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| DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO<br>7325 S. Potomac St.<br>Centennial, Colorado 80112 | DATE FILED: October 11, 2017 4:28 PM<br><br>▲COURT USE ONLY▲ |
| **THE PEOPLE OF THE STATE OF COLORADO**<br><br>**v.**<br><br>**CURTIS BROOKS,**<br>**Defendant** | Case No. **95CR675**<br><br>Division: **201** |

**ORDER REGARDING DEFENDANT'S REQUEST TO BE RESENTENCED TO THIRTY YEARS IN PRISON WITH TEN YEARS OF MANDATORY PAROLE AND PEOPLE'S MOTION TO DECLARE § 18-1.3-401(4)(C)(I)(A), (II) AND (III), C.R.S (2017) UNCONSTITUTIONAL**

## INTRODUCTION

This case tasks the Court with a difficult and heart-rending decision. The defendant, who received a mandatory sentence to life imprisonment without the possibility of parole in 1997 for a crime he committed at the tender age of fifteen, has a compelling and sympathetic story. Further, his request to invoke the Court's discretion to reduce his sentence to a term of thirty years in prison with ten years of mandatory parole finds support in

legislation enacted by the Colorado General Assembly in 2016. The People agree that the authority cited by the defendant requires the Court to resentence him, but argue that the statutory provisions on which he relies in seeking a prison sentence of thirty years with ten years of mandatory parole are unconstitutional because they violate article V, section 25 of the Colorado Constitution, the Special Legislation Clause. Thus, they request that the Court declare the statutory provisions in question unconstitutional, deny the defendant's request for a thirty-year prison sentence with ten years of mandatory parole, and impose a new sentence of life in prison with the possibility of parole after forty years.

For the reasons articulated in this Order, the Court finds that the defendant must be resentenced, but concludes that the statutory provisions authorizing a determinate prison sentence of thirty to fifty years with ten years of mandatory parole are invalid because they constitute prohibited special legislation under the Colorado Constitution. The Court, therefore, grants the People's motion to declare the relevant statutory provisions unconstitutional and denies the defendant's request for a thirty-year prison sentence with ten years of mandatory parole. In light of these rulings, and based on the legislature's intent, the Court determines that the defendant

must be resentenced to a term of life in prison with the possibility of parole after forty years. In the end, no matter how poignant and tragic the defendant's story may be, "this Court and all courts in the United States [must] seek to enforce the rule of law—the bedrock of our democracy." *Baragona v. Kuwait & Gulf Link Transport Co.*, 691 F. Supp. 2d 1351, 1371 (N.D. Ga. 2009).

## II. FACTUAL AND PROCEDURAL BACKGROUND

In 1995, at the precocious age of fifteen, the defendant was homeless and relatively new to the Denver area. Defendant's Sentencing Memorandum at pp. 2, 5-6.[1] During a blizzard on April 10, three troubled juveniles carrying stolen guns ran into the defendant at an arcade and enlisted his participation in the theft of a motor vehicle that was parked outside a credit union across the street. *Id*. The defendant's task during the theft was to fire a gun provided to him by the other juveniles as a diversion to distract the targeted vehicle's owner, Christopher Ramos, as he made his way back to his car from the credit union. *Id*. at pp. 5-6. The defendant did not aim at Ramos, and the

[1] The defendant filed a sentencing memorandum on March 31, 2017. Thereafter, on May 12, the People filed a response in which they challenged the constitutionality of the pertinent legislation. On June 19, the defendant filed a response to the People's constitutional attack. The People then filed a reply on June 30. In this Order, the Court cites to the "Defendant's Sentencing Memorandum," the "People's May 12 Response," and the "Defendant's June 19 Response."

bullet he fired did not harm Ramos. *See id*. at p. 6. However, one of the codefendants then tragically shot and killed Ramos with a different gun. *Id*. at pp. 4-6. The decision to shoot and kill Ramos was that codefendant's decision alone. *Id*. at p. 6.

The defendant was subsequently charged as an adult with several crimes, including felony murder, a class 1 felony. *Id*. at p. 7. In March 1997, following a jury trial, he was convicted of multiple charges, including felony murder. *See id*. Pursuant to the sentencing statutes governing defendants convicted as adults of class 1 felonies for offenses committed as juveniles on or after July 1, 1990, and before July 1, 2006,[2] the Court, the Honorable Thomas Levi presiding, sentenced the defendant to a mandatory term of life in prison without the possibility of parole.

The three codefendants were also punished for Ramos' death, albeit to varying degrees. *Id*. at pp. 9-11. One of them completed his five-year commitment to the Division of Youth Services in less than four years; he was prosecuted as a juvenile because he was too young to be charged as an adult. *Id*. at p. 10. Another one was released from his 48-year prison sentence in

[2] For the sake of brevity, in this Order, when discussing the period of time of "on or after July 1, 1990, and before July 1, 2006," the Court often refers to "between 1990 and 2006."

2011 when the Governor granted his petition for clemency. *See id*. at pp. 10-11. Finally, the codefendant who shot and killed Ramos, the only codefendant with whom the defendant was acquainted before the shooting, received the same sentence imposed on the defendant—a mandatory term of life in prison without the possibility of parole. *See id*. at pp. 5, 11. The defendant, now thirty-seven years old, remains behind bars as he continues serving his sentence.

In 2012, the United States Supreme Court held that imposing a mandatory life sentence without the possibility of parole on a juvenile is cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. *See Miller v. Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The holding in *Miller* rendered unconstitutional Colorado's statutory scheme requiring mandatory sentences of life imprisonment without the possibility of parole for defendants convicted as adults of class 1 felony offenses committed as juveniles between 1990 and 2006.

The Colorado legislature did not react to the decision in *Miller*. As a result, three years later, in 2015, the Colorado Supreme Court was faced with the daunting and unenviable task of predicting the remedy the legislature

would have intended in light of *Miller*. *See People v. Tate*, 352 P.3d 959 (Colo. 2015) ("The question, then, becomes one of remedy" because "[t]he legislature has not acted to adopt a new sentencing scheme in light of *Miller*"), *reh'g denied* (July 13, 2015), *reh'g denied* (Aug. 3, 2015)).[3] The *Tate* Court determined that "the proper remedy in [the two direct appeal] cases, in the absence of legislative action, [was] to remand" each case for a hearing on whether the sentence of life imprisonment without the possibility of parole was "appropriate considering the defendant's youth and attendant characteristics." *Id*. at 963 (internal quotation marks omitted). The Court added that in the event the trial court determined on remand that a sentence of life imprisonment without the possibility of parole was not warranted, "the appropriate sentence, again in the absence of legislative action, [was] life in prison with the possibility of parole after forty years," the sentence required "both before and after the mandatory [life sentence without the possibility of parole] scheme" was enacted—i.e., "before 1990 and after 2006." *Id*. Finally, the Court ruled that *Miller* was procedural in nature and did not apply retroactively. *Id*.

[3] In *Tate*, the Court granted review in two direct appeals, *Tate* and *People v. Banks*, to determine the appropriate remedy for juvenile defendants who received sentences that were subsequently rendered unconstitutional by the decision in *Miller*. 352 P.3d at 962. The Court in *Tate* also granted review in a third case, *People v. Jensen*, to determine whether that remedy applies retroactively. *Id*. at 962, 963.

