IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Joseph Bonilla, **on *Habeas Corpus***	Case No. S214960 (Court of Appeal No. B248199) (Los Angeles County Superior Court No. BA320049)

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF JUVENILE LAW CENTER AS *AMICI CURIAE* ON BEHALF OF APPELLANT

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MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE* ON BEHALF OF APPELLANT

Juvenile Law Center, *et al.*, respectfully moves this court, pursuant to Cal. Rules of Court, rule 8.520(f), for leave to appear as *amicus curiae* on behalf of Appellant Joseph Bonilla. In support, Juvenile Law Center states as follows:

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

unique developmental differences between youth and adults in enforcing these rights. Information about Juvenile Law Center, including downloadable versions of publications and *amicus* briefs, is available at www.jlc.org. *See* Brief for statements of interest and identity of other *amici* joining this Brief.

Juvenile Law Center is particularly concerned with constitutional challenges to the treatment of youth in the juvenile and criminal justice systems and has participated as *amicus curiae* in many such cases in state and federal courts nationwide. Juvenile Law Center authored *amicus* briefs in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (regarding the constitutionality of mandatory life without parole sentences for juveniles), *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (regarding protection of Miranda rights for youth), *Graham v. Florida*, 560 U.S. 48 (2010), (regarding the constitutionality of sentencing juveniles to life without parole for non-homicide crimes), and *Roper v. Simmons*, 543 U.S. 551 (2005) (regarding the constitutionality of the death penalty for minors aged sixteen and seventeen at the time of their crimes). Juvenile Law Center also participated as *amicus curiae* in *People of California v. Caballero*, 55 Cal.4th 262, 282 P.3d 291, 145 Cal.Rptr.3d 286 (Cal. 2012), where this Court reversed the Court of Appeal's opinion, ruling that a 110-year-to-life sentence imposed on a juvenile convicted of non-homicide offenses violates *Graham*'s mandate against cruel and unusual punishment under the

Eighth Amendment. Marsha Levick, counsel for Amici Juvenile Law Center *et al.*, also argued before this Court in *Caballero* and *People v. Gutierrez*, 324 P.3d 245 (Cal. 2014).

The questions of law before this Court are closely tied to important and pressing public policy concerns related to the prosecution and sentencing of youth. *Amici* are well positioned to offer insight to this Court regarding these concerns.

Jessica Feierman, along with Marsha L. Levick, Emily C. Keller, and Jean Strout authored this *amicus* brief.

No other parties or counsel for other parties authored the proposed *amicus* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

Respectfully submitted,

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BRIEF OF JUVENILE LAW CENTER, *et al.*, AS *AMICI CURIAE* ON BEHALF OF APPELLANT

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

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

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.

The **National Center for Youth Law (NCYL)** is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance.

The mission of the **National Juvenile Justice Network (NJJN)** leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal law, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty-one members in thirty-

three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner focused on their rehabilitation. Youth should not be transferred into the punitive adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and are exposed to serious, hardened criminals. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development.

II. SUMMARY OF ARGUMENT

In *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the United States Supreme Court held that the mandatory imposition of sentences of life without the possibility of parole on juvenile offenders convicted of murder is unconstitutional. The Court required that before a juvenile homicide offender can receive a sentence that offers no "meaningful opportunity to obtain release," *id.* at 2469 (quoting *Graham*, 560 U.S. 48, 75 (2010)), the sentencing court must have discretion in sentencing and must consider the defendant's youth and its accompanying characteristics.

Appellant Joseph Bonilla was sentenced to 50 years to life for a crime he committed as a juvenile. Because Appellant's sentence deprives him of a "meaningful opportunity to obtain release," it is the functional equivalent of life without parole. The sentencer did not consider Appellant's age or the age-related factors required by *Miller*; therefore, the imposition of functional life without parole on Appellant is unconstitutional.

Miller's prohibition on mandatory life without parole applies retroactively to the Appellant. *Miller* announced a substantive rule, which pursuant to U.S. Supreme Court precedent applies retroactively. Further, even assuming the rule is procedural, *Miller* is a watershed rule of criminal procedure that applies retroactively. Moreover, *Miller* must be applied

retroactively because, once the Court determines that a punishment is cruel and unusual when imposed on a child, any continuing imposition of that sentence is itself a violation of the Eighth Amendment; the arbitrary date of sentencing cannot convert an otherwise unconstitutional sentence into a constitutional one.

III. ARGUMENT

A. *Miller* Reaffirms The U.S. Supreme Court's Recognition That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments.[1] Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes: [a]s compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Graham* found that "[t]hese 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

[1] *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life without parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (quoting *Roper*, 543 U.S. at 569, 573). 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.'" *Graham,* 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for release 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." *Id.*

Id. 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 reaching these conclusions about a juvenile's reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of

research confirming the distinct emotional, psychological and neurological attributes of youth. The Court clarified in *Graham* 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." *Graham*, 560 U.S. at 68. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offenders" is central to the question of whether a punishment is constitutional. *Id.* at 68-69.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life without parole sentences for children convicted of homicide offenses. Reiterating that children are fundamentally different from adults, the Court held that a sentencing scheme that mandates life without parole for juvenile offenders violates the Eighth Amendment and that the sentencer must take into account the juvenile's reduced blameworthiness and individual characteristics before imposing this harshest available sentence. *Miller*, 132 S. Ct. at 2460. 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 "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized

sentencing for defendants facing the most serious penalties." *Id.* (quoting *Graham*, 560 U.S. at 68, 74). 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*, 560 U.S. at 68-69); *Roper*, 543 U.S. at 570.

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." 132 S. Ct. at 2465. The Court instead 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.* As a result, it held in *Miller* "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.

B. *Miller v. Alabama* Applies Retroactively

United States Supreme Court precedent requires that *Miller* be applied retroactively. True justice should not depend on a particular date on the calendar, especially where the Eighth Amendment's ban on cruel and unusual punishments is at issue. As Justice Harlan wrote: "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States,* 401 U.S. 667, 693 (1971) (Harlan, J., concurring). The U.S. Supreme Court's decisions interpreting the Eighth Amendment mark our nation's progress as a civilized society; once the Court sets down a marker along the continuum of our evolving standards of decency, all those affected must benefit. To deny retroactive application of *Miller* would compromise our justice system's consistency and therefore legitimacy.

