IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

No. S-1-SC-35657

APR 0 7 2017

JOEL IRA,

Petitioner,

vs.

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

Respondent

STATE OF NEW MEXICO'S ANSWER BRIEF TO PETITIONER'S BRIEF-IN-CHIEF

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SUPREME COURT OF NEW MEXICO
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STATEMENT OF COMPLIANCE

The body of this Answer Brief does exceed the 35 page limit set forth in Rule 12-213(F)(2) NMRA; however, the document is proportionally spaced using Georgia, a TrueType font, set at fourteen (14) points, and contains 10,284 words. The word count was determined using Microsoft Office 2013.

STATEMENT OF RECORD CITATIONS

Citations to the record proper were made in accordance with Rule 23-112 NMRA. Citations to the recorded transcripts also were made in accordance with Rules 23-112 NMRA and 12-213 NMRA.

INTRODUCTION

Petitioner's claim that he "engaged in sex" with a stepsister, whom he described as just four years his junior **[BIC 1]**, falls far short of the actual facts presented to the trial court. In reality, he waged a two year campaign of torment against a little girl five-and-a-half years younger than him.[1] He sexually assaulted her. He physically abused her. He threatened her. He humiliated her. Petitioner's actions toward the victim amounted to a great deal more than just "sex."

Petitioner received a 91½ year adult sentence as a youthful offender after a lengthy sentencing hearing during which multiple experts from the field of juvenile law testified. In imposing the sentence, the trial court issued an opinion that was sensitive to Petitioner's youth but nonetheless recognized that no way existed to treat him in the juvenile system. The Court of Appeals affirmed this sentence in 2002, after which the case lay dormant until 2015, when Petitioner requested a Writ of Habeas Corpus which the same trial court denied. Petitioner then requested a Writ of Certiorari to the trial court, which was granted.

In his brief, Petitioner has asked this honorable Court for another sentencing hearing, as remedy for what essentially boils down to his

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[1] Respondent's birthday is Feb. 28, 1981; the victim's, July 7, 1986.

argument that he was treated unfairly. To be sure, Petitioner suffered in his early life, and no one can doubt that his prison term is an unusually long one. Thus, it might be tempting at first glance to give credence to his position. The fact remains, however, that this sentence was and is still a legal one. Consequently, the State asks this Court to deny Petitioner's request and affirm that his sentence does not violent either the Federal or New Mexico Constitution.

SUMMARY OF PROCEEDINGS

I. FACTUAL HISTORY (FROM THE ORIGINAL 1997 HEARING)

Petitioner, given the surname of his first step-father, Thomas Ira,[2] lived with his mother and Joe Ray Mills for approximately two years **[7/10/1997 5T 276]**, starting at age eight.[3] **[7/10/1997 5T 241]** Despite Mills' claim that the family didn't have any problems other than the ordinary ones incumbent in raising children **[7/10/1997 5T 260]**, Petitioner first appeared on the radar of juvenile services at the age of 9. **[1 RP 49, 50]** At some point, not clear in the record, Petitioner went to live

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2 The biological father does not seem ever to have been involved with Respondent.

3 Mills approximated the ages by remembering that Petitioner's school held him back in either 3rd or 4th grade for poor marks. **[7/10/1997 5T 276]**

with Ira because Petitioner's mother could not control him. **[8/20/1997 3T 83]**

Petitioner's delinquency escalated dramatically during his years with Ira. The juvenile probation department ("the department") received a referral on him for a battery in March 1995, when Petitioner tripped a child in a mall. **[8/20/1997 2T 496]** The victim and other witnesses reported that Petitioner also frequently hit Ira **[7/10/1997 1T 510]**, once gouging his eye. **[8/20/1997 6T 107]** On September 29, 1995, law enforcement responded to a battery call that Petitioner had attacked Ira and had to be restrained. **[1 RP 186]** When officers arrived, the 14-year-old Petitioner swore, was "angry and upset" and said he "would kick his dad's ass again." **[1 RP 186; 8/20/1997 2T 354]**

On October 30, 1995, the department received another referral for two auto burglaries **[8/20/1997 2T 547]**, which formed the basis of a 1995 juvenile petition. **[1 RP 1]** Petitioner agreed to resolve the matter by Consent Decree **[1 RP 24]**, and the trial court imposed probation for six months. **[1 RP 25]** During this period, Petitioner attended required counseling from October 1995, until July 1996, to address his violent tendencies.

