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OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

TENARRO BANKS,
PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

Case Number: 12SC1022

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CORRECTED BRIEF AS *AMICUS CURIAE* ON BEHALF OF PETITIONER

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I. INTEREST OF *AMICUS CURIAE*

Juvenile Law Center, *Amicus Curiae,* is the oldest public interest law firm for children in the United States. Founded in 1975, 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 participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children, and specifically on the issue of juvenile life without parole. Juvenile Law Center served as *amicus* counsel in *Graham v. Florida*, as well as *Roper v. Simmons*, *Miller v. Alabama*, and other related cases. Juvenile Law Center also served as *amicus curiae* before this Court in the case of *Flakes v. People,* 153 P.3d 427 (Colo., 2007).

Juvenile Law Center writes in support of Petitioner's argument that the appellate court's imposition of a sentence of life imprisonment with the

possibility of parole after 40 years misapprehended the Supreme Court's holdings in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010).

I. THE JUDICIALLY CREATED SENTENCING SCHEME APPLIED TO PETITIONER IS UNCONSTITUTIONAL

A. *Miller v. Alabama* Reaffirms The U.S. Supreme Court's Recognition That Children Are Fundamentally Different From Adults And Categorically Less Deserving Of The Harshest Forms Of Punishments

Justice Kagan, writing for the majority in *Miller*, was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life without parole on children "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham v. Florida*, 130 S. Ct. 2011, 2026–27, 2029–30 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Miller* at 2460. The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id.* at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted "that those [scientific] 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.'" *Id.* at 2464-65 (quoting *Graham*, 130 S. Ct., at 2027; *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

In *Graham,* which held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, the U.S. Supreme Court found that three essential characteristics distinguish youth from adults for culpability purposes:

> As 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." *Roper*, 543 U.S. at 569-70. These salient characteristics mean 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." *Id.* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

Id. at 2026. The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

The *Graham* Court found that because adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for review

was developmentally inappropriate and constitutionally disproportionate. 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." *Ibid.*

Id. at 2026-27. The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

In *Graham*, the Court further relied upon an emerging body of research confirming the distinct emotional, psychological and neurological status of youth. The Court clarified that, since *Roper,* "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* at 2026. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offender" is central to the question of whether a punishment is constitutional. *Id.* at 2027.

Importantly, in *Miller,* the Court found that none of what *Graham* "said about children——about their distinctive (and transitory) mental traits and environmental vulnerabilities——is crime-specific." *Id.* at 2465. The Court thus emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.*

The U.S. Supreme Court has repeatedly affirmed that a child's age is far "more than a chronological fact"; it bears directly on children's constitutional rights and status in the justice system. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citations omitted). *Miller*, *Graham* and *Roper* enriched the Court's longstanding view of juveniles with scientific research confirming that youth merit distinctive treatment under the Eighth Amendment. *See, e.g.*, *Roper*, 543 U.S. at 569-70 (examining the social science research demonstrating the unique characteristics of children); *Graham*, 130 S. Ct. at 2026 ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. . . . [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."); *Miller*, *132* S. Ct. at 2464 ("Our decisions [in *Roper* and Graham]

rested not only on common sense———on what 'any parent knows'———but on science and social science as well."). In *J.D.B.*, the Court reduced to a footnote the social science and cognitive science research cited at length in both *Roper* and *Graham*, stating that "[a]though citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions [that children are different than adults], the literature confirms what experience bears out." 131 S. Ct. 2403 n.5.

As a result of these key differences between children and adults, *Miller* held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. While the Supreme Court left open the possibility that a trial court could impose a life without parole sentence, the Court found that "given all we have said in *Roper*, *Graham*, and [*Miller*] about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*." *Miller*, 132 S. Ct. at 2469 (emphasis added).

