IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DEC 30 2016

No. S-1-SC-35657

SUPREME COURT OF NEW MEXICO
FILED
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**JOEL IRA,**

Plaintiff-Appellant,

vs.

**JAMES JANECKA, Warden,**
**Lea County Correctional Facility,**
**Hobbs, New Mexico,**

Defendant-Appellee.

No. D-1215-JR-1995-00142

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**BRIEF-IN-CHIEF**

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## SUMMARY OF PROCEEDINGS

## NATURE OF CASE, THE COURSE OF PROCEEDINGS, AND THE DISPOSITION IN THE COURT BELOW

Petitioner, **JOEL IRA**, in accordance with ***NMRA Rule 12-501***, petitioned the Supreme Court for the issuance of a Writ of Certiorari seeking review of the denial of his Habeas Corpus Petition (RP521-661) entered December 9, 2015, by the District Court, Division I, Twelfth Judicial District, County of Otero, State of New Mexico, in Cause No. D-1215-JR-1995-00142 (RP760-762). Joel Ira sought on habeas certain relief because he has been in detention/ jail or prison for 20 years serving a sentence of 91 ½ years imposed on him as a child. He has at least another 73 years to serve for crimes occurring (if they did at all) when he was a 15 year old boy for sexual acts with a girl 4 years his junior. His sentence violates both Constitutions, the Statutes of the State of New Mexico, United States Supreme Court and New Mexico Supreme Court decisions. The punishment is cruel and unusual, violates due process and was of a child who neither understood nor comprehended nor able to protect himself and when he needed it most, did not have the effective counsel he needed.

In a series of cases since Joel Ira was placed in custody the United States Supreme Court has prohibited the execution of children, (***Roper v Simmons***, 542 U.S. 551 (2005)), prohibited life sentences for children for non-homicidal crimes (***Graham v Florida***, 130 S. Ct. 2011 (2010), prohibited life sentences without

parole, (***Miller v Alabama***, 132 S.Ct. 2455 (2012)), while the New Mexico Supreme Court has ruled a child cannot waive an amenability hearing, (***State v. Jones***, February 16, 2010, 148 N.M. 1, 229 P.3d 474 2010-NMSC-012) and set forth clear guidelines based on age as to any determination of a waiver of ***Miranda*** (***State v. DeAngelo M.***, Supreme Court of New Mexico, October 15, 2015--- P.3d ----2015 WL 602 3323 2015 -NMSC- 033). The ***Miller v Alabama*** rule applies retroactively on state collateral reviews. ***Montgomery v. Louisiana***, Supreme Court of the United States January 25, 2016, 136 S.Ct. 718, 2016 WL 280758.

The above cases make it clear children must be treated differently and their age considered because the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Courts can no longer ignore the vast number of studies and science regarding adolescent development especially a child's lack or decreased impulse control, emotion regulation, foresight, planning ahead and reasoning. A child must have a chance to be rehabilitated early on.

## SUMMARY OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

**Procedural Facts**: Joel Ira was born February 23, 1981. He has been in jail or prison since February 21, 1997. (R.P. 38, 43-44.45a) serving a sentence of 91 ½ years for crimes allegedly committed at age 15 years (RP233, 370-376). Offenses committed at age 14, being juvenile offenses, were run concurrently with adult

sentences and the Court ordered that Joel Ira not be housed at any time in a juvenile facility. (RP233, 250-254). He was sentenced to 91 ½ years for criminal sexual penetration in the first degree of his stepsister (no blood relation) (RP233, 250-254), based on a petition filed Feb. 20, 1997 (RP 32-33) and later amended (RP 38-41). The child was detained on the 21st day of February, 1997 (RP 41, 45a) Appointed counsel waived his preliminary hearing. (RP91). He has been in detention and/or prison ever since. He will be eligible for parole if at all in 45.75 years if 50% good time (age 62) or 77.7 years if 85% good time (age 94).

The prosecutor sought and obtained an Adult Sentence. (RP64-65,233,250-254). On June 20, 1997, Joel age 16 pled no contest to 10 counts of criminal sexual penetration in the first degree, 1 count of aggravated battery against a household member, and 1 count of bribery or intimidation of a witness. Disposition or sentencing was in the discretion of the court. (RP 154-157). The child was sentenced to a total of 108 years in prison. (RP213-221, 227-230). A Commitment to the Penitentiary of the State of New Mexico was entered September 9, 1997. (R.P. 232). An appeal was taken and on October 1, 1998, in ***No. 18,915,*** the Court of Appeals entered its Memorandum Opinion reversing the decision of the Trial Court and remanding for a new sentencing because crimes committed when 14 years of age did not qualify for an adult sentence thus the sentence was arbitrary

and capricious because it was not in accordance with the law and the Trial Court had abused its discretion. (RP 313-318).

