

STATE OF MINNESOTA

IN SUPREME COURT

A16-0553

State of Minnesota,

Respondent,

**REQUEST OF JUVENILE
LAW CENTER FOR LEAVE
TO PARTICIPATE AND FILE
BRIEF AS *AMICUS CURIAE***

Mahdi Hassan Ali,

Appellant.

**TRIAL COURT CASE NO:
27-CR-10-2076**

**BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANT, MAHDI HASSAN ALI.**

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INTEREST OF *AMICUS CURIAE*¹

Founded in 1975, Juvenile Law Center is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interest of children, and specifically on the issues of juvenile life without parole and de facto life sentences. Juvenile Law Center served as *amicus* counsel in *Graham v. Florida*, 560 U.S. 48 (2010), as well as *Roper v. Simmons*, 543 U.S. 551 (2005), *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and other related cases. Most recently Juvenile Law Center served as co-counsel in the U.S. Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

¹ Pursuant to Rule 129.03 of the Minnesota Rules of Appellate Procedure, the undersigned certifies that no counsel for a party authored this brief in whole or in part and that no one made a monetary contribution to the preparation or submission of this brief other than the *amicus curiae* and their counsel.

STATEMENT OF THE CASE AND THE FACTS

Amicus Curiae accepts the Appellant's statement of the case and the facts.

SUMMARY OF ARGUMENT

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

Appellant Mahdi Hassan Ali was sentenced to three consecutive sentences of thirty years to life for crimes he committed as a juvenile. Appellant will become eligible for parole after serving ninety years in prison; therefore, as a practical matter, Appellant will never become eligible for parole. Because Appellant’s sentence deprives him of a “meaningful opportunity to obtain release,” it is the functional equivalent of life without parole. The sentencer did not consider Appellant’s age or age-related factors as required by *Miller*; therefore, the imposition of functional life without parole on Appellant is unconstitutional.

ARGUMENT

I. *Graham* And *Miller* Affirm The United States Supreme Court’s Recognition That Children Are Categorically Less Deserving Of The Harshest Forms of Punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments.² Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes:

[a]s compared to adults, juveniles have a “lack of maturity and an underdeveloped sense of responsibility”; they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and their characters are “not as well formed.”

560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Graham* found that “[t]hese salient characteristics mean that ‘[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender 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

² *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life without parole sentences for juveniles convicted of nonhomicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life without parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

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. 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. (citations omitted). The Court’s holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had the 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). 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.*

II. Appellant’s Sentence Violates *Miller* Because It Is The Functional Equivalent Of Life Without Parole And Was Imposed Without Consideration Of The *Miller* Factors

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

The Supreme Court’s Eighth Amendment jurisprudence has clarified that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. For example, the U.S. Supreme Court took this commonsense and equitable approach in *Sumner v. Shuman*, 483 U.S. 66 (1987), where it noted that “there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy.” 483 U.S. at 83.

Miller defines a life without parole sentence as one that does not give the offender “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 75). A sentence that exceeds a juvenile offender’s life expectancy clearly fails to provide a meaningful opportunity for release.³ As the Supreme Court of California held in *People v. Caballero*,

³ See *Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012) (vacating a sentence in which a 15-year-old offender would not be parole-eligible until age 83 noting that “[t]his Court does not believe that the Supreme Court’s analysis would change simply because a sentence is labeled a term-of-years sentence rather than a life sentence if that term-of-years sentence does not provide a meaningful opportunity for parole in a juvenile’s lifetime. The Court’s concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label.”); *People v. Rainer*, 2013 COA 51, *reh’g*

282 P.3d 291, 295 (Cal. 2012), “sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment.”

Labels and semantics should not enable courts to escape the clear mandate that juveniles must receive an appropriate sentencing hearing before they can be deprived of meaningful opportunity for release from prison. 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). Courts cannot circumvent the