B. The Appellate Court's Sentence Deprives Petitioner Of A Meaningful Opportunity For Release As Required By *Miller* and *Graham*

1. Mandatory Sentences Of Life With The Possibility Of Parole After 40 Years Contravene *Miller* And *Graham*

The possibility of parole after a minimum of 40 years imprisonment is unconstitutional, as it neither allows the court to impose an individualized sentence as required by *Miller*, nor provides a meaningful opportunity for release as required by *Graham,* 130 S. Ct. at 2030. Petitioner was 15 years old when he committed the crime for which the appellate court recommended this sentence. He will be approaching the latter stages of his life before he is even first granted an opportunity to go before the state parole board.[1] This does not comport with the lynchpin of *Graham* and *Miller* that juveniles are categorically less culpable than adults who commit similar offenses.[2] *See, e.g., Miller* at 2464

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[1] Although under the Colorado constitution, the Governor has the "power to grant reprieves, commutations and pardons after conviction" for first degree murder, Colo. Const. art. IV, § 7, this does not provide a *meaningful* opportunity for release, which is one of the fundamental tenets of the Supreme Court's *Graham* decision.

[2] The opportunity for parole after serving 40 years is inconsistent with what the field has promoted as a reasonable sentence for youthful offenders. The American Law Institute draft revisions to the Model Penal Code sentencing provisions for (Continued)

(noting that "juveniles have diminished culpability and greater prospects for reform"). In other words, juveniles who commit first degree murder are categorically less culpable than adults who commit first degree murder.[3]

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juvenile offenders who have been convicted in adult criminal courts have promoted a twenty-year maximum sentence as appropriate for children like Petitioner. *See* American Law Institute, *Model Penal Code: Sentencing – Tentative Draft No. 2*, Mar. 25, 2011, at 35-37, *available at* http://www.ali.org/00021333/ Model% 20Penal%20Code%20TD%20No%202%20-%20online%20version.pdf. The draft sentencing guidelines for juveniles suggest that for anyone under the age of 18, no sentence of imprisonment longer than 25 years be imposed for any offense or combination of offenses, and twenty years should be the maximum prison term available for offenders who were under the age of 16 at the time of the offense. *Id.* at 36. While the draft recommendations are not absolute, and recognize that individual jurisdictions will determine the appropriate sentencing caps differently, their suggestion of 25 and 20 year maximums for offenders under age 18 and under age 16, respectively, demonstrates how punitive and out of line a 40 year minimum sentence is.

[3] In addition to *Graham* and *Miller's* recognition of the mitigating factors of youth, detailed both here and in Petitioner's petition, the notion that youthful offenders should be held to a lesser degree of culpability for the same crime committed by an adult is well established in academic literature. As one expert notes,

> criminal law arrays actors' culpability and blameworthiness along a continuum from a premeditated killer for hire at one end to the minimally responsible actor barely capable of discerning right from wrong at the other end, even though each caused the same harm. [...]Youthfulness affects the actor's abilities to reason instrumentally and freely to choose behavior, and locates an offender closer to the diminished responsibility end of the continuum than to the fully autonomous free-willed actor.

(Continued)

Barry C. Feld, *Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 500-501 (2003). Feld further argues, "[e]very other area of law recognizes that young people have limited judgment, are less competent decision-makers because of their immaturity, and require greater protection than do adults. Applying the same principle of diminished responsibility in the criminal law requires...shorter sentences for youths than for adults convicted of the same offenses." *Id.* at 498-499. *See also* David A. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (not) to Punish Minors for Major Crimes*, 82 Tex. L. Rev. 1555, 1557-58 (2004); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility, in* Youth On Trial: A Developmental Perspective On Juvenile Justice 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[T]he criminal law needs to make sense as a language of moral desert, punishing only those who deserve condemnation, punishing the guilty only to the extent of their individual moral desert, and punishing the range of variously guilty offenders it apprehends in an order that reflects their relative blameworthiness."). Further, in the case of *State v. Kennedy*, 957 So.2d 757, 784, 2005-1981, n.31 (La. 2007) (reversed on other grounds), the Louisiana Supreme Court likened youth to mental retardation in terms of reduced culpability and diminished capacity:

