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SUPREME COURT, STATE OF COLORADO

Ralph L. Carr Judicial Center  
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Denver, Colorado 80203

Certiorari to the Colorado Court of Appeals  
Case No. 10CA2414

Petitioner

THE PEOPLE OF THE  
STATE OF COLORADO

v.

Respondent

ATORRUS LEON RAINER

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Atty. Reg. #37922

Case Number: 13SC408

***AMICUS CURIAE* BRIEF IN SUPPORT OF ATORRUS RAINER**

## CERTIFICATE OF COMPLIANCE

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

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 3,403 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*Ryan D. Hardman*

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## **INTRODUCTION**

Pursuant to Rule 29 of the Colorado Rules of Appellate Procedure, the Office of the Colorado State Public Defender, respectfully submits this brief as *amicus curiae*.

## **ISSUES ANNOUNCED BY THE COURT**

Whether the court of appeals erred by extending *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S.Ct. 2455 (2012), to invalidate a consecutive term-of-years sentence imposed on a juvenile convicted of multiple offenses.

Whether a conviction for attempted murder is a non-homicide offense within the meaning of *Graham v. Florida*, 560 U.S. 48 (2010).

## **STATEMENT OF IDENTITY AND INTEREST OF AMICUS**

The Office of the Colorado State Public Defender is a statutorily created agency of the judicial department charged with the duty of providing legal services to indigent persons, including juveniles, accused or convicted of criminal offenses in the State of Colorado. *See* §21-1-101, C.R.S. 2015. The Public Defender's Office has an important interest in the outcome of this case and any case in this Court that may impact its current, former, and future clients.

## **STATEMENT OF THE CASE AND APPLICABLE FACTS**

For purposes of this Brief, the Office of the Public Defender adopts the statement of facts as set forth in the Respondent's brief.

## SUMMARY OF THE ARGUMENT

“Children are different.” “Youth is more than a chronological fact.” And “children cannot be viewed simply as miniature adults.” The Supreme Court has repeatedly emphasized that children are constitutionally different in many areas of law, including sentencing. Both science and common sense inform the Court’s juvenile sentencing cases. The Court has observed that juveniles have diminished culpability and greater prospects of rehabilitation. Also, the penological justifications for criminal punishment do not apply to juveniles in the same way as they do to adults. Most importantly, juveniles have a particularly great capacity for change and rehabilitation. Therefore, a juvenile’s sentence is unconstitutional if it does not afford a meaningful opportunity for future release based on demonstrated maturity and rehabilitation.

Juveniles, who will in almost all cases outgrow their “transient immaturity,” must have the opportunity to demonstrate maturity and rehabilitation while such reform matters. Almost all serious juvenile offenders will “age out” of crime and do not continue criminal behavior into adulthood. Thus, it is improper to sentence juvenile offenders to long terms without periodically reviewing their development, particularly during the early to mid-twenties. A sentence that does not provide a meaningful opportunity for future early release renders a juvenile’s rehabilitative

efforts meaningless. A lengthy sentence that does not even allow a juvenile to be considered for release on parole until he is in his late forties or older does not provide a juvenile, who is still maturing into his mid-twenties, with the opportunity to obtain release based on demonstrated maturity and rehabilitation.

## ARGUMENT

### A. “Children are different.”

The Supreme Court has repeatedly emphasized that children are different in the eyes of the law. Long before *Roper*,<sup>1</sup> *Graham*, and *Miller*, in *Haley v. Ohio*, the Supreme Court declared that “special care” must be used in evaluating juvenile cases and that juveniles “cannot be judged by the more exacting standards of maturity.” 332 U.S. 596, 599 (1948)(finding juvenile’s confession involuntary). In *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), the Court observed that “youth is more than a chronological fact.” More recently, the Court has continued to observe that “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.” *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011).

It does not take a degree in psychology to understand the differences between children and adults. See *Graham*, 560 U.S. at 78; *J.D.B.*, 131 S.Ct. at 2398-99, 2407; *Roper*, 543 U.S. at 572-73. The differences between adolescent and adult behavior are

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).



common sense and “self-evident to anyone who was a child once himself, including any ... judge.” *J.D.B.*, 131 S.Ct. at 2403, 2407 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (Breyer, J., dissenting)). “The experience of mankind, as well as the long history of our law, recognize[es] that there *are* differences which must be accommodated when assessing the rights and duties of children as compared with those of adults.” *Thompson v. Oklahoma*, 487 U.S. 815, 823, 824-25 (1988). Indeed, the law provides numerous exceptions and special protections for juveniles. *J.D.B.*, 131 S.Ct. at 2403-04; *see, e.g.*, Colo. Const. art. VII, §1 (persons must be eighteen years or older to vote); §13-22-101, C.R.S. 2015 (persons must be eighteen years or older to enter into and be bound by a contract, manage his estate, sue and be sued without a guardian ad litem, or make decisions regarding his own body or his children’s bodies); §14-2-106, -108, C.R.S. 2015 (persons must be eighteen years or older to marry without parental consent); §18-13-122(3)(a), C.R.S. 2015 (persons must be twenty-one or older to consume alcohol).

