**No. 122327**

**IN THE**
**SUPREME COURT OF ILLINOIS**

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| **PEOPLE OF THE STATE OF** of **ILLINOIS,** | ) | Appeal from the Appellate Court of Illinois, First District, No. 1-14-2931 |
| Respondent-Appellant, | ) | |
| v. | ) | There on Appeal from the Circuit Court of Cook County, Illinois No. 09 CR 10493 |
| **DIMITRI BUFFER,** | ) | Honorable Thaddeus L. Wilson, |
| Petitioner-Appellee. | ) | Judge Presiding. |

## PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned certifies that we sent via FedEx the original and thirteen (13) copies of the Brief for *Amicus Curiae* in the above-entitled cause to the Clerk of the above Court; and three (3) copies to the Attorney General of Illinois, the Cook County State's Attorney, and the Office of the State Appellate Defender, by placing the documents in envelopes bearing sufficient postage and depositing them in a U.S. mail box in Chicago, Illinois on November 2, 2018.

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# BRIEF AND ARGUMENT OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLEE


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## IDENTITY AND INTEREST OF AMICI CURIAE

*Amici Curiae*, Children and Family Justice Center, et al., work on behalf of children and youthful offenders involved in the child welfare, juvenile, and criminal justice systems.[1] *Amici* understand that youth are fundamentally different from adults in ways that reduce their culpability and accordingly, require different treatment from the criminal justice system, specifically in sentencing. This state has long recognized – just as this Court has long held – "that age is not just a chronological fact but a multifaceted set of attributes that carry constitutional significance." *People v. Holman*, 2017 IL 120655, ¶44.

The United States Supreme Court has recognized these categorical differences in a series of cases where it has determined that youth lack maturity, are especially vulnerable to outside influences due to their lack of control over their situations, and that juveniles' characters are not fully formed, giving them a greater capacity to show remorse and be rehabilitated. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Thus, having already banned the death penalty and life without parole for non-homicide offenses, the Court concluded that the penological justifications for life without parole collapse in light of the distinctive attributes of youth and banned life sentences for all but the rare

[1] A full list of amici and statements of interest are attached as Appendix A.

juvenile offender whose crime reflects irreparable corruption. *Montgomery*, 136 S. Ct. at 734. Sentencing practices and empirical research have continued to evolve since *Roper* and have continued to demonstrate that lengthy sentences are inappropriate for youth.

A little more than one year ago, this Court recognized the sweeping and substantive nature of the change brought forth by the U.S. Supreme Court in *Miller*. *Holman*, 2017 IL 120655, ¶44 (adopting a broad reading of *Miller*). The *Holman* decision, perhaps, telegraphed the relief that should be accorded Mr. Buffer. *Id.* at ¶45 ("Because *Miller* is retroactive. . . all juveniles, whether they were sentenced after [§5-4.5-105 – requiring youth-specific factors be considered in mitigation and granting judges ability to depart from mandatory firearm enhancements – became effective], or before that, should receive the same treatment at sentencing") (internal citation omitted). In so concluding, the *Holman* Court cited approvingly *People v. Ortiz*, 2016 IL App (1st) 133294, which found *Miller* applies to a 60-year sentence imposed on a juvenile. What this Court declared all youth should be afforded, is the relief granted to Mr. Buffer by the appellate court in this case. *People v. Buffer*, 2017 IL App (1st) 142931, ¶72 (remanding "for resentencing in accordance with section 5-4.5-105 of the Code"). Dimitri Buffer's 50-year sentence offers no meaningful opportunity for release and constitutes a *de facto* life sentence in violation of the Eighth Amendment's categorical protections for youth. *Amici* urge this Court to affirm the appellate court's

decision remanding Mr. Buffer's case for a resentencing hearing in accordance with precepts and principles of *Graham, Miller,* and *Montgomery*.

## I. Any Sentence Imposed on a Youth Under the Age of 18 that Precludes a "Meaningful Opportunity to Obtain Release" is Unconstitutional Because Children are Redeemable.

In *Roper*, *Graham*, *Miller*, and *Montgomery*, the U.S. Supreme Court recast the fundamental principles governing how children interact with, and experience outcomes within, the criminal justice system. Rather than beginning from the premise that children who commit serious offenses are amoral or irredeemable, these cases rest upon the understanding that children are different than adult offenders and are, by their nature, redeemable.