In 2016, in *Montgomery v. Louisiana*, --- U.S. ---, 136 S. Ct. 718, 732, 193 L. Ed. 2d 599 (2016), the United States Supreme Court held that *Miller* announced a substantive rule of constitutional law that applies retroactively. Based on the holding in *Miller* and the retroactive effect ascribed to it in *Montgomery*, approximately fifty defendants in Colorado (including the defendant) are serving unconstitutional sentences. *See* People's May 12 Response at pp. 13-14; Defendant's June 19 Response at p. 4. Just months after *Montgomery* was decided, and perhaps because of it, the Colorado General Assembly determined it was time to intervene. Of course, by that time, approximately four years had elapsed since the United States Supreme Court's decision in *Miller* and nearly a year had passed since the Colorado Supreme Court had applied *Miller* in *Tate*. Unfortunately, despite undoubtedly having the best of intentions, the legislature made matters worse.

Rather than follow the sensible approach adopted by the majority in *Tate* or even the straightforward remedy suggested by Chief Justice Rice in her partially concurring and partially dissenting opinion,[4] the legislature

[4] Chief Justice Rice argued that, absent legislative action, the best way to comply with the holding in *Miller* was to sever "the problematic language and leave[] the remainder of the relevant statut[ory] [provisions] intact." *Tate*, 352 P.3d at 973. Her severance approach would have made any juvenile convicted as an adult of a class 1 felony

enacted a new sentencing scheme (hereinafter the "2016 sentencing scheme," the "new sentencing scheme," or the "sentencing scheme") for the approximately fifty defendants (hereinafter the "fifty defendants") who are currently serving mandatory life sentences without the possibility of parole following convictions as adults of class 1 felonies for offenses committed as juveniles between 1990 and 2006. *See* § 18-1.3-401(4)(c), C.R.S. (2017). Of course, it was within the legislature's prerogative to take action to remedy the unconstitutional nature of the sentences being served by the fifty defendants. To the extent the new sentencing scheme simply extends to most of the fifty defendants the same penalty that similarly situated defendants have received in the past or will face in the future—life in prison with the possibility of parole after forty years—the People are not challenging its validity. *See generally* People's May 12 Response.

However, the new sentencing scheme also offers an exclusive class within the group of fifty defendants the potential to receive a determinate prison sentence in the range of thirty to fifty years, followed by ten years of mandatory parole. *See* § 18-1.3-401(4)(c)(I)(A), (II), (III). This punishment

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offense committed between 1990 and 2006 subject to the same penalty applicable to any juvenile convicted as an adult of a class 1 felony offense committed before 1990 and after 2006: life imprisonment with the possibility of parole after forty years. *Id*. at 977.

option, which is new in Colorado jurisprudence, is only potentially available to approximately sixteen defendants (hereinafter the "sixteen defendants") whose class 1 felony convictions are for felony murder.[5] *See* People's May 12 Response at p. 15.

The People urge the Court to find that the parts of the 2016 sentencing scheme that create the new option of a determinate prison sentence between thirty and fifty years with ten years of mandatory parole, section 18-1.3-401(4)(c)(I)(A), (II), (III), C.R.S. (2017) (hereinafter the "challenged provisions" or "section 18-1.3-401(4)(c)(I)(A), (II), and (III)"), are unconstitutional because they violate the Special Legislation Clause of the Colorado Constitution. The defendant opposes the motion.

## III. RULING

The Court agrees with the parties that *Miller*, *Montgomery*, and the 2016 sentencing scheme require that the defendant be resentenced. But the question is: to what? The answer hinges on whether the challenged provisions are constitutional under the Special Legislation Clause.

[5] It appears to be undisputed that there are sixteen defendants who received a mandatory sentence of life in prison without the possibility of parole following a conviction as an adult of felony murder for an offense committed as a juvenile between 1990 and 2006. *See* People's May 12 Response at p. 15; *see generally* Defendant's June 19 Response (not disputing this number).

The Court finds that the challenged provisions regulate the practice in courts of justice and grant a special or exclusive privilege to the sixteen defendants. Inasmuch as article V, section 25 expressly prohibits special legislation that regulates the practice in courts of justice or grants a special or exclusive privilege to an individual, the Court must examine whether the class created by the challenged provisions is real or illusory. The Court determines that the sixteen defendants are members of an illusory class because the class is drawn so that it will never have any members other than the sixteen defendants targeted by the challenged provisions. As such, the challenged provisions constitute prohibited special legislation.

In the alternative, the Court concludes that the legislature abused its discretion in enacting the challenged provisions. The legislature could have made a general law applicable, and its decision to opt for special legislation instead was not reasonable.

Since the challenged provisions violate the prohibition against special legislation in article V, section 25 of the Colorado Constitution, the Court grants the People's motion. Accordingly, the Court declares section 18-1.3-401(4)(c)(I)(A), (II), and (III) unconstitutional. To borrow from the old idiom,

the legislature's response to *Miller* and *Montgomery* was "a day late and a dollar short."

The next question, then, becomes one of remedy, since the defendant is currently serving an unconstitutional sentence and the Court has declared the challenged provisions unconstitutional. The Court rules that it must resentence the defendant to life in prison with the possibility of parole after forty years. Therefore, the defendant's request for a determinate prison sentence of thirty years with ten years of mandatory parole is denied.

## IV. ANALYSIS

### A. *Colorado's Evolving Definition of "Life Sentence," Miller, Tate, and Montgomery*

Beginning July 1, 1985, Colorado defined "life sentence" for both adults and juveniles as a life sentence with the possibility of parole after forty years. *Tate*, 352 P.3d at 967 (citing section 18-1-105(4)(a), C.R.S. (1985), which defined "life imprisonment," and section 17-22.5-104(2)(c), C.R.S. (1985), which addressed parole eligibility). Effective July 1, 1990, the legislature modified the 1985 definition of "life sentence" to "life without the possibility of parole." *Id*.[6] Rather than remove the 1985 statutory provisions, however, the legislature simply added language indicating that the new definition applied

[6] This is the definition that was in effect when the defendant was sentenced in this case.

to any crime committed on or after July 1, 1990. *Id*. (citing section 18-1-105(4)(a), C.R.S. (1990) and section 17-22.5-104(2)(d), C.R.S. (1990)). Like the 1985 definition, the new "definition did not differentiate between adults and juveniles." *Id*.

In 2006, the legislature changed the definition of "life sentence" yet again, essentially going back to the 1985 definition: a life sentence with the possibility of parole after forty years. *Id*. However, this definition was limited to juveniles. *Id*. As it had done previously, the legislature kept the earlier statutory provisions, but added language noting "that for juveniles convicted of crimes committed on or after July 1, 2006, a life sentence . . . mean[s] being eligible for parole after forty years." *Id*.; § 18-1.3-401(4)(b)(I), C.R.S. (2006), § 17-22.5-104(2)(d)(IV), C.R.S. (2006).

In 2012, the United States Supreme Court held that a sentence of mandatory life imprisonment without the possibility of parole (hereinafter "LWOP") for a juvenile offender is cruel and unusual punishment in violation of the Eighth Amendment. *Miller*, 567 U.S. 460, 465, 132 S. Ct. 2455. The Court in *Miller* concluded that juveniles are constitutionally different than adults for purposes of sentencing, and that a LWOP sentence may be imposed on a juvenile only after an individualized sentencing hearing that considers

the defendant's youth and age-related characteristics, as well as the nature of his crimes. *See id*. at 471. Drawing a distinction between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption," the Court required sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 479-80 (internal quotation marks omitted). *Miller* made clear that a LWOP sentence is an unconstitutional sentence for all but the rarest of juveniles. *Id*. at 479 ("we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon").

