exact same sentence again.

The question for this Court is:

Did Kentucky violate the Eighth and Fourteenth Amendments when it allowed a youth who was 17 when his crimes occurred to be sentenced to life in prison plus 50 years based on an involuntary plea to a minimum 20 years that contained a maximum sentence "hammer clause" which operated as an unreasonable penalty that was grossly disproportionate for relatively minor, mitigated infractions without a meaningful, demonstrated inquiry as in *Miller* and *Montgomery* into whether this harsh sentence is appropriate for this youth under all the circumstances of his case?

LIST OF ALL PARTIES

Petitioner is Layw Thomas. Counsel for Mr. Thomas is the Hon. Kathleen Kallaher Schmidt, Assistant Public Advocate, Department of Public Advocacy, 5 Mill Creek Park, Ste. 100, Frankfort, Kentucky 40601.

Respondent is the Commonwealth of Kentucky, represented by Hon. Todd D. Ferguson, Assistant Attorney General, and Hon. Daniel Cameron, Attorney General of the Commonwealth of Kentucky, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, Kentucky 40602-2000, (502) 696-5342, Counsel for Respondent.

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CITATIONS TO OPINIONS BELOW

The Petitioner filed a direct appeal of his convictions and sentence in the Kentucky Supreme Court. The final opinion is reported as *Thomas v. Commonwealth*, 605 S.W.3d 545 (Ky. 2020). That opinion is attached at Appendix A1 – A39.

JURISDICTION

The Kentucky Supreme Court decision was entered on August 20, 2020. The decision below affirms the denial of relief to Petitioner related the withdrawal of his guilty pleas and the request to impose the sentences bargained for in those pleas.[1] It is a final judgment of the state's highest court. The Kentucky court did not rely on untimeliness or any other procedural bar. This

[1] The Kentucky Supreme Court vacated the judgment against Petitioner and remanded for a new sentencing hearing because the trial court violated a state law requiring it to consider probation and other forms of alternate sentencing before imposing a prison sentence on the Petitioner because he was a juvenile at the time his offenses occurred.

Court has jurisdiction under 28 U.S.C. § 1257(a). This petition has been filed within one hundred and fifty days of that opinion, as required by Supreme Court Rule 13.1 and Order of this Court of March 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> ...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws....

STATEMENT OF THE CASE

The Christian County Kentucky grand jury charged 17 year old Layw Thomas in Indictment No. 06-CR-110 with the murder of Ronnie Franks on January 17, 2006, as a principal or accomplice. In Indictment 06-CR-142, the grand jury charged Thomas as a principal or accomplice with robbery in the first degree, assault in the first degree, assault in the second degree and wanton endangerment in the first degree stemming from crimes occurring at Luigi's Pizza on January 5, 2006.

He was not alone when these offenses happened. The crimes were unrelated but most of the co-defendants were the same. In the citation underlying 06-CR-110, the police officer alleged Thomas admitted being the driver of the vehicle who went to a place intending to kill "an old white guy." In 06-CR-142, the officer stated in the citation that three other accomplices were with Thomas during the robbery where an employee was shot in the leg. Three of the same defendants were in involved in the murder case and all four were in the robbery case.

Original guilty pleas

Hon. Eric Bearden, a public defender, entered his notice of appearance in both cases on May 16, 2006. On April 13, 2007, Thomas' family hired Hon. William Aldred, a private attorney from Clarksville, TN, for the murder case and he entered a notice of appearance and moved for a continuance in 06-CR-110.

On May 3, 2007[2], on the trial date, the prosecutor offered Thomas the following agreement in writing: robbery in the first degree- 12 years[3]; assault in the first degree- 12 years; assault in the second degree- 5 years; and wanton endangerment- 5 years to run concurrently. See A44. The offer stated this sentence would run concurrent to all other felony sentences. The plea contained a "hammer clause." This statement is typed in the bottom of the plea form: "Failure to appear at sentencing shall result in the Commonwealth moving to modify the sentence to the maximum sentence on all charge(s), run consecutively, or to the maximum aggregate allowed by law." Id. The plea offer did not say what that maximum sentence was. It did not mention 06-CR-110, the murder indictment. Thomas, Mr. Bearden and the prosecutor all signed the plea agreement. The parties did not discuss any pre-sentencing release of Thomas because he was still being held on the other indictment for which an October 2007 trial day had been set. The prosecutor did not include pre-sentencing release as part of the plea in this indictment.

On October 3, 2007, in 06-CR-110, the prosecutor offered Thomas a plea under *Alford v. North Carolina,* 400 U.S. 25 (1970) to murder in exchange for a 20-year sentence, concurrent with the sentence in 06-CR-142. See A43. The prosecutor opposed probation but had no objection to Thomas being released on his own recognizance on a GPS ankle monitor pending sentencing with the condition of being at home only. The same boilerplate "hammer clause" language appears at

[2] Layw Thomas was born on May 2, 1988, so he turned 19 the day before his plea.
[3] The minimum for robbery and assault was 10 years.

the bottom of the plea offer including the language that the sentence run consecutively to all other felony sentences and that the Commonwealth would move for maximum sentencing if the defendant did not appear for sentencing. The offer did not spell out the maximum sentence.

When the parties appeared in court, the prosecutor told the court the offer was 20 years on murder, it would oppose probation, Thomas would agree that all items would be forfeited, and Thomas would cooperate with Probation and Parole on the plea and cooperate fully with the Commonwealth Attorney's office. The prosecutor said she would not object to the release of Thomas on an ankle monitor if he would only be at home with his mother. Thomas' mother was in court. The prosecutor said she checked to see if this was possible with Ms. Thomas living in Clarksville, TN and found out the GPS tracking could handle that. The court chided her for asking if it technically can be done but not who would cover the case. She agreed she had not asked that. The trial court appeared already concerned about the arrangement.

The trial court conducted a plea colloquy. Thomas said understood the plea agreement and had no questions about it. He acknowledged the constitutional rights he was giving up, he did not need more time to talk to his attorney, his plea was voluntary, no one had tried to scare him or threaten or pressure him to plead, and no one told him the court would "take it easy" on him or probate him if he pled guilty. He had all the information he needed, was fully aware of what he was doing and was not impaired by intoxicants or mental illness. He was pleading guilty because he believed the Commonwealth had evidence with which to convict him. He believed the plea was in his best interest and he made the decision on his own after consulting with Mr. Aldred. He was satisfied with his defense attorney and had no complaints about him.

The court found Thomas' plea was entered willingly, freely, intelligently and voluntarily. The court then told Thomas he must cooperate with Parole and Probation and come back to court

for sentencing or he would get the maximum on this charge and the other charges and the sentences would run consecutively "so you have a lot riding on this." However, the court did not tell him the maximum sentences were life plus 50 years.