1. *Miller* Applies Retroactively Pursuant To *Teague v. Lane*

In *Teague v. Lane*, the U.S. Supreme Court held that a new Supreme Court rule applies retroactively to cases on collateral review only if it is: (a) a substantive rule; or (b) a "watershed" rule of criminal procedure. 489 U.S. at 307, 311 (1989). *See also Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Because *Miller* announced a new substantive rule or, in the alternative, a "watershed" procedural rule, *Miller* applies retroactively.

a. *Miller* Is Substantive Pursuant To *Teague* Because It Alters The Range Of Available Sentencing Options

The U.S. Supreme Court has held that "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 U.S. at 353. Moreover, a rule is substantive if it "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 329, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)). *Miller* applies retroactively because it prohibits a "category of punishment" (mandatory life without parole) for a "class of defendants" (juveniles). *See id.*

Mandatory life without parole sentences are substantively distinct and obviously much harsher than alternative sentencing schemes in which life without parole is, at most, a discretionary alternative. The U.S. Supreme Court has stated that "[m]andatory minimum sentences increase the penalty for a crime," and has found it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2160 (2013). The Court has explained that "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id.* at 2161. Accordingly, a

mandatory life without parole sentence for a juvenile is substantively different from a discretionary life without parole sentence; it is substantively harsher, more aggravated, and imposes a more heightened loss of liberty.

Miller therefore *expanded* the range of sentencing options available to juveniles by prohibiting mandatory life without parole and requiring that *additional* sentencing options be put in place. Unlike procedural rules, which "regulate only the *manner of determining* the defendant's culpability," *Summerlin*, 542 U.S. at 353, *Miller* imposes a fundamental, substantive change in sentencing for juveniles.

b. *Miller* Is Retroactive Pursuant To *Teague* Because It Establishes A Substantive Right To Individualized Sentencing For Juveniles Facing Life Without Parole Sentences

In *Miller*, the U.S. Supreme Court established a new rule requiring individualized sentencing for juvenile homicide offenders facing life without parole. *See Miller*, 132 S. Ct. at 2466 n.6 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses."). This new right to individualized sentencing is a new substantive right for juvenile offenders and must be applied retroactively.

In death penalty cases, the U.S. Supreme Court has held that defendants have a substantive right to individualized sentencing. In

Woodson v. North Carolina, an adult capital case, the Supreme Court stated that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death." 428 U.S. 280, 304 (1976) (plurality opinion) (internal citation omitted) (emphasis added). *See also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("we cannot avoid the conclusion that an individualized decision is *essential* in capital cases") (emphasis added). Significantly, *Lockett* differentiates between the substantive right to individualized sentencing that is required under the Eighth Amendment and the specific procedures states adopt in implementing individualized sentencing schemes:

> *There is no perfect procedure* for deciding in which cases governmental authority should be used to impose death. *But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's* character and record and to circumstances of the offense . . . creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605 (emphasis added). The right to individualized sentencing is a prerequisite to the constitutional imposition of the death penalty, even though the procedures may vary from state-to-state.

Since *Miller* acknowledges that life without parole sentences for juveniles are "akin to the death penalty" for adults, 132 S. Ct. at 2466, *Miller*'s new requirement of individualized sentencing for youth facing life without parole is, as in the death penalty cases, "constitutionally indispensable" and "essential." As with the death penalty, a mandatory juvenile life without parole sentencing scheme "creates the risk that [the sentence] will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. *See Summerlin*, 542 U.S. at 352 (New substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998))). Therefore, *Miller* establishes a new substantive right to individualized sentencing in juvenile life without parole cases that must be applied retroactively.

c. *Miller* Is *Substantive* Pursuant To *Teague* Because It Outlawed An Automatic Life Without Parole Penalty For Juvenile Offenders And Required Sentencers To Consider Factors Other Than The Crime Itself Before Sentencing Juveniles To Life Without Parole

In addition to creating a new substantive right to individualized sentencing, *Miller* holds that mandatory life without parole for juveniles violates the Eighth Amendment and that, prior to imposing a life without parole sentence, the sentencer must consider specific factors that relate to

the youth's overall culpability. 132 S. Ct. at 2468-69. These factors include: (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.*

The fact that *Miller* requires sentencers to consider these specific new factors before imposing juvenile life without parole and bans the automatic imposition of such sentences necessitates a finding that *Miller* announced a substantive rule. The Supreme Court's refusal to hold *Ring v. Arizona*, 536 U.S. 584 (2002), retroactive in *Schriro v. Summerlin*, 542 U.S. at 358, illustrates this point. In *Ring*, the U.S. Supreme Court had held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating factors essential to imposition of the death penalty. In *Summerlin*, the Court distinguished between *procedural* rules adopted by the Court which dictate who must make certain findings before a particular sentence could be imposed and *substantive* rules established by the Court which dictate what factors must be considered before a particular sentence could be imposed:

> [the U.S. Supreme] Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as [*the U.S. Supreme*] *Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

542 U.S. at 354. Because *Miller* requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller*, 132 S. Ct. at 2469, the U.S. Supreme Court has made consideration of these particular factors "essential" to imposing life without parole on juveniles. As directed by *Summerlin*, *Miller* is a substantive rule.[2]