Joel was resentenced by the Court as an adult (RP351-376) to a period of incarceration of 91 ½ years. (RP371-376) The Judgment and Sentence and Commitment on Mandate was entered March 2, 2000. (RP376). The child's new attorney moved for reconsideration of the sentence and to set aside the plea and sentence. (RP 379-384). The Trial Court denied the motion to set aside the plea agreement (RP 413-417) and the motion to reconsider even though another mental health and rehabilitation program had been found for the child by his attorney and expert testimony indicated he could be treated as a child. (TP T1-T3, 1625&4/27/2000 T1-856). The child appealed. (RP413). The Court of Appeals affirmed the decision of the Trial Court in ***State v Joel Ira,*** 132 NM 8, 43P.3d 359, 2002-NMCA-037. The child filed a Petition for Writ of Certiorari to the New Mexico Court of Appeals. The Petition was denied. (Certiorari Denied, No. 27,355, April 4, 2002).

The child, now an adult, filed his Petition for Habeas Corpus on August 1, 2014 (RP521-661), a response was filed February 5, 2015 (RP 669-704), an evidentiary hearing held June 30, 2015 (TP 6/30/15 9:31-11:24) and November 20, 2015 (TP11/20/14 1:31:24-4:12:46). The Court denied his Petition and Joel Ira sought certiorari which has been granted.

**Facts from hearings**: On the 21st day of February 1997, police officers arrested Joel Ira and took a statement from him. He gave them his birth date and they asked him what had happened with his stepsister. (No motion to suppress this statement was made). In his statement to police which was recorded and played for the Court, Joel Ira acknowledged that on 2 occasions, he engaged in sex with his stepsister. On one of those occasions, he admitted that he "poked her in the butt" and on another occasion, she had oral sex with him. He admitted that he told his stepsister he would "kick her ass" if she told. He also told the officer that on 1 occasion, she had asked him to "suck her vagina." He said that the first time anything had ever happened sexually between he and his stepsister was when she came up to him and said that she wanted him to suck her and he refused. He admitted that on the day this occurred, he was smoking marijuana. The female child told the same investigator who Joel had touched her in an inappropriate way and that he had touched her underneath her T-shirt but on top of her panties. Joel Ira said the 2 incidents had occurred the week before he was arrested. (8/20/97, T.1, 144 thru T.2, 139). (Based on the child's statement he had a defense to all the other charges).

The female child was not blood related to Joel Ira. (8/20/97,T.1,1582-1620).

The female child, Joel Ira's stepsister, testified much differently than her statement to police. She testified she was 11 years of age and had lived with her

mother, father, a sibling, and 3 stepbrothers, including Joel Ira. Joel Ira, she said "started abusing me," and this happened when he placed his finger in her vagina in the spring of 1995. The date in the spring of 1995 was suggested to her in a leading question by the prosecuting attorney. She also testified that he had put his "penis in her butt" and in her mouth and on one occasion, in her vagina. She said that this occurred every other day since the spring of 1995. She said that he never hit her hard enough to knock the wind out of her but that he called her names and sometimes kicked her and that he said that if she told, he would kill her. She also said that they'd played games such as Truth and Dare where they were supposed to take a piece of clothing off and another game where the first team to fall asleep, the other team would have to do something bad to them such as put a soapy towel in their face. She said that he shoplifted once and smoked marijuana. She claimed he would squash bugs with his hand and kicked her dog because he pooped in the house. He showed them he could run his arm over a flame and not burn it and once he put a firecracker in a lizard's mouth. She said she had nightmares. On cross-examination, she testified that she didn't say anything about any of this until they had a DARE program at school and she learned about "this stuff." She also testified that she never asked him to stop and that she thought the games were fun. The female child said that she felt sad that he was going to jail and that she still

loved him and that there were a lot of things she liked about him because he protected them a lot. (7/10/97, T.1, 1 thru T.2, 276).

The investigation in this matter showed, through the police detective, that Joel Ira was the oldest one in the family home and that he was responsible for supervising several other children, all younger than he, particularly from the time school was out to the time the parents came home. (8/20/97, T.2, 1-71).

Psychologists, probation officers, police officers, social workers, program administrators and parents also testified.

Vicki Thomas, a psychologist, testified that she worked with victims of child abuse, determined the female child's emotional status, make treatment recommendations, noted the child's grades had dropped significantly even though the child was very bright. She testified the female child had been sexually abused prior to any activity with Joel Ira while the child lived in Italy. One of the problems she noted with the sexual abuse is that someone can become more precocious sexually and interested in that sort of thing because of the thing that had happened to them before. The female child indicated to her a desire or wish that Joel Ira would get some treatment. (8/20/97, T.2, 165-913).

Ronnie Reyes was a Children's Probation Officer. He testified Joel should not be placed in the juvenile justice system due to the serious nature of the charges. He admitted he had never paneled Joel Ira to determine what type or help would be

available for Joel. He admitted that paneling was essentially a monetary issue to determine whether a child would qualify for assistance and at what level. Children's Probation never tried or attempted in Joel Ira's case to qualify Joel for help (8/20/97, T. 1, 1347 thru T.3, 732).