Thomas said he knew he was not supposed to commit any crimes while out. Then he made the naïve but sincere promise of all adolescents who really want something badly in the moment: "You won't have to worry about that," he offered. It had the quality of every son or daughter who absolutely promised to take care of a new puppy if only mom or dad would buy one and completely meant it when he or she said it without thinking about how hard it would be.

The court asked if all that applied to the other charges as well. The prosecutor said it did. The trial court signed a home incarceration order in 06-CR-110 and Thomas was released that same day on both cases and told to come back December 5, 2007 to be sentenced in both cases.

Several weeks after his release, Thomas ran into difficulties with his living arrangements. On October 26, 2007, Aldred filed a pleading called a Notice of Extenuating Circumstances. He explained that Thomas' mother's landlord in Tennessee threatened to evict her because he did not agree to have Thomas stay there on an ankle monitor. Ms. Thomas contacted the court and was told to contact Thomas' attorney. She did and the parties were making efforts to find another placement for Thomas, preferably still with his mother, and obtain a court order to that effect. On October 27, the landlord terminated Ms. Thomas' lease because Thomas continued to live there. The landlord told her she was on the streets unless Thomas left immediately. Counsel stated they were making efforts to have Thomas turn himself in and explain to the court further. Counsel also noted that Thomas had originally self-reported a problem with the ankle monitor and reported to have it corrected.

Because of his youth and immaturity, Thomas made an impulsive, ill-conceived choice- he cut off his ankle monitor and did not appear for sentencing on the robbery case. The court issued a bench warrant.

Original Sentencing

The trial court called the murder case for sentencing on December 5, 2007. Aldred filed a written Objection to Enhancement of Sentence. He noted that Thomas would be subject to a new criminal charge for removing his ankle monitor and enhancement of the current sentence would be inappropriate.

When Thomas did not appear, the court issued a warrant with a million-dollar bond. The court asked his mother to step forward. The court told her if it found out she had anything to do with Thomas' disappearance she would be "over here across the street." The court let Thomas out of jail out of sympathy for her and said, "This is the thanks I get for it. I'm not going to stand for this. I'm not going to stand for him being out running the streets." The court went on that she could tell Thomas' buddies what the court said and if he wants his mother to be in jail that is his business. Ms. Thomas asked why she would be in jail and the court replied, "Contempt of court." She said she did not do anything wrong. She was sorry about what happened.

The police arrested Thomas on January 17, 2008, in Nashville.

Thomas appeared before the trial court on February 6, 2008, for sentencing in both cases. Aldred called Ms. Thomas to explain the circumstances surrounding Thomas leaving home. She explained when Thomas got his ankle monitor he came to her home and behaved and there were no problems. Then she explained about her landlord saying they had to leave if Thomas stayed there, reiterating what counsel told the court in his written motion.

The defense counsel told the court Thomas had been released without a monitor and came over and turned himself in so one could be attached. Aldred noted the prosecutor has filed no motion to amend the plea. He asked the court to enforce the plea as made and take into account the mitigation presented.

The trial court said this was a relatively minor situation that escalated. He said everyone should know a landlord cannot evict someone that fast. He said they just had to bring Thomas back to resolve the situation instead of taking the situation into their own hands and him cutting off his monitor. The court said the prosecutor made it abundantly clear when Thomas entered his plea on the prosecutor's "extremely generous terms" and he assured them they had nothing to worry about. In mitigation, defense counsel argued the court should consider Thomas' young age, the death of his father discussed in the PSI, and the cooperation he provided to the Commonwealth on other matters. The prosecutor harped on the fact that Thomas knew there were strict conditions to be at home at all times and instead he cut off his monitor, did not let them know where he was or appear for sentencing. The court found Thomas guilty and said in consideration of his failure to appear for sentencing as ordered, instructed and agreed, he was sentenced to life on 06-CR-110 and to 20 years, 20 years, 10 years [sic] and 5 years on 06-CR-142, with all sentences to run consecutively.

The trial court then arraigned Thomas on Case No. 08-CR-12, a new indictment on tampering with a prison monitoring device, escape and bail jumping.

State Post-Conviction

Thomas began litigating his case on his own. On February 22, 2011, he filed RCr 11.42, new trial and CR 60.02 motions. One issue he raised was that the trial court abused its discretion in imposing the hammer clause and trial counsel did not object to that provision. He asked to

proceed *in forma pauperis*, for counsel and for a hearing. On May 18, 2010, he filed a writ of mandamus because the trial court had taken no action on his pleadings.

The trial court denied Thomas' motions on August 22, 2011. Thomas filed a Notice of Appeal, a motion to proceed *in forma pauperis* and for the appointment of counsel. The trial court denied his motion to proceed as a pauper.

Thomas then filed a motion in both cases under CR 60.02 (d) (e) and (f) on January 15, 2015, arguing the trial court had improperly committed to imposing the hammer clause at sentencing. The trial court denied his motion on March 24, 2015, without a hearing. The trial court allowed Thomas to appeal as a pauper but never ruled on his motion for appointment of counsel. Thomas represented himself on appeal to the Kentucky Court of Appeals.

Kentucky Court of Appeals reverses

On April 21, 2017, the Kentucky Court of Appeals reversed and remanded Thomas' case. The Court of Appeals found the following:

> At that time [sentencing], his counsel again made a plea for leniency and Thomas's mother testified about the threatened eviction that caused Thomas to leave the residence. The trial court found no reason to grant leniency and reiterated the terms of the plea agreement that Thomas would be sentenced to the maximum sentence if he failed to appear for sentencing. In accordance with that agreement, the trial court stated Thomas would be sentenced to the maximum sentences on each count. The trial court made no reference to the presentencing report or circumstances of Thomas's crimes but only referenced the plea agreement and Thomas's violation of that agreement. In its docket order the court stated:
>
> '[Defendant] having failed to appear as ordered for previous sentencing hearing in violation of the plea agreement, he is sentenced to the maximum on his sentences. The sentences shall run consecutively to the extent allowed by statute.'

Thomas v. Commonwealth, 2015-CA-000654-MR, 2017 WL 1439685, at 1 (Ky. App. Apr. 21, 2017). See A45- A57.

The Court of Appeals noted that in the single Judgment entered for both cases, the trial court stated in bold, "DEFENDANT HAVING FAILED TO APPEAR AS ORDERED FOR

PREVIOUS SENTENCING HEARING IN VIOLATION OF THE PLEA AGREEMENT, HE IS SENTENCED TO THE MAXIMUM ON HIS SENTENCES. THE SENTENCES SHALL RUN CONSECUTIVELY TO THE EXTENT ALLOWED BY STATUTE." Id.