In these landmark decisions, the Court placed categorical limits on the severity of punishments that may be imposed on children under the age of 18 at the time of the offense. In *Roper v. Simmons*, the Court announced a categorical ban on the death penalty for all juveniles. 543 U.S. 551, 567, 574 (2005) (abrogating *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had rejected such a categorical ban). It did so because "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.* at 570. Five years later, in *Graham v. Florida*, the Court placed a categorical ban on juvenile sentences of life without parole for non-homicide offenses. 560 U.S. 48, 74 (2010) (departing from *Harmelin v. Michigan*, 501 U.S. 957 (1991), and its progeny, which had created different standards of review for capital and non-capital cases). The *Graham* Court found no meaningful distinction

between a sentence of death and a sentence of life without the possibility of parole for juveniles, given that both sentences overlooked juveniles' fundamental potential for redemption. *Id.* at 69 (describing life without parole, like the death penalty, as a sentence which "alters the offender's life by a forfeiture that is irrevocable"). In barring life without parole sentences for juveniles convicted of non-homicide offenses, *Graham* held that because children's personalities are still developing and capable of change, the imposition of an irrevocable penalty that afforded no opportunity for release was developmentally incongruous and constitutionally disproportionate. *Miller v. Alabama* expanded and expounded upon this new understanding.

In *Miller*, the Court categorically banned mandatory life without parole sentences for all children under 18—*even* those convicted of serious homicide offenses. The Court's holding, grounded "not only on common sense . . . but on science and social science," concluded that a child's "transient rashness, proclivity for risk, and inability to assess consequences . . . both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68-69 (quoting *Roper*, 543 U.S. at 570)). Perhaps most importantly, this Court emphasized that "none of what [*Graham*] said about children . . . is crime-specific." *Miller*, 567 U.S. at 473. In other words, none of *Graham*'s ardently expressed faith in children's redemptive potential could be swept

aside simply on the basis of the severity of a child's offense. *See People v. Holman*, 2017 IL 120655, ¶40 (noting the Supreme Court's "far-reaching commentary about the diminished culpability of juvenile defendants, which is neither crime- nor sentence-specific").

The Court reinforced its holding in *Miller* in *Montgomery v. Louisiana*, __ U.S.__, 136 S. Ct. 718, 732 (2016) (holding that *Miller* was a substantive change in law and therefore retroactive), underscoring that, even if a court considers age before sentencing an individual to die in prison, that sentence still violates the Eighth Amendment for a youth "whose crime reflects unfortunate yet transient immaturity." *Id.* at 734 (citing *Roper*, 543 U.S. at 573) (internal quotation marks omitted). Any life sentence that fails to consider whether the sentenced individual demonstrates "irreparable corruption," "permanent incorrigibility," or "irretrievable depravity," and does not afford a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" is unconstitutional. *Id.* at 734-35; *see also Graham*, 560 U.S. at 75.

A sentence that forswears the rehabilitative ideal and all but guarantees death in prison is the functional equivalent to life without the possibility of parole, regardless of the label. Courts cannot circumvent the categorical ban on life without parole sentences for juveniles by imposing a term-of-years sentence that, while avoiding the label of "life without parole," otherwise denies individuals, "hope for some years of life outside prison

walls." *Montgomery*, 136 S. Ct. at 737. State supreme courts and federal circuit courts have acknowledged that—when applied to youth—lengthy term-of-years sentences violate the Eighth Amendment where such sentences fail to provide for a meaningful opportunity for release. *See People v. Conteras*, 411 P.3d 445 (Cal. 2018); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013); *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016); *see also*, *People v. Reyes*, 2016 IL 119271 (finding 16-year-old defendant's 89-year sentence unconstitutional under *Miller* where such sentence was a mandatory, "*de facto*," life sentence).

Here, where Mr. Buffer will not be released until he has served 50 years in prison, debating whether he will have a "meaningful opportunity" to obtain release "based on demonstrated maturity and rehabilitation" is an exercise in futility; there is little question that such a lengthy sentence does not, by its nature, permit such an inquiry. Rather, Mr. Buffer will continue to serve his time decades beyond the point at which he has matured and become rehabilitated. In all likelihood he will suffer the physical and psychological effects of spending many years in prison, including the significant possibility that, given these deleterious effects of incarceration, he will die before he can be released. Even if he does survive his incarceration, his sentence all but ensures that he will be unable to pursue the endeavors normally associated with a meaningful and productive life in society—graduating from high school, going to college or vocational school, building and having a career,

raising a family, caring for elderly family members, and contributing to his community. A 50-year sentence is, in every relevant aspect, a life sentence; while arguably more "survivable" than the 89-year sentence that was the subject of this Court's analysis in *Reyes*, such sentence will similarly deprive Mr. Buffer of a meaningful life outside of prison walls. Thus, Mr. Buffer's 50-year sentence is a *de facto* life sentence and is contrary to the dictates of *Miller* and *Montgomery*. This Court should, therefore, find that Mr. Buffer's sentence violates the Eighth Amendment.

### A. Because incarceration is particularly harmful to children, lengthy sentences that fail to provide meaningful opportunity for release based on demonstrated maturity are constitutionally disproportionate.

