IN THE

MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

KENYA ALI HYATT,

Defendant-Appellee.

Supreme Court No. 153081

Court of Appeals No. 325741

Genesee CC: 13-032654-FC

On Appeal from the State of Michigan Court of Appeals
with the Honorable Michael J. Talbot presiding

BRIEF OF AMICUS CURIAE JUVENILE LAW CENTER IN SUPPORT OF DEFENDANT-APPELLEE HYATT

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INTEREST AND IDENTITY OF *AMICUS CURIAE*

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

Juvenile Law Center has worked extensively on the issue of juvenile life without parole, serving as co-counsel for petitioner in the U.S. Supreme Court case *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and filing *amicus* briefs in the U.S. Supreme Court in both *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Juvenile Law Center has participated as *amicus curiae* in numerous juvenile life without parole cases throughout the nation, including in the Michigan Supreme Court in *People v. Carp*, 496 Mich. 440 (2014), *vacated*, 136 S. Ct. 1355 (2016). Additionally, Juvenile Law Center has been a key player in coordinating the effort to obtain and train counsel for the more than 500 juvenile lifers awaiting resentencing in Pennsylvania.

SUMMARY OF THE ARGUMENT

In *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) the U.S. Supreme Court prohibited mandatory life without parole sentences for juveniles and further instructed that even the discretionary imposition of life without parole sentences should be "uncommon." In *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), the Court ruled *Miller* retroactive and explained that *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." These cases establish "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S. Ct. at 2466.

In *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), the Court articulated a categorical rule of reduced juvenile culpability that prohibited imposition of the death penalty on juveniles. *Graham v. Florida*, 560 U.S. 48 (2010), holds that it is unconstitutional for a judge to impose life without parole based on his subjective determination that a juvenile is "irredeemably depraved." 560 U.S. at 76-77. By comparing juvenile life without parole to the death penalty, *Graham* also makes the death penalty standard of review applicable to this case. *Miller*, 132 S. Ct. at 2467.

The Supreme Court's requirement that the sentence distinguish the typical juvenile from the rare permanently incorrigible juvenile requires a heightened standard of appellate review to ensure that these sentences are imposed in the rarest circumstances, if at all. The Conflict Panel therefore did not err in applying a heightened standard of appellate review when reviewing a juvenile life without parole sentence under MCL 769.25.

ARGUMENT

This Court granted review of this matter to guarantee that the discretionary imposition of a life without parole sentence is "uncommon" and reserved for the "rare juvenile offender whose

crime reflects irreparable corruption." This is a legal issue and therefore an appellate court must have a plenary standard and scope of review.

I. *MILLER V. ALABAMA* AND *MONTGOMERY V. LOUISIANA* ESTABLISH A PRESUMPTION AGAINST IMPOSING LIFE WITHOUT PAROLE SENTENCES ON JUVENILES

The United States Supreme Court has consistently recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Si*mmons, 543 U.S. 551 (2005). See also *Montgomery v. Alabama*, 136 S. Ct. 718 (2016). In *Graham*, the Court found that juveniles could not be sentenced to mandatory life sentences without the possibility of parole for nonhomicide offenses. 560 U.S. at 81 (citing *Roper v. Simmons*, 543 U.S. at 572). The Court expanded on this in *Miller v. Alabama*, 132 S. Ct. 2455, banning mandatory life without parole sentences for juvenile homicide offenders. *Miller* found that, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon." 132 S. Ct. at 2469.

A. Miller Establishes A Presumption Against Imposing Life Without Parole Sentences On Juveniles

Miller establishes a presumption against imposing life without parole sentences on juveniles. *Miller*, 132 S. Ct. at 2469. The "juvenile offender whose crime reflects irreparable corruption" will be "rare." *Miller*, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68). See also *Miller*, 132 S. Ct. at 2458 (a juvenile's "actions are less likely to be 'evidence of irretrievabl[e] deprav[ity]' (quoting *Roper*, 543 U.S. at 570)); *id*. at 2465 ("Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgement

that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'" (quoting *Graham*, 560 U.S. at 72-73)).

Three state supreme courts have held that *Miller* dictates this presumption against juvenile life without parole.[1] The Connecticut Supreme Court found:

> [I]n Miller, the court expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant circumstances, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." This language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances.