The Court of Appeals went on to hold:

> Applying the substantive law as set forth in *McClanahan* and *Knox* to this case and after review of the record, including the trial court's affirmative statements that it was sentencing Thomas pursuant to the hammer clause, we conclude that the sentencing court did not exercise the independent judgment as to the proper sentence to be imposed under the applicable statutory law and rules of criminal procedure. Although the sentencing court considered the circumstances of Thomas's violations of the conditions of his release, it did not consider whether the sentences imposed for the underlying crimes were appropriate considering the relevant factors, including the presentencing report. The only factor considered during sentencing was the violation of the plea agreement and the agreed upon punishment for that violation.
>
> The sentencing trial court erroneously sentenced Thomas as punishment for his failure to appear, rather than his underlying crimes. Thomas's crimes, including murder, were heinous and punishable by the sentences imposed. However, because Thomas entered guilty pleas and the full factual record was not developed, this Court is unaware of the circumstances of Thomas's crime. This Court does know that despite the seriousness of Thomas's crimes, the Commonwealth believed a twenty-year concurrent sentence was appropriate under the facts and was agreeable to his release pending sentencing. As in *Knox*, the difference between a twenty-year and a life sentence plus fifty years, particularly considering Thomas's young age, is so 'widely disparate' that it cannot be 'interchangeably just.' Id.

Id. at 5-6.

In holding Thomas was entitled to relief under CR 60.02 (f), the Kentucky Court of Appeals held, "Thomas's case presents circumstances of such an extraordinary nature, that we are compelled to invoke that provision." *Id.* at 6.

Motion to withdraw Guilty Plea or Impose 20 year sentence

On remand, new defense counsel made a motion to withdraw Thomas's guilty pleas based on involuntariness and ineffective assistance of counsel.[4] An evidentiary hearing was set for both

[4] The trial court denied a motion to recuse.

the motion to withdraw the plea in each case and final sentencing after remand by the Court of Appeals. At the hearing, the trial court heard evidence on the motion to withdraw the plea, ruled on that issue then heard evidence on the motion to impose the original sentence bargained for.

Evidentiary Hearing

Motion to withdraw guilty plea

Defense counsel presented evidence on the motion to withdraw Thomas's guilty plea. William Aldred testified he represented juvenile clients but it was probably 5% of his caseload in Kentucky and was 10% or less in Tennessee, consisting mostly of court-appointed cases that his associates handled now. He approaches juvenile clients differently than adults. They are younger, more immature, and less familiar with court system. They are more impulsive, more susceptible to peer pressure, and have an unformed character.

He had whatever information the state had. His independent investigation consisted of driving out to the scene that was a trailer. He talked to a girlfriend and a gentleman there. He did not collect any of Thomas' school records. He did not think Thomas was in school when the crime occurred and he should have been. He did not collect any mental health records.

He took the case intending to try it but as ballistics and other evidence developed, he thought they could lose at trial. He approached the prosecutor and said Thomas could do beneficial things for law enforcement. She seemed receptive to a plea and lower sentence and the proposal to cooperate with law enforcement. Mr. Aldred did not want to say what Thomas did but he cooperated with law enforcement "quite a bit."

At some point, Aldred became aware the prosecutor would offer a plea in the robbery case. He discussed it with Thomas and they decided if they could get a "pretty sweet deal" they would discuss it more. He thought the 20 years came from the prosecutor because he did not think they

could get that good of a deal. The attractive thing about the plea was it would run concurrently with the other indictment which was a completely separate crime.

He said the language in paragraph three in the plea form that if the defendant does not show up is a hammer clause that is standard in all plea agreements in Christian County. When asked how they reached the agreement that Thomas could go home on his own recognizance pending sentencing, Aldred said part of that related to the things he did for the Commonwealth. He did not remember how far in advance of the plea that language was discussed. He thought they had the understanding "way back" but it was not reduced to writing until the morning of the plea. They did discuss it before that day because his mother lived in Tennessee and the monitor would be going out of state.

Aldred saw Thomas at the jail three to five times because he was trying to coordinate his cooperation with law enforcement.

He did not remember how long he talked to Thomas about the hammer clause. He cannot remember verbatim how he explained the hammer clause to Thomas. He would have said "we got a good deal here, 20 years is not bad for murder and if you don't show up it's going to be really bad news, you are going to get life." Those were not his exact words "but you get the gist."

Aldred thought they would have gotten the same deal without him going home prior to sentencing. He has gotten favorable deals without that and there was no reason for the 20-year sentence to be conditioned on him going home. He could have gotten the maximum if he failed a drug test or committed another crime. Aldred was not aware if Thomas had a substance abuse background. When asked what placement plan Aldred put in place to make sure Thomas adhered to the plea, Aldred said not really any.

Aldred said Thomas was a young kid but thought he seemed to understand. Aldred said that while Thomas was working for the prosecutor and law enforcement and the FBI agent, Thomas was negotiating. Thomas told Aldred he thought the prosecutor would be receptive to him going home before sentencing. Aldred could not say he came up with it; it is not very common. Aldred was not present when Thomas met with law enforcement. In fact, he made an effort not to be; he did not want to do too much. They both understood what he was agreeing to. His mother was not part of the discussions about the plea because those all took place at the jail and she could not be there.

Aldred does not believe he read the plea agreement verbatim to Thomas. They went over it together but he paraphrased. He discussed the hammer clause with particularity. He discussed if he did not appear he could go to prison for life.

The trial court asked Aldred about the ongoing negotiations involving Thomas's cooperation with law enforcement. The court commented that this plea had moving parts that even the court was not aware of. Aldred agreed it was a pretty significant step to take. He was reluctant to describe the details of it because of the risk to Thomas. He thought Thomas was aware of the risks of being harmed when he pled. Then he added when it hit the papers that Thomas had fled and the prosecutor called him, his first concern was that the "bad guys had gotten him." Aldred thought he was capable of entering a plea and that he understood before sentencing he was to stay home and mind his own business.

Eric Bearden also testified. He worked with juveniles but it is less than 1% of his practice. Juveniles must be handled differently than adults because they are not as developed and are not as sophisticated; most have not been exposed to the criminal justice system. One has to spend more time explaining things to them.

He represented Thomas on the robbery and assault indictment. He did not meet with Thomas very often but talked to him about three times. He did not remember ever going to see him at the detention center. They had not gotten completely through discovery but when Mr. Aldred got in, Bearden did not participate much in the process.

He did not collect school or mental health records. He should have done that and would maybe have gotten around to it but Aldred had stepped in. He did not participate in the plea negotiations in the case. Aldred had been retained for the homicide and the assault "was just tagging along." He did not think he knew about the agreement until it was done. He did not work on the plea in the robbery case. The deal was made on the murder and he was given concurrent time on the robbery. It contained the hammer clause that if Thomas failed to appear at sentencing the Commonwealth would move to modify to the maximum sentences. That clause is part of every plea offer since he practiced in Christian County. Bearden remembered that he did not negotiate the ankle monitor provision. He would not have explained the hammer clause because Thomas was not being released. He never talked to Thomas about the hammer clause or that he would get the maximum if he did not show up. He had no part in the plea in the murder case.