Catherine Peterson, a psychotherapist, said she couldn't help Joel Ira because he wouldn't admit to being a pedophile. (8/20/97, T.3, 741 thru T.4, 129).

Dr. Thomas J. Salb, a psychotherapist, testified he did a forensic evaluation in April of 1997 of Joel Ira and reported that Joel Ira could not be treated in the State of New Mexico however, he mentioned a boot camp program in Lovington, New Mexico, and he suggested there were in-house programs in Texas and they might be able to provide some treatment. Dr. Salb diagnosed Joel as having conduct disorder with adolescent onset suffering from cannabis abuse. He also felt that he was not a pedophile and that his behavior was opportunistic rather than a specific interest in young children. He indicated Joel Ira was functioning in the average range of intellectual ability, he was behind in academic skills, had some limitation in short-term memory skills, and he suffered from some attention deficit, hyper-activity.. He indicated that the tests were simply a predictor and not necessarily a description. His bottom line was that the child, Joel Ira, would have no chance without treatment and that he was in need of treatment and Joel

appeared willing to accept psychological treatment options. (8/20/97, T.4, 236-1838).

Joe Ray Mills, Joel Ira's stepfather in that he had married Joel Ira's mother, indicated that they had lost control of Joel Ira when he went to live with his stepfather Thomas Ira. Mr. Mills indicated that he didn't condone what Joel Ira did but that he knew that he had been placed in charge of his siblings, had to take care of several of the children rather than their parents taking care of them, that Joel Ira was not an animal and that had he known something was wrong, he would have worked with him. Mr. Mills and Joel Ira had a good relationship. He had observed Thomas Ira, Joel Ira's father, yelling and screaming at Joel Ira and noted that they had a tough relationship. He explained his frustration with the fact that between police officers, probation officers and the court, no one had bothered to do much for him except give him 108 years. Mr. Mills said when he and Joel's mother had Joel, Joel was getting C's and B's in school. (8/20/97, T.5, 366-1256).

Social worker D.J. Gallegos provided the court and counsel with some alternative sentencing. He testified about sexual offender programs in the State of Texas, a program at Desert Hills in New Mexico, a program in Mesilla Valley, New Mexico, and other programs. He discussed the problem of parental abuse with the child and the child acting out and how that could be helped and/or treated and

his concern over Joel Ira's father's activities toward Joel Ira. (8/20/97, T.5, 1265 thru T.6, 978).

The State called Dr. Samuel Roll, a psychologist, who had spent 2 two hour sessions with Joel, testified Joel had no conscience. Dr. Roll had to admit, however, the beatings and the rejection Joel received created problems for the Joel and finally had to admit that of course therapy for Joel would include in-house treatment, he would have to have people committed to working with him on a daily basis, there would have to be group treatment and work to help socialize him, and somebody to work with him to have him appreciate joy in life, goodness in life, close relationships and he would need somebody to lean on and he would need therapy to address the issues in his life. Dr. Roll never concluded that he was a pedophile but concluded he suffered from a severe conduct disorder. (8/20/97, T.6, 999 thru T.7, 489).

Dr. Miller the director of psychological services of the New Mexico Boys School testified they had a sexual offender treatment program at Springer but they generally tended to treat pedophiles at Springer and since Joel Ira wasn't a pedophile, would not be as amenable to treatment. Dr. Miller indicated that one of the major problems in getting treatment for him was that of payment and that since New Mexico had sold them to Managed Care, there weren't facilities or programs available that were needed to take care of somebody like him. He indicated there

were programs outside the State that he had heard of but with current funding pictures in New Mexico, a treatment program wasn't available. Dr. Miller admitted that if he was placed in the Boys School, he would design a course of therapy for him to follow. In fact, he said the Boys School couldn't refuse treatment and they would treat everyone that comes to the Boys School. In fact, he admitted the Boys School was a structured environment, Joel would have limits placed on his behavior, that he could keep Joel until age 21. (8/20/97, T.8, 001-1512).

The above was testimony the Court heard before it sentenced Joel Ira to 108 years. After the Court of Appeals reversed the decision of the Trial Court and remanded, different defense counsel appeared, had Joel Ira re-evaluated and found programs to treat him.