In 2015, in the absence of legislative action, the Colorado Supreme Court was called upon to determine the appropriate sentence for juveniles subject to a mandatory LWOP sentence under Colorado law. *Tate*, 352 P.3d 959. The Court ruled as follows:

> Because *Miller* dictates that a juvenile cannot be sentenced to LWOP unless there is an individualized consideration of the defendant's "youth and attendant characteristics," we conclude that the proper remedy in these [ ] cases, in the absence of legislative action, is to remand for such a determination. A hearing on whether a LWOP sentence is appropriate considering the defendant's "youth and attendant characteristics" is the remedy that preserves as much of the legislature's work as possible given *Miller's* holding.

> If the trial court should determine, after an individualized sentencing process, that LWOP is not warranted, the appropriate sentence, again in the absence of legislative action, is life in prison with the possibility of parole after forty years [ ]. This is the sentence that was in place both before and after the mandatory LWOP scheme at issue in this case—that is, before 1990 and after 2006. We conclude that [life in prison with the possibility of parole after forty years] is the sentence that the legislature would have imposed had it known that LWOP could be imposed under *Miller* only after individualized sentencing, and that such individualized sentencing could lead to cases in which LWOP is unwarranted. We therefore find that this is the remedy that the [sic] "the General Assembly would have intended in light of our constitutional holding." *People v. Montour*, 157 P.3d 489, 502 (Colo.2007).

*Tate*, 352 P.3d at 962–63. The *Tate* Court also found that the new rule announced in *Miller* was procedural, not substantive, and therefore did not apply retroactively. *Id.* at 966.[7]

Approximately six months later, however, the United States Supreme Court held that the *Miller* rule was in fact substantive and therefore had retroactive application. *Montgomery*, 136 S. Ct. at 732. The effect of *Montgomery* was to require that the sentences of all individuals who had

[7] The Court in *Tate* hinted repeatedly at the need for legislative action in light of the decision in *Miller*. *See, e.g.*, *Tate*, 352 P.3d at 962, 963, 965, 967. Unfortunately, the Court's comments evidently fell on deaf ears at the State Capitol. It was not until *Montgomery* was decided that the legislature was spurred into action.

previously received a mandatory sentence of life in prison without the possibility of parole for crimes committed as juveniles be reexamined.[8]

### *B. 2016 Sentencing Scheme*

The Colorado General Assembly finally took action in May 2016, approximately four years after the decision in *Miller* and four months after the decision in *Montgomery*, by enacting two statutes—section 16-13-1001, C.R.S. (2017), and section 16-13-1002, C.R.S. (2017)—and amending others—including, as relevant here, section 18-1.3-401 and section 17-22.5-104, C.R.S. (2017).[9] The Court reviews each pertinent legislative action in turn.

Section 16-13-1001, "Legislative declaration," summarizes the holdings in *Miller* and *Montgomery*, recognizes that juveniles sentenced as adults for class 1 felony offenses committed between 1990 and 2006 received mandatory LWOP sentences, indicates that "[a]pproximately fifty persons in Colorado received such an unconstitutional sentence," and then declares that legislative intervention "is necessary to provide persons serving such unconstitutional sentences the opportunity for resentencing." § 16-13-1001 (1), (2), and (3).

[8] Consistent with *Miller*, the Court in *Montgomery* reasoned that a defendant serving a mandatory LWOP sentence for a crime committed as a juvenile must be afforded an opportunity to show that his crime did not reflect irreparable corruption, and, when he is able to make such a showing, his hope for release from prison must be restored. *Montgomery*, 136 S. Ct. at 736-37.

[9] The Governor signed the bill into law in June 2016.

Section 16-13-1002, in turn, states that a defendant who was convicted as an adult of a class 1 felony and sentenced to LWOP for an offense committed as a juvenile between 1990 and 2006 "may petition the sentencing court for a resentencing hearing." § 16-13-1002(1). When such a petition is filed, the district court must "conduct a resentencing hearing and resentence the offender as described in section 18-1.3-401(4)(c), C.R.S." § 16-13-1002(2). The parole eligibility "provisions of section[] 17-22.5-403(2)(c) . . . C.R.S., take effect upon resentencing." § 16-13-1002(3). A petition for a resentencing hearing under section 16-13-1002 "is not a motion under rule 35(c) of the Colorado rules of criminal procedure." § 16-13-1002(4).

Turning to the 2016 revisions to section 18-1.3-401, the legislature left unchanged the sentencing provisions governing class 1 felony offenses committed by adults and juveniles on or after July 1, 1985 and before July 1, 1990, including the following one: "life imprisonment shall mean imprisonment without the possibility of parole for forty calendar years." § 18-1.3-401(4)(a), C.R.S. (2017). Similarly, the legislature retained the sentencing provisions concerning juveniles convicted as adults of class 1 felonies for offenses committed on or after July 1, 2006, including the following one: "the district court judge shall sentence the person to . . . life imprisonment with the

possibility of parole after serving a period of forty years" (hereinafter "LWPP"); however, regardless of whether the person is released on parole, he "shall remain in the legal custody of the department of corrections for the remainder of [his] life and shall not be discharged." § 18-1.3-401(4)(b)(I), (II).

Thus, the 2016 sentencing scheme did not modify the statutory provisions that direct district courts to impose a LWPP sentence on any defendant convicted as an adult of a class 1 felony offense committed as a juvenile between 1985 and 1990, as well as after 2006. Nor did the sentencing scheme amend the statutory provision requiring that defendants convicted and sentenced as adults of class 1 felony offenses committed as juveniles after 2006 never be discharged from the legal custody of the department of corrections.

Nevertheless, the new sentencing scheme added certain provisions to section 18-1.3-401(4) to address those defendants serving mandatory LWOP sentences who were convicted and sentenced as adults for class 1 felony offenses committed as juveniles between 1990 and 2006—i.e., to comply with *Miller and Montgomery*:

> (c)(I) Notwithstanding the [earlier] provisions, . . . as to a [juvenile] who is convicted as an adult of a class 1 felony . . ., which felony was committed on or after July 1, 1990, and before

July 1, 2006, and who received a sentence to life imprisonment without the possibility of parole:

(A) If the felony for which the person was convicted is [felony murder], then the district court, after holding a hearing, may sentence the person to a determinate sentence within the range of thirty to fifty years in prison . . ., if, after considering the factors described in subparagraph (II) of this paragraph (c), the district court finds extraordinary mitigating circumstances. Alternatively, the court may sentence the person to a term of life imprisonment with the possibility of parole after serving forty years, . . . .

(B) If the felony for which the person was convicted is not [felony murder], then the district court shall sentence the person to a term of life imprisonment with the possibility of parole after serving forty years, . . . .