His practice is to go over terms of the agreement but he did not even remember that the pleas were not worked out at the same time. The 12-year offer would have been low considering the maximum was 50 years, part of which was 85% parole eligibility. He did not really remember a lot about sitting with him. He did not remember Thomas asking anything that made it seem like he did not understand the form. He seemed like an intelligent young man. He was sure he went through the "plusses and minuses" of trial.

Rebecca DiLoreto testified on Thomas's motion to withdraw his plea. She was an experienced juvenile litigator. She was currently the director for the Institute on Compassion in

Justice, and an adjunct professor at UK Law School since 2011. In the past she taught at the other Kentucky law schools and the UK School of Social Work, she was the Litigation and Policy Director of the Children's Law Center from 2008-2015, and worked for DPA from 1985 to 2008 which included starting the Juvenile Post-Dispositional Branch and serving as Post Trial Division Director responsible for the Juvenile Post Disposition Branch. She has always represented juveniles during her career- it was currently 50-60% of her practice.

In the early stages of working with a juvenile, an attorney should meet with the client, find out who his family members are, meet with them, get releases if possible and collect school and mental health records. The attorney should visit the home of the juvenile if possible. Most children had issues in school- learning disabilities, behavioral issues. Nevertheless, it is also important to get a picture of the child's strengths. Finding out who has influence on the child helps direct where to look for records and for friends with positive influence. The more serious the charges, the more important it is to spend time identifying who helps the client make decisions and then try and build a relationship with those people. The role of parents is key in the Juvenile Code and in the child trusting his attorney. Under the Kentucky Juvenile Code all that information can be brought before the trial court.

The issue is, how does an attorney discuss a plea agreement with a juvenile? He can diagram it, write it down, and let the youth see it visually so he can see what he is facing. What the brain science shows is that humans are not finished developing until the age of 25. The youth is not forward thinking but thinks in the moment, planning is challenging, and he is much more influenced by peers. He makes decisions mostly from emotional need. His capacity for making decisions based on rational thought and judgment is not dominant. With serious charges, an

attorney has to spend extra time with a juvenile client and advise the client to make sure his decisions are in his best interests and he will still feel good about them in 10-20 years.

Ms. DiLoreto reviewed Thomas's school records from Tennessee and his mental health records. His school records showed he had disabilities including ADHD. He had a special educational needs plan, he was impulsive, had issues with authority and was expelled twice. He struggled academically at several points. She would have investigated that further. These would also be concerns to inform the trial court and the Commonwealth about the client if the goal is to negotiate the case. His mental health records were the result of probation because of drug use. He failed to see the negative impact marijuana and drugs had on his life. Although the therapists recommended medication to his mother, she did not follow through. The records showed his father was an alcoholic and his mother drank several beers a day. The therapists had trouble getting him to see the consequences of his marijuana use on his life. He also admitted using alcohol. This had an impact of his ability to engage with life and make good decisions. He was involved with sex from a very early age and all he cared about was sex and French fries. That shows what he was focused on developmentally. The Department of Juvenile Justice records from his incarceration after his arrest show he had a hard time getting along with peers and authority.

The attorney has an ethical duty to present a plan to the court for probation or a lesser sentence. Part of that plan is building remedies in place to be able to answer a court's questions about how the child will be accountable. She would have been doing that with Thomas throughout the case.

If she had had a client who had issues with impulsivity, as diagnosed by unbiased medical professionals who said he needed help, and who asked to go home pending sentencing, she would have talked to him about what he really wanted and figured out some other way to meet his needs.

He would not have succeeded on release based on his record. She would not have allowed him to enter a hammer clause plea on her advice. Her experience is if you work at a relationship with the client, you can help him see the choice he is making is not right for him. She would also have wanted to know how Ms. Thomas was going to provide supervision for Thomas while she was working fulltime. His prior gang activity and his past of letting his hormones control his behavior would make her believe he would not follow the terms set. She would never have entered such a plea the same day it was offered.

Layw Thomas testified that when the offenses were committed, he was attending Greenwood Alternative School in Clarksville. Eric Bearden met with him a few times. They had a court date and Bearden brought the plea agreement on the robbery case to the court date and Thomas signed it. Bearden did not discuss the plea agreement with him before that.

He discussed the plea agreement on the murder case with Aldred the day of the plea. He talked about wanting a plea with Aldred twice before. Thomas mentioned going home on home incarceration prior to sentencing but Aldred did not think that was a great possibility. The idea just popped into Thomas's head and he asked if he could go home. He had been incarcerated for 639 days. He saw the plea form and discussed the plea with Aldred for five minutes before he appeared at the podium. Aldred did not go over each term of the plea with him. Aldred never discussed what would happen if he did not appear at sentencing but the judge did. Bearden did not discuss that on the robbery either. He was released the day he signed the plea. No one discussed on the record the maximum sentences he could get for robbery and murder. All he knew was he would be "maxed" out on all the charges if he did not appear. He did not know what the maximum sentence was. When asked if he knew he could get life, he responded he just knew one thing- he was going home. He did not understand the magnitude that he could get life and spend his entire life in prison. All

he wanted at the time and all that was in his head was home, home, home. That was all he cared about.

Had he fully known and appreciated what could result by him going home, he would not have accepted the plea if he had really understood he could get the maximum. He would have thought about it more, taken more time.

On cross-examination, it became obvious that Thomas had been negotiating directly with the prosecutor without Aldred being there. Thomas was willing to assist the Commonwealth in exchange for getting this concurrent term with release to go home for 60 days before sentencing. These discussions were a couple days before the plea was entered.

He knew he was supposed to stay home when he was released and go to final sentencing and he chose not to. A whole bunch of things hit him at once- his mother being evicted and people who were supposed to be his friends in his ear about whether he really wanted to go back and do 20 years. He was young and scared and did not really understand the magnitude of what was going on. He felt everything was his fault. His father died and he felt his mother would be better off without him. He went to Nashville and got shot when a friend tried to rob him. He was hanging around with people he should not have been. He knew the possibility of what could happen but did not think about it. His goal now was to have a second chance to live his life. He was 30 now, he was more mature, he made plans, he mended relationships with his family, and he had a 10-year-old daughter. He understood what he did was wrong; he thought about the murder victim, Ronnie Franks, every day.