Although studies indicate that life expectancy is reduced for incarcerated individuals generally (*See, e.g., People v. Contreras*, 411 P.3d 445, 450 (Cal 2018) *citing* Patterson*, The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003* (2013) 103 Am. J. Pub. Health 523, 526 [finding each year of incarceration correlated with a 15.6 percent increase in odds of death for parolees and a two-year decline in life expectancy]; *U.S. Dept. of Justice, Nat. Inst. of Corrections, Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates* (2004) 9–10 [stresses of incarceration intensify the health problems of elderly inmates and accelerate aging processes]; Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health–Care Planning* (2011) 173 Am. J. Epidemiology 479, 484 [currently

and formerly incarcerated individuals in Georgia have "overall heightened mortality ... over 15 years of follow-up relative to the general Georgia population," with significant differences by race, gender, and time incarcerated]), whether or not a child will actually die in prison is not a sufficient or appropriate measure for determining whether a particular sentence passes constitutional muster. In comparison to adults, juveniles experience disparate effects while in prison, both mentally and physically. Human Rights Watch, *Against All Odds* at 45 (2012) available at http://www.fairsentencingforyouth.org/wp/wp-content/uploads/2009/04/Against-All-Odds.pdf. Juveniles are especially vulnerable to abuse by other inmates and staff, and to depression and suicide. *Id.* Juveniles' lack of brain development results in their special vulnerability in adult prison. Studies have shown that "youth held in adult facilities are eight times more likely to commit suicide, five times more likely to report being a victim of rape, twice as likely to report being beaten by staff and 50 percent more likely to be attacked with a weapon." H. Ted Rubin, Campaign for Youth Justice, *Return Them to Juvenile Court*, 12-13 (2007). In a study conducted by Human Rights Watch that interviewed hundreds of incarcerated juveniles, it was found that almost every youth had raised issues of sexual assault and had suffered physical violence in prison. Human Rights Watch at 15.

The psychological effects of prison on youth are especially onerous.

Most youth entering prison have been exposed to violence in their lives and are likely to be grappling with this trauma while in prison, making them susceptible to "chronic health and psychological problems related to trauma and severe victimization, which puts them at higher risk of suicide." Civil Justice Clinic, Quinnipiac University School of Law & Allard K. Lowenstein International Human Rights Clinic, Yale Law School, *Youth Matters: A Second Look for Connecticut's Children Serving Long Prison Sentences* at 19 (2013). Adult staff who are uneducated in child mental health may use disciplinary tactics such as isolation, which has been demonstrated to exacerbate mental health issues in youth. *Id.* Youth placed in solitary confinement are shown to experience paranoia, anxiety, and depression, even if only for a very short period of time, and youth who experience extended terms of isolation are the most at risk of attempting suicide. The U.S. Department of Justice, *Report of the Attorney General's National Task Force on Children Exposed to Violence* at 178 (2012).

Thus, considering life expectancy tables alone, or the fact that youth may ostensibly seem better adapted for prison, having spent their lives there since young ages, does not paint a complete picture of the harm suffered by these young people. Moreover, emerging research has demonstrated that early adolescent "traumatic experiences evoke . . . changes that persist into adulthood and are associated with both deleterious psychological and physical health outcomes." Nicole R. Nugent, *Topical Review: The Emerging*

*Field of Epigenetics: Informing Models of Pediatric Trauma and Physical Health*, J. of Pediatric Psychology, Vol. 41, 55-64 (2016) at 60. This research has demonstrated negative health effects regardless of whether or not the individual demonstrates clinically significant PTSD symptoms. *Id*. Therefore, it is fair to say that a youth incarcerated from childhood and subjected to decades in prison, face psychological and physical health challenges that may last the rest of their lives.

As a result, for purposes for determining what sentence will allow a youth a "meaningful opportunity for release," it makes little sense for any court to simply guess at whether a child will survive a given sentence. Rather, given the rationales of *Graham*, *Miller*, and *Montgomery* and the reality of incarceration and the irreversible harm it causes—especially for a child—a better question is whether the principles and penological goals underpinning those decisions are met by a particular sentence. A sentence that ignores the fact that Mr. Buffer will, in all probability, have long been rehabilitated before his possible date of release, condemns him to physical and mental trauma and abuse for decades beyond the point at which he is likely to reoffend, and that has long-since exacted the degree of retribution and incapacitation demanded for a tragic act resulting in the loss of life is contrary to central holdings of *Miller* and *Montgomery*.

### B. Juveniles are more likely to be rehabilitated before the end of their lengthy sentences, diminishing the underlying justifications for imposing such sentences on youth.

Young people possess an extraordinary ability to reform and mature. In fact, "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." Human Rights Watch, *"When I Die, They'll Send Me Home:" Youth Sentenced to Life without Parole in California*, Volume 20, No.1 at 46 (2008). The U.S. 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 Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). In a study of over thirteen hundred 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*, MacArthur Foundation, at 3 (2014) *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf. In other words, most juvenile offenders would no longer be a public safety risk once they reached their mid-twenties, let

alone later in life. Because juveniles are apt 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 their progress should be assessed regularly. *See, e.g.*, *Research on Pathways to Desistance: December 2012 Update*, Models for Change, at 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").