While on probation and in counseling, Petitioner continued to act out. He tested positive for marijuana usage **[8/20/1997 2T 576]**, committed numerous curfew violations **[8/20/1997 2T 550, 576]** and refused to follow probation rules. **[8/20/1997 2T 584]** Nevertheless, the first case, the probation, and the counseling, all terminated as scheduled on July 15, 1996. **[1 RP 25, 31; 8/20/1997 2T 556]**

Unfortunately, even after Petitioner completed the rehabilitative programs provided by the department, he continued to offend. On January 1, 1997, Ira reported that Petitioner had taken a vehicle without permission. On January 4, 1997, Petitioner committed another battery against Ira, who finally admitted that he was afraid of his step-son **[8/20/1997 3T 87]**, all of which led to the filing of a second petition on February 20, 1997. **[1 RP 32]** The alleged offenses painted the picture of an uncontrollable—albeit perhaps redeemable—youth, but far more sinister information began to emerge in the days that followed.

Just days later, children's court attorneys filed an amended petition, adding allegations which outlined Petitioner's offenses against the victim that included sexual and physical abuse. He forced the victim to perform fellatio until she vomited **[8/20/97 2T 105]**, making her swallow urine **[7/10/1997 1T 109]** and semen. **[1 RP 51]** He raped and sodomized her

[7/10/1997 1T 120], using his fingers **[7/10/1997 1T 77]** and his penis **[7/10/1997 1T 171]** and stifling her screams with his hand. **[7/10/1997 1T 126, 132]** He told her that if she "didn't shut up . . . he would hurt her bad" **[7/10/1997 1T 130]**, a threat he carried out on numerous occasions by tearing her anus. **[1 RP 50]**

He tormented her psychologically. Routinely, after he had violated her, he commandeered the family bathroom to wash and forced her to wait, bleeding, to use the toilet. **[7/10/1997 1T 144, 146]** He called her a "bitch" **[7/10/1997 1T 187]** and threatened to kill her if she told anyone. **[7/10/1997 1T 198]** He often abused her dog in her presence. **[7/10/1997 1T 327, 367]**

He abused her physically, as well. He often hit her, "knocking the wind out of her," and kicked her, causing her bruises. **[7/10/1997 1T 181]** Once, he choked her until she lost consciousness. **[8/20/1997 4T 623]** In total, he abused her approximately every other day for two years[4] **[7/10/1997 1T 195]**, from the time she was eight-and-a-half years old.

Finally, he began to groom the victim's female friends and M.L., her brother. **[11/20/2015 CD 2:47:50]** He began leading the group in games

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4 The victim's testimony about the frequency of the abuse departs slightly from what she said in the forensic interview, that the abuse happened once or twice a week. **[1 RP 52]**

in which they all removed their clothing. **[8/20/1997 1T 367, 388]** He simulated a rape of the victim in front of one friend, J.M. **[8/10/1997 1T 399],** whom he then fondled under her shirt and on her private parts over her panties. **[8/10/1997 1T 457]** He threatened J.M. with "something bad" if she disclosed those activities. **[8/20/1997 1T 434]** Finally, he tried to force M.L. to penetrate the victim anally. **[12/3/1999 2T 377]**

Not once, while in detention, did Petitioner ever express any remorse for his crimes. **[8/20/1997 2T 626, 635]** To the contrary, he did not think that he had done anything wrong and just had made a mistake in his choice of victim. **[8/20/1997 2T 666]** Petitioner believed that he could have had any number of girls that he wanted, but he "just blew it on some stupid shit like her." **[8/20/1997 6T 479]** He told a witness that "those fuckers, they need a beating," referring to the victim and M.L. **[8/20/1997 1T 528]**

Most disturbingly, Petitioner continued in his violent actions. During his time in detention, the department received a final referral battery on him: he—along with others—had beaten a younger child and tried to take his pants down. **[8/20/1997 2T 710]** Katherine Peterson was a psychotherapist who had specialized in sex offender treatment for ten years; she ran an intensive five year outpatient treatment program.