Final sentencing evidence

Dr. Lawrence Steinberg testified for final sentencing. Dr. Steinberg is a professor of psychology specializing in adolescent development. The adolescent period is from 10 years of age

to 20 years of age. Early is 10-13, mid is 14-17 and late is 18 to 21. The characteristics of adolescents relevant to legal issues are they are more impulsive, are short-sighted meaning they focus on the present, more sensitive to the rewards of choices rather than the costs of them, more susceptible to peer influence, and less fully hardened so they have a greater capacity to change. During adolescence, the brain develops in specific regions. The first includes the pre-frontal cortex and connections to other brain regions. This provides cognitive controls such as advanced thinking abilities and self-regulation. It improves in a straight line and becomes more mature through the mid-20s. The second is in the limbic system in a deep area of the brain and is used to process emotions, social information like the emotions and expressions of others and the experience of rewards and punishments. That system undergoes a temporary state of heightened arousal shortly after puberty until late adolescence so the child experiences emotions more intensely, is more concerned what others think of him and experiences reward and punishment more intensely. Over the course of adolescence, those two systems become better connected and communicate better to regulate emotions and behavior more effectively. All this development goes on through the teen years into the early 20s.

Hot versus cold cognition refers to the context in which people think about things. Cold cognition would be used when filling out a form alone- not very arousing. Hot cognition is when the person is emotionally aroused, either negatively or positively. Mid-adolescents perform more poorly than adults on hot cognition and are starting to catch up on cold cognition. Late adolescents perform the same on cold cognition but still are worse on hot. This is why a child can do well in school but still do stupid things with his friends. The consensus is the brain finishes maturing around 22-23 years old. Within the scientific community, some think it takes longer but no one thinks it happens sooner. They discovered this when techniques were developed around 2000

which allowed for the study of a living brain. The scientific community is confident maturation occurs between 18 towards the mid-20s.

Dr. Steinberg was the lead scientist on the amicus brief from the American Psychological Association in *Roper v. Simmons*, 543 U.S. 551 (2005). The three characteristics of adolescents discussed by Justice Kennedy came from an article Dr. Steinberg co-authored with another scientist. These characteristics are true from ages 10-20. A 17-year-old brain activates more intensely in hot cognition situations. Impulse control is immature. Middle adolescents are less able to control themselves. Scientists had studied the reactions of this group. Risk-taking behavior peaks in mid-late adolescents. It increases from 12-19 then declines. FBI statistics show the peak age for arrests is 18-19 years old. Studies show the mere presence of friends influences the performance of an adolescent – they are highly susceptible to peer influence in a way adults are not. They are extremely concerned about what their friends think of them, their opinions and their social standing. The social brain is more easily aroused during adolescence that childhood or adulthood. An older peer would more likely influence a 17-year-old. Having a group of mid-to-late adolescents would make the adolescent even more sensitive to potential rewards of their choices. That is why they take more risks in groups. A group setting creates a hot cognition situation. When adolescents are in groups, they overweigh the rewards of a choice and undervalue the costs. Dopamine is released when humans experience rewards or pleasure or expect a reward. There is more dopamine activity in the reward centers of the brain in adolescents than children or adults. Therefore, they are more sensitive to rewards and are on the lookout for things that are rewarding. They are not forward thinking about punishment because they are focused on rewards and less attentive to costs but also because the pre-frontal cortex which controls forward thinking

and planning is still maturing. So potential punishment does not affect the brain like it would an adult.

Rhonda Thomas, Thomas's mother, testified Thomas was heavily involved in sports in school. She has stayed close to Thomas these 11 years. Thomas' daughter is almost 11. She wanted Thomas to be able to come home and do well.

Bernard Westover testified he has known Thomas since he was eight. Westover is a veteran and goes to school full-time. He has stayed in touch with Thomas and knows him very well. They have made plans for Thomas if Thomas gets out. Bernard has a job for Thomas with a construction company. They can coach youth sports and raise their children together. He has seen that Thomas has matured; Thomas is still a good man and deserves a second chance.

Thomas testified again. The neighborhood he grew up in was bad. He thought the guys he knew since he was four were his friends but they had a negative influence on him. His mother and father were the primary people around him. But his mother worked 8-12 hours a day multiple days a week and at different times. His father was home but was drunk on the couch. His father died January 1, 2007.

He played a lot of sports in school. He took every program he could in prison whether it contributed to him getting out or not. This included parenting, anger management, cage my rage, positive sight, and drug programs. He got his GED and has begun college. He helped serve inmates with cancer.

He has frequent contact with his daughter. He had plans for the future living with Bernard and achieving his goal of being a personal trainer. That was a skill he learned in prison. He also wants to help influence other youths not to end up in prison. He wants to be a good father, son and uncle.

Despite this mitigation, the trial court denied the motion to impose the original 20-year sentence originally bargained for and sentenced him to life and 50 years. See A40- A42.

Thomas' Appeal

Thomas raised these issues[5]: (1) The trial court's refusal to allow Thomas to withdraw his guilty plea which was not knowingly, voluntarily or intelligently entered was unreasonable and violated the Sixth, Eighth and Fourteenth Amendment; 2) The court erred by imposing a life plus 50 years hammer clause sentence on a youthful offender whose transgression was cutting off his ankle monitor, leaving home and failing to appear for sentencing, violating the Eighth and Fourteenth Amendments.

Kentucky Supreme Court Opinion

The Kentucky Supreme Court affirmed the trial court's judgment. The Kentucky Supreme Court denied Thomas' claims that his plea was involuntary and the court should have imposed the original sentence in the plea agreement:

> Thomas also raised claims of deficient representation by counsel that are novel in comparison to the claims made in *Bronk*. Thomas claims that his attorneys had a duty to communicate with him in a different way than they would with adult offenders because he was proceeding in the case as a youthful offender, was only nineteen at the time his accepted the plea bargains and had ADHD and a documented history of conflict with authority. Thomas further argues that these same characteristics required his trial counsel not only to ensure that he had adequate guidance while on home incarceration but, more importantly, to refrain from advising Thomas to accept a plea bargain that involved a hammer clause. In support of these arguments, Thomas relies on DiLoreto's testimony and on the Supreme Court's decisions in *Roper v. Simmons*, *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*.
>
> Thomas argues that Diloretto's testimony and the decisions in *Roper* and the cases following it indicate that the law requires youths to be treated differently in some circumstances to comport with the Eighth and Fourteenth Amendments of the United States Constitution. We disagree with Thomas that this is one of those cases. Here, based on the totality of the circumstances surrounding Thomas's guilty pleas, we find that Thomas's case is more akin to *Bronk* and supports the trial court's finding that Thomas's pleas were voluntarily entered. We acknowledge that, at the

[5] Thomas also claimed the trial court erred in failing to recuse.

very least, Bearden's apparently lackadaisical approach may have fallen 'outside the wide range of professionally competent assistance.' We further acknowledge that Thomas alleges additional instances of ineffective assistance of counsel that are different than the claims presented in *Bronk*. But we cannot say, even taken together, that Bearden's and Aldred's performance "so seriously affected the outcome of the plea process that, but for the[se] errors ... there is a reasonable probability" that Thomas would not have pleaded guilty but instead insisted on going to trial.