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[2] Notably, the United States Department of Justice has taken a uniform position that *Miller* is, indeed, retroactive. *See, e.g.*, Brief of Respondent/Appellee at 33, *Martinez v. U.S.*, No. 14-2737 (7th Cir. May 6, 2013); Gov't's Resp. to Pet'r's App. for Authoriz. to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 18, *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744) (explaining that "*Miller* should be regarded as a substantive rule for *Teague* purposes under the analysis in Supreme Court cases."); Letter from the Gov't to the Clerk of Court, United States Court of Appeals for the Second Circuit, dated July 3, 2013 at 1, *Wang v. United States*, No. 13-2426 (2d Cir. July 16, 2013) (explaining that "at least for purposes of leave to file a successive petition, *Miller* applies retroactively . . . under the law of this Circuit."); Gov't's Resp. to Pet'r's Mot. for Recons. of Order Den. Mot. for Leave to File a Second Mot. Purs. to 28 U.S.C. § 2255 at 10-11, *Stone v. United States*, No. 13-1486 (2d Cir. June 7, 2013) (explaining that "*Miller's* holding that juvenile defendants cannot be subjected to a mandatory life-without-parole sentence is properly regarded as a substantive rule" because *Miller* "alters the range of sentencing options for a juvenile homicide defendant"); Gov't's Resp. to Pet'r's App. for Authoriz. to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 13-14, *Williams v. United States*, No. 13-1731 (8th Cir. Aug. 29, 2013) (explaining that rules that "categorically change the range

d. *Assuming Miller* Is Not A Substantive Rule, *Miller* Is A "Watershed Rule" Under *Teague*

Assuming *arguendo* the ruling announced in *Miller* is procedural, *Miller* must still be applied retroactively pursuant to *Teague*'s second exception, which applies to "watershed rules of criminal procedure" and to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. This occurs when the rule "requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.* at 307 (internal citations omitted). To be "watershed[,]" a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding, and second, "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal citations omitted). The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it

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of outcomes" for a defendant should be treated as substantive rules and, therefore, *Miller* announced a new substantive rule for retroactivity purposes); Resp. of the United States to Pet'r's App. for Authoriz. to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 8-15, *In re Corey Grant*, No. 13-1455 (3d. Cir. June 17, 2013) (arguing that *Miller's* new rule is substantive).

"necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] fate." (internal citation omitted)).

Miller satisfies both requirements. First, mandatory life without parole sentences cause an "impermissibly large risk" of *inaccurately* imposing the harshest sentence available for juveniles. *Whorton*, 549 U.S. at 418. *Miller* found that sentencing juveniles to "that harshest prison sentence" without guaranteeing consideration of their "youth (and all that accompanies it) . . . poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth – and of each individual youth – which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464.

Second, by requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding. *See id.* at 2469 (requiring sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). The *Miller* ruling has "effected a profound and sweeping change," *see Whorton*, 549 U.S. at 421 (internal quotation marks omitted), by immediately striking down sentencing schemes for children in twenty-nine jurisdictions. *See*

Miller, 132 S. Ct. at 2471. In comparison, the quintessential "watershed" right to counsel announced in *Gideon* changed the law in only fifteen states. Brief for the State Government *Amici Curiae*, p. 2, *Gideon v. Cochran*, 372 U.S. 335 (1963).

Of the fifteen state appellate courts that have addressed the question of *Miller's* retroactivity to date, ten have found Miller to be retroactive. *People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *Ex Parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014); *Nebraska v. Mantich*, 287 Neb. 320 (2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Diatchenco v. Suffolk Cnty. Dist. Atty.*, 466 Mass. 655 (2013); *Jones v. Mississippi*, 122 So.3d 698 (Miss. 2013); *Petition of State of New Hampshire*, No. 2013-566, 2014 WL4253359 (N.H. Aug. 29, 2014); *Wyoming v. Mares*, 335 P.3d 487 (Wy. 2014); *Aiken v. Byars*, No. 2012-213286, 2014 WL 5836918 (S.C. Nov. 12, 2014); *Falcon v. Florida*, No. SC13–865, 2015 WL 1239365, (Fl. Mar. 19, 2014). While these courts have not addressed whether Miller constitutes a watershed rule, at least one state appellate court has adopted the watershed analysis. *See, e.g.*, *People v. Williams*, 982 N.E.2d 181, 196, 197 (Ill. App. Ct. 2012) (granting petitioner the right to file a successive post-conviction petition because *Miller* is a "watershed rule," and at his pre-*Miller* trial, petitioner had been "denied a 'basic 'precept of justice'' by not receiving any consideration of his age from the circuit court in sentencing," and finding that "*Miller* not only changed

procedures, but also made a substantial change in the law"), *abrogated by People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (holding *Miller* to be "a new substantive rule").[3]

Moreover, *Miller*'s admonition – and expectation – that juvenile life without parole sentences will be "uncommon" upon consideration of youth and its "hallmark attributes" explicitly undermines the accuracy of life without parole sentences imposed pre-*Miller* – the very sentence at issue in this appeal.

The *Teague* watershed framework was based on Justice Harlan's opinion in *Mackey*, where he argued that "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Mackey v. U.S.*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring). As Justice Harlan predicted, changes in the understanding of youth have led to a line of cases dramatically changing the "bedrock" of juvenile criminal process, including *Roper* and *Graham,* and culminating in *Miller*. This process of dramatic, "profound and

[3] The five states finding *Miller* is not retroactive are: Alabama, *Ex parte Williams*, No. 1131160, 2015 WL 1388138 (Ala. Mar. 27, 2015); Louisiana, *State v. Tate*, 130 So. 3d 829 (La. 2013); Minnesota, *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); Michigan, *People v. Carp*, 852 N.W.2d 801 (2014); and Pennsylvania, *Commonwealth v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013).

sweeping" reshaping of the sentencing of juvenile offenders illustrates that *Miller*, in conjunction with its predecessors, constitutes a watershed rule.

2. *Miller* Is Retroactive Because Kuntrell Jackson Received The Same Relief On Collateral Review

The Supreme Court's decision in *Miller* involved two juveniles, Evan Miller, petitioner in *Miller*, and Kuntrell Jackson, the petitioner in Miller's companion case, *Jackson v. Hobbs*. Kuntrell Jackson was sentenced to life imprisonment without parole and the Arkansas Supreme Court affirmed his conviction in 2004. *Jackson v. State*, 194 S.W.3d 757 (Ark. 2004). Having been denied relief on collateral review as well, Jackson filed a petition for certiorari; the U.S. Supreme Court granted certiorari in both Miller's and Jackson's cases and ordered that they be argued together. *Jackson v. Hobbs*, 132 S. Ct. 548 (2011); *Miller v. Alabama*, 132 S. Ct. 548 (2011). In its consolidated decision in *Miller* and *Jackson*, the U.S. Supreme Court vacated the judgments of sentences in both cases and remanded each for further proceedings. *Miller,* 132 S. Ct. at 2475.