State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015) (citation omitted), cert. denied, 136 S. Ct. 1361 (2016). Similarly, the Missouri Supreme Court held that the state bears the burden of demonstrating, beyond a reasonable doubt, that life without parole is an appropriate sentence. *See*

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[1] Massachusetts has gone further, banning juvenile life without parole sentences altogether. Relying on United States Supreme Court precedent, the Massachusetts Supreme Judicial Court held that even the discretionary imposition of juvenile life without parole sentences violates the state constitution. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 283-84 (Mass. 2013). The Court held:

> Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an "irretrievably depraved character," can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.

Id. at 283-84 (footnote and citations omitted).

State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013) (en banc) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances."). The Iowa Supreme Court also found that Miller established a presumption against juvenile life without parole:

> [T]he court must start with the Supreme Court's pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon. Thus, the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder unless the other factors require a different sentence.

State v. Seats, 865 N.W.2d 545, 555 (Iowa 2015) (citations omitted). Notably, since its decision in Seats, the Iowa Supreme Court has expanded its decision and held that juvenile life without parole sentences are always unconstitutional pursuant to their state constitution. The Iowa Supreme Court found:

> [T]he enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation. . . . But a district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical experience would not attempt to make such a determination.
>
> No structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure this fundamental problem.

State v. Sweet, 879 N.W.2d 811, 836-37 (Iowa 2016). Miller establishes a presumption against juvenile life without parole sentences. As a result, the appropriate imposition of such sentences will be "rare."

B. Montgomery Clarifies And Expands Miller's Presumption Against Imposing Life Without Parole Sentences On Juveniles

Montgomery explained that the Court's 2012 decision in *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734. The Court held "that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption," *id*., noting that a life without parole sentence "could [only] be a proportionate sentence for the latter kind of juvenile offender." *Id*. *Montgomery* establishes that a life without parole sentence for a youth whose crime demonstrates ''transient immaturity" is unconstitutional. *Id*. Under the Eighth Amendment, juvenile offenders can only receive a life without parole sentence if their crimes reflect "permanent incorrigibility," "irreparable corruption" or "irretrievable depravity." *Id*. at 733, 734.

Since *Montgomery*, at least one state supreme court has recognized that *Montgomery* clarified *Miller*'s standard in juvenile sentencing cases. The Georgia Supreme Court noted that

> [t]he *Montgomery* majority explains . . . that by *uncommon*, *Miller* meant *exceptionally rare*, and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt*.

Veal v. State, 784 S.E.2d 403, 411 (Ga. 2016). The Georgia Supreme Court continued that "[t]he Supreme Court has now made it clear that [life without parole] sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murderers, much like the Supreme Court has long

directed that the death penalty may be imposed only on the worst-of-the-worst adult murderers." *Id*. at 412.

More recently, the United States Supreme Court's remands in several re-sentencing cases demonstrate that the determination must weigh in favor of parole eligibility as "youth is the dispositive consideration for 'all but the rarest of children.'" *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) (quoting *Montgomery*, 136 S. Ct. at 726). When "[t]here is no indication that, when the factfinders . . . considered petitioners' youth, they even asked the question *Miller* required them not only to answer, but to answer correctly: whether petitioners' crimes reflected 'transient immaturity' or 'irreparable corruption,'" remand is required. *Id*.; *Tatum v. Arizona*, 137 S. Ct. 11 (2016) (Sotomayor, J., concurring). As the Court has recognized the vast majority of youth are not the rare and uncommon juvenile whose crime reflects irreparable corruption, the sentencer must start the analysis with the presumption that juveniles' crimes are a reflection of their transient immaturity.

The Supreme Court reasoned in *Graham*, that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573). The American Psychological Association reinforced this in Miller in their amicus brief to the Court: "[T]here is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile—even one convicted of an extremely serious offense—should be sentenced to life in prison, without any opportunity to demonstrate change or reform." Brief for the American Psychological Association et al. as *Amici Curiae* in Support of Petitioners at 25, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), (Nos. 10-9646, 10-9647). Notably, the difficulty

in making this assessment has led at least two state supreme courts to ban juvenile life without parole entirely. *See Diatchenko*, 1 N.E.3d at 283-84; *Sweet*, 879 N.W.2d at 836-37.

