IN THE SUPREME COURT OF THE STATE OF OREGON

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| **LYDELL MARCUS WHITE,** | ) | |
| Petitioner-Appellant | ) | |
| Petitioner on Review | ) | Marion County Circuit Court Case |
| | ) | No. 11C243315 |
| v. | ) | |
| | ) | Court of Appeals Case No. A154435 |
| **JEFF PREMO,** | ) | |
| Superintendent, Oregon State | ) | Supreme Court Case No. 065188 |
| Penitentiary, | ) | |
| Defendant-Respondent, | | |
| Respondent on Review | | |

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# BRIEF ON BEHALF OF *AMICI CURIAE* LEWIS & CLARK LAW SCHOOL'S CRIMINAL JUSTICE REFORM CLINIC, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, OREGON JUSTICE RESOURCE CENTER, JUVENILE LAW CENTER AND PHILLIPS BLACK, INC. IN SUPPORT OF PETITIONERS

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Review of Decision of Oregon Court of Appeals Affirming Judgment of the Circuit Court of Marion County, Honorable Thomas M. Hart

Opinion Filed May 17, 2017
Before: Sercombe, Presiding Judge, and Hadlock, Chief Judge, and Tookey, Judge (vice Nakamoto, J. pro tempore).

(Counsel listed on inside cover) December 3, 2018

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## IDENTITY AND INTEREST OF *AMICI*

**Lewis & Clark Law School's Criminal Justice Reform Clinic** (CJRC) is a legal clinic dedicated to students receiving hands-on legal experience while engaging in a critical examination of and participation in important issues in Oregon's criminal justice system. Under the supervision of Lewis & Clark Law School faculty, CJRC students work on a variety of cases and issues. In addition to direct client casework, CJRC also works in collaboration with attorneys in Oregon on various research projects and legal briefs, designed to understand and improve Oregon's criminal justice system. The case before the Court addresses juvenile sentencing issues in Oregon. CJRC's attorneys and students interact with and represent numerous juveniles with life-without-parole and other extremely long sentences through their casework and other client-centered projects.

**The Oregon Criminal Defense Lawyers Association** (OCDLA) is as non-profit organization based in Eugene, Oregon. OCDLA's 1,291 members are lawyers, investigators, and related professionals dedicated to defending people who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, and networking opportunities. *Amicus* is concerned with legal issues presenting a substantial statewide impact to defendants in criminal cases.

**The Oregon Justice Resource Center** (OJRC) works to promote civil rights and improve legal representation for communities that have often been underserved: people living in poverty and people of color among them. OJRC works with likeminded organizations to maximize its reach and to best serve underrepresented populations, to train future public interest lawyers, and to educate our community on civil rights and civil liberties concerns. OJRC's work includes direct legal services, public awareness campaigns, strategic partnerships, and coordinating legal and advocacy areas to develop favorable criminal justice reforms.

**The Juvenile Law Center** (JLC) advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, JLC is the first non-profit public interest law firm for children in the country. JLC strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. JLC has worked extensively on the issues of juvenile life without parole and *de facto* life sentences, serving as co-counsel for petitioner in the U.S. Supreme Court case *Montgomery v. Louisiana*, __ US __, 136 S Ct 718, 193 L Ed

2d 599 (2016), and filing *amicus* briefs in the U.S. Supreme Court in both *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825(2010), and *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012). Additionally, JLC has participated as *amicus curiae* before this Court in *In the Matter of J.C.N.-V.*, 359 Or 559, 380 P3d 248 (2016).

**Phillips Black, Inc.** attorneys have extensive familiarity and experience with the administration of the harshest penalties under law and the imposition of life without parole upon juveniles in particular. Phillips Black consists of independent practitioners collectively dedicated to providing the highest quality of legal representation to prisoners in the United States sentenced to the severest penalties under law. Phillips Black further contributes to the rule of law by consulting with counsel, conducting clinical training, and developing research on the administration of criminal justice.

Phillips Black has conducted leading research on the administration of juvenile life without parole sentences and has served as counsel for *amici* and inmates serving such sentences in the state and federal courts across the United States.

***Amici*** share a concern that the law be applied fairly and without reliance upon empty formalisms in its application. This concern is particularly acute where,

as here, the potential formalism concerns the imposition of the harshest penalty available under law: sentencing juveniles to die in prison.