[8/20/1997 2T 280] She testified during Petitioner's original sentencing hearing and identified the penultimate issues for the trial court: Petitioner's refusal to accept responsibility for his victims' suffering and his complete lack of remorse. **[8/20/1997 3T 420]** She did not imagine that Petitioner could be treated, and she refused to accept him in her program because she didn't want to "bang her head against a stone wall for five years." **[8/20/1997 3T 284]**

II. PROCEDURAL HISTORY

Children's court attorneys filed the Petition in this case on October 30, 1997, alleging one count of battery against a household member. **[1 RP 32]** Two amended pleadings were filed subsequently, adding charges that stretched across a two-year time span. The final version upon which the parties went to trial charged Petitioner with six counts of criminal sexual penetration against the victim occurring in 1995; two counts of aggravated battery perpetrated in 1996, against the victim and M.L.; four counts of criminal sexual penetration of the victim and one count of threatening her, all in 1997, plus the final battery against Ira. **[1 RP 67-72]** Thus, when this case started, it involved only thirteen felonies and a misdemeanor, despite the countless other times Petitioner had brutalized the victim.

The 1997 Hearing

Petitioner eventually agreed to resolve his case as a youthful offender with a no contest plea. **[6/20/1997 1T 462]** No agreement existed as to punishment. On August 20, 1997, the trial court conducted the hearings required under the Children's Code. A panoply of experts testified about the futility of treating Petitioner in the juvenile system, with various factors informing these opinions.

Although possessed of average intelligence **[8/20/1997 3T 316]**, Petitioner had gotten "stuck" in the development of his emotional skills and conscience at around age five or six **[8/20/1997 6T 501]**: he had failed to develop any true appreciation for the needs of others. **[8/20/1997 3T 308]** Petitioner had committed increasingly aggressive acts against younger and more vulnerable persons for his gratification **[8/20/1997 4T 580]**, a pattern made worse by his eventual eroticism of violence. He began to find "intense" sexual pleasure from the infliction of pain on his victims **[11/20/2015 CD 3:13:30; 8/20/1997 6T 492]** without any care for their suffering. This fact, according to Dr. Sam Roll[5] **[11/20/2015 CD 2:34:10]**, distinguished Petitioner from much younger and more typical

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5 A clinical psychologist for over 25 years who specialized in developmental psychology, the study of how the personality develops from birth through death.

juvenile sex offenders, for whom treatment focused on basic sexual boundaries and the inappropriate age of some partners.

Of utmost concern remained the fact that Petitioner was in counseling for his 1995 case while he was sexually and physically abusing the victim. **[8/20/1997 8T 203]** Able to hide his violent side, it appeared that Petitioner was adept at "appear[ing] normal," with the same interests as his peers, which made it all the more difficult to treat him. **[8/20/1997 3T 316]** This ability to manipulate indicated a poor prognosis for additional treatment. **[8/20/1997 3T 646]** Most importantly, all the experts agreed that no facility existed anywhere in the country that offered the type of program required by Petitioner in order to have even a modest chance for success.