> Intellectual deficits and adaptive disorders of the former, and a lack of maturity and a fully developed sense of responsibility of the latter, tend to diminish the moral culpability of the mentally retarded and juvenile offender, with important societal consequences. Retribution 'is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity[,]' *Roper,* 543 U.S. at 571, 125 S.Ct. at 1196, or by reason of the 'diminished capacities to understand and process information' of the mentally retarded. *Atkins v. Virginia,* 536 U.S. 304, 318-319, 122 S. Ct. 2242, 2251 (2002). For the same reasons, the mentally retarded and the juvenile offender 'will be less susceptible to deterrence.' *Roper,* 543 U.S. at 571,

(Continued)

Therefore, it is improper to set such a categorically high threshold before parole can even be considered, since the legislature has set the minimum sentence much lower for less culpable *adult* murderers.[4] This approach also ignores the United States Supreme Court's concern in *Graham* and *Miller* that juveniles sentenced to life, because of their young age, serve longer sentences than adult murderers who receive the same sentence. *See, e.g., Graham*, 130 S. Ct. at 2028 ("Life without parole is an especially harsh punishment for a juvenile. 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."). Although the Colorado Supreme Court has determined that "age is [not] a relevant consideration in conducting a proportionality review," *Valenzuela v. People*, 856 P.2d 805 (Colo., 1993), the calculus for measuring proportionality has surely shifted as a result of *Graham* and *Miller*, which differentiate between juveniles and adults

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> 125 S. Ct. at 1196; *see Atkins,* 536 U.S. at 320, 122 S. Ct. at 2251 ('[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable ... that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.').

[4] The minimum sentence for second degree murder is 16 years, Colo. Rev. Stat. Ann. § 18-1.3-406 (West 2002), or substantially lower than the sentence imposed (Continued)

with respect to the proportionality analysis under the Eighth Amendment.[5] *Graham* and *Miller* dictate that not only is age relevant, but that the characteristics associated with youth development are relevant. *See, e.g.,* Miller, 132 S. Ct. at 2468. A 40 year minimum sentence fails to acknowledge that, though a youth may be deserving of a harsh sentence, it should be less harsh than the sentence for an adult who commits the same serious crime.

Further, imposing a one-size-fits-all approach to juvenile sentencing ignores the U.S. Supreme Court's concern with harsh mandatory sentencing schemes directed at juveniles:

> Under these schemes, every juvenile will get the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.

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on Petitioner here. *See also* Colo. Rev. Stat. Ann. § 18-3-103 (West 2002).

[5] *Miller* recognized, as previously held by *Harmelin v. Michigan*, 501 U.S. 957 (1991), that in the adult context, there is no substantive right against mandatory sentencing–"a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is mandatory." *Miller*, 132 S. Ct. at 2470. However, the Court rejected *Harmelin* in the juvenile context, writing that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentence of juvenile offenders." *Id.* Instead, the Court likened its holding to *Roper* and *Graham*, decisions holding that "a sentencing rule permissible for adults may not be so for children." *Id.*

Id. at 2467-68. These mandatory sentencing schemes are particularly infirm under U.S. Supreme Court precedent if the parole review does not ensure that each juvenile receives a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 130 S. Ct. at 2030. Merely replacing a mandatory juvenile life without parole scheme with a mandatory life with parole after 40 years scheme does not cure the scheme's constitutional infirmities since "life with parole after 40 calendar years" is the functional equivalent of "life without parole."

2. Colorado's Sentencing Scheme Is Inconsistent With, And arsher Than, Emerging Legislative And Sentencing Trends In Other Jurisdictions

While many of the states required to adopt new sentencing schemes in the aftermath of *Miller* have yet to act, the sentencing scheme adopted by the appellate court is nevertheless contrary to trends emerging elsewhere. California allows youthful offenders serving life without parole an opportunity to seek a reduced sentence of twenty-five years to life beginning after fifteen years imprisonment. Cal. Penal Code § 1170(d)(2). Wyoming provides parole eligibility for those currently serving life without parole sentences after 25 years or after commutation by the governor to a term of years. Wyo. Stat. Ann. § 6-10-301(c). In Arkansas, youth convicted of capital murder are eligible for parole after serving 28 years.