denied (May 9, 2013) (holding that a sentence where a juvenile nonhomicide offender becomes eligible for parole after his statistical life expectancy violates *Graham*), *cert. granted*, 2014 CO 81; *Atwell v. State*, No. SC14–193, 2016 WL 3010795, at *1 (Fla. May 26, 2016) (holding a sentence rendering a juvenile parole eligible after 140 years unconstitutional under *Miller* and “virtually indistinguishable from a sentence of life without parole”); *Gridine v. Florida*, 175 So. 3d 672, 673 (Fla. 2015) (holding that a seventy-year sentence for a juvenile nonhomicide offender does not provide a meaningful opportunity for release); *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (logic of *Miller* applies to two consecutive sentences of fifty years as *de facto* life sentences) (“But the ‘children are different’ passage that we quoted earlier from *Miller v. Alabama* cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life.”); *but see Diamond v. State*, 419 S.W.3d 435 (Tex. Ct. App. 2012) (upholding a child’s consecutive 99 year and 2 year sentences without any discussion of *Graham*); *State v. Kasic*, 265 P.3d 410, 411 (Ariz. Ct. App. 2011) (upholding an aggregate term 139.75 years based on 32 felonies, including one attempted arson continued into defendant’s adulthood); *State v. Brown*, 118 So. 3d 332, 341 (La. 2013) (upholding consecutive term-of-years sentence rendering the defendant eligible for parole at 86); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (upholding a sentence where the earliest possibility of parole was at age 95); *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011) (finding that *Graham* was not violated because juveniles sentenced to life without parole for nonhomicide offenses in Virginia would be eligible for release at age 60).

categorical ban on mandatory life without parole for juveniles simply by choosing a lengthy or consecutive term-of-years sentence—here three consecutive terms of thirty years to life—instead of life without parole. Looking at Appellant’s sentence as three separate terms and ignoring the fact that they run consecutively constitutes an end-run around the *Miller* requirements. This would allow courts that want to ensure life-long incarceration for youth to sentence them to multiple long consecutive sentences, rather than one life without parole sentence, in order to frustrate *Miller*’s constitutional requirements.

In fact, at Appellant’s original sentencing hearing, the judge stated that “my imposing consecutive sentence is my message to future generations is that you not be considered for release no matter what the circumstances, no matter what the change in law is.” Oct. 31, 2011 Sentencing Hearing Transcript at 27. The judge noted that even if the life without parole sentence were overturned, he intended to functionally prevent the Appellant from any chance of release. At the resentencing hearing, the State also conceded that the ninety-year sentence would result in Appellant’s death in prison:

Your Honor, the State just wanted to place its reason for not pursuing the Miller hearing on the record, which is given that the Minnesota Supreme Court affirmed the consecutive imposition of essentially the three life terms, Mr. Ali will be over 100 years old before he is eligible for parole, and we felt that judicial economy would be best served by foregoing a Miller hearing in this particular case.

Jan. 6, 2016 Re-sentencing Hearing Transcript at 4. It is clear that the intent of both the State and the sentencing judge was to impose the equivalent of a life without parole sentence on Appellant. This is the very type of circumvention of constitutional

protections that must be prevented by treating functional life sentences as life without parole under *Miller*.

Appellant is effectively serving a sentence of 90 years to life. He would be well over 100 years old before first becoming eligible for parole. *Id.* Under any scientific or common sense measure of life expectancy, Appellant will die in prison before becoming eligible for parole. Because this sentence clearly provides Appellant with no meaningful opportunity to re-enter society during his natural life, it is the equivalent of life without parole.

B. Whether A Sentence Provides A Meaningful Opportunity For Release Is Not Contingent Solely On Whether The Sentence Exceeds A Juvenile's Life Expectancy

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 solely depend on anticipated dates of death. Under his current sentence, Appellant will certainly die before he is eligible for release after ninety years. However, if Appellant were eligible for parole after sixty years or even thirty years, that does not mean his opportunity for release would be meaningful. 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 (quoting *Graham*, 560 U.S. at 75).

Life expectancy is a poor measure of whether a sentence provides a meaningful opportunity for release. First, the life expectancy of inmates who have been sentenced as juveniles is difficult to determine. For instance, the average life span for an American male is 76. *See People v. Mendez*, 114 Cal. Rptr. 3d 870, 882 (Cal. 2010) (citing National Center for Health Statistics, Centers for Disease Control, *National Vital Statistics Repts.* (June 28, 2010) table 2, vol. 58, No. 28). However, “[l]ife expectancy within prisons and jails is considerably shortened.” *People v. J.I.A.*, No. G040625, 2013 WL 342653, at *5 (Cal. Ct. App. Jan. 30, 2013) (citing The Commission on Safety and Abuse in America's Prisons, *Confronting Confinement*, p. 11 (June 2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf); *see also* Jason Schnittker et al., *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 *J. of Health & Soc. Behav.* 115, 115-30 (2007); Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 *J. of Health and Soc. Behav.* 56, 56-71 (2008); Michael Massoglia et al., *No Real Release*, 8 *Contexts* 38, 38-42 (2009). There is evidence that inmates who were sentenced to life without parole as juveniles have even shorter life expectancies than