Both the Supreme Court's and this Court's jurisprudence regarding juvenile sentencing recognize the unique ability of young people to be rehabilitated and reformed. *Miller*, 567 U.S. at 478; *Holman*, 2017 IL 120655, ¶35. According to the U.S. Department of Justice, "[n]o juvenile offender should be treated as an adult. . . . [S]entencing [juveniles] to harsh punishments that ignore and diminish their capacity to grow must be replaced or abandoned." The U.S. Department of Justice, *Report of the Attorney General's National Task Force on Children Exposed to Violence* at 23 (2012). In *Graham*, the Court highlighted that life without parole "is an especially harsh punishment for a juvenile offender. Under this sentence a juvenile offender will on average serve more years and a greater percentage

of his life in prison than an adult offender," ultimately concluding that, "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation" and juveniles "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." 560 U.S. at 70, 79.

Twenty years prior to the Supreme Court's decision in *Roper*, the global community began efforts to recognize and protect youth in their interactions with the carceral state. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the "Beijing Rules"), adopted in 1985, has acknowledged the capability of young people to change and the importance of rehabilitation in incarceration. UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* (1985). The Rules state that juvenile incarceration should be avoided if at all possible, and when it is implemented, should be used to help youth "assume socially constructive and productive roles in society" and services should be provided "in the interest of their wholesome development." *Id.* §§ 26.1–26.3. The Convention on the Rights of the Child ("CRC"), a human rights treaty ratified by every country except the United States, also states that "the arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time." U.N. Convention on Rights of the Child art. 37(b) Res 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49

(Nov. 20, 1989); U.N., *Treaty Series,* vol. 1577, at 3; depository notifications C.N. 147.1993. TREATIES-5 of 15 May 1993 *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf.

The United States is the only country in the world to sentence juveniles to life without parole, and the majority of the world (65%), limits all sentences of juveniles to 20 years or less. Connie de la Vega, et. al. *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, Univ. of San Francisco School of Law's Center for Law and Global Justice at 9 (2012). The CRC states that children under the age of eighteen should not be subject to "capital punishment [ ]or life imprisonment without possibility of release." CRC art. 37(a). The Committee on the Elimination of Racial Discrimination has concluded that "[i]n light of the disproportionate imposition of life imprisonment without parole against young offenders, including children, belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article of 5(a) of the Convention." Committee on the Elimination of Racial Discrimination, Concluding Observations of the United States (May 8, 2008), ¶ 21, U.N. Doc. CERD/C/USA/CO/6. This reasoning can be analogously applied to a long term-of-years sentence that is functionally equivalent of life without parole. Ultimately, from an international perspective, the disproportionately long punishments that American children face "lack a rehabilitative purpose" and

"violate[ ] the human rights of individual children." Connie de la Vega, et al. at 49.

In *Miller*, the Court "reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." 567 U.S. at 472 (internal quotation marks omitted). The problem with a lengthy sentence for youth is that it "reflects an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change." *Id.* at 473 (internal quotation marks omitted). Although a 50-year sentence may not reach the 89-year *de facto* life sentence this Court addressed in *Reyes*, 50 years is more than three times the length of Mr. Buffer's life at the time of the incident that led to his incarceration. A sentence of 50 years for a sixteen-year-old is a "denial of hope; it means that good behavior and character improvement are immaterial." *Reyes,* 2016 IL 119271, ¶ 9 (quoting *Graham*, 560 U.S. at 70).

### C. Illinois should join its sister states and conclude that sentences like Mr. Buffer's 50 years, imposed on a 16-year-old, violates the protections of the 8th Amendment.

The substantive heart of *Miller*'s reasoning is that a life sentence "reflects an 'irrevocable judgment about [an offender's] value and place in society' at odds with a child's capacity for change." 567 U.S. at 472 (quoting *Graham*, 560 U.S. 48, 74 (2010)). In essence, *Miller* is about children's

potential to reform at a later point in time and, accordingly, about the undeniable value of revisiting the past after a child has had time to grow and mature. Accordingly, state courts recognizing *Miller*'s central intuition – namely, "that children who commit even heinous crimes are capable of change" – have determined that lengthy sentences, like Mr. Buffer's, violate the Eighth Amendment or their own constitution. *Montgomery*, 136 S. Ct. at 736.

The California Supreme Court recently held that a 50-year-to-life sentence for a youth ineligible for parole under the Youthful Offender Parole Act violated the Eighth Amendment within the meaning of *Graham*. *People v. Contreras*, 411 P.3d 445, 446 (Cal. 2018). In *Contreras*, the Attorney General urged the court to consider actuarial data, which showed that the average life expectancy for a 16-year-old boy was 76.9 years old. *Id.* at 449. As Contreras would be 74 years old when he becomes eligible for parole, the Attorney General argued that he would have a meaningful opportunity for release within his natural life expectancy. *Id.* The majority opinion rejected this actuarial approach to determining what constitutes a *de facto* life without parole sentence, reasoning that it could create a risk of gender and race discrimination. *Id.* at 449-50. The court further reasoned that:

> [a]n opportunity to obtain release does not seem "meaningful" or "realistic" within the meaning of *Graham* if the chance of living long enough to make use of that opportunity is roughly the same as a coin toss. Of course, there can be no guarantee that every juvenile offender who suffers a lengthy sentence will live until his or her parole eligibility date. But we do not believe the outer

> boundary of a lawful sentence can be fixed by a concept that *by definition* would not afford a realistic opportunity for release to a substantial fraction of juvenile offenders.

