IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-35657

JOEL IRA,

Petitioner,

vs.

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

Respondent.

The Honorable Jerry H. Ritter, Jr., presiding District Judge Division I, Twelfth Judicial District, County Of Otero, State of New Mexico in Cause No. JR-1995-00142

Respondent.

REPLY BRIEF

For the Defendant/Appellant

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Joel Ira has always denied, excepting for two acts occurring in the same week. (RP 91& 64-65,233,250-254), the expansive and extensive facts which the State (Children's Court Attorney) asserts. (8/20/97, T.1, 144 thru T.2, 139). Joel Ira was an abused child. The female child is bi-polar as are other members of her family. In fact, one has to determine which story of the child victim to believe, the one originally given or the one given with the assistance of a vehement and passionate prosecutor (7/10/97, T.1, 1thru T.2, 276) who sought the 108 years of imprisonment as punishment. (RP213-221,227-230).

The actions of certain "professionals" should make the Court cringe. The detailed studies mentioned in ***Roper, Miller*** and ***Graham*** bely just how ignorant and close minded these professionals were. Most importantly is their almost total disregard for the immaturity of children, the science of maturation, brain development and behavior with good guidance. (See Summary of Facts from Petitioner). Their opinions and the failures of the system to attempt to even provide for a child a wholesome rehabilitation program should shock the conscience of the Court. A fact the State does not wish mentioned: Joel Ira has been a model prisoner. The child who they said had no conscience actually has one and has for over 20 years done well, worked hard and maintains contact with

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his mother, grandmother, stepfather and brothers and sisters. So when we decide to throw children away, some even manage to survive the prisons we put them in. Why is it so hard to admit we made a mistake with Joel Ira?

ARGUMENT

I. General State of the Current Law

It is wise and proper the State concedes the import and impact of ***Roper v Simmons,*** 542 U.S. 551 (2005), ***Miller v Alabama***, 132 S. Ct. 2455 (2012) and ***Graham v Florida***, 560 U.S. 48 (2010), for the State to do otherwise places the State of New Mexico on the dung heap of not caring for its troubled children. However, the State asserting the language of ***Roper*** and ***Miller*** should be disregarded because the directed orders apply to death/homicide cases ignores the basis/framework for those decisions which should apply to New Mexico's children. ***State v. Zuber,*** Supreme Court of New Jersey, January 11, 2017, 227 N.J. 422152 A.3d 197, tells us the constitutional requirements of ***Miller***, that a sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison, apply with equal strength to a sentence that is the practical equivalent of life without parole; defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation. ***U.S. Const. Amend. 8; N.J. Const. art. 1***, para. 12.

The focus at a juvenile's sentencing hearing belongs on the real-time consequences of the aggregate sentence, and to that end, judges must evaluate the ***Miller v. Alabama*** factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense; they must do the same when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times, *i.e.,* when judges decide whether to run counts consecutively, and when they determine the length of the aggregate sentence. ***U.S. Const. Amend. 8; N.J. Const. art. 1***, para. 12, ***Zuber***, supra.

The constitutional requirements of ***Miller v. Alabama,*** that a sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison, apply broadly to cases in which a defendant commits multiple offenses during a single criminal episode, to cases in which a defendant commits multiple offenses on different occasions, and to homicide and non-homicide cases. ***U.S. Const. Amend. 8; N.J. Const. art. 1,*** para. 12.), ***State v. Zuber,*** supra. See also ***People v. J.I.A.***, 127 Cal.Rptr.3d 141, 149 (2011) and ***People v. Nunez***, 125 Cal.Rptr.3d 616, 624 (2011) holding that consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy is violate of ***Graham***. Other courts, however, have rejected the de facto life sentence argument, holding that ***Graham*** only applies to juvenile nonhomicide offenders expressly sentenced to "life

without parole." See, *e.g.*, ***Henry v. State***, 82 So.3d 1084, 1089 (Fla.Ct.App.2012); ***State v. Kasic***, 228 Ariz. 228, 265 P.3d 410, 415 (App.2011).

II. Retroactivity

The best rule and fairest rule is ***Graham, Roper*** and ***Miller*** apply retroactively. ***Miller***, the United States Supreme Court has determined, does apply retroactively. ***Montgomery v. Louisiana,*** Supreme Court of the United States, January 25, 2016, 136 S.Ct. 718, 2016 WL 280758. ***Montgomery's*** statement that ***Miller's*** ruling is a substantive one means protection against disproportionate punishments is the central substantive guarantee of the ***Eighth Amendment.*** ***Montgomery***, 136 S.Ct. at 732. ***Graham's*** ruling is a substantive one as well and ***Graham's*** protection should be applied to Joel Ira's case and ***Graham*** applies retroactively. The State acknowledges such.