Having granted relief to Jackson on collateral review, the Supreme Court's ruling should be deemed retroactive. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court noted that the fair administration of justice requires that similarly situated defendants be treated similarly. *Id.* at 315-

16. *See also Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court."). The Appellant here should likewise benefit from the Supreme Court's ruling in *Miller*.

3. The Eighth Amendment Requires That *Miller* Apply Retroactively

Even outside the boundaries of *Teague*, U.S. Supreme Court precedent requires that the holding of *Miller* apply retroactively.

a. *Miller* Is Retroactive Because It Involves A Substantive Interpretation Of The Eighth Amendment That Reflects The Supreme Court's Evolving Understanding Of Child And Adolescent Development

The Supreme Court consistently has recognized that a child's age is far "more than a chronological fact," and has recently acknowledged that it bears directly on children's constitutional rights and status in the justice system. *See, e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citing *Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982)). *Roper*, *Graham*, and *Miller* have enriched the Court's Eighth Amendment jurisprudence with scientific research confirming that youth merit distinctive treatment. *See Roper*, 543 U.S. at 569-70 (explaining that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders

cannot with reliability be classified among the worst offenders") (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)); *Graham*, 560 U.S. at 68 (reiterating that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Miller*, 132 S. Ct. at 2464 n.5 ("[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

This understanding that juveniles, as a class, are less culpable than adult offenders is central to the Court's holding in *Miller,* 132 S. Ct. at 2469, and reflects a substantive change in children's rights under the Eighth Amendment. As previously described, to ensure that the sentencing of juveniles is constitutionally appropriate, *Miller* requires that, prior to imposing a life without parole sentence on a juvenile offender, the sentencer must consider the factors that relate to the youth's overall culpability and capacity for rehabilitation. 132 S. Ct. at 2468-69. *Miller* therefore requires a substantive, individualized assessment of the juvenile's culpability prior to imposing life without parole.

The language of *Miller* demonstrates that the rule announced was not considered a mere procedural checklist, but a substantive shift in juvenile sentencing. The Court found:

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon*. . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, *we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.*

Miller, 132 S. Ct. at 2469 (emphasis added). The Court's finding that appropriate occasions for juvenile life without parole sentences will be "uncommon" and that the sentencer must consider how a child's status counsels against sentencing *any* child to life without parole underscores that the decision in *Miller* substantively altered sentencing assumptions for juveniles – that is, the Court rejected long held views that mandated juvenile life without parole sentences were appropriate and further found that even discretionary juvenile life without parole sentences are constitutionally suspect.

Because *Miller* relies on a new, substantive interpretation of the Eighth Amendment that recognizes that children are categorically less culpable than adults, and because sentencers must consider how these

differences mitigate against imposing life without parole on youth, the decision must be applied retroactively.

b. U.S. Supreme Court Death Penalty Jurisprudence Requires That *Miller* Apply Retroactively

Because the two lines of cases upon which *Miller* relies – new categorical rules and new individualized sentencing rules – have been applied retroactively, *Miller* must similarly apply retroactively. Like the categorical rules announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper* and *Graham*, which have all been applied retroactively,[4] *Miller* "prohibit[s] a certain category of punishment" – mandatory life imprisonment without the possibility of parole – "for a class of defendants" – juvenile homicide offenders. *Horn v. Banks*, 536 U.S. 266, 271 n.5

[4] *Atkins* barred the imposition of the death penalty on the intellectually disabled. 536 U.S. at 321. Courts across the country have applied *Atkins* retroactively. *See, e.g.*, *Morris v. Dretke*, 413 F.3d 484, 487 (5th Cir. 2005); *Black v. Bell*, 664 F.3d 81, 92 (6th Cir. 2011); *Allen v. Buss*, 558 F.3d 657, 661 (7th Cir. 2009); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). Similarly, *Roper* and *Graham*, two cases upon which *Miller* relies, have been applied retroactively. *See Loggins v. Thomas*, 654 F.3d 1204, 1206 (11th Cir. 2011) (noting *Roper* applied retroactively); *Lee v. Smeal*, 447 F. App'x 357, 359 n.2 (3d Cir. 2011) (unpublished) (same); *Horn v. Quarterman*, 508 F.3d 306, 308 (5th Cir. 2007) (same); *LeCroy v. Sec'y, Florida Dept. of Corr.*, 421 F.3d 1237, 1239 (11th Cir. 2005) (same); *See also In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review); *Bonilla v. State*, 791 N.W.2d 697, 700-01 (Iowa 2010) (holding *Graham* applies retroactively); *In re Evans*, 449 Fed. App'x 284 (4th Cir. 2011) (per curiam) (unpublished) (noting Government "properly acknowledged" *Graham* applies retroactively on collateral review); *State v. Dyer*, 77 So. 3d 928, 929 (La. 2011) (per curiam); *Rogers v. State*, 267 P.3d 802, 804 (Nev. 2011) (noting that district court properly applied *Graham* retroactively).