On December 3, 1999, Dr. Matthews, a licensed psychologist who had worked in the State of New Mexico for 22 years specializing in forensic psychology, and in particular, working with sexual offenders, testified regarding his evaluation of the child Joel Ira. He did tests of him that had never been done before, regarding sexual issues, sexual attitudes and sexual interests, motivation and dangerousness. He had some antisocial qualities, there were some aggressive qualities, some self-indulgence qualities; however, he was not a pedophile. He diagnosed him as having a conduct disorder, a substantial level of depression, a substantial level of anxiety, a prolonged level of insecurity and inadequacy, poor

self-esteem, lack of confidence and immaturity. He found Joel had matured. Joel's level of depression was acute and chronic and because of the intimidation, threats and the violence he had experienced since being in the New Mexico State Penitentiary, he was extremely hyper vigilant, and because he was labeled a sexual offender in the New Mexico State Penitentiary, he had to be hyper vigilant to prevent being accosted, threatened, and intimidated. Dr. Matthews testified that children are certainly more malleable and more treatable and there is a greater likelihood they are going to respond to treatment. He pointed out through his diagnosis and his evaluation that a psychologist such as Dr. Roll simply coming in and saying that an individual lacked a conscience and couldn't be treated was wrong and that you had to do that on an individual basis. He noted there are a variety of factors that you had to consider when you deal with children, such as his intellectual functional level, his intellectual ability. The doctor found him to be of average IQ, that in fact, he had the capacity to benefit from rational therapeutic approaches, he noted that he had some level of motivation at this point and noted for example, that since he had been incarcerated, he had obtained his GED certificate, he was involved in a drug treatment program, he was involved in a program related to interpersonal skills and involved in a program in being able to resolve personal problems. Joel Ira expressed a need to address issues related to his offenses and based on his actions in the New Mexico State Penitentiary, and his

involvement in the programs offered, he was motivated. Dr. Matthews further advised the Court the younger the individual, the more amenable they are for treatment and the more likely they are to change. He was still a young man and the chances he was going to respond to treatment were far better than those of a 25 or 35 year-old. Joel Ira had family support in Mr. and Mrs. Mills, his biological mother and stepfather, although he did not have in the man he thought to be his real father. He indicated to the Court there was potential for treatment and advised a structured long-term setting. Dr. Matthews, based on his treatment of sexual offenders, recommended comprehensive treatment, multiple levels of care, and suggested several programs and a combination of treatment in Sequoia, the Maximum Security Juvenile facility in New Mexico as well as the STOP program at Las Vegas Medical Center, programs in Colorado and Texas. Dr. Matthews pointed out that had we started Joel Ira into such a program when this first came up and he was first sentenced, chances would be far better. A good therapy program would be approximately 5 years. (12/3/99, T.1 thru T.3, 1625).

Sheila Mills, the child's mother, testified of Joel's extensive contacts with his family, her visits with him once a month, her children visits every other month, his grandmother's visits, his calls once a week and letters to the family. It was Joel's idea to get his high school diploma and enter programs. (12/3/99, T4,1299-1381).

On April 27, 2000, defense counsel for Joel Ira presented additional programs and in particular, a program in Oklahoma that would treat his problems. In fact, Oklahoma would accept him without all the funding necessary. The Court denied that alternative. (4/27/00, T.1 thru 856). Despite several alternatives, the Court refused to consider treatment options for the child.

The child, through his attorney, filed a motion to set aside the plea agreement and on March 30, 2000, the Court heard testimony and argument. His prior attorney testified that he along with the Court and the prosecution were wrong about the law when the plea bargain was entered into, accepted and the Court entered its judgment. In fact, the Court of Appeals, in their decision, said they were wrong. He acknowledged that he had explored with Joel Ira, the fact that he could get into treatment as a juvenile and even if he received an adult sentence, he could get into treatment at Las Vegas in their STOP program. He indicated he had an emotional age level of 12 years old and he was going along with whatever his attorney said. He also advised the court, through his testimony, that neither Joel Ira nor his attorney expected to get the kind of time the court gave, otherwise they wouldn't have entered into the plea, and that another reason for him entering into the plea was so that the victim would not have to testify. (TP 3/30/00 761-1530).

Joel Ira was called to testify and indicated that he had no knowledge of the law, had never read a law book in this field, didn't know how to use a law book and thought he was going to Las Vegas or Springer for 2 years and that he was going to go into a treatment program. He didn't realize he was going to prison for the rest of his life. He simply wanted to get his time done (TP 3/30/00 T 1 1595-T2 216). In the end it did no good to present the Court with treatment options, or ask the plea be set aside. The Court re-sentenced Joel to 91 ½ years in prison. (RP413-417). The decision of the District Court was affirmed in ***State v Joel Ira,*** 132 NM 8, 43P.3d 359, 2002-NMCA-037.

The Habeas hearings, pleadings, exhibits and evidence introduced at the hearings held on 2 days show the following: Joel Ira, a child, was 15 and younger when he had sex with a female child who was 4 years younger than him. Both lived in the same household (they were not blood related but step siblings) (TP 6/30/15 9; 31-11:24). The female child is bi-polar due to genetics and Joel Ira was an abused child. (TP 11/20/2015) Joel Ira has been in custody since 1997.