adults serving the same sentence. Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, available at <http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf>. Moreover, even if life expectancy data were perfectly accurate, a full 50% of people will die *before* the age indicated by the statistic. Adele Cummings & Stacie Nelson Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. DAVIS J. JUV. L. & POL'Y 267, 283 (2014).

Second, a meaningful opportunity for release must mean more than simply release to die outside the prison walls. For an opportunity for release to be “meaningful” under *Graham*, review must begin long before a juvenile reaches old age. Providing an opportunity for release only after decades in prison denies these young offenders an opportunity to live a meaningful life in the community and meaningfully contribute to society. *See, e.g., State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (striking down a 35-year sentence that would render the juvenile eligible for parole at age 52 because it violated *Miller* by “effectively depriv[ing] [him] of any chance of an earlier release and the possibility of leading a more normal adult life”). The challenge of finding employment post-retirement age, with felony convictions and no work experience outside of prison, makes it unlikely that juveniles serving extremely long sentences will be able to become productive, tax-paying members of society upon release. These parolees are also unlikely to be able to engage in other aspects of a meaningful life, like starting a family. *See, e.g., Null*, 836 N.W.2d at 71 (“The prospect of geriatric release, if one is to

be afforded the opportunity for release at all, does not provide a ‘meaningful opportunity’ to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society as required by *Graham*.”).

Finally, allowing possible release from prison 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 (2003)). In a study of juvenile offenders, “even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25.” Laurence Steinberg (2014) *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*. Chicago, IL: MacArthur Foundation, p. 3, available at <http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf>. Therefore, most juvenile offenders would no longer be a public safety risk once they reached their mid-twenties, let alone their thirties, forties, and fifties. Because most juveniles are likely to outgrow their antisocial and criminal behavior as they mature into adults, review of the juvenile’s maturation and rehabilitation

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

Therefore, review for juvenile offenders should be early and regular; such assessments would 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 treatment" to "juvenile offenders, who are most in need of and receptive to rehabilitation").

C. Appellant Was Sentenced Without Consideration Of His Age And Age-Related Characteristics

Prior to imposing a discretionary sentence of life without parole (or its functional equivalent) upon a juvenile, the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct. at 2469. The decision to sentence Appellant to consecutive,

rather than concurrent, terms of thirty years to life was made at the discretion of the trial judge who did not and was not required by Minnesota law to consider the unique characteristics of youth. The judge made this determination twice, each time without considering or making findings concerning the *Miller* factors: once at the original sentencing hearing, when the Appellant was sentenced to two consecutive terms of thirty years to life and one sentence of mandatory life without parole; and again at the resentencing, when Appellant's life without parole sentence was converted to a third consecutive term of thirty years to life. Because the trial court never took into account how Appellant's young age counseled against sentencing him to consecutive sentences that amount to life without parole, his sentence is unconstitutional and must be vacated.

1. The Sentencing Judge Failed To Consider Age And Age-Related Characteristics Before Imposing Consecutive Sentences That Constitute Life Without Parole

Miller adopted a presumption against imposing life without parole sentences on juveniles. While the U.S. Supreme Court has left open the possibility that a trial court could impose a life without parole sentence on a child, the Court declared that “given all we have said in *Roper*, *Graham*, and [*Miller*] about children’s diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.*” *Miller*, 132 S. Ct. at 2469 (emphasis added). Quoting *Roper* and *Graham*, *Miller* further noted that the “juvenile offender whose crime reflects irreparable corruption” will be “rare.” *Id.*

To overcome the presumption, the trial court must make specific findings demonstrating why the life without parole sentence is appropriate. *Miller* set forth specific factors for the sentencer to examine before imposing a discretionary sentence of life without parole: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* at 2468. Prior to imposing a juvenile life without parole sentence, the sentencer must consider how these factors impact the juvenile's overall culpability. *Id.* at 2469.