(2002). When the Court, as in *Miller*, holds that a penalty is unconstitutional based on the unique characteristics of a class of defendants, the ruling has been applied retroactively.[5]

The U.S. Supreme Court's jurisprudence requiring individualized sentencing in capital cases is also instructive to the *Miller* retroactivity analysis. For example, in *Woodson*, 428 U.S. 280 (1976) (plurality opinion), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion), and *Sumner v. Shuman,* 483 U.S. 66 (1987), the Supreme Court held that a mandatory death penalty was a violation of the Eighth Amendment because it did not permit the sentencer to weigh appropriate factors in determining the proper sentence. "The mandatory death penalty statute in *Woodson* was

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[5] Though some new rules in capital cases have not been applied retroactively, those rules have not been based on the unique characteristics of a class of defendants. *See, e.g.*, *Sawyer v. Smith*, 497 U.S. 227, 233, 241 (1990) (new rule prohibiting "the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere" barred by *Teague*); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (holding that a rule requiring juries to give adequate effect to mitigating evidence would be a new rule that could not be applied retroactive under *Teague*); *Beard v. Banks*, 542 U.S. 406, 416 (2004) (refusing to apply retroactively a ban on jury instructions to disregard mitigating factors not found unanimously). In these cases, the Court held that the rules were not substantive rules that "prohibit a certain category of punishment for a class of defendants because of their status or offense." *See Penry v. Lynaugh*, 493 U.S. 302, 305 (1989). The new rule in *Miller*, however, falls directly within *Penry*'s substantive definition because a category of punishment – mandatory life without parole – is prohibited as to a class of defendants – juveniles – because of their status. *See* Section III.B.1.a., *supra*. In addition, *Miller* imposed new substantive factors which the sentencer must consider, as discussed in Sections III.B.1.b and III.B.1.c.

held invalid because it permitted *no* consideration of 'relevant facets of the character and record of the individual offender or the circumstances of the particular offense.'" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (quoting *Woodson*, 428 U.S. at 304). In *Lockett*, the Supreme Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 608. *See also Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (requiring state courts to consider all mitigating evidence before imposing the death penalty). *Woodson*, *Roberts*, *Lockett* and *Eddings* have been applied retroactively. *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (applying *Lockett* retroactively); *Harvard v. State*, 486 So.2d 537, 539 (Fla. 1986) (same); *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (*Eddings* applied retroactively).

The reasoning of these individual sentencing capital cases similarly applies to mandatory juvenile life without parole. *Miller* found that "[b]y removing youth from the balance – by subjecting a juvenile to the same life-without-parole sentence applicable to an adult – these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." 132 S. Ct. at 2466. *See also Johnson v. Texas*, 509 U.S. 350, 367 (1993) ("There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death

sentence is to meet the requirements of *Lockett* and *Eddings*."). *Miller* should therefore similarly be applied retroactively.

c. Once Mandatory Juvenile Life without Parole Sentences Have Been Declared Cruel And Unusual Punishment, No Juvenile Offender May Continue To Suffer That Sentence Under The Eighth Amendment

The boundaries of the Eighth Amendment are dynamic and constantly evolving. "The [Supreme] Court recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). The Court has thus recognized that "a penalty that was permissible at one time in our Nation's history is not necessarily permissible today." *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring).

In recent years, Eighth Amendment jurisprudence has evolved with extraordinary speed in the context of juvenile sentencing. Prior to the Court's 2005 decision in *Roper*, juvenile offenders could be executed. Less than a decade later, not only the death penalty, but life without parole sentences for children are constitutionally disfavored. This evolution in Eighth Amendment jurisprudence has been informed by both neuroscience and adolescent development research that explains why children who

commit crimes are less culpable than adults, and how youth have a distinctive capacity for rehabilitation. In light of this new knowledge, the Court has held in *Roper*, *Graham*, and *Miller* that sentences that may be permissible for adult offenders are unconstitutional for juvenile offenders. *See, e.g., Miller,* 132 S. Ct. at 2465 ("In [*Graham*], juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime.").

This understanding of adolescent development was not fully incorporated into Eighth Amendment jurisprudence when the direct appeal rights of Appellant Bonilla were exhausted. However, the timing of his appeal does not alter the applicability of the science. Therefore, Bonilla is serving a constitutionally disproportionate sentence. *See Miller*, 132 S. Ct. at 2475 (finding "the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"). Forcing individuals to serve constitutionally disproportionate sentences for crimes they committed as children based solely on the date of their conviction or finality of their cases directly contradicts the dynamic qualities of the Eighth Amendment's evolving standards of decency and serves no societal interest. *See Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring) ("[T]he writ [of habeas corpus] has historically been available for attacking convictions on [substantive due process] grounds. This, I believe, is because it

represents the clearest instance where finality interests should yield."). It is both common sense and a fundamental tenet of our justice system that

> the individual who violates the law should be punished to the extent that others in society deem appropriate. If, however, society changes its mind, then what was once "just desserts" has now become unjust. And, it is contrary to a system of justice that a rigid adherence to the temporal order of when a statute was adopted and when someone was convicted should trump the application of a new lesser, punishment.

S. David Mitchell, *Blanket Retroactive Amelioration: a Remedy for Disproportionate Punishments*, 40 Fordham Urb.L.J. City Square 14 (2013), *available at* urbanlawjournal.com/?p=1224.

Additionally, depriving the majority of juveniles sentenced to life without parole the benefit of *Miller*'s holding because they have exhausted their direct appeals violates the Eighth Amendment's proscription against the arbitrary infliction of punishment. *See Furman*, 408 U.S. at 256 (Douglas, J., concurring) ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."). In his concurring opinion in *Furman*, Justice Brennan found:

> [i]n determining whether a punishment comports with human dignity, we are aided also

> by a second principle inherent in the Clause – that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments.

Id. at 274 (Brennan, J., concurring). Unless *Miller* is applied retroactively, children who lacked sufficient culpability to justify the life without parole sentences they received will remain condemned to die in prison simply because they exhausted their direct appeals. As the Illinois Appellate Court concluded in finding *Miller* retroactive for cases on collateral review, in addition to mandatory life without parole sentences constituting "cruel and unusual punishment[,]" "[i]t would also be cruel and unusual to apply that principle only to new cases." *Williams*, 982 N.E.2d at 197. *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."), *appeal docketed*, No. 10-14568 (6th Cir. Dec. 20, 2013).

Finally, the U.S. Supreme Court has found that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."