C. Life Without Parole Sentences Are Developmentally Inappropriate And Constitutionally Disproportionate When Applied To Juveniles Who Are Amenable To Change

Relying on *Roper*, the Supreme Court in *Graham* cited three essential characteristics that distinguish youth from adults for culpability purposes: "[a]s compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *See also Miller*, 132 S. Ct. at 2464; *Montgomery*, 136 S. Ct. at 733. In reaching these conclusions about a juvenile's reduced culpability, the Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. *Graham*, 560 U.S. at 68. The Supreme Court confirmed in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id*. For example, "[t]he ability to resist impulses and control emotions, the ability to gauge risks and benefits as an adult would, and the ability to envision the future consequences of one's actions—even in the face of environmental or peer pressures—are critical components of social and emotional maturity, necessary in order to make mature, fully considered decisions." Brief for the American Psychological Ass'n, et al. as *Amici Curiae* Supporting Petitioners at 12-13, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) *See, e.g.*, Laurence Steinberg et al., *Peers Increase Adolescent Risk Taking Even When The Probabilities of Negative Outcomes Are Known*, 50 DEVELOPMENTAL PSYCHOL. 1, 2 (2014) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4305434/.

The Supreme Court's holding in *Graham* rested largely on the incongruity of imposing a final and irrevocable penalty that afforded no opportunity for release on an adolescent who had capacity to change and grow. See *Graham*, 560 U.S. at 68. The Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

Id. *Graham* acknowledged that the salient characteristics of youth—the lack of maturity, evolving character, vulnerability and susceptibility to negative influences and external pressure—would make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573). Accordingly, the Court recognized that "juvenile offenders cannot with reliability be classified among the worst offenders," *id*., and that although "[a] juvenile is not absolved of responsibility for his actions, . . .his transgression 'is not as morally reprehensible as that of an adult.'" *Graham*, 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 835 (1988) (plurality opinion)).

II. AN "ABUSE OF DISCRETION" STANDARD IS INSUFFICIENT TO ENSURE THAT SENTENCERS COMPLY WITH *MILLER* AND *MONTGOMERY*

The Michigan Court of Appeals appropriately reasoned that

> "[b]ecause of the unique nature of the punishment of a life-without-parole sentence for juveniles and the mitigating qualities of youth, . . . the imposition of a life-without-parole sentence for juveniles requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is proportionate to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect."

People v. Hyatt, 316 Mich. App. 368, 424 (2016). The court further held that "appellate review of a life-without-parole sentence imposed on a juvenile cannot be a mere rubber-stamping of the penalty handed out by the sentencing court." *Id.*

The Georgia Supreme Court recently recognized that *Miller* and *Montgomery* vastly restrict a sentencing court's discretion to impose juvenile life parole sentences. *See Veal v. State*, 784 S.E.2d. 403, 411 (Ga. 2016) ("The *Montgomery* majority's characterization of *Miller* also undermines this Court's cases indicating that trial courts have significant discretion in deciding whether juvenile murderers should serve life sentences with or without the possibility of parole."). Because juvenile life without parole sentences must be "rare," "uncommon," and reserved only for "irreparably corrupt" young offenders, appellate courts must have the ability to carefully scrutinize a sentencing court's decision to impose juvenile life without parole. The lower court held that in order "[t]o impose the maximum possible penalty, the case must 'present a combination of circumstances placing the offender in . . . the most serious . . . class with respect to the particular crime . . . .' Accordingly, sentencing courts should guard against routinely imposing the most severe penalty authorized by statute." *Hyatt*, 316 Mich. App. at 425 (first quoting *People v. Milbourn*, 435 Mich. 630, 654 (1990), then citing *Milbourn*, 435 Mich. at 645).

Amici contend that the imposition of life without parole sentences for children are contrary to law. Nevertheless, at a minimum, these extreme sentences should be subject to more scrutiny on appellate review than an abuse of discretion standard provides. Absent such scrutiny, the imposition of juvenile life without parole will be arbitrary and capricious; different judges and different counties may balance the same factors differently yet survive a challenge on appeal because of the highly deferential nature of an abuse of discretion standard. Moreover, "the unjust imposition of a maximum sentence has the potential to shake '[t]he public's faith in the just and

fair administration of justice . . . .' *Hyatt*, 316 Mich. App. at 425 (quoting *Milbourn*, 435 Mich. at 645). To prevent disparities in sentencings among judges or across counties, appellate courts must scrutinize—without judicial deference—the sentencer's findings to ensure that the sentencer has properly considered how a youth's characteristics mitigate against imposing a life without parole sentence.[2]

A. An Appellate Court Must Conduct A *De Novo* Review To Determine If the Defendant's Conduct Was A Product Of "Transient Immaturity"

In *Miller*, the United States Supreme Court held that a factfinder must consider the offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." 132 S. Ct. at 2468. *See* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008).