What the State ignores is the more modern, civilized and proper rule is that ***Graham*** is retroactive. ***Budder v. Addison,*** United States Court of Appeals, Tenth Circuit, March 21, 2017, 851 F.3d 1047; ***People v. Morfin,*** Appellate Court of Illinois, First District, Third Division. November 30, 2012, 2012 IL App (1st) 103568 981 N.E.2d 1010; ***In re Sparks,*** United States Court of Appeals, Fifth Circuit, September 16, 2011, 657 F.3d 258 which took into consideration the rules of retroactivity set forth in ***Teague v. Lane***, 489 U.S. 288, 307, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and ***Schriro v. Summerlin***, 542 U.S. 348, 351–52, 124

S.Ct. 2519, 159 L.Ed.2d 442 (2004)); ***In re Moss***, United States Court of Appeals, Eleventh Circuit, January 03, 2013, 703 F.3d 1301 2013 WL 28371; ***Ex parte Maxwell***, Court of Criminal Appeals of Texas, March 12, 2014, 424 S.W.3d 66 2014 WL 941675; ***Diatchenko v. District Attorney for Suffolk Dist.***, Supreme Judicial Court of Massachusetts, Suffolk, December 24, 2013, 466 Mass. 655 1 N.E.3d 270; ***Horsley v. State***, Supreme Court of Florida, March 19, 2015, 160 So.3d 39340 Fla. L. Weekly S155 (Fla. Legislature corrected the problem by making juvenile code comply with ***Graham & Miller***); ***People v. Rainer,*** Colorado Court of Appeals, Div. VI. April 11, 2013 --- P.3d ----2013 WL 14901072013 COA 51, cert. granted); ***State v. Zuber***, Supreme Court of New Jersey, January 11, 2017, 227 N.J. 422152 A.3d 197; ***Henry v. State***, 175 So.3d 675 (Fla.2015); ***State v. Mares***, Supreme Court of Wyoming, October 09, 2014, 335 P.3d 487 2014 WL 5034628; ***Gridine v. State***, Supreme Court of Florida, March 19, 2015, 175 So.3d 672 2015 WL 1239504 (70 year sentence was unconstitutional)***; State v. Null,*** Supreme Court of Iowa, August 16, 2013, 836 N.W.2d 41 (Life in prison without parole cannot be imposed on a juvenile nonhomicide offender); ***Tyson v. State***, District Court of Appeal of Florida, Fifth District, September 2, 2016, 199 So.3d 1087 (A 45-year sentence imposed upon juvenile defendant for robbery with a weapon, conspiracy to commit robbery with a deadly weapon, and evidence tampering convictions did not afford meaningful opportunity for early release

based upon demonstrated maturity and rehabilitation, where sentence did not include requirement that defendant was entitled to review of his sentence after serving 20 years. ***West's F.S.A. § 921.1402(2) (d) (2014))***; ***People v. Caballero,*** Supreme Court of California, August 16, 2012, 55 Cal.4th 262 282 P.3d 291 (Juvenile defendant's sentence of 110 years to life for non-homicide offense constituted cruel and unusual punishment.).

In one instance in which the trial court resentenced the child and still gave him 60 years, the Iowa Supreme Court held such was the functional equivalent of unconstitutional mandatory life-without-parole sentence. ***State v. Ragland***, Supreme Court of Iowa, August 16, 2013, 836 N.W.2d 107 2013 WL 4309970.

III. Applicability to Aggregate Sentences,

And

IV. New Mexico should apply *Graham v. Florida* to cases in which a defendant commits multiple offenses at different times resulting in an aggregate sentence that violates *Graham*

And

V. A life sentence without parole for a child for a single crime is not qualitatively different than a sentence comprised of multiple terms of years sentences-the issue is the denial of hope