*Contreras*, 411 P.3d at 451 (citation omitted). The court reinforced its holding, citing 1) scientific research demonstrating youths' capacity to change and rehabilitate and that 2) there is no penological justification for life-like sentences imposed on youth. *Id*. at 452-53. In reaching its conclusion, the court also relied upon its prior decision in *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding a 110-years-to life sentence as *de facto* life without parole) and the decisions of other state supreme courts.

The Wyoming State Supreme Court held that a life sentence plus up to 30 additional years that would not make the defendant eligible for parole until he was 70 years old was the equivalent of a life without parole sentence and therefore violative of *Miller*. *Sam v. State*, 401 P.3d 834, 860 (Wyo. 2017), *cert. denied*, __ S. Ct. __, No. 17-952, 2018 WL 2186232 (May 14, 2018). The court relied on its previous decision in *Bear Cloud v. State*, holding that "[t]he prospect of geriatric release . . . does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." 334 P.3d 132, 142 (Wyo. 2014) (alteration in original) (quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)). The court reasoned that because the defendant was not "one of the juvenile offenders whose crime reflects irreparable corruption," an aggregated

sentence that does not permit parole eligibility for 52 years is unconstitutional under *Miller*. *Sam*, 401 P.3d at 860. *See also Bear Cloud*, 334 P.3d at 141-42 ("To do otherwise [not conduct a full *Miller* sentencing hearing, which accounts for the distinct characteristics of youth] would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile 'die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence . . . more appropriate.'" (quoting *Miller*, 567 U.S. at 465)).

The Ohio Supreme Court determined, "for purposes of applying Eighth Amendment protections discussed in *Graham* and *Miller*, there is no distinction between life-without-parole sentences for juveniles and term-of-years sentences that leave a juvenile offender without a meaningful opportunity to demonstrate rehabilitation and growth leading to possible early release." *State v. Moore*, 76 N.E.3d 1127, 1146 (Ohio 2016) (citation omitted). Similarly, by pointing to the realities of seeking employment, starting a family, and various health concerns after spending fifty years in prison, the Supreme Court of Connecticut further reasoned that "[t]he United States Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Casiano*

*v. Comm'r of Corr.*, 115 A.3d 1031, 1047 (Conn. 2015) (citing *Graham*, 560 U.S. at 75).

The Maryland Court of Appeals recently acknowledged that a sentence precluding parole eligibility for 50 years would be "treated as a sentence of life without parole for purposes of Eighth Amendment analysis under most of the benchmarks applied by the courts." *Carter v. State*, 192 A. 3d 695, 734 (Md. 2018). That court explained that preventing a meaningful opportunity for release from occurring before the typical retirement age and exceeding the threshold duration that most courts and legislatures passing reform legislation recognize, required that "the sentence would be regarded as equivalent to a sentence of life without parole." *Id.* at 734.

The state supreme courts of New Jersey and Iowa have considered sentences similar to Mr. Buffer's and found them to invoke youth-centered protections of the Eighth Amendment. *State v. Zuber*, 152 A.3d 197, 201, 212-213 (N.J. 2017) (though the term-of-years sentences in the appeals were not officially "life without parole," the juvenile defendants' potential release after five or six decades of incarceration when they would be in their seventies and eighties implicated the principles of *Graham* and *Miller*, as the "proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence").[2] The Iowa Supreme Court held that

[2] To be sure, many more state supreme courts have recognized *Miller*'s protections extend to *de facto* life sentences, but have not passed on the question of whether a 50-year sentence is a term that denies meaningful opportunity for review. *See, e.g., State v. Ramos*, 387 P.3d 650, 659-660 (Wash. 2017) (*Miller* applies to juvenile homicide

sentences like Mr. Buffer's should be considered equivalent to life without parole. In *Null*, the court held that:

> while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections. Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society as required by *Graham*.

836 N.W.2d at 71 (quoting *Graham*, 560 U.S. at 75). The court recognized that although the evidence did not clearly establish that Null's prison term is beyond his life expectancy, it did "not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *Id*. at 71-72.