Arkansas Code section 5–10–101(c). Those who have been convicted of first degree murder in both Delaware and North Carolina can be eligible for parole after 25 years, and North Carolina specifically requires judges to consider the mitigating factors associated with youth when meting out such a sentence. *See* Del. Code Ann. tit. 11 § 4209A, Act effective July 12, 2012, 2012 N.C. ALS 148. Pennsylvania similarly requires trial courts to consider enumerated factors on the record before sentencing a juvenile to life without parole, and also distinguishes between older and younger youth in allowing for more proportional punishments. 18 Pa.C.S. § 1102.1(d) (setting out that for second degree murder, children 14 and younger must serve a minimum of 20 years, and 15-17 year olds must serve at least 30 years; for first degree murder, children 14 and younger are eligible for parole after 25 years, and 15-17 year olds are eligible after 35 years).[6] The 40 year

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[6] A minority of states to date have enacted sentencing schemes similar to the one imposed by the appellate court here, but they are distinguishable in important ways. *See* 2013 NE L.B. 44 (NS), 103d Leg., 1st Sess. (Neb. 2013) (empowering judges to sentence juveniles from 40 years to life in prison for first degree murder); S. D. Codified Laws § 23A-27-1 (vesting sentencing judges with discretion to sentence youth to any term of years up to life without parole, but requiring them to consider mitigating factors in making that determination), Tex. Gov't Code Ann. § 508.145. Importantly, both the Nebraska and South Dakota statutes require judges to consider mitigating factors when sentencing youth, and parole eligibility in Nebraska begins when a person has served half of his or her minimum term, making parole possible after 20 years. *Id.* South Dakota provides further protections for youth, as the statute specifically requires the court to "allow the (Continued)

minimum for youthful offenders established by the appellate court in Colorado is therefore out of line with the majority of states that have addressed this issue legislatively, and represents a harsher, and unconstitutional, sentencing scheme.

The punishment meted out to Petitioner by the appellate court is likewise inconsistent with what courts in other jurisdictions have interpreted *Miller* to require. Both state and federal courts around the country have interpreted *Miller* to require parole eligibility for those who previously were sentenced to life without parole, and have deemed sentencing schemes similar to that under which Petitioner was sentenced to violate the Supreme Court's mandate. Most recently, the Iowa Supreme Court pronounced 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

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defense counsel an opportunity to speak on behalf of the defendant and ... address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment." SDCL § 23A-27-1. Texas is the only other state that has authorized a sentencing scheme as harsh as that imposed below. *See* Tex. Gov't Code Ann., Tex. Code Crim. Proc. Ann. art. 37.071. *See also* http://www.legis.state.tx.us/tlodocs/832/billtext/pdf/SB00002F.pdf #navpanes=0.

> 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*. 560 U.S. at ___, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845– 46.

Iowa v. Null, --- N.W.2d ----, 2013 WL 4250939 (Iowa, 2013). The court went on to explain that a "life" sentence does not require exceeding one's life expectancy, as "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 52. Instead, courts sentencing juveniles, even those convicted of the most serious of crimes, must focus on the characteristics that distinguish youth from adults—those that diminish their culpability and increase their capacity for rehabilitation. *Id.* (citing *Roper*, *Graham* and *Miller*). *See also Hill v. Snyder*, No. 10–14568, 2013 WL 364198 at *2 (E.D. Mich., Jan. 30, 2013) (proclaiming that "if ever there was a legal rule that should – as a matter of law and morality–be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice."), *Jones v. State*, --- So.3d ----, 2013 WL 4137022 (Miss., Aug. 15, 2013), *People v. Luciano*, 2013 IL App (2d) 110792 , 988 N.E.2d 943 (Mar. 14, 2013) (vacating petitioner's sentence as invalid under *Miller* and

remanding for resentencing), *People v. Williams*, 2012 IL App (1st) 111145, 982 N.E.2d 181 (Dec. 12, 2012), *People v. Morfin*, 2012 IL App (1st) 103568, 981 N.E.2d 1010 (Nov. 30, 2012) (same). As the Iowa Supreme Court explained, the trial court "must appl[y] the principles of *Miller*" to Petitioner's sentence and sentence him according to the spirit and letter of the Supreme Court's decision. *Iowa v. Null*, No. 11-1080, at 61.