## ARGUMENT

Petitioners Laycelle and Lydell White have asked this Court to determine whether the decision in *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012), applies with equal force to children subject to aggregate terms of years, imposed for multiple offenses, that constitute *de facto* life sentences. Because *Miller*, like the rest of the Court's juvenile jurisprudence, rests on the reduced culpability of juveniles and their greater capacity for change, there is no meaningful basis upon which this court could confine *Miller*'s reach to cases involving children sentenced to "life-without-parole" for a single offense. Instead, this court must conclude that *Miller*'s protections extend to children like the petitioners, whose lengthy term-of-years sentences deny them any "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 US 48, 75, 130 S Ct 2011, 176 L Ed 2d 825 (2010).

### I. The Eighth Amendment's protections apply with equal force to children who are sentenced to lengthy terms of years and convicted of multiple offenses.

In *Miller*, the United States Supreme Court substantially curtailed a state's authority to impose life-without-parole sentences on juveniles. No matter the severity of the crime (or crimes) a juvenile has committed, he cannot be denied any

possibility of future release unless he is the rare juvenile homicide offender "who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery v. Louisiana*, __ US __, 136 S Ct 718, 733, 193 L Ed 2d 599 (2016). No coherent limiting principle can cabin the scope of this holding to encompass only life-without-parole sentences, imposed for a single offense.

The animating principle behind *Miller*, as well as *Graham*, is that, unlike adults, juveniles possess a "lack of maturity and an underdeveloped sense of responsibility," tend to be "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and are "more capable of change." *Graham*, 560 US at 68. Social science proves, and the Court recognized, that for almost all children, what presents as incorrigibility is actually a transitory state. *Id* at 68-69; *Miller*, 567 US at 472. Once a child's brain fully develops, the juvenile is likely to emerge as a less impulsive, more responsible, more stable person. *Miller*, 567 US at 472. Because of a juvenile's "diminished culpability and greater prospects for reform," a lifetime of incarceration is a constitutionally disproportionate punishment for the vast majority of juvenile offenders. *Montgomery*, 136 S Ct at 733-34.

*Graham*'s holding that a life-without-parole sentence was constitutionally excessive for a juvenile nonhomicide offender focused on the fact that it denied the juvenile "any chance to later demonstrate that he is fit to rejoin society." 560 US at

79. The Court noted, "this sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'" *Id* at 70 (quoting *Naovarath v. State*, 105 Nev 525, 526, 779 P2d 944, 944 (1989)).

*Miller* relied heavily on *Graham*'s rationale and conclusions, observing that, although *Graham*'s categorical prohibition on a lifetime of incarceration applied to only a juvenile nonhomicide offender, "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile." *Miller*, 567 US at 473. Therefore, the *Miller* court extended *Graham*'s protections to the vast majority of juvenile homicide offenders as well, save the scant few who are incapable of rehabilitation. *Id* at 479-80.

Because a life-without-parole sentence's disproportionality stems from its harshness, as well as its denial of "any chance to later demonstrate that [a juvenile] is fit to rejoin society," *Graham*, 560 US at 79, a lengthy term-of-years sentence, requiring a lifetime of incarceration, suffers from the same constitutional malady. Therefore, *Miller* and *Graham* must apply equally to any term-of-years sentence that denies a juvenile offender the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id* at 75.

Focusing on the precise form of the sentence imposed ("life without parole"), rather than its practical effect on the juvenile involved (a lifetime of incarceration with no meaningful opportunity for release), also elevates form over substance, a practice that the Supreme Court's precedent has soundly disapproved in a number of contexts. *See, e.g., Bd. of Cty. Comm'rs, Wabaunese Cty., Kan. v. Umbehr*, 518 US 668, 679, 116 S Ct 2342, 135 L Ed 2d 843 (1996) ("Determining constitutional claims on the basis of [] formal distinctions, which can be manipulated largely at the will of the government * * * is an enterprise that we have consistently eschewed."); *Ring v. Arizona*, 536 US 584, 610, 122 S Ct 2428, 153 L Ed 2d 556 (2002) (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). Affording constitutional protection to a juvenile sentenced to life without parole, but not one sentenced to life, with the earliest opportunity for parole in his eighties, is a classic example of the kind of arbitrary formal distinction the Supreme Court routinely scorns.