Thomas was not a juvenile when he entered these guilty pleas. Bearden and Aldred both testified that Thomas seemed like an intelligent man, and that he never did or said anything that indicated that he could not fully understand the terms of the plea agreements. Aldred took the lead in representing Thomas in the plea negotiations for both indictments, which resulted in a potentially lenient disposition for Thomas in both cases. Thomas was competent enough to negotiate, alone, with the Commonwealth in a way that convinced the prosecutor to agree to allow him to return to his mother's home in Clarksville, Tennessee, before final sentencing while still recommending a total sentence of twenty years. And while it is disputed that Thomas was explicitly told that if he did not appear for sentencing the hammer-clause provisions in the plea agreements could cause him to be sentenced to life plus 50 years, Aldred testified that he emphasized the hammer-clause provision to Thomas before he entered the plea and explained that it was crucial that Thomas show up for sentencing. Even if Thomas did not know he could receive a life sentence plus fifty years, he knew that he received a very favorable recommendation from the Commonwealth and he knew that if he did not follow the terms of both the written agreement and those explained to him orally during the guilty-plea hearing, that he could receive a life sentence.

Thomas also argues that even if his guilty plea were voluntarily entered, the trial court still abused its discretion by denying his motion to withdraw the pleas based on: the disparity between the sentence offered in exchange for the pleas and the sentence actually imposed; the ineffective assistance of counsel in failing to investigate his case and advise him of the consequences of violating the plea agreement; and the ultimate imposition of a "grossly unfair sentence," especially considering the "great benefit" Thomas provided through his cooperation with the Commonwealth and law enforcement.57

As stated above, a trial court abuses its discretion when it renders a decision that is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." These arguments are essentially the same as the arguments addressing the voluntariness issue, and we reject them for the same reasons. Accordingly, we find that the trial court did not abuse its discretion by denying Thomas's motion to withdraw his guilty pleas.

Thomas v. Commonwealth, 605 S.W.3d 545, 557–58 (Ky. 2020), citing

Bronk v. Commonwealth, 58 S.W.3d 482 (Ky. 2001) [footnotes omitted]. However, it vacated the judgment because the trial court did not consider probation because it believed Thomas was ineligible which is contrary to Kentucky state law.

REASONS FOR GRANTING

The Kentucky Supreme Court decided an important question of law in a way that conflicts with relevant decisions of this Court. The sentence imposed by the trial court and upheld by the Kentucky Supreme Court, based on a plea agreement with a form hammer clause that was in fact an unenforceable penalty provision, was arbitrary and grossly disproportionate and failed to adequately consider the mitigating attributes of Thomas' youth, the crime, mitigating factors, the harshness of the sentence and whether Thomas is "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery, supra*, 136 S.Ct. at 733.

1. Hammer Clauses in Guilty Pleas

Thomas was 17 years old when the offenses for which he was charged with were committed.[6] He was a day past his nineteenth birthday when he entered his first guilty plea to serious crimes including first degree robbery, assault and wanton endangerment. Several months later he entered an *Alford v. North Carolina* plea to murder. In exchange for his guilty pleas, the prosecutor felt it appropriate to offer Thomas close to minimum or minimum sentences on all offenses in both indictments, all run concurrent for a total of 20 years. While the plea offer did not specifically mention it, the record makes it clear that Thomas also gave the government his substantial assistance in other investigations during the plea negotiations, to the extent his attorney felt Thomas put his life at risk. The plea bargain included the ability of Thomas to be released on

[6] He was tried in adult court because he was found to be a youthful offender under KRS 640.010.

bond with an electronic monitor before sentencing with the intent he would stay with his mother in Tennessee. Both plea offers contained a form "hammer clauses" that all guilty plea offer forms in that jurisdiction contained which said if the defendant did not return for sentencing, he would be subject to the absolute maximum sentence run consecutively. Neither plea calculated what that was. When Thomas did not return for sentencing, he found out the maximum was life in prison plus 50 years.

2. Plea agreements are contracts

"'[P]lea bargains are essentially contracts.'" *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019), citing *Puckett v. United States*, 556 U.S. 129, 137 (2009). However, "plea agreements are constitutional contracts." *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987). The Due Process Clause of the Fourteenth Amendment requires that a procedure must be followed to insure a guilty plea is knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969).

3. Hammer clauses are penalties

A hammer clause is essentially a liquidated damages clause that operates as a penalty. As the Kentucky Supreme Court explained:

> A hammer-clause provision is 'a provision in a plea agreement which, in lieu of bail, allows the defendant, after entry of his guilty plea, to remain out of jail pending final sentencing. Generally, a hammer clause provides that if the defendant complies with all the conditions of his release and appears for the sentencing hearing, the Commonwealth will recommend a certain sentence. But, if he fails to appear as scheduled or violates any of the conditions of his release, a specific and substantially greater sentence will be sought.' *Knox v. Commonwealth*, 361 S.W.3d 891, 893–94 (Ky. 2012).

Thomas, supra at 548. Hammer clauses are highly disfavored by the Kentucky Supreme Court but have not been prohibited outright because of separation of power concerns. See *Knox, supra* at 899. However, "[w]hen presented with a plea agreement with a hammer clause, the trial judge

should accord it no special deference, and shall make no commitment that compromises the court's independence or impairs the proper exercise of judicial discretion." *Id.* at 900.

In contract law, liquidated damages clauses are reviewed to determine if they are in fact an unreasonable penalty for non-performance. In *Priebe & Sons v. United States*, 332 U.S. 407, 413 (1947), this Court struck down a liquidated damages clause, saying it "could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. . . . the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance.... But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust." See also *Kothe v. R.C. Taylor Tr.*, 280 U.S. 224, 226–27 (1930). "A penalty is designed to coerce performance by punishing default." *Vanderbilt University v. DiNardo*, 174 F.3d 751, 755 (6th Cir. 1999).

" ' "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced." ' " CVS *Pharmacy, Inc. v. Press America, Inc.*, 377 F. Supp. 3d 359, 375 (S.D.N.Y. 2019) [cites omitted]. *CVS Pharmacy* illustrates what an unenforceable penalty looks like. Press America contracted with CVS and Caremark to print and mail letters about pharmaceutical benefits. This task carried the risk that some letters containing individuals' health care information would be "misdirected." CVS also entered into a contract with IBM that had a clause that CVS would pay a penalty of $45,000 for each letter misdirected. After Press America misdirected 41 letters, IBM demanded $1.845 million dollars from CVS who paid then tried to collect that amount from Press America under an indemnification provision. The court held the

clause was an unenforceable penalty which was grossly disproportionate to the injury suffered. See also *Patel v. Tuttle Properties, LLC*, 392 S.W.3d 384, 387 (Ky. 2013).

Courts have found it material when the contract contains boilerplate liquidated damages clauses. In *Easton Telecom Services, L.L.C. v. CoreComm Internet Group, Inc.*, 216 F. Supp. 2d 695, 698 (N.D. Ohio 2002), the court found that "the liquidated damages clause of the contract between Easton and CoreComm was a one-sided boiler-plate provision that was not conceived through the bargaining exchange." The parties did not bargain over the language of that clause. Rather, it was "generic language" in Easton's standard contracts.