In *Roper*, *Graham*, and *Miller*, the Court relied on social science research to buttress these common sense conclusions about juvenile behavior. *Miller*, 132 S.Ct. at 2464; *Graham*, 560 U.S. at 68-73; *Roper*, 543 U.S. at 569-70, 573. The Court noted, “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. The Court explained that juveniles have diminished culpability and greater prospects of rehabilitation. *Miller*, 132 S.Ct. at 2458, 2464-65, 2468-69; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70. 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.” *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 570.

Moreover, the penological justifications for criminal punishment --retribution, deterrence, incapacitation, and rehabilitation -- do not apply to juveniles in the same way as they do to adults. *Graham*, 560 U.S. at 71-74. Indeed, very recently, in *Montgomery v. Louisiana*, the Supreme Court explained that *Miller* established that the penological justifications for sentencing a youth to a “lifetime” in prison “collapse in light of the ‘the distinctive attributes of youth.’” *Montgomery v. Louisiana*, No. 14-280, slip op. at 16-17 (U.S. Jan. 25, 2016).

Because of the differences between juvenile and adult defendants, the Supreme Court has held that “children are constitutionally different from adults for purposes of sentencing” and has created “a distinctive set of legal rules” for juvenile sentencing. *Montgomery*, No. 14-280, slip op. at 16-17; *Miller*, 132 S.Ct. at 2470; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569. As “death is different,” “children are different too.” *Miller*,

132 S.Ct. at 2470. The Supreme Court explained that adult sentencing principles do not apply to juveniles: “*Hamelin* [*v. Michigan*, 501 U.S. 957 (1991),] had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders.” *Miller*, 132 S.Ct. at 2470 (“Our ruling neither overrules nor undermines nor conflicts with *Hamelin* .”).

Thus, the court of appeals’ decision in this case does not “eradicate Colorado’s sentencing scheme” or “effectively overrule *Close* [*v. People*, 48 P.3d 528, 541 (Colo. 2002)],” as the State claims. *Close* simply had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. *Cf. Miller*, 132 S.Ct. at 2470. Thus, the court of appeals’ decision in this case neither overruled nor undermined nor conflicted with *Close*.

Also based on the Court’s observations about juvenile behavior, it is clear that the State’s fear that applying *Graham* to a term-of-years sentence will “incentivize crime sprees” is unfounded. The “hallmark features” of adolescence include “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 132 S.Ct. at 2468. Because juveniles tend not to consider or weigh consequences, they are less susceptible to deterrence and less likely to take a possible punishment into consideration. *Montgomery*, No. 14-280, slip op. at 16; *Graham*, 560 U.S. at 72. Holding that a court may not impose a sentence that denies a *meaningful opportunity* for

release (not even *guaranteed* release) simply will not factor into a juvenile's choice to engage in risky or criminal behavior.

Moreover, there is nothing in the Court's *Graham* opinion that suggests the Court intended to exempt juveniles convicted of multiple offenses or juveniles with criminal histories from the distinct sentencing rules for juveniles. In fact, everything the Court has said about children and how they must be sentenced indicates that children like Terrance Graham, who were convicted of multiple offenses, cannot be sentenced to terms that deny them any meaningful opportunity of release. *See Graham*, 560 U.S. at 53-54; *see also People v. Nunez*, 125 Cal.Rptr.3d 616, 624 (Cal. Ct. App. 2011). And after *Miller* (which focused on life-without-parole sentences for homicide offenders), in several cases involving aggregate prison terms, the Supreme Court granted certiorari, vacated the sentences, and remanded for reconsideration in light of *Miller*. *See State v. Null*, 836 N.W.2d 41, 73 (Iowa 2013)(collecting cases).