Trop v. Dulles, 356 U.S. 86, 100 (1958). *See also Furman*, 408 U.S. at 270 (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."). The Eighth Amendment's emphasis on dignity and human worth has special resonance when the offenders being punished are children. 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." More recently, the Court has found that:

> [juveniles'] own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. . . . From 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.

Roper, 543 U.S. at 570.

In order to treat the Appellant – or any other child sentenced to mandatory life without parole and seeking collateral review – with the dignity that the Eighth Amendment requires, *Miller* must apply retroactively. "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and

potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79.

C. The Interest In Ensuring That The Life Without Parole Sentence Imposed On A Juvenile Is Constitutional Outweighs The Interest In Finality

Courts have long recognized that they cannot fully resolve the "tension between justice and efficiency." *Wainwright v. Sykes*, 433 U.S. 72, 115-16 (1977). The *Teague* limitations on the retroactive application of a new rule are part of the judiciary's balancing act, and demonstrate respect for the importance of the finality of judgments. *Teague v. Lane*, 489 U.S. 288, 309 (1989). However, the interest in finality is not always paramount. "The fact that life and liberty are at stake in criminal prosecutions" means that conventional notions of finality should receive less weight than in civil cases, *id.*, and the Supreme Court of the United States has expressly held that "the principles of finality and comity 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

When the retroactive application of a new rule concerns a sentence, rather than an underlying conviction, the interest in finality should be accorded less weight because the traditional justifications for finality are

weakened. This is especially true in the context of a mandatory life without parole sentence imposed on a juvenile; the unjust nature of an unconstitutionally imposed mandatory life without parole sentence must outweigh any interest in the finality of that sentence.

1. The Accuracy Concerns Underlying Finality Interests Are Diminished In The Context Of Sentencing

In *Mackey*, Justice Harlan argued that failure to sufficiently respect the finality of convictions would force courts to "relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed," resulting in subsequent verdicts no more accurate than the first. *Mackey*, 401 U.S. at 691. Because "[c]riminal trials are inherently backward-looking, offense-oriented events, . . . merely the passage of time . . . provides reason to fear that any new review or reconsideration of backward-looking factual determinations of guilt made during a trial will be costly and inefficient, will be less accurate, and will raise questions about the accuracy and efficacy of criminal trials generally." Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 167, 170 (2014) [hereinafter Berman, *Finality*].

However, these concerns do not apply in the context of a new sentencing hearing because fundamentally "different conceptual, policy and practical considerations are implicated when a defendant seeks only review

and reconsideration of his final sentence and does not challenge his underlying conviction." *Id.* at 152. The practical differences are obvious: for instance, sentencing hearings have different rules of procedure, evidence, and burdens of proof than trials. They also have different goals; while criminal trials "are designed and seek only to determine the binary question of a defendant's legal guilt," sentencing hearings "are structured to assess and prescribe a convicted offender's future and fate." *Id.* at 167.

The sentencing hearing has an essential "forward-looking" component, which includes consideration of the defendant's characteristics and the possibility of rehabilitation. The final decision is not a binary finding of guilt or innocence, but "what to do with the convicted criminal in light of his, the victims', and society's needs." *Id.* at 169. "Although resentencing may take place years after the original proceedings, the relaxed evidentiary rules at resentencing make the risk of inaccuracy from unavailable or spoiled evidence less acute than at retrial. Indeed, the passage of time may provide better information about the offender's dangerousness and rehabilitation, enhancing accuracy." Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 181 (2014) [hereinafter Scott, *Collateral Review*].

Concerns about the accuracy of the original sentence are inapt in the context of mandatory sentences like those at issue in *Miller*. The mandatory

nature of the sentence means there was never an opportunity for the judge to impose a sentence based on the particular facts and circumstances of the case and the offender. Therefore, it is illogical to conclude that the "accuracy" of the former unconstitutional sentence will be *reduced* by applying *Miller* retroactively; applying *Miller* retroactively and allowing individualized sentencing would *increase* accuracy.

2. The Resource Concerns Underlying Interests In Finality Are Diminished In The Context Of Sentencing

Efficient use of judicial resources is also relevant to concerns for finality. *See Mackey*, 401 U.S. at 691 (noting that it would "seriously distort the very limited resources society has allocated to the criminal process . . . to expend[] substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final."). As several Circuit courts have recognized, this argument has greater force when applied to relitigating convictions than to resentencing:

> [T]he context of review of a sentencing error is fundamentally different. From the standpoint of the parties, the error might have great significance . . . More importantly, the cost of correcting a sentencing error is far less than the cost of a retrial.

United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005). *See also United States v. Saro*, 24 F.3d 283, 287–88 (D.C. Cir. 1994) "[w]hen an error in sentencing is at issue . . . the problem of finality is lessened, for a

resentencing is nowhere near as costly or as chancy an event as a trial."; *United States v. Brockenborrugh*, 575 F.3d 726, 743 (D.C. Cir. 2009) (Rogers, J., concurring in part, dissenting in part) ("The court is to be cognizant, in determining whether the sentence should be remanded in light of clearly erroneous factual findings, of the lesser costs to the systemic interests in finality where resentencing, as opposed to retrial, is the appropriate remedy."); *United States v. Serrano-Beauvaix*, 400 F.3d 50, 61 (1st Cir. 2005) (Lipez, J., concurring) ("resentencing does not pose the burden of a new trial, with its considerable costs in time, money, and other resources."); *Carrington v. U.S.*, 503 F.3d 888, 901 (9th Cir. 2007) (Pregerson, J., concurring in part and dissenting in part) ("The interest in repose is lessened all the more because we deal not with finality of a *conviction,* but rather the finality of a *sentence*. There is no suggestion that [the defendants] be set free or that the government be forced to retry these cases. The district court asks only for an opportunity to re-sentence in accordance with the Constitution."); Scott, *Collateral Review* at 181 ("[r]esentencing is faster, less complex, and cheaper than a new trial."). Finally, "review or reconsideration of an initial sentence may be an efficient way to save long-term punishment costs" by reducing the fiscal load on the prison system. Berman, *Finality*, at 170. In the case of mandatory life without parole sentences, any reformation of the punishment

to a lesser term of years necessarily will save the state the direct costs of incarceration and those associated with growing old or infirm in prison.