Joel Ira is a model prisoner, has close ties to his family, especially his biological mother, grandmother, half brothers and sisters and his step-father. He was working full time in prison as a baker and takes great pride in his work and the special goods he bakes for special occasions. He has no sexual write ups. The Courts and District Attorneys' fear he would be a mean, sorry danger to society has

been proven wrong. In fact, for 18 years, he has proven them wrong. He and family members all testified to his good work and his good behavior. He presented the Court with certificates of accomplishments. (Exhibit "A" of the exhibits introduced at the hearing) The State rebutted none of this evidence.

The State's witness indicated the female child had been in the military but received a general discharge due to mental health issues, was bi-polar as other members of the family were, had been married and divorced and had children she gave up to her mother to care for. The former prosecuting attorney and a psychologist again claimed without having examined Joel Ira since he was a child that he had no conscience. Even if 70 years from now he had been a model prisoner, worked, stayed out of trouble and maintained close relationships with his immediate family, the state's psychologist believed he had no conscience. In a portion of the cross-examination, he had to admit he was an abused child, was responsible for younger children left with him and when they had no food to eat, he shoplifted in order to feed them. (TP 11/20/15 1:31-4:13) The trial court denied all relief.

## I. ISSUES AND ARGUMENT SHOWING THE DISTRICT COURT'S DECISION WAS ERRONEOUS

### A. The Sentence imposed upon Joel Ira violated his Eighth Amendment Right to the United States Constitution and his Art II Section 13 Rights pursuant to the Constitution of New Mexico to be free from a cruel and unusual punishment as the United States Supreme

**Court has articulated a separate Eighth Amendment analysis for children and adolescents.**

Joel Ira's sentence exceeds a life sentence in New Mexico because he is not eligible for parole in 30 years (NMSA 31-18-14 L. 1979) thereby violating ***Roper***, ***Graham*** and ***Miller***. These cases and recent New Mexico Supreme Court cases (***State v. Jones***, supra. and ***State v. DeAngelo M.***, supra, no longer ignore the vast number of studies and science regarding adolescent development especially a child's lack or decreased impulse control, emotion regulation, foresight, planning ahead and reasoning. ***Roper***, ***Graham*** and ***Miller*** establish that children are constitutionally different from adults for sentencing purposes.

In 2010, the U.S. Supreme Court explained in ***Graham v. Florida***, supra: "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." *Id.* at 79. ***Graham*** held that a sentence that provides no "meaningful opportunity to obtain release" for a juvenile convicted of nonhomicide crimes is unconstitutional. *Id.* In ***Miller v. Alabama,*** supra, 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 the

sentencing court must have discretion in sentencing and must consider the defendant's youth and its accompanying characteristics. ***Miller***, 132 S. Ct. at 2471.

Although we have said that the Legislature intended to treat serious youthful offenders "as adults, not as delinquent children," ***State v Muniz***, 2003–NMSC–021, ¶ 15, 134 N.M. 152, 74 P.3d 86, the clear grant of discretion in sentencing serious youthful offenders, set forth in ***NMSA Sections 31–18–15.3(D)*** and ***31–18–13(A)***, underscores the Legislature's intent to treat serious youthful offenders as individuals who may be rehabilitated. ***State v. Tafoya***, Supreme Court of New Mexico, April 28, 2010, 148 N.M. 391, 237 P.3d 693, 2010 -NMSC- 019. Joel Ira was not even a serious youthful offender but merely a youthful offender. Unlike the adult criminal justice system, with its focus on punishment and deterrence, the juvenile justice system reflects a policy favoring the rehabilitation and treatment of children. ***NMSA § 32A-2-2, 5, 11, 12, 14, 17, 19 and 20.***

Interesting, ***In re J.D.B.***, 131 S.Ct. 2394 (2011), the United States Supreme Court has also held that courts must consider the age of a juvenile suspect in deciding whether he or she is in custody for ***Miranda*** purposes.

## B. Children Are Categorically Less Deserving of the Harshest Forms of Punishment as noted in *Roper v. Simmons* and *Miller v. Alabama*, supra.

The U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments. ***Graham*** notes 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 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 "lessened culpability", "greater capacity for change," and individual characteristics before imposing this harshest available sentence. ***Miller***, 132 S. Ct. at 2460 (quoting ***Graham***, 560 U.S. at 68, 74). 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.*

### C. The Eighth Amendment and Article II Section 13 require that Sentences be proportionate and a sentence that is functionally equivalent to a sentence of life for a non-homicide crime violates *Graham*, supra.

Joel Ira's 911/2 year sentence for a non-homicide delinquent act at age 15

has no comparison. No 15 year old child has ever received 91 ½ years for a non-homicide crime(s). It makes no sense and in anyone's calculation is disproportionate. Further and most importantly is the fact the New Mexico legislature, by enacting ***NMSA 31-18-15.3 (D) and 31-18-13(A),*** made it clear a child treated as an adult even in a murder case may be sentenced as an adult but cannot receive more than an adult and a Court has discretion to give less. New Mexico children convicted of crimes have a right to a chance at "reasonable" rehabilitation. ***State v. Ira***, 2002-NMCA-037 {3}. ***Graham*** establishes a right to a "meaningful opportunity" of release or rehabilitation. 130 S. Ct. at 2030.