**B. A juvenile's sentence is unconstitutional if it does not afford a meaningful opportunity for future early release based on demonstrated maturity and rehabilitation.**

In *Graham*, the Court held that a sentence for a juvenile nonhomicide offender must afford a meaningful opportunity for release based on demonstrated maturity and rehabilitation. 560 U.S. at 74-75. In *Miller*, the Court made clear that *Graham's* reasoning applies to *any sentence* which does not provide a meaningful opportunity for

release. The Court explained that “none of what [*Graham*] said about children ... is crime specific.” *Miller*, 132 S.Ct. at 2465-66; see *People v. Caballero*, 282 P.3d 291, 294 (Cal. 2012)(*Miller* clarified that *Graham*’s reasoning applies to term-of-years sentences). And in *Montgomery v. Louisiana*, the Supreme Court stated that even juveniles convicted of homicide offenses “must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.” No. 14-280, slip op. at 22.

The supreme courts of California, Florida, Connecticut, Wyoming, and Iowa have held that *Miller* and *Graham* apply whenever a sentence does not afford a juvenile a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, regardless of the how the sentence is labeled or structured. *Caballero*, 282 P.3d at 290; *Casiano v. Comm’r of Corr.*, 115 A.3d 1031 (Conn. 2015); *Henry v. State*, 175 So.3d 675 (Fla. 2015); *Null*, 836 N.W.2d at 72 (holding based on Iowa constitution); *Bear Cloud v. State*, 334 P.3d 1132 (Wyo. 2014); see also *Nunez*, 125 Cal.Rptr.3d at 622 (pointing out that *Graham* itself was not a “life without parole” case, but was instead involved a “de facto” life sentence because the state had abolished its parole system).

Juveniles, who will in almost all cases outgrow their “transient immaturity,” *e.g.*, *Miller*, 132 S.Ct. at 2467, 2469, must have the opportunity to demonstrate maturity

and rehabilitation while such reform matters. In *Roper*, *Graham*, and *Miller*, the Supreme Court relied on the research of Dr. Laurence Steinberg. See Appendix , Report Prepared by Laurence Steinberg, Ph.D., at ¶7; see also *Miller*, 132 S.Ct. at 2464 (citing Dr. Steinberg’s work); *Graham*, 560 U.S. at 68 (same); *Roper*, 543 U.S. at 569-73, 573 (same). Dr. Steinberg has provided an updated affidavit to be filed with this amicus brief in support of respondent’s position. See Appendix.

Dr. Steinberg’s research has shown that, in late adolescence, there is significant potential for a juvenile’s brain to be modified by experience. Thus, juveniles have relatively unformed character and great capacity to change. See Appendix at ¶22-23; see also *Roper*, 543 U.S. at 570. Dr. Steinberg’s research has also shown that “[v]ery few individuals who have committed crimes as juveniles continue offending beyond their mid-twenties.” Indeed, “ninety percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.” See Appendix at ¶24-25; see also *Roper*, 543 U.S. at 569-70. Thus, it is improper to sentence juvenile offenders to long terms without periodically reviewing their development, particularly during the early to mid-twenties. A lengthy sentence that does not allow a juvenile to be considered for release on parole until he is in his late forties or older does not provide a juvenile, who is still maturing into his mid-twenties, with the opportunity to obtain release based on demonstrated maturity and rehabilitation. See Appendix at ¶27.

In *Casiano v. Commissioner of Correction*, the supreme court of Connecticut stressed the importance of a meaningful opportunity for release based on demonstrated maturity and rehabilitation. The court explained that, under *Graham*, “life” means more than biological survival:

The United States Supreme Court viewed the concept of “life” in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for “life” if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

115 A.3d at 1047. The *Casiano* court held that a fifty-year term and its “grim prospects for any future outside of prison” do not provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation. 115 A.3d at 1047. The court observed that, after a half century of incarceration, a juvenile will have lost the opportunity to engage meaningfully in many activities of adulthood, such as holding a job, marrying, or voting, and will be left with seriously diminished prospects for his quality of life for the few years he has left. *Id.* at 1046. Release from prison in a person’s late sixties comes at an age when the law presumes that he no longer has productive employment prospects and when he will be at increased risk for health complications associated with aging. *Id.* at 1046-47.

In *State v. Null*, the Supreme Court of Iowa similarly held in a homicide case that parole eligibility at fifty-two and a half years, when the juvenile was sixty-nine

years old, triggered the protections of *Miller*. 836 N.W.2d at 71. The court stated, “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*.” *Id.* The court also observed that a juvenile sentenced to a lengthy term-of-years sentence “should not be worse off” than a juvenile sentenced to life without parole who has the benefit of an individualized hearing under *Miller*. *Id.* at 72; *see also Bear Cloud*, 334 P.3d at 142; *see generally People v. Tate*, 352 P.3d 959, 967-68 (Colo. 2015)(for a juvenile who has committed homicide, if a life-without-parole sentence is inappropriate, courts must impose sentence of life with parole consideration after forty years).