Here, the record does not reflect how, if at all, the trial court considered Appellant's young age at the time of the offense. At the first sentencing hearing, Appellant's counsel argued that mandatory life without parole sentences for juveniles constitute cruel and unusual punishment. The trial court dismissed this argument and sentenced Appellant to mandatory life without parole. The court had a presentence report to review, but no testimony about the Appellant was admitted at the sentencing hearing itself. However, three victim impact statements were presented. As to the determination of whether the two thirty year sentences would be served consecutively or concurrently, the sentencing judge stated that:

It is the Court's intention to sentence you consecutively on each count, and that is for two reasons.

The first is symbolic. They should be served consecutively because three men died. And everything we have heard is that these were good me[n], loved by their family and friends . . .

The second reason is pragmatic. . . . [P]erhaps someday . . . some state leader might think about relooking at these sentences . . . So my imposing consecutive sentence is my message to future generations is that you not be considered for release no matter what the circumstances, no matter what the change in law is.

It might seem terrible to not only take away your liberty, but by sentencing consecutively perhaps taking away any hope you have of release.

Oct. 31, 2011 Sentencing Hr'g Tr. at 26-27.

In sentencing Appellant to consecutive terms, the judge considered and commented on only the nature of the crime and the impact on the victims. In contrast, U.S. Supreme Court precedent requires sentencers to separate the nature of the crime from the culpability of the offender. In *Roper*, the Court found that “[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 sentence less severe than death.” 543 U.S. at 573. The same “unacceptable likelihood” exists whenever a juvenile convicted of homicide is sentenced; if the violent nature of the crime outweighs evidence of mitigation based on youth, the extreme sentences disfavored by *Miller* will be common. Therefore, even when a homicide is especially brutal, the sentencer must consider how the youth’s age and developmental

immaturity *counsel against* a sentence that deprives a juvenile offender of a meaningful opportunity to obtain release. *See Miller*, 132 S. Ct. at 2469. The sentencing judge in this case did not make any mention of the Appellant's age; the circumstances in which he grew up; or how children are different from adults. He demonstrated neither individualized consideration of the Appellant nor an understanding of the constitutionally relevant differences between children and adults. The trial court made no findings with respect to Appellant's youth or juvenile status at the time of the offenses. At the same time, the sentencer's clearly stated goal was to impose the equivalent of a life without parole sentence through the use of consecutive sentences.

Five years after Appellant's first sentencing hearing, after the Supreme Court of the United States issued its ruling in *Miller*, Appellant's life without parole sentence was vacated by this Court. Appellant was returned for resentencing to the same trial judge who stated that Appellant should not be released "no matter what the circumstances, no matter what the change in law is." Oct. 31, 2011 Sentencing Hr'g Tr. at 27. Appellant was sentenced to a third thirty-year consecutive sentence. In making his sentencing determination, the judge merely reread from the prior sentencing hearing; no further evidence or testimony was presented. The judge did not provide any explanation or make any findings as to why this sentence was imposed consecutively.

No *Miller* hearing was held before Appellant was sentenced to this additional term, which rendered him eligible for parole after ninety years. In fact, at the resentencing hearing, the State noted that they had purposefully *not* pursued or held an

individualized sentencing hearing at which the Appellant's age and age-related characteristics could be considered. Jan. 6, 2016 Re-sentencing Hr'g Tr. at 4.

Although the judge failed to consider it, extensive mitigating evidence exists in this case to show that Appellant is not one of the uncommon, irreparably corrupt juveniles for whom the Supreme Court has reserved the possibility of a life without parole sentence. *Miller*, 132 S. Ct. at 2469. In fact, Appellant had an unstable, abusive, and traumatic childhood. Appellant is a Somalian refugee. Court File, Dennis O'Rourke, Child Protection Report, 7/5/2005. He spent his early childhood with his family in a refugee camp in Kenya. *Id.*; Appellant's Sentencing Brief at 33. Appellant was taken from his parents at eight or nine years old and made his way to the United States under a false identity. Trial Transcript at 3. Appellant presumably suffered traumatic experiences in Africa and "appeared traumatized by the loss of his family and his immersion in a foreign country." Court File, Lynell Anderson, Staffing Report/Clinical Treatment Plan, 5/24/2005. He was physically abused by both his grandmother and the family he lived with in the United States, Dennis O'Rourke, Child Protection Report, 7/5/2005, before he was abandoned by them. Transcript of Evidentiary Hearing on Age, Day 3 at 381. Appellant experienced instability in his living arrangements and lived in a shelter when he was in the 6th grade. Court File, Valerie Moore and Cynthia Slowiak (Pre-trial exhibits), 8/10/2010. Appellant also has difficulty speaking English, understanding his new culture, and making his needs and wants clear to others. Court File, Lynell Anderson, Staffing Report/Clinical Treatment Plan, 5/24/2005. Appellant was suspended from school twice for fighting, and has exhibited the impulsive and reckless behavior