In addition, resentencing juveniles serving mandatory life without parole will not duplicate previous costs or efforts. Because every defendant who would be affected by retroactive application of *Miller* received a mandatory sentence, a new sentencing hearing will be the first time the court considers mitigating factors in support of a lesser sentence.

3. Finality Concerns Regarding Judicial Reputation Are Diminished In The Context Of Sentencing

Finality is also an important interest because it maintains the legitimacy and reputation of the criminal justice system. As Justice Harlan noted: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey*, 401 U.S. at 691. However, Justice Harlan's concerns rest on the finality of the conviction itself, not on the possibility of repeated resentencing or parole:

> 'Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error *but rather on whether the prisoner can be restored to a useful place in the community.*'

> *Sanders v. United States*, 373 U.S. at 24-25 (Harlan, J., dissenting).

Mackey, 401 U.S. at 690 (emphasis added). Justice Harlan suggests that "continuing litigation over a sentence may not pose the same threat to the reputation of the criminal justice system as continuing litigation over guilt or innocence." Scott, *Collateral Review*, at 181. Because "[s]entences are already subject to modification and reduction through a host of procedures," *id.*, retroactive application of laws that alter the length of a sentence are less disruptive than laws that call into question whether a defendant was properly convicted in the first place. On the other hand, confidence in the justice system is undermined if the Supreme Court's recognition that children have been unconstitutionally sentenced to mandatory life without parole applies only prospectively, leaving hundreds of juveniles to die in prison.[6]

4. Because Life Without Parole Sentences For Juveniles Are Akin To The Death Penalty, Concerns With Finality Are Further Diminished

[6] *Teague* was also concerned that applying new rules retroactively would greatly interfere with the "deterrent effect" of criminal law. 489 U.S. at 309. However, juveniles are generally "less susceptible to deterrence." *Roper*, 545 U.S. at 571. *See also Graham*, 560 U.S. at 72 (juveniles "are less likely to take a possible punishment into consideration when making decisions"). Moreover, all of the defendants who would directly benefit from applying *Miller* retroactively have served years, if not decades, in prison. Because applying *Miller* retroactively is not an evasion of punishment, it would not erode the deterrent effect of criminal law.

"[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable." *Graham*, 560 U.S. at 70. Both sentences mean that the defendant will die in prison, and must live until that point with "denial of hope." *Id.* (quoting *Naovarath v. State,* 105 Nev. 525, 526 (1989)). In addition, just as death is the most serious sentence available for an adult offender, life without parole is the most serious – and an "especially harsh" – punishment that a juvenile can receive. *Id. Miller* relied on *Graham* to import protections that were constitutionally required in death penalty sentencing into the sentencing of juveniles to life without parole. "By likening life-without-parole sentences for juveniles to the death penalty, *Graham* makes relevant this Court's cases demanding individualized sentencing in capital cases." *Miller*, 132 S. Ct. at 2450.

The Supreme Court of the United States' precedent suggesting that the interest in finality is lessened when capital punishment is at issue is therefore also relevant to juvenile life without parole cases. In capital cases, the Court has found that the Constitution requires "a correspondingly greater degree of scrutiny of the capital sentencing determination," *California v. Ramos,* 463 U.S. 992, 998-99 (1983), and "a greater degree of accuracy . . . than would be true in a noncapital case." *Gilmore v.*

Taylor, 508 U.S. 333, 342 (1993). *See also Littlejohn v. Trammell*, 704 F.3d 817, 859 (10th Cir. 2013) (citing *Osborn v. Shillinger*, 861 F.2d 612, 626 n.12 (10th Cir. 1988)) ("the minimized state interest in finality when resentencing alone is the remedy, combined with the acute interest of a defendant facing death, justify a court's closer scrutiny of attorney performance at the sentencing phase."). The relative weight of finality is decreased when set against the interest in ensuring that a juvenile sentence of life without parole is applied in a constitutional manner.

D. Appellant's Sentence Violates *Miller* Because It Is the Functional Equivalent of Life Without Parole And Was Imposed Without Consideration of the *Miller* Factors

1. A Sentence That Precludes A "Meaningful Opportunity To Obtain Release" Is Unconstitutional Regardless Of Whether It Is Labeled "Life Without Parole"

The Supreme Court's Eighth Amendment jurisprudence has clarified that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. For example, the U.S. Supreme Court took this commonsense and equitable approach in *Sumner v. Shuman,* 483 U.S. 66 (1987), where it noted that "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." 483 U.S. at 83.

Miller defines a life without parole sentence as one that does not give the offender "'some meaningful opportunity to obtain release based on maturity and rehabilitation.'" 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 75). A sentence that exceeds a juvenile offender's life expectancy clearly fails to provide a meaningful opportunity for release.[7] As this Court held in *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012), "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." Therefore, a mandatory sentence that has the practical effect of depriving a juvenile of a meaningful opportunity to renter the society is subject to *Miller* despite being labeled a term-of-years sentence.

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[7] *See also Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012) (vacating a sentence in which a 15-year-old offender would not be parole-eligible until age 83 noting that "[t]his Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years sentence rather than a life sentence if that term-of years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime. The Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label."); *but see Diamond v. State*, 419 S.W.3d 435 (Tex. Crim. App. 2012) (upholding a child's consecutive 99 year and 2 year sentences without any discussion of *Graham*); *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011) (upholding an aggregate term 139.75 years based on 32 felonies, including one attempted arson continued into defendant's adulthood); *State v. Brown*, 118 So. 3d 332, 341 (La. 2013) (upholding consecutive term-of-years sentence rendering the defendant eligible for parole at 86); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (upholding a sentence where the earliest possibility of parole was at age 95).