**D. Conclusion**

Evolving Eighth Amendment jurisprudence has clarified that the constitutionality of a sentence depends on the actual impact of the

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offenders facing *de facto* life without parole sentences, whether the sentence was invoked for a single crime or is an aggregate sentence resulting from the commission of multiple crimes), *cert. denied*, 138 S. Ct. 467 (Nov. 27, 2017) (mem.); *Atwell v. State*, 197 So. 3d 1040, 1047 (Fla. 2016) ("evident from our case law that this Court has –and must—look beyond the exact sentence denominated as unconstitutional by the [U.S.] Supreme Court and examine the practical implications of the juvenile's sentence, in the spirit of the [U.S.] Supreme Court's juvenile sentencing jurisprudence").

sentence upon the individual, not how a sentence is labeled. This Court took this commonsense and equitable approach in *People v. Reyes*, 2016 IL 119271 ("A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison"); *accord Sumner v. Shuman*, 483 U.S. 66, 83 (1987) ("there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy"). As the heart of this Eighth Amendment youth-centered jurisprudence counsels against irrevocable sentences that do not permit meaningful review, this Court should affirm the appellate court below and its conclusion that Mr. Buffer's *de facto* life sentence is cruel and unusual punishment.

## II. Illinois' Sentencing Structure – Which, at the Time of this Offense, Treated a 16-Year-Old the Same as an Adult – is Contrary to the Core Principles of *Miller* and *Montgomery*.

A youth's age "is far more than a chronological fact"; "[i]t is a fact that generates commonsense conclusions about behavior and perception" that are "self-evident to anyone who was a child once himself, including any police officer or judge" and are "what any parent knows—indeed, what any person

knows—about children generally." *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citations and internal quotations omitted). Despite this truism, Illinois had long abandoned a system wherein a youth's age and attendant circumstances could meaningfully be considered when the case originated in our adult system. *See, e.g., People v. Miller*, 202 Ill. 2d 328, 340-43 (2002) (in finding an as-applied violation of the Illinois Constitution's proportionate penalties clause, this Court noted the convergence of three statutes – automatic transfer, accountability, and mandatory life sentence – which deprived the circuit court of any discretion in sentencing a youthful defendant). Here, by age and charge alone, Mr. Buffer's case originated in adult court, and upon conviction, the least amount of time he could serve was 45 actual years. 705 ILCS 405/5-130(1)(a); 730 ILCS 5/3-6-3; 730 ILCS 5/5-8-1 (West 2009). To be sure, in 2015, the Illinois General Assembly passed legislation which mandated the consideration of the hallmark attributes of youth in mitigation at the time of sentencing and granted circuit court judge's the ability to depart from mandatory firearm enhancements – legislation which would have reduced the minimum sentence Mr. Buffer faced to 20 years. 730 ILCS 5/5-4.5-105 (West 2016). Absent affirmance of the appellate court's decision, little solace for Mr. Buffer can be found in this legislative enactment (*see, e.g.*, *People v. Hunter, Wilson*, 2017 IL 121306), but it is indicia of the evolving moral ideas of the Illinois people. *See People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 421 (1894) ("When the

legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people. . . ."). The charge now falls on this Court to evaluate Illinois' sentencing scheme for individual's like Mr. Buffer, and answer whether it was constitutionally adequate to assess the gravity of a youthful offense against the backdrop—and bedrock principles and protections—of the U.S. Supreme Court's youth-centered Eighth Amendment jurisprudence.

**A. By abandoning indeterminate sentencing, eliminating the ability to earn day-for-day good time credit against such sentences, and requiring an additional 25 years-to-life for use of a firearm during the course of the offense on top of a mandatory minimum, Illinois has made irrelevant the meaningful consideration of youth in imposing impermissibly – and now unconstitutionally – long sentences.**

For decades, Illinois strayed from a system that could meaningfully acknowledge and address whether individuals incarcerated for decades—including youth—are sufficiently rehabilitated and thus fit to reenter society. Before 1977, Illinois' indeterminate sentencing system included the possibility of parole for individuals serving lengthy and life-like sentences, but when indeterminate sentences were eliminated in favor of determinate sentencing, so was the chance for parole for a large swath of Illinois' incarcerated population. Ill.Rev.Stat., 1978 Supp., ch. 38, par. 1005-8-1. To make matters worse, the state's truth-in-sentencing statute (which originally passed in 1995, was later found unconstitutional by the Illinois Supreme Court, and then was subsequently reenacted in 1998) initiated the

requirement that those convicted of first-degree homicide offenses must serve 100% of their sentence, as opposed to receiving "day-for-day" credit (which had allowed individuals to earn a one day sentence reduction for every day served with good behavior). *See People v. Slater*, 304 Ill. App. 3d 489, 491 (3d Dist. 1999) (detailing the legislative history of the truth-in-sentencing statute); 730 ILCS 5/3-6-3(a)(2) (West 2009).