A sentence is unconstitutionally disproportionate if it does not serve legitimate penological goals. *E.g.*, *Graham*, 560 U.S. at 67. The arguments for retribution, deterrence, and incapacitation, do not apply as strongly, if at all, to juveniles. *Montgomery*, No. 14-280, slip op. at 15-16; *Graham*, 560 U.S. at 71-73. However, the goal of rehabilitation is very applicable to juveniles, who are particularly amenable to rehabilitation. *Graham*, 560 U.S. at 73-74; *Roper*, 543 U.S. at 570. A sentence which does not provide a meaningful opportunity for future release, no matter how the



sentence is denominated, renders a juvenile's rehabilitative efforts meaningless. *See Montgomery*, No. 14-280, slip op. at 22; Appendix at ¶27.

Such a sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.” *Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 779 P.2d 944 (1989)). Indeed, a sentence which does not provide a meaningful opportunity for release “forswears altogether the rehabilitative ideal.” *Id.* at 74. Not only does such a prison term remove any incentive to reform, it effectively denies access to rehabilitative services. *Id.* Defendants serving long prison terms are often denied or are last to receive rehabilitative programming. *Id.*; *see* DOC Admin. Reg. 500-01(IV)(A)(3) (effective October 15, 2015)(in the offender education system, “[i]f a composite test score of functional literacy is not attained, the program may require the offender to continue to receive [basic education] instruction, *unless such offender is [s]erving a life sentence, life without parole, or is under sentence of death.*”)(emphasis added); DOC Admin. Reg. 700-20(IV)(F)(4.b) (effective August 1, 2015)(an offender is not eligible for sex offender treatment until he is within eight years of parole eligibility); DOC Admin. Reg. 700-20(IV)(F)(4.b) (effective August 1, 2015)(the alcohol and drug services program places priority on offenders who have five years or less to parole

eligibility and/or eight years of less to mandatory release date). A sentence which does not provide a meaningful opportunity for release, therefore, does not serve the goal of rehabilitation, the penological goal that has the most applicability to juveniles.

**C. Whether a sentence affords a meaningful opportunity for release should not depend on life expectancy tables or other speculative considerations.**

The measure for whether a sentence affords a meaningful opportunity for release should not depend on life expectancy tables or other speculative considerations. In *Null*, the court stated, “we 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.” 836 N.W.2d at 71. In coming to this conclusion, the court noted “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.’” *Id.* at 71-72. In *Bear Cloud*, the Supreme Court of Wyoming relied on this language from *Null* and similarly declined to make any projections of the juvenile’s life expectancy. 334 P.3d at 142.

Projections of a juvenile's life expectancy are speculative, at best. Life expectancy measures are inconsistent estimates. *Cf. People v. Lehmkuhl*, 2013 COA 98, ¶¶13-14 (Colo. App. 2013)(finding Lehmkuhl has a life expectancy of 78.2 years, relying on section 13-25-103, C.R.S.); *People v. Lucero*, 2013 COA 53, ¶13 (Colo. App. 2013)(finding Lucero has a life expectancy of 75 years); *People v. Rainer*, 2013 COA 51, ¶67 (Colo. App. 2013)(finding Rainer has a life expectancy of between 63.8 and 72 years, relying on Centers for Disease Control tables); *Casiano*, 115 A.3d at 1046 (average male life expectancy is 76 years, citing Centers for Disease Control reports). And most do not account for the impact of spending almost all of one's life in prison. *See Casiano*, 115 A.3d at 1046 (general statistics do not "account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison"; citing studies indicating that lengthy prison terms drastically shorten life expectancy); *Null*, 836 N.W.2d at 71 (it may be "that long-term incarceration presents health and safety risks that tend to decrease life expectancy as compared to the general population"). Similarly, accounting for "good time" or "earned time" in the determination whether a juvenile will become parole eligible within his lifetime is speculative. Instead of estimating "good time" or "earned time," this Court should "evaluate the sentence the trial court actually imposed, not wait on later developments that may or may not occur." *Nunez*, 125 Cal.Rptr.3d at 620-21.

#### **D. Conclusion**

In light of all the Supreme Court has said about how children are constitutionally different from adults in their diminished culpability and their great potential for reform, juveniles must be given a meaningful opportunity for release based on demonstrated maturity and rehabilitation. A lengthy sentence that does not allow a juvenile to be considered for release on parole until he is in his late forties or older does not provide a juvenile with the meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation contemplated by the Supreme Court's decisions in *Graham*, *Miller*, and now *Montgomery*.