(II) In determining whether extraordinary mitigating circumstances exist, the court shall conduct a sentencing hearing, make factual findings to support its decision, and consider relevant evidence presented by either party regarding the following factors:

(A) The diminished culpability and heightened capacity for change associated with youth;

(B) The offender's developmental maturity and chronological age at the time of the offense and the hallmark features of such age, including but not limited to immaturity, impetuosity, and inability to appreciate risks and consequences;

(C) The offender's capacity for change and potential for rehabilitation, including any evidence of the offender's efforts toward, or amenability to, rehabilitation;

(D) The impact of the offense upon any victim or victim's immediate family; and

> (E) Any other factors that the court deems relevant to its decision, so long as the court identifies such factors on the record.
>
> (III) If a person is sentenced to a determinate range of thirty to fifty years in prison pursuant to this paragraph (c), the court shall impose a mandatory period of ten years parole,
>
> (IV) If a person is sentenced to a term of life imprisonment with the possibility of parole after serving forty years . . ., regardless of whether the state board of parole releases the person on parole, the person shall remain in the legal custody of the department of corrections for the remainder of his or her life and shall not be discharged.[10]

The 2016 sentencing scheme also modified section 17-22.5-104, C.R.S. (2017), which deals with parole regulations, to make it consistent with the additions in section 18-1.3-401(4)(c). For example, section 17-22.5-104(2)(c)(I) now states that no defendant serving a life sentence for a crime committed on or after 1985 may be paroled before he has served at least forty calendar years "[e]xcept as described in section 18-1.3-401(4)(c), C.R.S., and in subparagraphs (IV) and (V) of paragraph (d) of this subsection (2)." Section 17-22.5-104(2)(d)(IV) governs defendants sentenced as adults to life imprisonment for class 1 felony offenses committed as juveniles before 1990 or after 2006. *See* §

[10] As indicated earlier, the People only challenge the constitutionality of section 18-1.3-401(4)(c)(I)(A), (II), and (III). These are the provisions referred to in this Order as the "challenged provisions." There is no challenge to section 18-1.3-401(4)(c)(I)(B) or section 18-1.3-401(4)(c)(IV).

17-22.5-104(2)(d)(IV) (such defendants "may be eligible for parole" after they have "served at least forty years less any earned time granted"). Section 17-22.5-104(2)(d)(V) applies to defendants sentenced as adults to life imprisonment for class 1 felony offenses committed as juveniles between 1990 and 2006:

> Notwithstanding the provisions of subparagraph (I) of this paragraph (d) [stating that no inmate serving "a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole]," an inmate sentenced to life imprisonment for a class 1 felony committed on or after July 1, 1990, and before July 1, 2006, who was convicted as an adult [for an offense committed as a juvenile], may be eligible for parole after serving forty years, less any earned time granted pursuant to section 17-22.5-405.[11]

It is undisputed that the fifty defendants "received [ ] an unconstitutional [mandatory] sentence" of LWOP for class 1 felony offenses committed as juveniles between 1990 and 2006. *See* § 16-13-1001(2)(b). Further, it is uncontested that, upon filing a petition pursuant to section 16-3-1002, each of the fifty defendants is entitled to a resentencing hearing during which his sentence to LWOP will be vacated and a new sentence will be

[11] The 2016 sentencing scheme includes revisions to the following sections as well: section 17-22.5-403 ("Parole eligibility—repeal"), section 17-22.5-405 ("Earned time—earned release time—achievement earned time"), section 24-4.1-302 ("Definitions" related to the Victim's Rights Act), section 24-4.1-302.5 ("Rights afforded to victims"), and section 24-4.1-303 ("Procedures for ensuring rights of victims of crimes"). These amendments are not discussed in this Order because they are irrelevant to the Court's analysis.

imposed. But this is where equal treatment of all fifty members of the class of the fifty defendants ends.

The new sentencing scheme divides the fifty defendants into two groups: (1) defendants who stand convicted of felony murder (or the sixteen defendants); and (2) all other defendants (hereinafter the "thirty-four defendants"). The thirty-four defendants must be resentenced to LWPP and may never be discharged from the custody of the department of corrections, even if they are released on parole. Thus, once the thirty-four defendants have been resentenced, they will be serving a sentence identical to the sentence imposed on defendants convicted as adults of class 1 felonies for offenses committed as juveniles after 2006.[12]

As for the sixteen defendants, the 2016 sentencing scheme provides two possible sentences: (1) LWPP without eligibility for discharge from the custody of the department of corrections, even if released on parole; or (2) a determinate prison sentence of thirty to fifty years with ten years of

[12] The new sentence for the thirty-four defendants will also be similar, albeit not identical, to the sentence imposed on defendants convicted as adults of class 1 felony offenses committed as juveniles between 1985 and 1990. The difference is that there does not appear to be a provision in section 18-1.3-401 that prohibits the discharge from the custody of the department of corrections of any defendant convicted as an adult and paroled while serving a LWPP sentence for a class 1 felony offense committed as a juvenile between 1985 and 1990.

mandatory parole. The sixteen defendants have an opportunity at a resentencing hearing to present extraordinary mitigating circumstances warranting the latter sentence. Because a determinate prison sentence of thirty to fifty years with ten years of mandatory parole is in the district court's discretion, such a sentence is not required even if there is a finding of extraordinary mitigating circumstances; the district court always has the discretion to impose a LWPP sentence, but if a LWPP sentence is imposed, the defendant is not eligible to be discharged from the custody of the department of corrections. In determining whether extraordinary mitigating circumstances exist, the district court is required to "make factual findings to support its decision[] and consider relevant evidence presented by either party regarding [specific] factors" selected by the legislature and "[a]ny other factors" that the court identifies on the record as "relevant to its decision." *See* § 18-1.3-401(4)(c)(II). If the district court ultimately finds there are no extraordinary mitigating circumstances, it is required to impose a LWPP sentence, in which case the defendant may not be discharged from the custody of the department of corrections.

### *C. People's Constitutional Challenge*

The People argue that the challenged provisions violate the Special Legislation Clause of the Colorado Constitution. The Court agrees. Therefore, it grants the People's motion to declare the challenged provisions unconstitutional and denies the defendant's request for a determinate prison sentence of thirty years with ten years of mandatory parole. In furtherance of the legislature's intent, the Court concludes that the defendant must be resentenced to LWPP.

**1. Law**

**a) Standard of Review**

It is not the role of the judiciary "to act as overseer of all legislative action and declare statutes unconstitutional merely because [it] believe[s] they could be better drafted or more fairly applied." *People v. Dist. Court*, 521 P.2d 1254, 1255 (Colo. 1974). A court is not to "seek out reasons to invalidate a statute." *People v. Jefferson*, 748 P.2d 1223, 1231 (Colo. 1988). On the contrary, when a statute "is susceptible to different interpretations," including one which is constitutional, a court must "interpret it so as to preserve its validity." *Id.*; *see also Dist. Court*, 521 P.2d at 1255 (if a statute "is capable of two interpretations," a court is required to "interpret it so as to satisfy constitutional dictates").

Whether a statute is constitutional is a question of law. *See City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). "To declare an act of the legislature unconstitutional is always a delicate duty, and one which courts do not feel authorized to perform, unless the conflict between the law and the constitution is clear and unmistakable." *Id.* (quoting *People v. Goddard*, 7 P. 301, 304 (Colo. 1885)).