State v. Zuber, Supreme Court of New Jersey, January 11, 2017, 227 N.J. 422152 A.3d 197, tells us the constitutional requirements of ***Miller v. Alabama***, require a sentencing judge take into account how children are different, and how

those differences counsel against irrevocably sentencing them to a lifetime in prison, apply with equal strength to a sentence that is the practical equivalent of life without parole; defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation. ***U.S. Const. Amend. 8; N.J. Const. art. 1***, para. 12. The focus at a juvenile's sentencing hearing belongs on the real-time consequences of the aggregate sentence, and to that end, judges must evaluate the ***Miller v. Alabama*** factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense; they must do the same when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times, *i.e.,* when judges decide whether to run counts consecutively, and when they determine the length of the aggregate sentence. ***U.S. Const. Amend. 8***; ***N.J. Const. art. 1,*** para. 12; ***Zuber***, supra. The constitutional requirements of ***Miller v. Alabama*** that a sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison, apply broadly to cases in which a defendant commits multiple offenses during a single criminal episode, to cases in which a defendant commits multiple offenses on different occasions, and to homicide and non-homicide cases. ***U.S. Const. Amend. 8; N.J. Const. art. 1,*** para. 12.). See also ***People v. J.I.A.***, 127 Cal.Rptr.3d 141, 149 (2011) and ***People v. Nunez***, 125 Cal.Rptr.3d 616, 624

(2011) holding that consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy is violate of ***Graham***.

VI. ***Budder v Addison*** should control this decision

In ***Budder v. Addison***, United States Court of Appeals, Tenth Circuit. March 21, 2017, 851 F.3d 1047, the 16 year old boy was sentenced to three life sentences plus 20 years, consecutively for the multiple stabbings and rapes of a seventeen year old female child. ***Graham*** was decided after ***Budder*** was sentenced. The 10th Circuit held:

1. The Eighth Amendment's ban on cruel and unusual punishments prohibited imposition of a life without parole sentence on juvenile offender who did not commit homicide; sentencing practice considered by Court included any sentence that denied juvenile nonhomicide offender a realistic opportunity to obtain release in his or her lifetime.
2. Embodied in the Eighth Amendment's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense. ***U.S. Const***. Amend. 8.
3. The Eighth Amendment's ban on cruel and unusual punishments does not require strict proportionality between crime and sentence, but rather, forbids only extreme sentences that are grossly disproportionate to the crime. ***U.S. Const***. Amend. 8
4. The Constitution's protections do not depend upon a legislature's semantic classifications, but on the irrevocability of the punishment, that is the denial of hope.
5. The clearly established categorical rule in the Supreme Court's decision in ***Graham v. Florida***, 560 U.S. 48, that the ***Eighth Amendment's*** ban on cruel and unusual punishments prohibits imposition of a life without parole sentence on a juvenile offender who did not commit a homicide applies and Budder's sentence violates the ***Eighth Amendment***.

Budder applies to Joel Ira's case. First, ***Graham*** established a categorical rule and is therefore retroactive. Second, whether it is called a life sentence or a sentence

that means virtual life under New Mexico law does not matter - the Constitution's protections do not depend upon a legislature's semantic classifications but the denial of hope. Third, the sentences of ***Budder,*** and even ***Graham*** for that matter, were aggregate type sentences, in other words, sentences for more than one crime just as in Joel Ira. In ***Graham***, part of the sentencing involved crimes committed at different times due to a probation violation in which he committed more burglaries. ***Graham v. Florida***, Supreme Court of the United States, May 17, 2010, 560 U.S. 48130 S.Ct. 2011176 L.Ed.2d 825 (Syllabus).

VII. New Mexico Jurisprudence at present does not support this type of result And

VIII. A Juvenile Petitioner retains his Eighth Amendment Protection but for a child the Eight Amendment is more expansive than what New Mexico has ruled heretofore.

The State asserts New Mexico already provides protections against cruel and unusual punishment. If that be so, then why is the leading case on cruel and unusual punishment ***State v Ira***, 132 N.M. 8, 43P.ed 359, 2002-NMCA-037? Bluntly, the State cites to only ***State v. Rueda***, 199-NMCA-033, 126 N.M. 738, cert denied in ***State v Rueda***, 127 N.M. 391 (1999) asserting the unfulfilled promise of a true proportionality review. ***Rueda*** and ***Ira*** taken together begs the question of just how extreme must the punishment be before it is cruel and unusual. No, as the implementation of ***Roper***, ***Graham*** and ***Miller*** has been attempted and states have fought back in order to be even more extreme the only

remedy is the Supreme Court of the United States telling us to stop, to treat children differently and detailing what is cruel and unusual. New Mexico may have had some words that give some hope of punishment that is not cruel and unusual but its actions tell a far different story.

IX. The testimony from the 1997 and 1999 hearings did not satisfy all the requirements of both the *1993 Children's Code* and *Miller*

Miller tells us because juveniles have diminished culpability and greater prospects for reform, "they are less deserving of the most severe punishments." ***Graham***, 560 U.S., at 68, 130 S.Ct., at 2026.

> "First, children have a " 'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. Roper, 543 U.S., at 569, 125 S.Ct. 1183. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. Ibid. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." Id., at 570, 125 S.Ct. 1183."