#### **CONCLUSION**

For the foregoing reasons and authorities, the Public Defender urges this Court to hold that, for a juvenile who has committed multiple nonhomicide offenses, a consecutive term-of-years sentence that does not provide a meaningful opportunity for future early release based on demonstrated maturity and rehabilitation constitutes cruel and unusual punishment.

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CERTIFICATE OF SERVICE

I certify that, on March 3, 2016, a copy of this Opening Brief was electronically served through ICCES on Rebecca A. Jones, Senior Assistant Attorney General, and Kathleen A. Lord and Ashley Ratliff, counsel for Atorrus Rainer.

*Nancy H. Medina*

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# APPENDIX

**REPORT PREPARED BY LAURENCE STEINBERG, PH.D.**  
**Prepared for People vs. Atorrus Rainer 13SC408**

**PROFESSIONAL POSITION**

1. My name is Laurence Steinberg. My address is 1924 Pine Street, Philadelphia, Pennsylvania, 19103, USA.
2. I hold the degrees of A.B. in Psychology from Vassar College (Poughkeepsie, New York) and Ph.D. in Human Development and Family Studies from Cornell University (Ithaca, New York).
3. I am a developmental psychologist specializing in adolescence, and I am on the faculty at Temple University, in Philadelphia, Pennsylvania, USA, where I am the Distinguished University Professor and Laura H. Carnell Professor of Psychology. I am a member and Fellow of the American Psychological Association and the Association for Psychological Science, a member of the Society for Research in Child Development, and a member of the Society for Research on Adolescence. I was a member of the National Academies' Board on Children, Youth, and Families and chaired the Academies' Committee on the Science of Adolescence. I was President of the Division of Developmental Psychology of the American Psychological Association and President of the Society for Research on Adolescence.
4. I received my Ph.D. in 1977 and have been continuously engaged in research on adolescent development since that time. Prior to my appointment at Temple University, where I have been since 1988, I was on the faculty at the University of Wisconsin—Madison (1983-1988) and the University of California, Irvine (1977-1983). From 1997-2007, I directed the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, a national multidisciplinary initiative on the implications of research on adolescent development for policy and practice concerning the treatment of juveniles in the legal system.
5. Although my work has focused broadly on adolescent psychological development, I have a special interest in adolescent judgment and decision-making, especially with regard to risky and criminal behavior. In my capacity as chair of the National Academies' Committee on the Science of Adolescence, I organized and oversaw several workshops on adolescent risk-taking and its consequences for health and well-being. The summary of these workshops, which was published in 2011, discusses findings from recent research on adolescent brain development and the implications of this work for understanding why adolescents often display poor judgment in a range of situations, including those involving criminal behavior.
6. Since 1997, I have been engaged in research on the implications of research on adolescent development for legal decisions about the behavior of young people. More specifically, my colleagues and I have been studying whether, to what extent, and in what respects adolescents and adults differ in ways that may inform decisions about criminal responsibility and about sentencing.

7. The work that my colleagues and I have conducted has had demonstrable impact on American jurisprudence. Most significantly, it was cited and quoted verbatim in the majority opinion of the United States Supreme Court in *Roper v. Simmons*, the 2005 case that abolished the juvenile death penalty, and more recently, in *Graham v. Florida* (2010), which banned the imposition of the sentence of life without parole for juveniles convicted of crimes other than homicide, and *Miller v. Alabama / Jackson v. Hobbs* (2012) (subsequently referred to in this report as “*Miller*”), which banned mandatory sentences of life without parole for juveniles, even those convicted of homicide. In these cases, I served as the lead scientist in the drafting of amicus briefs filed by the American Psychological Association, which argued that adolescents’ neurobiological and behavioral immaturity warranted treating them differently than adults. In these opinions, the Court held, citing our work, that juveniles’ diminished decision-making capacity, heightened susceptibility to peer influence, and unformed character mitigate their responsibility and, as such, moderate the degree to which juveniles should be punished relative to adults who have been convicted of identical offenses.
8. This report is prepared at the request of the Office of Alternate Defense Counsel (OADC). I have been asked to discuss what is known about psychological and neurobiological development of individuals during adolescence and young adulthood and to render an opinion as to what this research suggests regarding the definition of “meaningful opportunity for parole.”