**D. <u>Joel Ira's Sentence Violates the Eighth Amendment Because It Is the Functional Equivalent of Life without Parole and Was Imposed without Consideration of the Miller Factors.</u>**

Joel Ira was convicted of nonhomicide offenses that he committed at ages 14 and 15. He was sentenced to 91 ½ years in prison more years than an adult convicted of First degree murder and serving a life sentence wherein they are eligible for parole in 30 years. His sentence is the functional equivalent of life without parole, the sentence fails to provide a meaningful opportunity for release, and was imposed without consideration of his youth and the ***Miller*** factors.

***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.

With respect to juvenile homicide offenders, ***Miller*** held that prior to imposing a life without parole sentence, the sentencer must examine factors that relate to the youth's diminished culpability and heightened capacity for rehabilitation. 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.* ***Miller*** therefore requires the sentencer to make an individualized assessment of the juvenile's culpability prior to imposition. *See also* ***People v. Gutierrez***, 324 P.3d 245, 26 (Cal. 2014) (With respect to juvenile homicide offenders, finding that "that the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in ***Miller*** and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.'") (quoting ***Miller***, 132 S.Ct. at 2465).

Therefore, even were this Court to find that Joel Ira's 91 ½ year sentence is

not the functional equivalent of life without parole, he is entitled, at a minimum, to a hearing in which the ***Miller*** factors was considered as a mitigating factor. Because, at his sentencing hearing, there was no discussion of the mitigating factors required by ***Miller*** before imposing life without parole, see Petition for Writ of Habeas Corpus at 21-22, He is entitled to a new sentencing hearing in which the court considers, as mitigating, his "'lessened culpability'" and "greater 'capacity for change'", ***Miller***, 132 at 2460.

**E. Joel Ira *must have a* "Meaningful Opportunity to Obtain Release".**

In ***Graham v. Florida***, the U.S. Supreme Court held the Eighth Amendment forbids States from "making the judgment at the outset that [juvenile nonhomicide] offenders never will be fit to reenter society." 560 U.S. at 75. Instead, States must give these offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* In ***Graham***, the Court explained that juveniles who commit nonhomicide offenses "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 79. Due to their stage of development, juveniles are more impulsive and susceptible to pressure and less mature and responsible than adults; at the same time, they possess a greater capacity for rehabilitation, change and growth than do adults. *Id.* at 68. Emphasizing these unique developmental characteristics, the Court held that juveniles who are convicted of nonhomicide

offenses require distinctive treatment under the Constitution.

***Miller v. Alabama,*** 132 S. Ct. 2455 (2012), banning mandatory life without parole sentences for juvenile *homicide* offenders, confirms that a life without parole sentence is unconstitutional for a juvenile convicted of nonhomicide crimes, even multiple nonhomicide offenses. A juvenile convicted of only nonhomicide crimes by definition cannot be categorized as one of the most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See* ***Miller***, 132 S. Ct. at 2476 (Breyer, J., concurring)

### *F.* Even When Juveniles Commit Multiple Nonhomicide Offenses, They Are Entitled To A "Meaningful Opportunity to Obtain Release" Under *Graham.*

A court cannot, "at the outset," decide that a child who has not committed homicide should be sentenced to die in prison. ***Graham***, 560 U.S. at 75. Sentencing Petitioner to die in prison is no more constitutional because it involved *multiple* convictions of nonhomicide offenses – it remains a sentence contrary to U.S. Supreme Court precedent. The U.S. Supreme Court has found that people who do not kill or intend to kill are categorically less culpable than people who commit homicide offenses. ***Graham***, 560 U.S. at 69. The fact that a child was convicted of *multiple* nonhomicide counts does not alter this equation. *See, e.g.,* ***Ohio v Moore***, Slip opinion No. 2016-Ohio-8288; ***Gridine v. State***, No. SC12-1223, 2015 WL 1239504 (Fla. Mar. 19, 2015) (holding a seventy-year prison

sentence for a juvenile convicted of multiple nonhomicide offenses unconstitutional). The U.S. Supreme Court has equated life without parole for juveniles with death sentences for adults. *See* ***Miller***, 132 S. Ct. at 2466 (viewing life without parole "for juveniles as akin to the death penalty"); just as an adult who was convicted of multiple *nonhomicide* offenses could not receive the death penalty, *see, e.g.*, ***Coker v Georgia***, 433 U.S. 584, 599 (1977) (plurality opinion) (banning the death penalty for an individual convicted of rape and robbery), a juvenile who is convicted of *multiple* nonhomicide offenses cannot be sentenced to die in prison, an otherwise unconstitutional sentence. The U.S Supreme Court has been clear: "[a]s it relates to crimes against individuals . . . the death penalty should not be expanded to instances where the victim's life was not taken." ***Kennedy v. Louisiana***, 554 U.S. 407, 437 (2008). Where no life has been taken, a child analogously cannot be sentenced to die in prison – even if the child is convicted of multiple offenses.