4. Hammer clauses should not apply to juveniles

As Thomas pointed out to the Kentucky Supreme Court, he has found no published cases in Kentucky challenging hammer clause sentences in which a hammer clause had been imposed on a youthful offender. But Kentucky law does not prevent them.

Thomas found that other states allow imposition of increased penalties when a defendant fails to appear for sentencing, including where appearance at sentencing is a term of a plea agreement. See *State v. Batchelor*, 786 N.W.2d 319 (Minn. 2010); *People v. Masloski*, 25 Cal. 4th 1212, 1219, 25 P.3d 681, 685 (2001); *State v. Garvin*, 699 A.2d 921 (Conn. 1997); *State v. Shaw*, 618 A.2d 294 (N.J. 1993); *People v. Hayes*, 159 Ill. App. 3d 1048, 1053, 513 N.E.2d 68, 72 (1987); *State v. Holman*, 486 So.2d 500, 503–04 (Ala.1986); *People v. Dodson,* 494 N.Y.S.2d 339, 114 A.D.2d 421 (1985); *McGarry v. State*, Fla.Dist.Ct.App, 471 So.2d 615 (1985).

What Thomas cannot find are examples of states who allow youths who were juveniles when their offenses were committed to enter into hammer clause pleas or which allow trial courts to increase the penalty bargained for based on non-appearance at sentencing. Thomas believes the penalty imposed by Kentucky on him as a result of a hammer clause is both grossly

disproportionate and extremely rare, both within and outside Kentucky, and immediately raises the specter of disproportionality under the Eighth and Fourteenth Amendments.

5. Standards for assessing cruel and unusual punishment

In determining whether a punishment violates the Eighth Amendment prohibition against "cruel and unusual punishments," courts have referred to "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons, supra,* 543 U.S. at 561, (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1985). The right not to be subject to excessive punishments, "'flows from the basic "precept of justice that punishment for crime should be graduated and proportioned" 'to both the offender and the offense. Ibid. (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910))." *Miller v. Alabama*, supra, 567 U.S. at 469. Prior to *Moore v. Texas*, 137 S.Ct. 1039 (2017) cases finding an Eighth Amendment violation have relied on both "objective indicia of consensus" that the practice is excessive, ***and*** a finding in the Court's "independent judgment" that the punishment practice at issue does not serve a legitimate penological purpose. *Roper*, 543 U.S. at 564. In *Moore,* the Court found that Texas' method of determining intellectual disability violated the Eighth Amendment, without reference to whether any consensus existed as to its use.

6. *Roper, Graham, Miller* and *Montgomery*

This Court's jurisprudence concerning how and what states can sentence juveniles to has evolved. The Court has consistently concluded that crimes committed by juveniles- even the most heinous of offenses- are categorically different than adult offenses. Due to the inherent mitigating qualities of youth, juvenile offenders are less morally culpable than their adult counterparts and thus are afforded special consideration under the Eighth Amendment. As such, this Court has, over time, expanded the Eighth Amendment's protection of juvenile offenders

from the harshest sanctions available in the criminal justice system. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (establishing minimum age for capital punishment of 16); *Roper v. Simmons, supra*, 543 U.S. at 560 (prohibiting capital punishment entirely for juvenile offenders); *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting a sentence of life without the possibility of parole for juveniles who committed a non-homicide offense).

In *Graham v. Florida*, this Court analyzed a life without parole (LWOP) sentence impose on a juvenile non-homicide offender as on par with a death sentence. Like a death sentence, LWOP deprives an inmate of hope and irrevocably forfeits his life. The court remarked that an LWOP sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at 70 (2010) [cite omitted].

In examining whether such a harsh result was proportionate under the Eighth Amendment for a juvenile offender, the Court considered "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 67. The Court then evaluated four penological justifications for a life without parole sentence, finding all of them inapplicable in the context of a non-homicide offense committed by a juvenile.

The Court found that retribution was not a legitimate justification for a juvenile LWOP sentence because "the case for retribution is not as strong with a minor as with an adult." *Id.* at 71 (quoting *Roper, supra*, 543 U.S. at 571). The Court found that deterrence was also not a sufficient justification because a juvenile's "lack of maturity and underdeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions." *Graham*, supra, at 72 (quotations omitted).

Incapacitation was also rejected, because "to justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible, [and] [t]he characteristics of juveniles make that judgment questionable. *Id.* at 72-73. Finally, the Court found that a juvenile life without parole (JLWOP) sentence cannot be justified on grounds of rehabilitation because "[t]he penalty forswears altogether the rehabilitative ideal." *Id.* at 74. As there was no penological justification for the sentence, the sentence was, by definition, excessive, and therefore unconstitutional.

The *Graham* decision laid the foundation to question whether a life without parole sentence was constitutional for a juvenile homicide offense. This Court answered this question in *Miller v. Alabama*, *supra*, which held that state laws that impose a mandatory sentence of life without the possibility of parole violated the Eighth Amendment. This Court affirmed that the penological justifications for a JLWOP sentence "diminish" in light of the "distinctive attributes of youth... even when they commit terrible crimes." *Id.* at 2465.

The *Miller* decision held that a mandatory JLWOP sentence prevented the sentencer from considering the mitigating characteristics of youth and thus risked a punishment that is disproportionate to the juvenile offender's level of culpability for the offense. The Court held that a life without parole sentence without such considerations "contravenes *Graham 's* (and also *Roper 's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 2466. It required the sentencing factfinder to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

In *Montgomery v. Louisiana*, the Court expanded the holding in *Miller*, stating:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological

> justifications for life without parole collapse in light of "the distinctive attributes of youth." *Id.*, at ——, 132 S.Ct., at 2465. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " Id., at ——, 132 S.Ct., at 2469 (quoting *Roper*, 543 U.S., at 573, 125 S.Ct. 1183). Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " 567 U.S., at ——, 132 S.Ct., at 2469 (quoting *Roper*, supra, at 573, 125 S.Ct. 1183), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (emphasis added).

Under the precedents discussed above, it is clear that given the "distinctive attributes of youth," the Eighth Amendment prohibits an LWOP sentence for a juvenile offender unless the sentencer considers the mitigating attributes of youth ***and*** there are specific findings that the defendant is "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Id.* at 733.

7. The guilty plea and sentencing procedures applied to Thomas violated the Eighth and Fourteenth Amendments

While Thomas' case does not fit squarely within the facts of these precedents because he is eligible for parole after service of 20 years, the rationale underlying them in addition to this Court's basic jurisprudence on cruel and unusual punishment, voluntariness of guilty pleas and unreasonable penalty clauses in contracts illustrates how Kentucky's actions violate the Eighth and Fourteenth Amendments. This Court should grant review to establish a procedure for insuring Kentucky youth are not subject to grossly disproportionate sentences including life in prison arising from the application of a hammer clause.

a. Thomas' youth and immaturity played into an involuntary plea to a hammer clause and a bad decision not to return for sentencing

Thomas presented extensive evidence to show how his age and transient maturity affected both his decision to accept a disastrous hammer clause plea, his decision not to return for sentencing and his growing maturity in the intervening years in prison.