At the time of Mr. Buffer's offense, the base sentencing range for first-degree murder was 20–60 years; in Mr. Buffer's case, he also was required to receive a minimum of 25 years on top of the base sentence because a firearm was used in the offense. 730 ILCS 5/5-8-1(a)(1)(a), (a)(1)(d)(iii) (West 2009). As noted above, an individual convicted of first-degree murder must serve every day of the sentence and—unless he or she receives clemency—cannot be released earlier no matter how great his or her rehabilitation. 730 ILCS 5/3-6-3(a)(2)(i) (West 2009). For a child facing a sentence that nearly triples the number of years he's lived on this Earth, with nothing he can do to change his circumstances, a feeling of profound hopelessness and resignation is not difficult to imagine.

This situation is not mitigated for Mr. Buffer or others like him, despite the passage of youth-centric legislation that affords judges greater discretion when sentencing a young person. In 2015, the Illinois legislature mandated consideration of the hallmark attributes of youth in mitigation and gave discretion to judges sentencing children in adult court to "decline to

impose any otherwise applicable sentencing enhancement based upon firearm possession." 730 ILCS 5/5-4.5-105(b), enacted by Pub. Act 99-69, § 10, and Pub. Act 99-258, § 15 (eff. Jan. 1, 2016). This laudable recognition that a mandatory sentencing tool should not indiscriminately apply to children was an important step forward for Illinois youth. However, the impact of this legislation was hampered by its temporal reach. *See People v. Hunter*, 2017 IL 121306. Notwithstanding that ruling, this Court similarly has recognized that *all juveniles*, whether sentenced after the effective date of that provision or before, should receive the same treatment at sentencing. *People v. Holman*, 2017 IL 120655, ¶45. Guided by this recognition, and pursuant to the protections afforded by the Eighth Amendment, this Court should remand Mr. Buffer's case for resentencing. *People v. Reyes*, 2016 IL 119271, ¶12 (remanding for resentencing under 5-4.5-105).

As Justice Theis wisely summarized, "[o]ur state, home of the country's first juvenile court and once a leader in juvenile justice reform, should not be a place where we boast of locking up juveniles and throwing away the key. Illinois should be a place where youth matters, and we work to tailor punishment to fit the offense and the offender, as required by our federal and state constitutions." *People v. Patterson*, 2014 IL 115102, ¶ 177 (J. Theis, dissenting). Acknowledging the categorically diminished culpability of youth, while also recognizing their unique capacity to become rehabilitated and be restored to useful citizenship, is a matter of constitutional significance and

critical to this state's historical place at the forefront of juvenile justice reform.

**B. The Illinois legislature has failed to create a meaningful opportunity for review of a juvenile's sentence. Accordingly, this Court must act in the resultant void and overturn Mr. Buffer's sentence.**

Writing recently for the Illinois Appellate Court, Justice P. Scott Neville urged the Illinois legislature to "consider . . . legislation to permit juveniles subjected to lengthy sentences to show rehabilitation." *People v. Patterson*, 2018 IL App (1st) 101573-C at ¶ 30 (May 22, 2018). Illinois is an outlier in its failure to create a system for meaningful review of juveniles' sentences. As the *Patterson* court and several state supreme courts have noted when striking down a lengthy sentence as unconstitutional, the legislature should work to enact a process that provides meaningful review of lengthy juvenile sentences. *People v. Caballero*, 282 P.3d 291, 296 fn.5 (Cal. 2012); *State v. Zuber,* 152 A.3d 197, 215 (N.J. 2017). In addition to those states that already provided parole opportunities, in the six years since *Miller*, twelve states and the District of Columbia have enacted laws that provide meaningful opportunities for release of youthful offenders. *See People v. Contreras*, 411 P.3d 445 (Cal. 2018) (aggregating recent state legislation); Ark. Code Ann. § 16-93-621(a)(1) (juvenile nonhomicide offenders eligible for parole after 20 years); Cal. Penal Code § 3051 (juvenile offenders eligible for parole after 15 years); Colo. Rev. Stat. Ann. § 18-1.3-401(4)(c)(I)(B) (juvenile offenders sentenced to life without parole for a crime other than first degree

murder resentenced to life with opportunity for parole after 40 years); Conn. Gen. Stat. Ann. § 54-125a(f)(1) (juvenile offenders sentenced to over 50 years eligible for parole after 30 years, and juvenile offenders sentenced to between 10 and 50 years eligible for parole after the greater of 12 years or 60% of the sentence); Del. Code Ann. tit. 11, § 4204A(d) (juvenile offender convicted of a crime other than first degree murder eligible for resentencing after 20 years); D.C. Code Ann. § 24-403.03(a) (juvenile offenders eligible for sentence reduction after 20 years); Fla. Stat. Ann. § 921.1402(2)(d) (juvenile offenders convicted of offenses other than murder entitled to review of sentence after 20 years); La. Rev. Stat. § 15:574.4(D)(1) (juvenile offenders sentenced to life for crimes other than first or second degree murder eligible for parole after 30 years); Mo. Ann. Stat. § 558.047(1) (juvenile offenders sentenced to life without parole eligible for review of sentence after 25 years); Nev. Rev. Stat. Ann. § 213.12135 (juvenile nonhomicide offenders eligible for parole after 15 years); N.D.C.C. § 12.1-32-13.1 (juvenile offenders eligible for sentence reduction after 20 years); W.Va. Code § 61-11-23(b) (juvenile offenders eligible for parole after 15 years); Wyo. Stat. Ann. § 6-10-301(c) (juvenile offenders sentenced to life eligible for parole after 25 years).