## RELEVANT U.S. SUPREME COURT OPINIONS

9. In its majority opinion in *Roper*, the U.S. Supreme Court noted that “As any parent knows, and as the scientific and sociological studies...tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. These qualities often result in impetuous and ill-considered actions and opinions....The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”
10. In *Graham*, the Court reiterated the logic behind its ruling in *Roper* and noted that “No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles. . . . 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.”
11. In *Miller*, the Court reiterated the logic behind its prior rulings, in *Roper* and *Graham*, and noted that “the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.” The Court further noted that “the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger,” that “[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court’s conclusions,” and that, “It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.” The Court, citing *Graham*, further noted that in cases in which a juvenile offender has been given



a life sentence, the State is required to provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”

## **SCIENTIFIC KNOWLEDGE ABOUT PSYCHOLOGICAL AND NEUROBIOLOGICAL DEVELOPMENT IN ADOLESCENCE AND YOUNG ADULTHOOD**

12. Several specific aspects of psychological development in adolescence are especially relevant to the present case (for a review, see Steinberg, L. (2007). Risk-taking in adolescence: New perspectives from brain and behavioral science. *Current Directions in Psychological Science*, 16, 55-59).
13. First, adolescents are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation. In our work, when asked to make a decision about a course of action, compared to adults, adolescents had more difficulty identifying the possible costs and benefits of each alternative, underestimated the chances of various negative consequences occurring, and underestimated the degree to which they could be harmed if the negative consequences occurred (Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N., & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior*, 27, 333-363).
14. Second, adolescents are more likely than adults to engage in what psychologists call “sensation-seeking,” that is, the pursuit of arousing, rewarding, or novel experiences. As a consequence of this, adolescents are more apt to focus on the potential rewards of a given decision (e.g., the money obtained as a result of a robbery) than the potential costs (e.g., the harm that might occur during the course of the robbery) (Steinberg, L., Albert, D., Cauffman, E., Banich, M., Graham, S., & Woolard, J. (2008). Age differences in sensation seeking and impulsivity as indexed by behavior and self-report: Evidence for a dual systems model. *Developmental Psychology*, 44, 1764-1778).
15. Third, adolescents are less able than adults to control their impulses and consider the future consequences of their actions. In general, adolescents are more short-sighted and less planful, and they have more difficulty than adults in foreseeing the possible outcomes of their actions and regulating their behavior accordingly. (Steinberg, L., Graham, S., O'Brien, L., Woolard, J., Cauffman, E., & Banich, M. (2009). Age differences in future orientation and delay discounting. *Child Development*, 80, 28-44).
16. Finally, these inclinations are exacerbated by the presence of peers. In several studies we have found that when they are with their friends, adolescents pay relatively more attention to the potential rewards of a risky decision than they do when they are alone, and that they are especially drawn to immediate rewards. Moreover, we have shown that the presence of peers activates the brain's “reward center” among adolescents, but has no such effect on adults (Chein, J., Albert, D., O'Brien, L., Uckert, K., & Steinberg, L. (2010). Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry. *Developmental Science*, 14, F1-F10; Gardner, M., & Steinberg, L. (2005). Peer influence on risk-taking, risk preference, and risky

decision-making in adolescence and adulthood: An experimental study. *Developmental Psychology*, 41, 625-635; O'Brien, L., Albert, D., Chein, J., & Steinberg, L. (2011). Adolescents prefer more immediate rewards when in the presence of their peers. *Journal of Research on Adolescence*, 21, 747-753; Smith, A., Chein, J., & Steinberg, L. (2014). Peers increase adolescent risk taking even when the probabilities of negative outcomes are known. *Developmental Psychology*. Advance online publication. doi: 10.1037/a0035696; Weigard, A., Chein, J., Albert, D., Smith, A., & Steinberg, L. (2014). Effects of anonymous peer observation on adolescents' preference for immediate rewards. *Developmental Science*, 17, 71-78). In addition, studies also show that adolescents are more susceptible than adults to overt peer pressure (and boys are especially susceptible to pressure to engage in antisocial activity) (Steinberg, L., & Monahan, K. (2007). Age differences in resistance to peer influence. *Developmental Psychology*, 43, 1531-1543).