Dr. Steinburg's evidence, relied on by this Court previously, described the state of the science on brain development in older adolescents (i.e., those 18-20 years of age) and how the scientific consensus has emerged during the years after *Roper*. His findings and that of the scientific community support the notion that the brains of even 19 year olds are not fully formed and make them susceptible to impulsive actions focused on the here and now. Thomas wanted to go home. That is all he knew. He did not have the maturity (or the effective assistance of counsel) to understand how to make sure his cooperation with the government was adequately documented in the plea agreement. He was not told by the court or his attorneys what the maximum sentence he could face was. He could not conceive of life in prison. Then when he was released, he could not be patient enough to let the adults in his life figure out how to keep his mother from being evicted. He could not then resist the siren call of his "friends" not to go back to court.

The trial court heard how his attorneys should have investigated his case more and worked more with Thomas before resolving his case. They should not have let him enter a hammer clause plea given his youth and background. Interestingly, Aldred said he thought he could have gotten a plea without that clause tied to being released on bond. Thomas did not even get the benefit of the hammer clause in the robbery plea. He was not released on bail at that time.

These circumstances lead to the conclusion that hammer clauses are not appropriate for juvenile offenders.

b. The sentence imposed on Thomas was grossly disproportionate.

The hammer clause language in Thomas' plea agreements was the result of boilerplate language that contained an unconscionable penalty that was grossly disproportionate to the damage suffered by the Commonwealth and was used to coerce performance by severely punishing default. This was despite the fact Thomas also gave even more consideration than the prosecutor reduced to writing when he risked his life to assist the government in other cases.

The disparity between the minimum sentences willingly offered by the prosecutor in the pleas and the maximum sentences from the hammer clause was enormous. If Thomas had been sentenced to the 20 years he bargained for, he would serve out his sentence in 18.5 years, or approximately 2024. He would have the second half of his life to be a good father and citizen. Under the life plus 50 year sentence, he is not eligible to be considered for parole until approximately 2026, and he could be deferred for at least 20 years (possibly more) or be served out and spend his natural life in prison.

The Commonwealth suffered no damage by Thomas' failure to appear at sentencing. It had already secured his guilty plea to both indictments as charged. It generally knew where he was-middle Tennessee. It had at its disposal other methods to punish his failure to return including other criminal charges which it pursued.

The sentence was also disproportionate because of the circumstances surrounding both the plea and Thomas' failure to appear. Thomas's role in either crime was not well-defined. He may have been the driver in the robbery that others committed. He entered an *Alford v. North Carolina* plea to the murder, thus not admitting he committed the homicide. His counsel did not adequately investigate his case nor did they adequately tailor their advice for a juvenile offender. Thomas' mother was on the verge of imminent eviction. Thomas felt guilty about that. He also gave

something else of great value- his cooperation with the government if other cases- which put his own life at risk.

8. The failure to give meaningful consideration to Thomas' youth and other factors presented violated the Eighth and Fourteenth Amendments.

The core problem with a hammer clause plea is it changes the calculus a court uses when sentencing a defendant. Despite the Kentucky Supreme Court's warnings of according it no special deference, it is impossible for a trial court not to factor into its sentencing decision the fact that the defendant broke his agreement the trial court had accepted. This becomes even more fraught with danger when the defendant is a juvenile when the crime occurred and was still a teenager when the plea was entered. The trial court, having accepted the plea, has an understandably difficult time when sentencing does happen pivoting to acknowledge the youth would have had a very difficult if not impossible time complying with the condition to return when adverse circumstances hit or he was influenced by his peers. The inability to consider all the circumstances a judge must consider in Kentucky instead of automatically sentencing the youth based on the hammer clause is what caused the Kentucky Court of Appeals to vacate the trial court's judgment and remand for resentencing.

Yet the Kentucky Supreme Court did not require the trial court to do more than what would be done where an adult pled guilty and failed to appear for sentencing. It was clear from the trial court's decision that it had failed to truly consider the evidence presented about the mitigating effects of youth upon Thomas' thought processes. In denying Thomas' motion to withdraw his plea, it found he was aware of the consequences and that he was not a child but instead was "savvy." The trial court made no specific findings that it fully considered the evidence Thomas presented.

Even more disturbing was the trial court's insistence in imposing the hammer clause sentence of life plus 50 years again. Despite the extensive evidence presented by Thomas, the trial court entered this order:

> A separate sentencing hearing having been conducted where the defendant testified and presented testimony of other witnesses and having heard the arguments of counsel, and considered all the statutory requirements of sentencing, the court finds that imposition of a sentence consistent with the original plea agreement subject to the "hammer clause" implications is appropriate. The judgement so stating is incorporated here by reference.

See A40- A42.

The trial court made no findings that demonstrate it gave any consideration to the mitigation of Thomas' youth, the circumstances of the offenses, his assistance to the government before his plea, his efforts at rehabilitation in prison, his plan for his future and his daily remorse over the death of Mr. Franks.

The Kentucky Supreme Court merely applied basic law for determining whether the trial court erred in failing to let Thomas withdraw his plea. In Kentucky the voluntariness decision is reviewed for whether it is supported by evidence and the decision on withdrawal is reviewed for abuse of discretion. But the standard and case relied on, *Bronk, supra*, was decided before *Roper* and its progeny. It was decided before the scientific evidence Dr. Steinberg referred to about late adolescent development was discovered. This was the basis of Rebecca DiLoreto's expert opinion that she would not have allowed Thomas to enter into a plea with this hammer clause.

The Kentucky Supreme Court's decision does not squarely address the argument that even if the plea were not withdrawn, the trial court violated Thomas' constitutional rights by imposing such an onerous sentence given the facts and circumstances presented. Instead, it agreed that the trial court violated KRS 533.010 when it fails to consider probation or alternative sentencing because it did not believe Thomas was eligible for such.

This Court should address the issue of whether the hammer clause of this kind is appropriate for a juvenile. Furthermore, can a trial court impose the kind of grossly disproportionate sentence without demonstration it gave meaningful consideration to the mitigation of the defendant's youth, background, circumstances of the crime and his maturity and rehabilitation while in prison to determine whether a maximum life sentence is appropriate after being given a plea for a minimum 20 year sentence? The answer should be it cannot and thus Thomas' rights under the Eighth and Fourteenth Amendments were violated.

CONCLUSION

The petition for writ of certiorari should be granted and the judgment herein reversed.

Respectfully Submitted,

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