Courts must presume that the state legislature comports with constitutional standards when enacting a statute. *See People v. Harper*, 111 P.3d 482, 484 (Colo. App. 2004) ("[s]tatutes are presumed constitutional"); *City of Greenwood Vill.*, 3 P.3d at 440 ("[t]he presumption of constitutionality we accord statutes . . . reflects the foundational premise that [the legislative and executive] branches observe and effectuate constitutional provisions in exercising their power"). Thus, statutes are presumed to be constitutional. *People v. DeWitt*, 275 P.3d 728, 731 (Colo. App. 2011).

It is well established that "the party challenging a statute bears the burden of proving its invalidity beyond a reasonable doubt." *Harper*, 111 P.3d at 484; *see also City of Greenwood Vill.*, 3 P.3d at 440 ("parties challenging statutes on constitutional grounds ordinarily must prove the statute's unconstitutionality 'beyond a reasonable doubt'"). Unless the moving party

satisfies this heavy burden, the Court lacks authority to declare a statute unconstitutional. *See City of Greenwood Vill.*, 3 P.3d at 440.

There are two types of constitutional challenges to a statute: facial challenges and "as applied" challenges. Because the People raise only a facial challenge, the Court limits its discussion in this Order accordingly.

A facial challenge to legislation is the most difficult challenge to mount successfully, since the challenge must establish beyond a reasonable doubt that no set of circumstances exists under which the statute would be valid. *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006) ("a statute is facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a permissible manner"). Generally, to show a statute is unconstitutional on its face "the complaining party [must] show that the law is unconstitutional in all its applications." *Dallman v. Ritter,* 225 P.3d 610, 625 (Colo. 2010); *see also People v. Bondurant*, 296 P.3d 200, 206 (Colo. App. 2012) (same); *People v. Boles*, 280 P.3d 55, 59 (Colo. App. 2011) (same). This is in stark contrast to an as-applied challenge, which requires the claimant to establish "that the provision at issue is unconstitutional not on its face, but 'under the circumstances in which [he or she] has acted or proposes to act.'" *Developmental Pathways v. Ritter*, 178 P.3d 524, 533-34 (Colo. 2008) (quoting

*Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006)). Whereas the practical result "of holding a statute unconstitutional as applied is to prevent its future application in a similar context," a successful facial challenge renders a statute "utterly inoperative." *Id*. at 534 (quoting *Sanger*, 148 P.3d at 411).

**b) The Special Legislation Clause**

The Special Legislation Clause of the Colorado Constitution provides:

> ***The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say;*** for granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys and public grounds; locating or changing county seats; regulating county or township affairs; ***regulating the practice in courts of justice;*** regulating the jurisdiction and duties of police magistrates; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions or giving effect to informal or invalid deeds; summoning or impaneling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election, or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; the protection of game or fish; chartering or licensing ferries or toll bridges; remitting fines, penalties or forfeitures; creating, increasing or decreasing fees, percentage or allowances of public officers; changing the law of descent; granting to any corporation, association or individual the right to lay down railroad tracks; ***granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases, where a general law can be made applicable no special law shall be enacted.***

Colo. Const. art. V, § 25 (emphasis added). This Clause "bars laws targeted at specific parties and incapable of more general application." *Vitetta v. Corrigan*, 240 P.3d 322, 328 (Colo. App. 2009), *as modified on denial of reh'g* (Oct. 15, 2009) (citation omitted).

The Special Legislation Clause "tests whether legislation is general and uniform in its operation upon all in like situation." *City of Greenwood Vill.*, 3 P.3d at 440-41 (internal quotation marks omitted). The inquiry under article V, section 25 necessarily "focuses on whether legislation creates valid classifications, and, if so, whether the classifications are reasonable and rationally related to a legitimate public purpose." *Id.* at 441; *see also In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005*, 814 P.2d 875, 885 (Colo. 1991) ("The question posed by article V, section 25, is whether the legislation creates true classes and, if so, whether the classifications are reasonable and rationally related to a legitimate public purpose"). "In this sense, [it] resembles Equal Protection doctrine." *City of Greenwood Vill.*, 3 P.3d at 441.

But the Special Legislation Clause is more than just another equal protection clause; it is "also intended to curb favoritism on the part of the General Assembly, prevent the state government from interfering with local

affairs, and preclude the legislature from passing unnecessary laws to fit limited circumstances." *People v. Canister*, 110 P.3d 380, 382–83 (Colo. 2005) (citations omitted). As such, it "creates a strong preference for the enactment of general legislation." *Id.* at 383. "The primary issue is whether the law is so logically and factually restricted that it could only apply to those specifically targeted." *Vitetta*, 240 P.3d at 328 (internal quotation marks omitted).

In analyzing whether a statute constitutes special legislation, the Court must first determine whether one of the prohibitions enumerated in the Special Legislation Clause is involved. *Canister*, 110 P.3d at 383. "If one of the enumerated prohibitions is implicated, the Court must decide "whether the classification adopted by the legislature is a real or potential class, or whether it is logically and factually limited to a class of one and thus illusory."[13] *In re Interrogatory*, 814 P.2d at 886; *see also id*. at 885 ("When an enumerated prohibition is implicated, the class cannot be limited to one"). "[T]he legislation is not prohibited special legislation if there is a genuine class and if the classifications are reasonable." *Id*. at 886. However, the inquiry stops "[i]f

[13] A "class of one" does not necessarily refer to a class of one member; rather a "class of one" is a class that will never have any members other than the ones targeted by the legislation. *See Canister*, 110 P.3d at 385 ("Because those two people are the only individuals to whom the statute will ever apply, the classification adopted by the legislature is logically and factually limited to a 'class of one'").

the class created by the legislation is illusory;" in such a situation, the statute "is prohibited special legislation."[14] *Canister*, 110 P.3d at 383. A class is not illusory unless it "is drawn so that it will never have any members other than those targeted by the legislation." *Id.* at 384. "[E]ven when the legislature had a specific entity in mind when drafting the legislation, the class created by the legislation is not illusory if it could include other members in the future." *Id.*[15]

In the event that "an enumerated prohibition is not implicated," the Court is "unconcerned with the composition of the class so long as the legislature has not abused its discretion." *Id*. at 383 (internal quotation marks omitted). Consequently, if one of the enumerated prohibitions is not at play, the question is "whether a general law could be made applicable," and that

[14] "[S]pecial laws have generally been understood to include not only those laws relating to particular persons, entities, places, or things by name, but also laws relating to persons, entities, places, or things, even if not particularized by name, numbering fewer than the entire class of those similarly situated." *Canister*, 110 P.3d at 386 (Coats, J., dissenting). Consequently, "[d]etermining whether a law is special, despite not naming a particular individual or entity, has [ ] been acknowledged to turn on the question whether the classification it creates is reasonable, or whether it is instead purely arbitrary, artificial, illusory, or fictitious." *Id*.

[15] "[S]pecial laws have generally been understood to include not only those laws relating to particular persons, entities, places, or things by name, but also laws relating to persons, entities, places, or things, even if not particularized by name, numbering fewer than the entire class of those similarly situated." *Canister*, 110 P.3d at 386 (Coats, J., dissenting). Consequently, "[d]etermining whether a law is special, despite not naming a particular individual or entity, has [ ] been acknowledged to turn on the question whether the classification it creates is reasonable, or whether it is instead purely arbitrary, artificial, illusory, or fictitious." *Id*.

determination "is within the discretion of the [legislature] and will not be disturbed absent an abuse of that discretion." *In re Interrogatory*, 814 P.2d at 885. "That standard requires only that whatever classification is employed by the legislature be 'reasonable.'" *Id*.