Children lack the ability to foresee and take into account the consequences of their behavior. Juveniles are more likely than adults to take risks in emotionally-charged or exciting situations. *See, e.g.,* Alexandra Cohen et al., *When Is An Adolescent An Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCHOL. SCI. 549, 555-559 (2016); Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 J. EXPERIMENTAL PSYCHOL. 709, 710 (2009). Although adolescents react impulsively to positive cues (i.e. happy facial expressions as opposed to neutral ones), Leah Somerville et al., *Frontostriatal Maturation Predicts Cognitive Control Failure to Appetitive Cues in Adolescents*, 23 J. COGNITIVE NEUROSCI. 2123, 2129 (2011), they also experience reduced self-

[2] Pennsylvania law, for example, provides a different level of scrutiny in death penalty cases. The "sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania." 42 Pa.C.S.A. § 9711(h)(1). The statute also sets out specific provisions for the review of capital sentences.

control "in the presence of threat." Michael Dreyfuss et al., *Teens Impulsively React Rather Than Retreat From Threat*, DEVELOPMENTAL. NEUROSCI. 1, 7 (2014). Instead of "retreating or withholding a response to threat cues, adolescents are more likely than adults to impulsively react to them, even when instructed not to respond." *Id.*

Studies have shown that adolescents also have a different risk-reward analysis than adults because they cannot maturely evaluate the costs and benefits of their actions. Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003); Susan Millstein & Bonnie Halpern-Felsher, *Perceptions of Risk and Vulnerability*, in ADOLESCENT RISK AND VULNERABILITY 15, 34-35 (Baruch Fischoff et al. eds., 2001). Adolescents have less life experience on which to draw, making it less likely that they will fully apprehend the potential negative consequences of their actions. *Miller*, 132 S. Ct. at 2468 (describing the "failure to appreciate risks and consequences" as one of the "hallmark features" of adolescence).

Adolescents also demonstrate deficits in social and emotional maturity. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 47, 55-56 (2009). Although some teens may have reasoning skills that approximate that of adults, sound judgment requires both cognitive and social and emotional skills, and social and emotional skills develop later than cognitive skills. Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 LAW & HUM. BEHAV. 333, 343-344 (2003) (16- to 17- year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on test of basic cognitive abilities).

The Supreme Court recognized that juveniles lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future. *See Roper*, 543 U.S. at 570

(quoting *Thompson*, 487 U.S. at 835 ("The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"); *Graham*, 560 U.S. at 68. Because the ultimate decision to impose juvenile life without parole may depend on discretionary findings of a trial court judge, appellate courts must have the ability to carefully review these findings without judicial deference to ensure that sentencers actually consider how a youth's characteristics "counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct. at 2469.

B. An Appellate Court Must Conduct A De Novo Review To Determine If Defendant's Family And Home Environment Diminished His Culpability

Miller also requires that a sentencer must "tak[e] into account the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." 132 S. Ct. at 2468. One of the characteristics that makes children less culpable than adults is that "children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S. Ct. at 2464 (alteration in original) (quoting *Roper*, 543 U.S. at 569). *See also id*. at 2468 ("All these circumstances go to [the juvenile's] culpability for the offense. . . . *And so too does [the juvenile's] family background*.") (emphasis added); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[W]hen the defendant was 16 years old at the time of the offense *there can be no doubt that evidence of a turbulent family history*, of beatings by a harsh father, and of severe emotional disturbance *is particularly relevant [mitigating evidence]*.") (emphasis added). United States Supreme Court jurisprudence therefore establishes that a troubled childhood is a mitigating factor that diminishes a juvenile's culpability, and the sentencing court's contrary finding must be subject to *de novo* review.

C. An Appellate Court Must Conduct A De Novo Review To Determine If Peer Pressure And Duress Were Mitigating Factors

The third *Miller* factor requires that a sentencing court consider "the circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him." 132 S. Ct. at 2468. Peer pressure to join a gang and pressure from gang members to commit crimes is precisely the sort of pressures to which juveniles are particularly susceptible. As the Court noted in *Roper:*

> [J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. *See* Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").