The ***Graham*** Court as noted in ***Budder*** gave us three criteria to consider: (1) the "sentencing practice"; (2) "the nature of the offense"; and (3) "the characteristics of the offender." See ***Graham,*** 560 U.S. at 60–61, 130 S.Ct. 2011; *id.* at 61, 130 S.Ct. 2011.

In the sentencing practice it does not matter if it be life without parole or life but it is the irrevocability of punishment. ***Graham*** at 57. In this context, there is no material distinction between a sentence for a term of years so lengthy that it

"effectively denies the offender any material opportunity for parole" and one that will imprison him for "life" without the opportunity for parole—both are equally irrevocable. *Id.* at 113 n.11, 130 S.Ct. 2011 as set forth in ***Budder***. Joel Ira's punishment of 108 years and then after correction for crimes committed at age 14 to 91 ½ years certainly is such a sentence that can be determined to be irrevocable. There is little hope.

Second, is the nature of the offense. The ***Graham*** Court drew a distinction between homicide and other serious violent offenses. "Although an offense like robbery or rape is 'a serious crime deserving serious punishment,' those crimes differ from homicide crimes in a moral sense." ***Graham***, (quoting ***Enmund v. Florida***, 458 U.S. 782, 797, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982)). Joel Ira did not kill anyone, and even 20 plus years later, there are serious questions as to exactly what he did do and the extent thereof. Even the fact he pled to CSP offenses is discredited by his lack of knowledge as to what was happening and the lawyers failure to even recognize some could not be considered because he was under age 15 and could not be treated as an adult. The ***Buddar*** Court warns us, "Again, we must emphasize that states may not circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences. Just as they may not sentence juvenile nonhomicide offenders to 100 years instead of "life," they may not take a single offense and slice it into multiple sub offenses

in order to avoid ***Graham's*** rule that juvenile offenders who do not commit homicide may not be sentenced to life without the possibility of parole." ***Buddar,*** paragraph III.

In Joel Ira's case, the State charged a large number of offenses so they could obtain a 108 year sentence and the Court bought right into it, even though serious questions had to be raised regarding the number of times any criminal activity occurred and the degree thereof. The fact is by charging a large number of counts the State and the Court took it to a virtual life sentence.

Third is the characteristics of the offender. The ***Graham*** Court stressed the unique characteristics of children offenders. Juveniles have lessened culpability because they are less deserving of severe punishments. Developments in psychology and brain science show fundamental differences between adults and children. Children 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.' Therefore age is a distinguishing characteristic .

Life, the second most severe punishment next to the death penalty, is more severe for a child because of his youth and doing more time if nothing more. Thus, as the Court in ***Graham*** noted, none of the recognized goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation—justified the sentence of

"life without parole for juvenile nonhomicide offenders." *Id.* at 71, 130 S.Ct. 2011. In this discussion, the Court noted that retribution was not proportional, given the reduced culpability of juveniles, *id.* that juveniles' lack of maturity prevented a justification of deterrence, *id.* at 72, 130 S.Ct. 2011, and that incapacitation was inadequate to justify the punishment because "incorrigibility is inconsistent with youth," id. at 72–73, 130 S.Ct. 2011 (quoting ***Workman v. Commonwealth***, 429 S.W.2d 374, 378 (Ky.1968)). All three of these conclusions are dependent upon the age of the offender. ***Budder***, supra.

The conclusion is simply this. The Court's categorical rule in ***Graham*** covered all offenders who committed their crimes before the age of eighteen and who did not kill, intend to kill, or foresee that life would be taken. It compared the culpability of these offenders to the severity of the sentence, in this case any sentence that would deprive the offender of a realistic opportunity for release in his or her lifetime. The Court concluded that such sentences were categorically unconstitutional when applied to these juvenile offenders. *Id.* at 75, 130 S.Ct. 2011. Although "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* All as cited in ***Budder***, supra.

Joel Ira's sentence would **not** be upheld if this Court follows the dictates of

are cruel and unusual. Joel Ira has shown the Trial Court and the State's experts were wrong. He did it while being thrown into prison and the fact he has proven to be rehabilitated and redeemed speaks not of the prison environment, but his own makeup. The Court should announce ***Graham*** is retroactive, ***Graham*** applies to multiple offense cases occurring at different times and to sentences which leave a child little or no hope due to their length. Further, we should for all time prohibit such severe, cruel and unusual sentences as the type Joel received. Finally, the court should order the release of Joel Ira immediately and set him free.

Request for Oral Argument:

Oral argument is requested.

Respectfully submitted,

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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 April, 2017.

Gary C. Mitchell