associated with youth. *Id.* Appellant has acted out in the past, possibly “to fit in or because he would rather act out than let anyone know that he does not understand.” *Id.*

When the court originally determined that Appellant would serve two thirty-year consecutive terms in addition to a mandatory life without parole sentence, the mitigating factors required by *Miller*, including the above evidence about Appellant’s past, were not considered. When the life without parole sentence was vacated and Appellant was resentenced to an additional thirty-year consecutive term, the court again failed to provide the individualized and youth-focused sentencing hearing required by *Miller*. Because the Court did not consider the differences between juveniles and adults, including “lessened culpability” and “greater ‘capacity for change,’” *Miller*, 132 S. Ct. at 2460, before sentencing him to functional life without parole, Appellant’s sentence is unconstitutional.

2. Minnesota Law Does Not Require Judges To Consider Age And Age-Related Characteristics Before Imposing Consecutive Sentences That Constitute Life Without Parole

Minnesota law grants judges the discretion to impose consecutive sentences. However, it provides no guidance for the judge’s discretion, stating only that the court “shall specify whether the sentences shall run concurrently or consecutively. If the court does not so specify, the sentences shall run concurrently.” Minn. Stat. Ann. § 609.15 (West 2016).

Minnesota case law has provided little clarification. When this Court previously denied a challenge to consecutive sentences on a *Miller* basis in *State v. Williams*, 862 N.W.2d 701, 703 (Minn. 2015), it cited to the *Warren* standard of review:

When reviewing a defendant's challenge to the imposition of consecutive sentences for multiple convictions of first degree murder involving more than one victim, we consider whether consecutive sentences are "commensurate with culpability and not an exaggeration of defendant's criminality." We are also guided by past sentences imposed on other offenders.

State v. Warren, 592 N.W.2d 440, 451-52 (Minn. 1999) (footnotes omitted).

The Warren factors must be applied consistently with the Supreme Court's decision in *Miller*. Therefore, the "commensurate with culpability" factor must take into account *Miller*'s requirements that the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" the juvenile's "family and home environment;" the circumstances of the offense; the incompetencies of youth; and the possibility of rehabilitation be considered. *Miller*, 132 S. Ct. at 2468. The *Warren* standard does not explicitly require the sentencer to consider these factors before sentencing appellant to a functional life without parole sentence, and as discussed in Section II.C.1., *supra*, the sentencing court in this instance did not apply the *Miller* factors.

In addition, considering "past sentences imposed on other offenders" is in opposition to the logic of the *Roper*, *Graham* and *Miller* line of cases. When *Warren*, which this Court cited as precedent for reviewing consecutive sentencing orders in *Williams*, was decided, the Supreme Court had not yet held that the death penalty for juveniles was unconstitutional. *Roper*, 543 U.S. at 578. It had not held that juveniles convicted of nonhomicide offenses cannot be sentenced to life without parole. *Graham*, 560 U.S. at 82. Most importantly in this context, it had not held that life without parole

sentences should be reserved for only the most culpable juveniles. *Miller*, 132 S. Ct. at 2469. The Supreme Court had yet to elaborate its jurisprudence on the essential differences between children and adults, and the constitutional limits on sentencing youth going forward. Considering past sentences, even those which comply with *Roper*, *Graham*, and *Miller*, fails to capture the more recent mandate from the Supreme Court that the characteristics of youth be considered in sentencing. This point is exemplified by the court's reliance on the standard set forth in *Warren*, an adult case, when deciding *Williams*, a juvenile sentencing case.

Leaving the decision to impose consecutive sentences completely to the judge's discretion fails to meet the *Miller* requirement that judges consider the unique attributes of youth before imposing a life without parole sentence.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully request that this Court hold that Appellant's three consecutive sentences of thirty years to life violate the dictates of *Miller v. Alabama*.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

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