543 U.S. at 569 (second and third alterations in original). Empirical studies in behavioral psychology and neuroscience continue to confirm that impulsive risk-taking is heightened under peer influence, a salient factor in risky behavior among adolescents, but less so among adults. *See, e.g.*, Steinberg, *Peers Increase Adolescent Risk Taking*, *supra*, at 2; Christopher N. Cascio et al., *Buffering Social Influence: Neural Correlates of Response Inhibition Predict Driving Safety in The Presence of a Peer*, 27 J. COGNITIVE NEUROSCI. 83, 89 (2015); Nancy Rhodes et al., *Risky Driving Among Young Male Drivers: The Effects of Mood And Passengers*, TRANSP. RES. 65, 72-75 (2014); Anouk de Boer et al., *An Experimental Study of Risk Taking Behavior Among Adolescents: A Closer Look at Peer and Sex Influences*, J. EARLY ADOLESCENCE 1, 2 (2016). Furthermore, "the presence of peers increases arousal, and increases sensitivity for social evaluation, a process specifically present in adolescents." Anouk de Boer, *supra*, at 11; *See e.g.*, Leah Somerville, *The Teenage Brain: Sensitivity To Social Evaluation*, 22 CURRENT DIRECTIONS

IN PSYCHOL. SCI. 121, 124 (2013); Leah Somerville et al., *The Medical Prefrontal Cortex and the Emergence of Self-Conscious Emotion In Adolescence*, 24 PSYCHOL. SCI. 1554, 1554 (2013). Indeed, in some situations, desire for peer acceptance may lead adolescents to decide that it is actually riskier for them to *not* go along with their peers. *See also* Scott & Steinberg, *Regulation of Youth Crime*, *supra*, at 23 ("In some high-crime neighborhoods, peer pressure to commit crimes is so powerful that only exceptional youths escape. As [other researchers] have explained, in such settings, resisting this pressure can result in loss of status, ostracism, and even vulnerability to physical assault.").

D. An Appellate Court Must Conduct A De Novo Review To Determine If Defendant Demonstrated Sophisticated Criminal Behavior

Miller finds that courts must consider a youth's incompetencies in dealing with a criminal justice system designed for adults. 132 S. Ct. at 2468. This includes the fact that a juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Id*.

Children are particularly susceptible to police interrogations. *See J.D.B. v. North Carolina*, 564 U.S. 261, 272-73 (2011) ("'[N]o matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject") (alteration in original) (quoting *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962)). The willingness to talk to the police without an attorney is directly tied to age and adolescent development. *See* Steinberg, *Adolescent Development, supra*, at 64 ("Significant age differences were found in responses to police interrogation . . . [Y]ouths . . . were much more likely to recommend waiving constitutional rights during an interrogation than were adults, with 55% of 11- to 13-year-olds, 40% of 14- to 15-year-olds, and 30% of 16- to 17-

year-olds choosing to 'talk and admit' involvement in an alleged offense (rather than 'remaining silent'), but only 15% of the young adults making this choice.").

E. An Appellate Court Must Conduct A De Novo Review To Determine If The Uncertainty Of Amenability To Treatment Weighs Against Leniency

Finally, *Miller* requires that courts consider "the possibility of rehabilitation" before imposing life without parole on a juvenile. 132 S. Ct. at 2468. The Supreme Court has recognized that "[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570 (second alteration in original) (quoting Steinberg & Scott, *Less Guilty*, *supra*, at 1014).. In a study of juvenile offenders, "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*. (2014) Chicago, IL: MacArthur Foundation, p. 3, *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf.

Most juvenile offenders would no longer be a public safety risk once they reached their mid-twenties, let alone later in life. Because most juveniles are likely to outgrow their antisocial and criminal behavior as they mature into adults, review of the juvenile's maturation and rehabilitation should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g.*, *Research on Pathways to Desistance: December 2012 Update*, Models for Change, p. 4, *available at* http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only

approximately 10% report continued high levels of antisocial acts. The study also found that "it is hard to determine who will continue or escalate their antisocial acts and who will desist," as "the original offense . . . has little relation to the path the youth follows over the next seven years.").

Research shows that as youth develop, they become less likely to engage in antisocial activities, an attribute that can be dramatically enhanced with appropriate treatment. "Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Youth are developmentally capable of change and research demonstrates that when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions. These findings are primarily grounded in behavioral research, and also are consistent with developmental neuroscience. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Scott & Steinberg, *Rethinking Juvenile Justice, supra,* at 46-68. *See also* Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence*. (Boston: Houghton Mifflin Harcourt, 2014): 9-11.

Indeed, compelling evidence demonstrates that non-rehabilitative, punitive sanctions have negative effects on juveniles' normal development from childhood to adulthood. Studies have shown that punitive sanctions, and incarceration specifically, may actually promote reoffending rather than help rehabilitate the youth. Justice Policy Institute, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration*, (December 2014) at 21-22 at www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

CONCLUSION

Wherefore, Juvenile Law Center respectfully requests that for the foregoing reasons this Honorable Court affirm that the appellate standard of review for imposition of discretionary life without parole sentences on juveniles should be plenary.

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