**2. Application**

The Court determines that the challenged provisions implicate two enumerated prohibitions within the Special Legislation Clause and create an illusory class made up of the sixteen defendants. In the alternative, the Court rules that, even if an enumerated prohibition is not involved, the legislature abused its discretion because it unreasonably opted to enact the challenged provisions even though a general law could have been made applicable. Therefore, regardless of whether an enumerated prohibition is involved, the Court concludes that the People have established beyond a reasonable doubt that the challenged provisions violate the Special Legislation Clause and are unconstitutional.

In light of the Court's resolution of the People's constitutional challenge, the defendant's request for a determinate prison sentence of thirty years with ten years of mandatory parole fails. Consistent with legislative intent, the defendant must be resentenced to LWPP.

### a) Two Enumerated Prohibitions Are Implicated And The Class Is Illusory

The Court first finds that the challenged provisions constitute a special law "regulating the practice in courts of justice," as well as a special law "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." The Court discusses each of these enumerated prohibitions in article V, section 25 in turn.

#### i. Regulating The Practice In Courts of Justice

The Colorado Supreme Court discussed the prohibition against special legislation regulating the practice in courts of justice in the companion capital cases of *Canister* and *People v. Hagos*, 110 P.3d 1290 (Colo. 2005).[16] Three days into Canister's trial, the United States Supreme Court held in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), that Arizona's capital sentencing hearing format, which, like Colorado's three-judge scheme, did not involve a jury, violated the defendant's right to a jury trial. *See Canister*, 110 P.3d at 381.[17] In response to *Ring*, the Governor of Colorado called on the

[16] The Court discussed the prohibition in much more detail in *Canister*; the Court then resolved the appeal in *Hagos* in summary fashion, noting that it was taking "the same course" it took in *Canister* and "[a]pplying the holding in *Canister*." 110 P.3d at 1291. Therefore, this Order focuses on the *Canister* opinion.

[17] The Colorado General Assembly passed the three-judge capital sentencing hearing statute based on the decision in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). *Canister*, 110 P.3d at 381.

legislature to hold a special session to consider legislation regarding "the implementation of a capital punishment sentencing structure that comports with the recent decisions of the United States Supreme Court." *Id*. (internal quotation marks and citation omitted). During the special session, the General Assembly passed a bill abolishing capital sentencing hearings before a three-judge panel and reinstating capital sentencing hearings before the jury that determined the defendant's guilt. *Id*. The bill was quickly approved by the Governor and became effective on July 12, 2002. *Id*. at 382.

The bill included the following provision (hereinafter "the 2002 special provision"):

> If, as of July 12, 2002, the prosecution has announced it will be seeking the death sentence as the punishment for a conviction of a class 1 felony and a defendant has been convicted at trial of a class 1 felony or has pled guilty to a class 1 felony, but a sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment has not yet been held, a jury shall be impaneled to determine the sentence at the sentencing hearing pursuant to the procedures set forth in this section or, if the defendant pled guilty or waived the right to a jury sentencing, the sentence shall be determined by the trial judge.

*Id*. at 381-82. The legislature's stated purpose in "the statute was to ensure that there was no hiatus in the imposition of the death penalty as a result of *Ring*." *Id*. at 382 (quotation marks and alteration omitted). Canister and

Hagos "were . . . the only two people to whom the [2002 special] provision[] . . . could ever apply." *Id*.

A jury had found Canister guilty of all his charges on July 9, 2002, just a few days before the 2002 special provision was enacted, "while the legislature was meeting in its four-day special session." *Id*. Thus, when the 2002 special provision went into effect, Canister was awaiting sentencing. *Id*.

On appeal, the Court examined the constitutionality of the 2002 special provision under the Special Legislation Clause. *Id*. at 381. At the outset, the Court explained that "[s]everal of the explicit prohibitions" in the Clause "relate to court proceedings."[18] *Id*. at 383. By way of example, the Court noted that "the first enumerated prohibition prevents the legislature from enacting a statute to grant a divorce to specific persons." *Id*. The Court then determined that "[t]wo of the enumerated prohibitions" were "relevant to the case [ ] before [it]: (1) "regulating the practice in the courts of justice;" and (2) "summoning or impaneling petit (i.e., trial) juries." *Id*. As it relates to the first of these enumerated prohibitions, the Court found that the 2002 special

[18] Article V, section 25 prohibits special legislation in a total of "23 separate categories, often overlapping with other similarly motivated provisions, *see, e.g.*, Art. II, Section 11 (forbidding special privileges, franchises or immunities);" and, as mentioned earlier, "it prohibits special laws in any case in which a general law can be made applicable." *Canister*, 110 P.3d at 386 (Coats, J., dissenting).

provision "regulate[d] the practice in the courts of justice by directing that two specific capital cases be handled in a specific manner." *Id*.

Here, the challenged provisions regulate the practice in courts of justice by directing that the sixteen defendants be resentenced in a specific manner. Not only do the challenged provisions dictate the two resentencing options for the sixteen defendants—a determinate prison sentence of thirty to fifty years and a LWPP sentence—they state that the Court may only impose the former sentence if it holds a resentencing hearing, makes findings of fact supporting its decision, considers any evidence presented by either party regarding specific factors listed by the legislature and any other factor the Court identifies as relevant on the record, and determines that extraordinary mitigating circumstances exist.

The defendant seems to make much of the fact that the challenged provisions include substantive legal changes—that is, they prescribe the two new sentencing options the Court may use with respect to the sixteen defendants. *See* Defendant's June 19 Response at p. 8 ("The constitutional provision does not purport to limit the legislature's ability to make substantive legal changes but rather it limits the legislature's ability to change the procedural rules applicable in a court for one class of individuals only").

However, the Court is aware of no authority which, in the context of the Special Legislation Clause, either equates "the practice in courts of justice" with "procedural rules" or excludes all "substantive legal changes" from the scope of "the practice in courts of justice." *Canister* does not support such a narrow interpretation. There, in determining whether the 2002 special provision violated the Special Legislation Clause, the Court did not analyze whether it was wholly (or even primarily) substantive or procedural in nature. Instead, the Court found that the 2002 special provision involved the regulation of the practice in courts because it "direct[ed] that two specific capital cases be handled in a specific manner." *Canister*, 110 P.3d at 383. Similarly, the challenged provisions direct district courts to handle the resentencing of specific defendants (the sixteen defendants) in a specific manner.

In rejecting the defendant's narrow interpretation of "regulating the practice in courts of justice," the Court is mindful of the purposes behind the Special Legislation Clause. As mentioned earlier, the Clause: tests whether legislation is general and uniform in its operation upon all in similar situations; looks with disfavor on any law that is so logically and factually restricted that it could only apply to those specifically targeted; focuses on

whether legislation creates valid classifications and whether such classifications are reasonable and rationally related to a legitimate public purpose; creates a strong preference for the enactment of general legislation; and was intended to curb favoritism on the part of the General Assembly, prevent the state government from interfering with local affairs, and preclude the legislature from passing unnecessary laws to fit limited circumstances. Given these purposes, the Court cannot in good conscience construe the regulation of "the practice in courts of justice" to be limited to the regulation of strictly procedural rules. Because the challenged provisions direct district courts to handle the resentencing of the sixteen defendants in a specific manner, the Court finds that they regulate the practice in courts of justice.