17. Recent research on brain development sheds light on the biological underpinnings of age differences in judgment and decision-making and suggests that many of the differences between adolescents' and adults' behavior likely reflect the neurobiological immaturity of juveniles, relative to adults, and not simply age differences in preferences, attitudes, or values.
18. The upshot of this new brain research is that adolescents are *inherently* less able than adults to regulate their impulses, give proper consideration to the longer-term consequences of their decisions, and appropriately attend to the risks, as well as the rewards, of their options. There is broad consensus among scientists on these points.
19. Research on neurobiological development shows continued maturation into the early- or even mid-20s of brain regions and systems that govern various aspects of self-regulation and executive function. These developments involve structural (anatomical) and functional (activity) changes in the prefrontal and parietal cortices as well as improved structural and functional connectivity between cortical and subcortical regions (for recent reviews of changes in brain structure and function during adolescence and young adulthood, see Blakemore, S-J. (2012). Imaging brain development: The adolescent brain. *Neuroimage*, 61, 397-406; Engle, R. (2013). The teen brain. *Current Directions in Psychological Science*, 22 (2) (whole issue); Luciana, M. (Ed.) (2010). Adolescent brain development: Current themes and future directions. *Brain and Cognition*, 72 (2), whole issue; and Steinberg, L. (2014). *Age of Opportunity: Lessons From the New Science of Adolescence*. New York: Houghton Mifflin Harcourt).
20. Many scientists, including myself, believe that the underlying cause of immaturity in judgment during adolescence is the different timetables along which two important brain systems change during adolescence, sometimes referred to as a "maturational imbalance." The system that is responsible for the increase in sensation-seeking and reward-seeking that takes place in adolescence undergoes dramatic changes very early in adolescence, around the time of puberty. But the system that is responsible for self-control, regulating impulses, thinking ahead, and evaluating the rewards and costs of a risky act is still undergoing significant maturation well into the decade of the 20s (Casey, B. J., et al. (2010). The storm and stress of adolescence: Insights from human imaging and mouse genetics. *Developmental Psychobiology*, 52, 225-235; and Steinberg, L. (2008). A social neuroscience perspective on adolescent risk-taking. *Developmental Review*, 28, 78-106). Thus, during middle adolescence (approximately 14-17

years) there is an imbalance between the reward system and the self-control system that inclines adolescents toward sensation-seeking and impulsivity. The hyperactivation of the brain's reward system that occurs in adolescents when their friends are present further exaggerates this imbalance.

21. As this “maturational imbalance” diminishes, there are improvements in such capacities as impulse control, resistance to peer pressure, planning, and thinking ahead (for reviews, see Albert, D., & Steinberg, L. (2011). Judgment and decision making in adolescence. *Journal of Research on Adolescence*, 21, 211-224; Blakemore, S-J., & T. Robbins, T. (2012). Decision-making in the adolescent brain. *Nature Neuroscience*, 15, 1184-1191; and Steinberg, L. (2009). Adolescent development and juvenile justice. *Annual Review of Clinical Psychology*, 5, 47-73).
22. Neuroplasticity refers to the potential for the brain to be modified by experience; certain periods in development appear to be times of greater neuroplasticity than others. There is growing consensus that there is considerable neuroplasticity in late adolescence, which suggests that there are opportunities for individuals to change (for a discussion of adolescent neuroplasticity, see Kays, J., Hurley, R., Taber, K. (2012). The dynamic brain: Neuroplasticity and mental health. *Journal of Clinical Neuropsychiatry and Clinical Neuroscience*, 24, 118-124; Steinberg, L. (2014). *Age of Opportunity: Lessons From the New Science of Adolescence*. New York: Houghton Mifflin Harcourt; and Thomas, M., & Johnson, M. (2008). New advances in understanding sensitive periods in brain development. *Current Directions in Psychological Science*, 17, 1-5). In *Graham*, the U.S. Supreme Court, relying in part on amicus briefs submitted by the American Psychological Association and other scientific organizations, recognized that youth under the age of 18 were not fully developed, and that it was this lack of maturity and capacity for growth that led to the requirement that youth who commit serious crimes are to have an opportunity for release based on demonstrated maturity and rehabilitation.
23. As a consequence of this heightened neuroplasticity, adolescents are also distinguished from adults by their relatively unformed character. Because considerable psychological and neurobiological development takes place during the late teens and early twenties, it is impossible to predict whether an adolescent who has committed an antisocial act will grow out of his delinquent behavior as a result of normal maturation (what psychologists refer to as “adolescence-limited offending”) or whether his adolescent offending is indicative of a chronic criminal in the making (so called, “life-course persistent offending”) (Moffitt, T. (2006). Life-course persistent versus adolescence-limited antisocial behavior. In D. Cicchetti & D. Cohen (Eds.), *Developmental psychopathology* (2nd ed., pp. 570-598). New York: Wiley).