Neither can the rationales of *Graham* and *Miller* be limited to children who commit only a single criminal offense. The holdings of those cases, which turn on the reduced culpability of juveniles and their greater capacity for change, should

apply to all juveniles whose sentences foreclose a meaningful opportunity for release. *See Graham*, 560 US at 68-69; *Miller*, 567 US at 472. The same impulsivity and underdeveloped judgment that lead a juvenile to commit one offense can lead the same child to commit multiple offenses. In fact, these unique characteristics of juveniles make it substantially more likely that they may commit several crimes before they are mature enough to respond to the incentives and rehabilitative opportunities offered by the criminal justice system. *See, e.g., Graham*, 560 US at 72, ("'[T]he same characteristics that render juveniles less culpable than adults suggest * * * that juveniles will be less susceptible to deterrence.'" (quoting *Roper v. Simmons*, 543 US 551, 571, 125 S Ct 1183, 161 L Ed 2d 1 (2005)). Simply put, no matter whether a juvenile is sentenced for a single offense or multiple offenses, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 US at 474.

Not only are their offenses likely to reflect their immaturity, children must also be afforded rehabilitative opportunities because they are "more capable of change" than are adults. *Graham,* 560 US at 68. Children who commit multiple offenses undergo the same brain development and emotional maturation as juveniles who commit a single offense. Over a period of years, a child who commits multiple offenses, even multiple serious violent offenses, may emerge as

a profoundly different person. Thus, while the commission of multiple crimes may inform the court's decision on "permanent incorrigibility," *Montgomery*, 136 S Ct at 734, the sentencer must also consider those known scientific facts about juvenile development, as well as the juvenile's biological, psychological, and social history, before depriving the child of any meaningful "chance to later demonstrate that he is fit to rejoin society," *Graham*, 560 US at 79.

Most state courts to address this question have agreed that lengthy term-of-years sentences are constitutionally equivalent to the juvenile "life-without-parole" sentences addressed in *Miller*. *See State v. Riley*, 315 Conn 637, 652-55, 110 A3d 1205 (2015) (aggregate 100-year sentence imposed for murder and three other offenses was an effective life sentence implicating *Miller)*; *Bear Cloud v. State*, 334 P3d 132, 135 (Wyo 2014) (*Miller*'s protections must apply to any sentence which results in a lifetime of imprisonment); *State v. Null*, 836 NW2d 41, 73 (Iowa 2013) (aggregate sentence imposed for murder and robbery offenses which required defendant to serve 52.5 years before he was eligible for release violated *Miller*); *People v. Nieto*, 52 NE3d 442, 455 (Ill App Ct 2016) (four sentences imposed consecutively for multiple homicide and nonhomicide crimes which when aggregated equaled 78 years violated *Miller*).

Likewise, the majority of courts addressing the analogous question – whether a lengthy term-of-years sentence is constitutionally equivalent to life-

without-parole – in the *Graham* context have reached the same conclusion. *See State v. Moore*, 149 Ohio St 3d 557, 557, 76 NE3d 1127 (2016), *cert den*, 138 S Ct 62, 199 L Ed 2d 183 (2017) (juvenile defendant's aggregate sentence for rape and other offenses, under which he could not be paroled for 77 years, violated *Graham*); *State ex rel. Morgan v. State*, 217 So3d 266, 271 (La 2016) (juvenile defendant's 99-year sentence for armed robbery was an "effective life sentence" that is unconstitutional under *Graham*); *Henry v. State*, 175 So3d 675, 679 (Fla 2015) (*Graham* applies with equal force to aggregate sentences that do "not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,'" including juvenile defendant's 90-year aggregate sentence) (quoting *Graham*, 560 US at 75); *State v. Boston*, 131 Nev Adv Op 98, 363 P3d 453, 458 (Nev. 2015) (juvenile's 14 life sentences with the possibility of parole, plus a consecutive 92 years in prison, which required him to serve 100 years in prison before he was eligible for release, unconstitutional under *Graham*); *People v. Caballero*, 55 Cal 4th 262, 267, 282 P3d 291 (2012) (110-years-to-life sentence imposed for three counts of attempted murder was the functional equivalent of a sentence of life without the possibility of parole under *Graham*).