As noted above, the California Supreme Court recently took note of the states that have taken action to provide juvenile offenders a meaningful opportunity for release in the wake of *Graham* and *Miller*. *People v. Contreras,* 411 P.3d at 369-70. The court used this reasoning to support its

conclusion that a sentence of 50 years-to-life is functionally equivalent to life without parole. *Id.* As the court recognized, "these state legislatures observed that sentencing juvenile nonhomicide offenders to 50 or more years of incarceration without parole eligibility is not consistent with *Graham." Id.*

Prompted by *Graham,* these legislatures have analyzed the disparate impact juveniles' face while in prison as well as a young person's ability to be rehabilitated and reformed. But, unlike these states, Illinois has not implemented a system for meaningful release in the wake of *Montgomery, Miller*, and *Graham*. In failing to act, the Illinois legislature has deprived Mr. Buffer of the opportunity for meaningful release. Accordingly, Mr. Buffer's 45-year minimum sentence denies him the opportunity of parole eligibility and ultimately, it denies him "the opportunity to demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery* 136 S. Ct. at 736. Because the legislature continues to fail to recognize the United States Supreme Court's directive in *Graham* and its progeny, this Court should follow other state high courts in holding that lengthy sentences are inappropriate for youth due to the detrimental impacts of prion on youth as well as youth's heightened potential for rehabilitation and reform. This Court should affirm the appellate court's decision that Mr. Buffer is entitled to review of his lengthy sentence.

## CONCLUSION

Absent this Court's intervention, Illinois will remain an outlier among courts and legislatures throughout the nation that have recognized that, in the wake of *Montgomery*, *Miller*, and *Graham*, lengthy sentences with no mechanism for release based on demonstrated maturity and rehabilitation are inappropriate for youthful offenders. Without a system of review, lengthy sentences, such as Mr. Buffer's, are unconstitutional under *Graham, Miller,* and *Montgomery.* As a result, this Court should affirm the appellate court's decision remanding Mr. Buffer's case for a resentencing hearing.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 30 pages.

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## APPENDIX TO THE BRIEF

Identity of Amici and Statements of Interest ..... A-1

## IDENTITY OF *AMICI* AND STATEMENTS OF INTEREST

The **Children and Family Justice Center** (CFJC), part of Northwestern University Law School's Bluhm Legal Clinic, was established in 1992 as a legal service provider for children, youth and families, as well as a research and policy center. Currently clinical staff at the CFJC provide advocacy on policy issues affecting children in the legal system, and legal representation for children, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, and immigration and political asylum. In its 21-year history, the CFJC has served as *amici* in numerous state and United States Supreme Court cases based on its expertise in the representation of children in the legal system.

The **Campaign for the Fair Sentencing of Youth** (CFSY) is a national coalition and clearinghouse that coordinates, develops, and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi-pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators—on both state and national levels—to accomplish our goal.

**Juvenile Justice Initiative (JJI) of Illinois** is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firm. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our mission is to transform the juvenile justice system in Illinois by reducing reliance on confinement, enhancing fairness for all youth, and developing a comprehensive continuum of community-based resources throughout the state. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system.

Founded in 1975 to advance the rights and well-being of children in jeopardy, **Juvenile Law Center** (JLC) is the oldest multi-issue public interest law firm for children in the United States. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential placement facilities or adult prisons, and children in placement with specialized service needs. JLC works to ensure that children are treated fairly by the systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Law Office of the Cook County Public Defender** is the second largest public defender office in the nation. With a full time budgeted staff of approximately 680, of which 490 are attorneys, the Office represents approximately 89 percent of all persons charged with felonies and misdemeanors in Cook County. The Office also represents juveniles charged with delinquent conduct, and parents against whom the State files allegations of abuse, neglect, or dependency. In 2016, the Office was appointed to more than 174,000 cases. The mission of the Office is to protect the fundamental rights, liberties and dignity of each person whose case has been entrusted to us by providing the finest legal representation.

**Restore Justice Illinois** (RJI) was founded to mitigate the human and fiscal impact of the extreme sentencing laws of the 1980s and 1990s, particularly where they have impacted children. RJI's first priority is ending the practice of sentencing children to "life without parole" in Illinois by helping the Illinois General Assembly make good policy based on principled legal analysis, best practices in other states, guidance from the U.S. Supreme Court, and international law. RJI believes in the possibility of rehabilitation, redemption, and reunification with the community for all incarcerated people, even those who have committed the most serious crimes.