**ii. Granting Any Special Or Exclusive Privilege**

The Court further rules that the challenged provisions grant the sixteen defendants a special or exclusive privilege. Only the sixteen defendants are permitted to show extraordinary mitigating circumstances in the hopes of receiving a determinate prison sentence of thirty to fifty years with ten years of mandatory parole. To illustrate the point, the Court presents a hypothetical example. Assume that one of the sixteen defendants convinces the district court during his resentencing hearing that extraordinary mitigating

circumstances warrant a prison sentence of thirty years with ten years of mandatory parole. Such a defendant will receive a special and exclusive privilege that is only potentially available to sixteen individuals—the sixteen defendants. Not only would such a sentence be at least one fourth shorter than a LWPP sentence, it would have the added benefits of having a determinate term and requiring discharge from the custody of the department of corrections after ten years of parole.[19]

Under the circumstances present, the Court finds that the challenged provisions grant the sixteen defendants a special or exclusive privilege—the potential for a sentence that is more lenient than LWPP. Hence, the enumerated prohibition in article V, section 25 barring special legislation which grants individuals "any special or exclusive privilege" is implicated.

**iii. Illusory Class**

Having found that the challenged provisions implicate two enumerated prohibitions, the Court must determine "whether the classification adopted by the legislature is a real or potential class, or whether it is logically and factually limited to a class of one and thus illusory." *Canister*, 110 P.3d at 383 (quoting *In re Interrogatory*, 814 P.2d at 886). If the class created by the

[19] In light of these added benefits, even a fifty-year determinate prison sentence with ten years of mandatory parole would arguably constitute a special or exclusive privilege over a LWPP sentence.

legislation can include other members in the future, then it is not illusory, even if the legislature had a specific entity in mind when drafting the legislation. *Id*. at 384. However, when an enumerated prohibition is involved and the class created is illusory, the legislation is prohibited special legislation in violation of article V, section 25. *Id*. at 383.

This is not a difficult question for the Court. It is clear that the class to whom the challenged provisions apply is illusory because it can never include other members in the future. *See id*.; *In re Interrogatory*, 814 P.2d at 887. The class of individuals convicted as adults of felony murder for offenses committed as juveniles between 1990 and 2006 "and who received a sentence to life imprisonment without the possibility of parole," § 18-1.3-401(4)(c)(I), is necessarily "drawn so that it will never have any members other than [the sixteen defendants] targeted by the legislation." *See Canister*, 110 P.3d at 384. Only sixteen individuals—the sixteen defendants—can ever meet the criteria set forth in the challenged provisions. Stated differently, the new sentencing option created by the challenged provisions is potentially available exclusively to the class of the sixteen defendants targeted by the legislature.

The defense argues that "as long as there remains [sic] homicides or unsolved or undetermined deaths that were committed between [1990 and

2006], it remains possible that others, who were juveniles at the time of the offense, could be added to that class as there is no statute of limitation." Defendant's June 19 Response at p. 16. The defense is mistaken. It is true that in the future an individual could be convicted as an adult of felony murder for an offense committed when he was a juvenile between 1990 and 2006. However, such a defendant could never be added to the class of the sixteen defendants created by the legislature because the sentencing scheme is specifically limited to individuals who, at the time the sentencing scheme went into effect in 2016, had already "received a sentence to life imprisonment without the possibility of parole." § 18-1.3-401(4)(c)(I). No one in the defense's hypothetical example can ever fit within this criterion in the challenged provisions. It is impossible for anyone who is convicted in the future to have already received a sentence to life imprisonment without the possibility of parole.

The defense's example actually illustrates that in enacting the challenged provisions the legislature unwittingly created a gap in the sentencing laws. The challenged provisions do not apply to a defendant who is convicted in the future as an adult of felony murder for an offense committed as a juvenile between 1990 and 2006. It follows that, in a future

cold case, if a defendant is charged as an adult with committing felony murder as a juvenile between 1990 and 2006, upon conviction, there would be no sentencing statute applicable to him. The challenged provisions would not apply to him because when such provisions went into effect in 2016, he had not received a sentence, and the old statutory provisions requiring a mandatory LWOP sentence would not apply because they were declared unconstitutional as applied to juveniles in *Miller*.

The defense also avers that "even for those individuals convicted of after deliberation murder or extreme indifference murder, if any of them were to be successful in a post-conviction proceeding and thus obtain a new trial, it is remains [sic] possible that upon retrial one of those individuals could be convicted of felony murder rather than after deliberation murder or extreme indifference murder and thus they would be eligible to join the class as well." Defendant's June 19 Response at pp. 16-17. However, the Court's earlier explanation holds true in this hypothetical scenario as well: the defendant in this situation would not be a person who had already "received" a valid "sentence to life imprisonment without the possibility of parole" for felony murder when the challenged provisions went into effect in 2016.

In sum, the Court concludes that the challenged provisions create an illusory class, not a true or genuine class. Because the challenged provisions involve two enumerated prohibitions and create an illusory class, they are unconstitutional.

**b) Even If No Enumerated Prohibition Is Implicated, The People's Motion Must Be Granted**

Even if the challenged provisions do not implicate any of the enumerated prohibitions within the Special Legislation Clause, the Court concludes that they are nevertheless unconstitutional. As the Court explained earlier, when no enumerated prohibition is implicated, the question is "whether a general law could be made applicable." *In re Interrogatory*, 814 P.2d at 885.[20] Because this determination is within the discretion of the legislature, the Constitution requires that it be reasonable. *Id*.

The Court finds that the General Assembly could have made a general law applicable, and that its decision to opt for this special legislation instead was not reasonable. Rather than enact a general law that treats a true class of

[20] The defense incorrectly understands the issue to be whether a general law was already in existence when the special legislation was enacted. Defendant's June 19 Response at pp. 11-14. However, the inquiry is "whether a general law ***could be made*** applicable." *In re Interrogatory*, 814 P.2d at 885 (emphasis added). The enactment of special legislation is prohibited by article V, section 25 in any case in which a general law could be made applicable, not just in any case in which a general law already in the books could be applied.

defendants equally, the General Assembly elected to pass special legislation that carves out a special sentencing option for the sixteen defendants. In general, other than the sixteen defendants, defendants in Colorado sentenced as adults for felony murder for offenses committed as juveniles on or after July 1, 1985 will serve a LWPP sentence. The sixteen defendants, however, have been granted preferential treatment: they are members of an exclusive class—singled out from numerous similarly situated defendants over the last thirty-two years—who have been afforded an opportunity to show at a resentencing hearing that extraordinary mitigating circumstances warrant a determinate prison sentence of thirty to fifty years with ten years of mandatory parole instead of a LWPP sentence without eligibility for discharge from the custody of the department of corrections.

Significantly, a defendant who was convicted as an adult of felony murder for an offense committed as a juvenile has no right to be considered for a determinate prison sentence of thirty to fifty years with ten years of mandatory parole if his offense was committed on June 30, 1990 at 11:55 p.m. instead of July 1, 1990 at 12:05 a.m., or if his offense was committed on July 1, 2006 at 12:05 a.m. instead of June 30, 2006 at 11:55 p.m. The same is true for a defendant who, in the future, is charged with and convicted of felony murder

as an adult for an offense committed as a juvenile, even if the offense was committed between 1990 and 2006. There is no reasonable basis for differentiating between the special class of the sixteen defendants and similarly situated defendants convicted as adults of felony murder for offenses committed as juveniles.