Oregon precedent also supports this conclusion. The Court of Appeals addressed an analogous issue over 20 years ago in *State v. Davilla*, 157 Or App 639, 972 P2d 902 (1998). There, a 16-year-old defendant convicted of murder

challenged his 1,397-month (116-year) upward departure sentence. *Id* at 642. The defendant argued that, because ORS 161.620 prohibited punishing juveniles with a sentence of "life imprisonment without the possibility of release or parole," his sentence was unlawful. *Id.* The Court of Appeals agreed that there was no meaningful difference between a sentence of 116 years and one of "life without parole":

> "We conclude from the plain language of the statutes that the legislature intended that remanded juveniles not be sentenced to imprisonment for the duration of their lives without having the possibility of release. A departure sentence of 116 years is in practical effect imprisonment for life without the possibility of release or parole."

*Id* at 643.

Each of those cases recognized that it is the effect of the sentence imposed upon a juvenile offender, rather than its precise form, that is significant. Because a lengthy aggregate sentence, like the ones imposed here, also guarantees that a child will spend his entire life in prison, without any meaningful opportunity for release, it is constitutionality indistinguishable from the "life without parole" sentences addressed by *Graham* and *Miller*.

## II. Laycelle and Lydell White are serving *de facto* life-without parole sentences that trigger *Miller*'s protections.

Laycelle and Lydell White's sentences, under which they are not eligible for parole for over 60 years, when they will be in their eighties, effectively forecloses any meaningful opportunity for release and, therefore, must trigger *Miller*'s substantive protections.

Although the *Miller* court did not establish a specific time limit on how long a juvenile can be imprisoned absent a showing he is irreparably corrupt, it is clear that a juvenile who has the potential to be reformed, and later realizes that potential, must be given a meaningful chance of release. *See Montgomery*, 136 S Ct at 736 ("The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change").

Several state Supreme Courts have recognized that, because *Graham* and *Miller* are primarily concerned with affording juveniles who rehabilitate themselves with an opportunity to rejoin society, the constitutional protections established therein must apply to sentences, like the Whites', that prohibit an offender's release until he is elderly or facing retirement. In *State v. Null*, the Iowa Supreme Court held that the prospect of "geriatric release" following "half a century of incarceration" was not "meaningful" and did not remove the defendant's 52-year sentence from the ambit of *Miller*. 836 NW2d at 71. The Connecticut Supreme Court agreed in *Casiano v. Comm'r of Correction*, 317 Conn 52, 78, 115

A3d 1031, 1046–47 (2015), finding that the concept of "life imprisonment" addressed in *Miller* and *Graham* was not limited to sentences exceeding a juvenile's actual life expectancy:

> "A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left. A juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects. Indeed, the offender will be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment. Any such prospects will also be diminished by the increased risk for certain diseases and disorders that arise with more advanced age, including heart disease, hypertension, stroke, asthma, chronic bronchitis, cancer, diabetes, and arthritis.
>
> "The 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."

317 Conn 52, 78, 115 A3d 1031, 1046–47 (2015) (internal citations omitted); *see also Sam v. State,* 401 P3d 834, 860 (Wyo 2017) (juvenile defendant's sentence of a minimum 52 years with possible release at age 70 was the "functional equivalent of life without parole"); *State v. Ronquillo*, 190 Wash App 765, 775, 361 P3d 779, 784 (2015) (juvenile defendant's sentence for first-degree murder, under which he must serve 51.3 years before becoming eligible for parole, was constitutionally

equivalent to life without parole and violated *Miller*); *Bear Cloud v. State*, 334 P3d 132, 142 (Wyo 2014) ("The prospect of geriatric release * * * does not provide a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release and reenter society.").

As the Ohio Supreme Court observed,

> "it is clear that the court intended more than to simply allow juveniles-turned-nonagenarians the opportunity to breathe their last breaths as free people. The intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society."

*Moore*, 76 NE2d at 1137. This Court should reach the same conclusion. Laycell and Lydell White's sentences, which deny them any opportunity for release for over sixty years, fall within the ambit of *Miller*.

## CONCLUSION

For the reasons set forth above, *amici* respectfully urge the court to conclude that *Miller* applies with equal force to juvenile term-of-years sentences, imposed for multiple offenses, that prohibit a meaningful opportunity for release.

Respectfully submitted,

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## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 3, 2018, I electronically filed the Motion to Appear as Amici Curiae with the Appellate Court Administrator, Appellate Records Section, 1163 State Street, Salem, OR 97301. I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Motion to Appear as Amici Curiae will be served electronically to Ryan O'Connor, Attorney for Petitioner on Review, and by U.S. mail delivery on Jeff J. Payne, #050102, attorney for Respondent on Review.

## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.50(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,330 words. I further certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

DATED this December 3, 2018.

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