III. PETITIONER SHOULD BE RESENTENCED BASED ON THE TRIAL COURT'S APPLICATION OF *MILLER* AND *GRAHAM*, WITH GUIDANCE FROM THIS COURT

It is axiomatic that it is the role of the legislature, not the judiciary, to legislate, even where legislation leaves gaps or leads to inconsistency. *See, e.g., Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994) ("We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate."); *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968) (finding unconstitutional the capital sentencing provision of the federal kidnapping statute but left devising a new procedure to the legislature). It is not the role of the appellate court to devise a new, alternative sentencing scheme; instead it must remand for resentencing. In this case, because there is not a statute that sets forth a constitutional sentence for juveniles convicted of F1 felonies committed between

1990 and 2006, this court must remand to the trial court with guidance to ensure compliance with *Miller* and *Graham*. The guidance should ensure that the trial court fully consider the developmental research about youth and how they are different from adults, and the circumstances of the offense and those related to Petitioner at the time it occurred. Any other interpretation of *Miller* would be incorrect, unjust, and immoral.

A. *Miller* Requires The Sentencer To Make An Individualized Sentencing Determination Based On A Juvenile's Overall Culpability

The remedy fashioned by the Court of Appeals does not comply with the Eighth Amendment or the recent Supreme Court case law that interprets it. Merely substituting one mandatory sentence for another does not satisfy the requirements enunciated by the Supreme Court in *Roper*, *Graham* and *Miller* which, building on the Court's prevailing death penalty jurisprudence, require individualized sentencing that takes into account the settled attributes of youth more broadly, and the characteristics and background of an individual youth and the circumstances of his offense in particular.

Miller requires that a sentencer must–at the outset, not decades later and not as delegated to a parole board -- make an individualized determination of a juvenile's level of culpability and then impose the appropriate sentence. The

Miller court faulted "mandatory penalty schemes [that] prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller,* 132 S. Ct. at 2458. Here, the appellate court's sentencing scheme is unconstitutional because the trial court (the sentencer) is denied any opportunity to consider factors related to the juvenile's overall level of culpability.

Miller sets forth specific factors that the sentencer, at a minimum, should consider: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* at 2468. This process was not followed in Petitioner's case. For example, Mr. Banks had no opportunity to argue that he deserved a less severe sentence in light of his young age, peer pressures

exerted upon him, or any other factor that would demonstrate a reduced level of culpability and capacity for rehabilitation.

Because the mandatory sentencing scheme imposed by this Court deprives the sentencer of the opportunity to consider the juvenile's age and related characteristics, Petitioner's sentence imposed pursuant to this scheme must be vacated. In determining an appropriate and individualized sentence, the trial court should consider any mitigating evidence, based on the *Miller* factors.[7]

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[7] The Supreme Court of this state has recognized that imposing an adult punishment on a child should be rare, and must serve purposes particular to the youthful nature of the juvenile offender, in addition to serving the larger goals of the criminal justice system ("punishment, deterrence and retribution"). *See Bostelman v. People*, 162 P.3d 686, 691-92 (Colo. 2007). The court has explained that:

> 'it is in the best interest of a child to have a limited exposure to an adult penal institution, regardless of the offense he has committed, in order to give him some indication of what he will face should he violate the law after he has become an adult.' [...T]his exposure to the adult punishment system can have severe consequences and contrasts remarkably from the predominantly civil remedial goal of the Children's Code[...].

Id. (internal citations omitted).