24. Very few individuals who have committed crimes as juveniles continue offending beyond their mid-20s. My colleagues and I have found, as have other researchers, that approximately 90 percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood (Monahan, K., Steinberg, L., Cauffman, E., & Mulvey, E. (2013). Psychosocial (im)maturity from adolescence to early adulthood: Distinguishing between adolescence-limited and persistent antisocial behavior. *Development and Psychopathology*, 25, 1093–1105; and Mulvey, E., Steinberg, L., Piquero, A., Besana, M., Fagan, J., Schubert, C., & Cauffman, E. (2010). Trajectories of desistance and continuity in antisocial behavior following court adjudication among serious adolescent offenders. *Development and Psychopathology*, 22, 453-475). Importantly, research indicates that one cannot predict, on the basis of information available during the teen years, whether an adolescent who has broken the law is likely to become a persistent offender on the basis of his adolescent offense alone, even if the offense is a serious one.
25. Longitudinal studies that document this pattern of desistance are consistent with epidemiological evidence on the relation between age and crime. In general, sociological studies demonstrate what scientists describe as an “age-crime curve,” which shows that, in the aggregate, crime peaks in the late teen years, and declines during the early 20s (see Sweeten, G., Piquero, A., & Steinberg, L. (2013). Age and the explanation of crime, revisited. *Journal of Youth and Adolescence*, 42, 921-938). For example, according to the most recent available data from the U.S. Bureau of Justice Statistics (2013), on arrest rates as a function of age, arrests for property crime and for violent crime increase between 10 and 18 years, peak at 18, and decline thereafter, most dramatically after 25. This is a robust pattern observed not only in the United States, but across the industrialized world and over historical time (see Farrington, D. (1986). Age and crime. In M. Tonry & N. Morris (Eds.), *Crime and justice: An annual review of research*, vol. 7 (pp. 189-250). Chicago: University of Chicago Press; Hirschi, T., & Gottfredson, M. (1983). Age and the explanation of crime. *American Journal of Sociology*, 89, 552-84; and Piquero, A., Farrington, D., & Blumstein, A. (2007). *Key issues in criminal careers research: New analysis from the Cambridge study in delinquent development*. Cambridge: Cambridge University Press).
26. Research in developmental psychology has produced a growing understanding of the ways in which normative psychological maturation contributes to desistance. My colleagues and I have shown that normal and expected improvements in self-control, resistance to peer pressure, and future orientation, which occur in most individuals even in the absence of intervention, are related to desistance from crime during the late adolescent and young adult years (Monahan, K., Steinberg, L., & Cauffman, E. (2009). Affiliation with antisocial peers, susceptibility to peer influence, and desistance from antisocial behavior during the transition to adulthood. *Developmental Psychology*, 45, 1520-1530; Monahan, K., Steinberg, L., Cauffman, E., & Mulvey, E. (2009). Trajectories of antisocial behavior and psychosocial maturity from adolescence to young adulthood. *Developmental Psychology*, 45, 1654-1668). This observation is consistent with findings from developmental neuroscience, noted earlier (for example, Liston, C., Watts, R., Tottenham, N., Davidson, M., Niogi, S., Ulug, A., & Casey, B.J. (2006). Frontostriatal microstructure predicts individual differences in cognitive control. *Cerebral Cortex*, 16, 553-560).

## **APPLICATION OF SCIENTIFIC FINDINGS TO JUVENILES SENTENCED IN COLORADO TO EXTREMELY LENGTHY TERM OF YEAR SENTENCES**

27. In light of the fact that considerable psychological and neurobiological development continue into the mid-20s, I believe that it is improper to sentence juvenile offenders to long terms without periodically reviewing their development and conduct, especially during the early and mid-20s, in order to assess whether the offending they exhibited during adolescence is likely to continue over time. Such evaluations should be performed by individuals who have training in adolescent development and are able to assess psychological maturity as well as progress with regard to rehabilitation. In addition, it is important to provide services and programs during the period of incarceration that are likely to facilitate rehabilitation. In my view, such practices would be consistent with the Supreme Court's ruling in *Graham* that sentencing schemes for juveniles must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." A lengthy sentence that does not allow a juvenile to be considered for parole until the juvenile offender is in his late forties or older does not provide a juvenile, who is still maturing into his mid-20s, with this opportunity.

### **STATEMENT OF TRUTH**

28. Throughout my report I have attempted to be accurate and complete and to discuss all matters that I regard as being relevant to the opinions expressed within my report.
29. I have indicated the source of any factual information upon which I have based an opinion on facts.
30. I have not included anything in my report that has been suggested to me by anyone without forming my own view on the matter.
31. I have received payment for my consultation with counsel and for the preparation of this report.
32. Where a range of reasonable opinion is present, I have indicated the extent of that range in my report.
33. If I believe that my existing report requires any correction or qualification, I will notify my instructing attorneys immediately in writing. If the correction or qualification is significant, I will prepare a supplementary report as soon as possible.
34. I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct.



Laurence Steinberg, Ph.D.  
Philadelphia, December 18, 2015