The brutality or cold-blooded nature of a nonhomicide offense provides no exception to ***Graham's*** categorical ban on life without parole for nonhomicide offenders. *See* ***Graham***, 560 U.S. at 78 (noting that, absent a categorical ban, "'[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity,

vulnerability, and lack of true depravity'" should require a less severe sentence) (quoting ***Roper v. Simmons***, 543 U.S. 551, 573 (2005)).See also ***Ohio v Moore,*** supra.

**G. A Sentence That Precludes A "Meaningful Opportunity To Obtain Release" Is Unconstitutional Regardless Of Whether It Is Labeled "Life Without Parole" and is not contingent on whether the sentence exceeds the child's life expectancy.**

A sentence for nonhomicide offenses that provides the juvenile offender no meaningful opportunity to re-enter society is unconstitutional. ***Ohio v Moore,*** supra. 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.

In ***Sumner v. Shuman,*** 483 U.S. 66 (1987), the Court said, "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. 66 at 83.

Labels and semantics should not enable courts to escape the clear mandate of ***Graham*** that children who commit nonhomicide offenses must be provided a meaningful opportunity for release from prison. Courts cannot circumvent the categorical ban on life without parole for juveniles who did not commit homicide simply by choosing a lengthy term-of-years sentence – here 91 ½ years. As the

Iowa Supreme Court noted, in vacating mandatory 60-year sentences for juvenile homicide offenders pursuant to ***Miller*** and ***Graham,*** "it is important that the spirit of the law not be lost in the application of the law." ***State v. Ragland,*** 836 N.W.2d 107, 121 (Iowa 2013). *See also* ***Moore v. Biter,*** 725 F.3d 1184, 1193 (9th Cir. 2013) ("***Graham's*** focus was not on the label of a 'life sentence' – but rather on the difference between life in prison with, or without, possibility of parole."); ***Henry v. State,*** No. SC 12-578, 2015 WL 1239696, at *4 (Fla. Mar. 19, 2015) (holding that ***Graham*** forbids terms-of-years sentences that preclude any "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'") (citing ***Graham,*** 560 U.S. at 75). (***Ohio v Moore***).

Though a sentence that exceeds a juvenile offender's life expectancy clearly fails to provide a meaningful opportunity for release, 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 was explicit 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.

Second, a meaningful opportunity for release must mean more than simply release to die at home. For an opportunity for release to be "meaningful" under ***Graham***, review must begin long before a juvenile reaches old age.

Finally, allowing possible release from prison long before a juvenile offender reaches his geriatric years is consistent with research showing that juvenile recidivism rates experience an enormous drop long before late adulthood. The 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 (2003Therefore, review for juvenile offenders should be early and regular. 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,*** 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").

Joel Ira's sentence, which requires him to serve more than 47 years before he may even be considered for parole, is at odds with ***Graham***. Moreover, ***Miller, Graham*** and ***Roper*** make clear that juvenile offenders' capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, set them apart from adult offenders in fundamental – and constitutionally relevant – ways. ***Graham*** prohibits a judgment of incorrigibility to be made "at the outset," 560 U.S. at 73; Joel Ira's 91 ½ year sentence for nonhomicide offenses makes precisely this prohibited judgment and is thus unconstitutional.

**H. <u>The principals of *Graham* and *Miller* apply retroactively, and New Mexico law provides greater protection.</u>**

The principals of ***Graham*** and ***Miller*** apply retroactively, and New Mexico law provides greater protection. ***Miller v. Alabama,*** supra, had a companion case, decided the same day and included as part of the ***Miller*** decision. ***Jackson v. Hobbs,*** Supreme Court of the United States, November 7, 2011, 132 S.Ct. 548 (Mem)181 L.Ed.2d 395, 80 USLW 3275, 80 USLW 3280 was a *habeas* petition

out of Arkansas. In ***Jackson***, the Supreme Court applied the principals enunciated in ***Miller*** with equal effect. ***Roper, Graham*** and ***Miller*** decided a new rule of substantive constitutional law that is to be applied retroactively. ***Montgomery v. Louisiana,*** supra. As Justice Bosson noted in his prescient special concurrence in the appellate decision in Joel Ira's last appeal, ***State v. Ira,*** Court of Appeals of New Mexico, January 24, 2002, 132 N.M. 8, 43 P.3d 359, New Mexico law provides greater protection for children, thus emphasizing that the U.S. Supreme Court decisions should be accorded retroactive effect to Joel Ira.