Additionally, the trial court should mete out a sentence that provides a "meaningful" opportunity for release. As *Graham* makes clear, the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Id.* at 2032. For an opportunity for release to be "meaningful" under *Graham*, review must begin long before a juvenile reaches old age. The Supreme Court has noted 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 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). 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, *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."). Early and regular assessments enable the reviewers to evaluate any changes in the juvenile's maturation, progress and performance. Regular review also provides an opportunity to confirm that the juvenile is receiving vocational training, programming and treatment that foster rehabilitation. *See, e.g., Graham*, 130 S. Ct. at 2030 (noting the importance of "rehabilitative opportunities or treatment" to "juvenile offenders, who are most in need of and receptive to rehabilitation").[8] Release on a gurney at the end of one's life is not what the *Miller* Court intended.

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[8] The American Bar Association (ABA) provides a model: in 2008, the ABA adopted a policy that built upon *Roper* and anticipated *Graham* and *Miller* by calling for different sentencing and parole policies for offenders who were under 18 at the time of their crimes. With respect to parole, the ABA declared that:

> Youthful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.

See ABA Criminal Justice Section, The State of Criminal justice 2007-2008, at 317 (Victor Streib, ed. 2008).

Finally, *Miller* unambiguously cautions that "appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon." *Miller*, 132 S. Ct. at 2469. *Miller* further notes that the "'juvenile offender whose crime reflects irreparable corruption'" will be "'rare.'" *Id.* (quoting *Roper*, 543 U.S. at 573). Thus, *Miller* creates a presumption *against* imposing juvenile life without parole sentences. Therefore, the guidance offered by this court must be mindful of that presumption and provide safeguards to ensure that imposition of juvenile life without parole sentences will be "uncommon" or "rare." Where, as here, the court has imposed a mandatory minimum sentence of 40 years to life, the court has transgressed the spirit, if not the letter, of *Miller*.

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson*, 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Even today, adult sentencing practices that preclude taking into account the characteristics of individual juvenile defendants are unconstitutionally disproportionate punishments. When sentencing children in the adult criminal justice system, courts must take additional considerations and precautions to ensure that the sentences account for the unique developmental characteristics of

adolescents, as the Supreme Court has acknowledged that a child's age is far "more than a chronological fact." *See J.D.B. v. North Carolina* 564 U.S. 1, 8 (2011). This approach builds upon other recent Supreme Court jurisprudence that recognizes that juveniles who commit crimes—even serious or violent crimes—can outgrow this behavior and become responsible adults.

For the foregoing reasons, *Amicus* respectfully requests that this Court remand the case for sentencing in accordance with *Miller* and *Graham*.

Respectfully submitted this 9th day of September, 2013.

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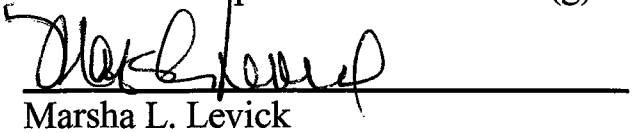
Certification of Word Count: 5,382

COLORADO SUPREME COURT 2 E. 14th Avenue Denver, CO 80203 **TENARRO BANKS,** **PETITIONER,** **v.** **THE PEOPLE OF THE STATE OF COLORADO,** **RESPONDENT.** Marsha Levick, Esq. (PA Attorney No. 22535) Emily Keller, Esq. (PA Attorney No. 206749) Lauren Fine, Esq. (PA Attorney No. 311636) Juvenile Law Center 1315 Walnut Street, Suite 400 Philadelphia, PA 19107 T: (215) 625-0551	Case Number: 12SC1022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 5, 382 words.



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CERTIFICATE OF MAILING

I certify that on the 3rd day of September, 2013, I dispatched, by first-class mail, the foregoing Amicus Curiae Brief to:

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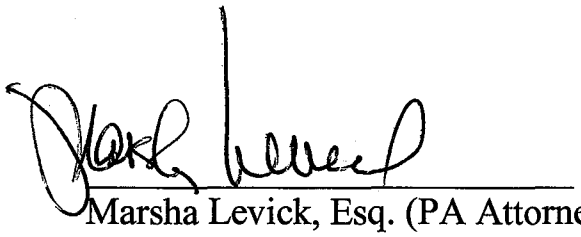

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