2. Life Expectancy Alone Cannot Determine Whether An Opportunity For Release is "Meaningful"

Evidence presented by the Appellant shows that his life expectancy is somewhere between 72 and 76 years, even without accounting for the impact on life expectancy of spending decades in prison. Appellant's Opening Brief on the Merits at 16. Appellant Bonilla is serving a sentence of 50 years to life. He will be nearly 70 years old before he first becomes eligible for parole. *Id.* Because this sentence provides Appellant with no meaningful opportunity to re-enter society during his natural life, it is the equivalent of life without parole.

Whether an opportunity for release is *meaningful* should not depend on anticipated dates of death. In *State v. Null*, 836 N.W.2d 41 (Iowa 2013), the Iowa Supreme Court held that a sentence for a juvenile nonhomicide offender granting parole eligibility at age 69, although not labeled "life without parole," merited the same analysis as a sentence explicitly termed "life without parole" and was unconstitutional under *Graham*. The Court ruled that whether a sentence complied with *Graham* was not dependent on an analysis of life expectancy or actuarial tables. The Court stated:

> [W]e do 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. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few

> that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Null, 836 N.W.2d at 71-72.

Life expectancy is a poor measure of whether a sentence provides a meaningful opportunity for release. First, the life expectancy of inmates who have been sentenced as juveniles is difficult to determine. "[Life] expectancy within prisons and jails is considerably shortened." *People v. J.I.A.*, 196 Cal. App. 4th 393, 127 Cal. Rptr. 3d 141, 149 (2011) (citing The Commission on Safety and Abuse in America's Prisons, Confronting Confinement, p. 11 (June 2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf); *see also* Jason Schnittker et al., Enduring Stigma: The Long-Term Effects of Incarceration on Health, 48 J. of Health & Soc. Behav. 115, 115-30 (2007); Michael Massoglia, Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses, 49 J. of Health and Soc. Behav. 56, 56-71 (2008); Michael Massoglia, *et al.*, No Real Release, 8 Contexts 38, 38-42 (2009). There is evidence that inmates who were sentenced to life without parole as juveniles have even shorter life expectancies than adults serving the same sentence. *See* Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, *available at* http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-

Life-Expectancy-Data-Youth-Serving-Life.pdf. Moreover, even if life expectancy data were perfectly accurate, a full 50% of people will die *before* the age indicated by the statistic. Adele Cummings & Stacie Nelson Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J. JUV. L. & POL'Y 267, 283 (2014).

Second, a meaningful opportunity for release must mean more than affording a juvenile offender the opportunity to die at home. For an opportunity for release to be "meaningful" under *Graham,* review must begin long before a juvenile reaches old age. Providing an opportunity for release only after decades in prison denies these young offenders an opportunity to live a meaningful life in the community and meaningfully contribute to society. *See, e.g., State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (striking down a 35 year sentence that would render the juvenile eligible for parole at age 52 because it violated *Miller* by "effectively depriv[ing] of any chance of an earlier release and the possibility of leading a more normal adult life."). Even assuming Appellant lived long enough to be released in his 70s, he would likely struggle with serious health conditions and would die soon after release. It is unlikely he would be able to engage in other aspects of a meaningful life, such as starting a family or otherwise integrating himself into his community. *See, e.g., State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) ("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*.").

Finally, allowing possible release from prison before a juvenile offender reaches his geriatric years is consistent with research showing that juvenile recidivism rates drop long before late adulthood. The U.S. Supreme Court has noted that "'[f]or most teens, [risky and antisocial] behaviors are fleeting; they cease with maturity as an 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: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003). In a study of juvenile offenders, "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg (2014) *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop.* Chicago, IL: MacArthur Foundation, p. 3, *available at* athttp://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf. Therefore, most juvenile offenders would no longer be a public safety risk once they reached their mid-

twenties, let alone their thirties, forties, and fifties. Because most juveniles are likely to outgrow their antisocial and criminal behavior with maturity, review of the juvenile's maturation and rehabilitation should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g., Research on Pathways to Desistance: December 2012 Update*, Models for Change, p. 4, *available at* http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts. The study also found that "it is hard to determine who will continue or escalate their antisocial acts and who will desist[,]" as the "original offense . . . has little relation to the path the youth follows over the next seven years.").

Therefore, review for juvenile offenders should be conducted at regular intervals at an appropriate point in their sentence. 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 the vocational training, programming and treatment that foster rehabilitation. *See, e.g., Graham*, 560 U.S. at 74 (noting the importance of "rehabilitative opportunities or treatments" to "juvenile offenders, who are most in need of and receptive to rehabilitation").

3. Appellant Was Sentenced Without Consideration Of His Age and Age-Related Characteristics

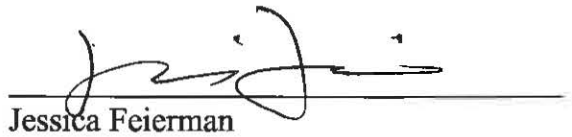
Miller requires that before a court can sentence a juvenile to life without parole, it must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469.

Appellant was sentenced to 50 years to life. At his sentencing hearing, there was no discussion of discretion in sentencing or of the mitigating factors required by *Miller* before imposing life without parole. Petitioner's Opening Brief on the Merits at 4. Because the Court did not consider the differences between juveniles and adults, including "'lessened culpability'" and "greater 'capacity for change'", *Miller*, 132 at 2460, before sentencing him to functional life without parole, Appellant's sentence is unconstitutional.

IV. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court hold that Appellant's sentence of 50 years to life constituted mandatory life without parole in violation of *Miller v. Alabama*, and that *Miller* must apply retroactively to defendants like Appellant who are seeking relief on collateral review.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief conforms to Rules 8.200 and 8.204, and that it contains 11, 204 words in 13-point Times New Roman font, as calculated by Microsoft Word 2013.

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I certify that, this 14th day of May, 2015, a true and correct copy of the foregoing brief of *Amicus Curiae* Juvenile Law Center et al. has been sent by regular U.S. mail to the following:

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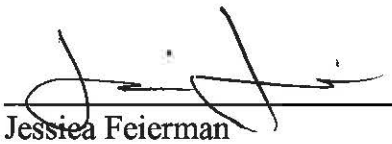

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