The Court acknowledges that the special legislation was motivated by recent United States Supreme Court precedent rather than legislative whim. To be sure, the decisions in *Miller* and *Montgomery* warranted legislative action and were the impetus for the 2016 sentencing scheme. But it is not the legislature's decision to intervene based on the holdings in *Miller* and *Montgomery* that contravenes the Special Legislation Clause; if it were, the People no doubt would be challenging all of the provisions in the new sentencing scheme. It is the way the legislature went about effectuating the decisions in *Miller* and *Montgomery*—specifically as it relates to the sixteen defendants—that is problematic under article V, section 25.[21]

[21] Of course, it is not unheard of for the legislature to amend sentencing laws, and the Court understands that an amendment sometimes results in sentences that are disparate from sentences imposed for the same crime committed before the effective date of the amendment. It is reasonable, for the sake of finality, to modify sentencing statutes without making the modifications retroactive. By contrast, the challenged provisions carve out a new sentencing option that is only potentially available to an exclusive group of sixteen defendants previously sentenced.

There were multiple avenues the legislature could have taken to respond to *Miller* and *Montgomery* without running afoul of the Special Legislation Clause. The Court presents a couple of examples here. First, the legislature could have subjected all defendants convicted as adults of class 1 felonies for offenses committed as juveniles, including the class of the sixteen defendants, to the same sentence—LWPP. Second, the legislature could have extended to every defendant convicted as an adult of felony murder for an offense committed as a juvenile the sentencing option of a determinate prison sentence between thirty and fifty years with ten years of mandatory parole. What the legislature could not do, however, is what it, in fact, did: arbitrarily single out the sixteen defendants and bestow preferential treatment upon them.

The Court completely understands why the General Assembly may have concluded that a new, more lenient sentencing option should be available to individuals convicted as adults of felony murder for offenses committed as juveniles. And that type of judgment, of course, is within the legislature's authority and is entitled to deference from the judicial branch. But it is not reasonable for the legislature to make that type of judgment and to then arbitrarily limit the new sentencing option to the class of the sixteen

defendants. There is no conceivable explanation for doing so that can pass constitutional muster.

The Court has reviewed some of the legislative history of the 2016 sentencing scheme, including hours of testimony and floor debates. The recordings reflect that a fair amount of time was spent on testimony and discussions related to the plight of specific defendants, including the defendant in this case. At times, the recordings resemble sentencing hearings or parole hearings more than legislative hearings. The legislature appeared intent on targeting certain defendants by crafting a statutory system that would be beneficial to them by affording them an opportunity to be released from prison earlier than other defendants convicted and sentenced as adults for class 1 felony offenses committed as juveniles. This is precisely the kind of conduct the Special Legislation Clause forbids. As persuasive and moving as some of the stories presented during the legislative hearings were, the General Assembly may not enact special legislation that flies in the face of article V, section 25. Nor may the legislature act as a sentencing court or a parole board.

In short, the Court finds that, even if the challenged provisions do not implicate any of the enumerated prohibitions in the Special Legislation

Clause, they are nevertheless unconstitutional. A general law clearly could have been enacted, and the legislature's choice to instead pass special legislation applicable to the sixteen defendants was unreasonable. As such, the legislature's decision to enact the challenged provisions was an abuse of its discretion.

**c) The Defendant Must Be Resentenced To LWPP**

As indicated, the Court agrees with the parties that, pursuant to the decisions in *Miller* and *Montgomery*, the defendant must be resentenced. But the question is: to what? Having found that the challenged provisions are unconstitutional, the Court, like the *Tate* Court, looks for "the sentence that best reflects legislative intent." 352 P.3d at 969. As in *Tate*, the Court acknowledges here "that no direct legislative intent exists to guide the determination." *Id*. In *Tate*, the Court found that where, as here, a defendant is serving a LWOP sentence rendered unconstitutional by *Miller*, a remand hearing is necessary to determine whether the "LWOP sentence is appropriate considering the defendant's youth and attendant characteristics." 352 P.3d at 962-63 (internal quotation marks omitted). If the trial court concludes during the remand hearing that LWOP is not warranted, a LWPP sentence is the appropriate sentence. *Id*. at 963.

However, *Tate* was decided "in the absence of legislative action." *Id.* Specifically, the *Tate* Court did not have the benefit of the 2016 sentencing scheme. And while this Court has concluded that the challenged provisions are unconstitutional, it is clear from the 2016 sentencing scheme that the legislature does not believe that LWOP is an appropriate sentence under any circumstances for a defendant who was convicted and sentenced as an adult for a felony murder offense committed as a juvenile. Indeed, this has been the legislature's position dating back to 2006. Given the evidence of legislative intent, the Court concludes that the legislature would want the defendant resentenced to LWPP.[22]

## V. CONCLUSION

For all the foregoing reasons, the Court concludes that the People have established beyond a reasonable doubt that the challenged provisions in the 2016 sentencing scheme violate article V, section 25. Therefore, the Court declares the challenged provisions, section 18-1.3-401(4)(c)(I)(A), (II), and (III), unconstitutional.[23] The Court further concludes that it must hold a

[22] The People agree that the defendant should be resentenced to LWPP. *See* People's May 12 Response at pp. 18-19.

[23] The defense contends that if the Court finds the challenged provisions unconstitutional, it should rule that the Supremacy Clause of the United States Constitution and the Eighth Amendment to the United States Constitution trump article

resentencing hearing to resentence the defendant to LWPP. The parties shall contact the Court's staff at (303) 649-6193 within seven days from the date of this Order to schedule a resentencing hearing.[24]

Dated this 11th day of October of 2017.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

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V, section 25 of the Colorado Constitution. Defendant's June 19 Response at p. 14. This contention rings hollow because it is premised on the erroneous assumption that any legislative action taken to adhere to the holdings in *Miller* and *Montgomery* "can ever [sic] be implemented" under Article V, § 25. *Id*. The defense presents a false choice between the Supremacy Clause and the Eighth Amendment, on the one hand, and article V, section 25, on the other. There is no conflict between the United States Constitution and the Colorado Constitution. As the Court explained earlier, the legislature's decision to provide a remedy for the fifty defendants in order to effectuate the holdings in *Miller* and *Montgomery* is not problematic under the Special Legislation Clause. It is the way it went about effectuating those holdings that runs afoul of article V, section 25. Tellingly, the remedy provided by the legislature for the thirty-four defendants is not inconsistent with the Special Legislation Clause and is not being challenged as unconstitutional by the People. In the end, although the Court finds the challenged provisions unconstitutional, the LWPP sentence the Court concludes must be imposed on the sixteen defendants does not breach the Supremacy Clause or the Eighth Amendment.

[24] Nothing in this Order should be understood as the Court's view regarding the appropriateness of a determinate prison sentence of thirty to fifty years with ten years of mandatory parole in this case. From its review of the record, the Court is keenly aware of some rather compelling circumstances the defense has presented in support of such a sentence. But the Court does not pass judgment on the propriety of that sentencing option in this case because the legislature violated the Special Legislation Clause in creating it.