**I. <u>Procedural errors at the trial level denied Joel Ira due process</u>.**

Joel Ira did not receive a preliminary hearing nor a separate amenability hearing at which the State was required to prove by clear and convincing evidence that he was not amenable to treatment as a child. ***State v. Jones***, 2010-NMSC-012; ***State v. Rudy B.***, 2010_NMSC-045. He was denied his right to have prepared for him prior to the determination of his amenability to treatment a report as to his amenability to treatment by the Children, Youth and Families Department. ***NMSA 1978, Section 32A-2-17A(3), State v. Jose S.***, 2007-NMCA-146. He was denied his right to a predisposition report prepared by the Department of Corrections as required by ***NMSA 32A-2-17A(3)(b). State v. Jose S.***, *supra.* Although Joel Ira waived his right to presentation to a grand jury or to have a preliminary hearing, that right for a child should not subject to waiver. ***NMSA 1978, Section 32A-2-***

*20A*, states that [a] preliminary hearing by the court or a hearing before a grand jury shall be held ...." (emphasis mine).

**J. The Trial Court erred in failing to set aside the Plea Agreement in this cause and Joel Ira was denied effective assistance of counsel**

Joel Ira did not have a preliminary hearing. No defense was presented. ***State v. Jones***, Supreme Court of New Mexico, February 16, 2010, 148 N.M. 1, 229 P.3d 474 and ***State v. DeAngelo M.***, Supreme Court of New Mexico, October 15, 2015--- P.3d ----2015 WL 6023323 2015 -NMSC- 033 both show the New Mexico Supreme Court requires that children understand. Joel Ira neither understood what a preliminary hearing was, how to present his defense, was not of age nor experience nor educational ability nor of intellectual capacity to understand what was going on as he has testified heretofore.

A defendant's understanding of the plea controls. ***North Carolina v. Alford***, 400 U.S. 25 (1970). ***State v. Mares***, 118 N.M. 217, 880 P.2d 314 (Ct.App. 1994), rev. on other grounds, 119 N.M. 48, 888 P.2d 930 (1994). ***State v. Robins***, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S.Ct. 130, 19 L.Ed.2d 137 (1967) (decided under former law), ***NMRA Rule 5-304*** requires that the defendant and his attorney fully understand the consequences of the plea. If the three lawyers in the courtroom didn't understand the consequences of the plea, ***State v Ira***, Ct of App. 132 N.M. 8, 43 P.3d 359,2002 -NMCA- 037, how in the world could this child understand? Plea agreements absent Constitutional validity are not binding upon

both parties. ***State v. Bazan***, 97 N.M. 531, 641 P.2d 1078 (Ct.App. 1982), overruled on other grounds, ***State v. Ball***, 104 N.M. 718 P.2d 686 (1986). The general rule is that a defendant is entitled to withdraw his plea if the sentence contemplated by the plea bargain is subsequently determined to be illegal or unauthorized, exactly what happened here. ***87 ALR 4th, 384*** (Guilty Plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized.)

Joel Ira, due to the lack of or incorrect knowledge of the Court, the prosecutor and Joel Ira's original defense attorney, as well as a waiver of a preliminary hearing and the failure to present an available defense was denied effective assistance of counsel. ***U.S.C.A. Const. Amend 6; Lafler v. Cooper***, 132 S.Ct. 1376, 182 L. Ed. 2d 398 80 USLW 4244 (2012); ***Strickland v Washington*** 466 U.S. 668, 104 S. Ct. 2052 (1984)); ***Patterson v LeMaster***, 130 N.M. 179, 21 P.3d 1032, (2001); ***State v Edwards***, 141 N.M. 491, 157 P.3d 56, (Ct of Appeals 2007).

In addition to an illegal plea agreement, the child never contemplated that the first time he would be in jail would also be his last and eternal.

## II. CONCLUSION:

The State's prosecutor and the Court wanted him put away for the rest of his life or at least until he was so old he was no longer a danger. Joel Ira was sacrificed

to the failures of New Mexico to provide treatment for juvenile offenders, fears of prosecutors and judges for the safety of the community, and the inability of mental health doctors and providers to guarantee he could be rehabilitated. The danger they feared has never occurred. He is a model prisoner.

It is time, it is right; it is legally and morally correct that the Supreme Court put an end to this great injustice and order the immediate release of Joel Ira. Joel Ira turns to the Court of last resort for him and respectfully requests such.

## III. Request for Oral Argument:

Oral argument is requested.

Respectfully submitted,

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Attorneys for Defendant

## CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed a true and correct copy of the foregoing to James A. Dickens, 1000 New York Ave., Alamogordo, NM 88310, (575) 434-2507, Attorney General's Office, PO Drawer 1508, Santa Fe, NM 87504; Judge Jerry H. Ritter, 1000 New York Ave., Rm 203, Alamogordo, NM 88310, and Warden, c/o Lea County Correctional Facility, 6900 W. Millen, Hobbs, NM 88240, this 23rd day of December, 2016.

Gary C. Mitchell