After an entire day of testimony and careful consideration of its options, the trial court imposed the maximum for each count, but ran some of them concurrently, resulting in a sentence of 108 years. In his remarks filed with the case, the judge reasoned that lengthy incarceration was appropriate because Petitioner was not the typical juvenile and because the evidence showed that "he is almost certain to be the same threat to society upon his release as he is today." **[1 RP 219]**

Very quickly, however, a problem arose: the court and the parties realized that the 1993 version of the Children's Code effective at the instigation of the case did not allow for youthful offender status to attach until the age of 15. For the crimes Petitioner committed when he was still 14, he could have been sentenced only in the juvenile system.[6] The State motioned the trial court to modify the sentence to comport with the statutes **[1 RP 236]** while Petitioner filed a motion to invalidate the entire proceedings and to allow him to withdraw his plea. **[1 RP 234]** After a combined hearing on both motions, the trial court denied them on the grounds that although the crimes committed at 14 years of age technically were not within the ambit of the youthful offender statute, they were nonetheless "clearly subject" to *State v. Montano*, 1995-NMCA-065, ¶ 7, 120 N.M. 218 ("[j]uvenile who was sentenced as adult for crime listed in New Mexico's juvenile transfer statute was also subject to adult sanctions for all offenses in same case, even [those] not listed in that statute as one allowing imposition of adult sanctions"). **[2 RP 254]**

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6 *See* NMSA 1978 §32A-2-3(I)(1) (1993). The trial court prepared an extremely useful chart, showing the counts, the offense dates, and Petitioner's age as of each crime committed. **[2 RP 251]**

The First Appeal

Petitioner filed his initial appeal on the grounds, first, that the trial court illegally sentenced him to crimes that occurred before he was 15; and second, that he received ineffective assistance of counsel. On October 1, 1998, the Court of Appeals ruled in Petitioner's favor on the first issue, distinguishing *Montano*. Since the Court of Appeals remanded for a new sentencing hearing, it hardly addressed the second claim **[RP2 314]**, indicating only that Petitioner had failed to make a prima facie case. The opinion did not remand on ineffective issue. **[1 RP 317]**

The 1999 and 2000 Hearings

The parties reappeared before the trial court on December 3, 1999, for another sentencing hearing. The State presented Dr. Matthews, a licensed psychologist for 22 years, with many of those years spent working for the state performing juvenile sex offender evaluations, and developing a juvenile sex offender program. **[2 RP 355]** Matthews gave Petitioner a better chance at reasonable rehabilitation than had the 1997 experts[7] **[12/3/1999 1T 650]** but concurred with the prior witnesses that Petitioner would be treatable only in a long term residential setting. **[12/3/1999 1T 500]** He also agreed that, unfortunately, no such type of

7 Dr. Matthews said Respondent stood a 50% chance for rehabilitation.

ideal facility existed. **[12/3/1999 1T 500]** Gary Mitchell, Petitioner's current counsel, announced that he had no testimony to offer. **[12/3/1999 1T 15]** Afterwards, the trial court imposed juvenile sanctions for those offenses committed when Petitioner was 14, to run concurrently with the adult portion of the sentence, 91½ years in prison.

This judgment was entered on March 6, 2000, and two days later, Petitioner filed a Motion to Reconsider Sentencing **[2 RP 379]** and a Motion to Withdraw Plea. **[2 RP 382]** At the combined hearing, the trial court allowed Petitioner to present evidence as to his claim of ineffective assistance of original counsel, despite the children's court attorney's objection that the claim was not part of the remand. **[2 RP 317]** During the hearing, Petitioner also continued to argue that there were appropriate programs available, which the trial court had ignored based on a lack of state funds to pay for private treatment. Petitioner did not, however, introduce any evidence on this point; and in the end, the trial court denied both motions.

<u>The Second Appeal</u>

Petitioner commenced his second appeal on May 1, 2000, arguing that the length of his sentence violated the Eighth Amendment and that the failure of his original lawyer to understand the age limits of NMSA §32A-2-

3(I)(1) (1993) constituted ineffective assistance of counsel.[8] On January 24, 2002, the Court of Appeals affirmed the sentence in *State v. Ira*, 2002-NMCA-037, 132 N.M. 8, *cert. denied, State v. Joel I.*, a Child, 132 N.M. 133 (2002). With respect to the first issue, the Court of Appeals held that "in sum, when comparing the gravity of the offenses committed by Petitioner to the sentence imposed by the court, we cannot say that Petitioner's punishment is so grossly disproportionate as to shock the general conscience or violate principles of fundamental fairness." *Ira*, 2002-NMCA-037, ¶ 19.

With regard to the second argument, the Court of Appeals held that the attorney's failure to know the contents of the Youthful Offender statutes clearly constituted ineffective counsel. *Ira*, 2002-NMCA-037, ¶ 39. The decision, however, still found the record insufficient to establish a prima facie case, despite the evidence introduced by Petitioner at the motions for resentencing and to withdraw his plea. Of particular note was the trial court's comment that it seemed "illogical for [Petitioner] to contend that he would not have pleaded guilty had he known he was facing a maximum sentence of 91½ years even though he actually did plead no contest when

[8]Respondent did assert two lesser issues: that the sentence was improperly based on financial constraints; and that it reflected an intent to exact judicial retribution. The Court of Appeals rejected them summarily.

he thought he was facing a sentence of 185 years. The Court of Appeals thus found it unnecessary to remand for further hearings. *Ira*, 2002-NMCA-037, ¶ 41.

The 2015 Hearing

From 2002 to 2015, the Supreme Court of the United States issued a number of opinions addressing the propriety of certain types of sentences imposed on juveniles. On the basis of those decisions, Petitioner filed his Petition for Writ of Habeas Corpus in the district court on July 31, 2014. **[3 RP 521]** Chief amongst his complaints, once again, were the alleged unconstitutionality of the sentence and the alleged ineffective assistance of counsel.

When the trial court heard the matter, however, defense counsel did not address any of his brief's various positions, but instead argued generally that Petitioner had developed a conscience, that he had been rehabilitated and had been a model prisoner. Claiming that the trial court's 1997 fears that Petitioner would continue to be a dangerous person had not come to pass, defense counsel asked for Petitioner's released.[9]

9 The State objected that Petitioner's intended presentation was irrelevant to a Habeas proceedings, however, the trial court, out of an abundance of caution, allowed Petitioner to make the evidentiary record he wanted.

Petitioner's mother, Joe Ray Mills (his second step-father), and a family friend all testified generally as to Petitioner's good character. Petitioner himself testified as well, that he no longer had any desire to hurt anyone and that he had been rehabilitated. However, he also continued to claim that he had never had an anger management problem in the first place **[2015 State's Ex 5, p. 11, ls. 6-10]**, that he had only been having sex with his step-sister **[2015 State's Ex 5, p. 28, ls. 3-10]**, and that he had never been the type to "take sex from" or "prey" on anyone. **[2015 State's Ex 5, p. 10, l. 4]**

Dr. Roll (from the 1997 hearing) testified again and expressed great concern that even after twenty years in prison, Petitioner still failed to take any real responsibility for his crimes and still was unable to identify with his victims' pain and suffering. **[6/30/2015 CD 2:53:50]** Dr. Roll added that even in those diagnosed with conduct disorder, Petitioner's degree of total disregard of and disrespect for his victim was unusual. **[11/20/2015 CD 2:46:30]**

To illustrate his point, the doctor cited a specific question and answer from Petitioner's direct testimony: defense counsel asked whether Petitioner had been sexually assaulted in prison, to which Petitioner replied "I fought a lot . . . . I couldn't be a victim. I wouldn't . . ." Then defense

counsel asked if Petitioner had made any connections between his fears about victimization in prison and his victim's feelings. **[2015 State's Ex 5, p. 20, ls. 7-19]** Petitioner responded that he did not understand the question. **[2015 State's Ex 5, p. 21, l. 8]** Dr. Roll concluded that Petitioner had not said anything in the 2015 hearing that caused the doctor to doubt his original diagnosis or recommendations.[10] **[11/20/2015 CD 2:59:00]** The doctor also informed the trial court that, even two decades later, no place exists which offers the treatment required by Petitioner.[11] **[11/20/2015 CD 2:48:54]**

The trial court denied the petition because it interpreted the case law cited by Petitioner to ban only mandatory sentences in which a judge had no discretion. The trial court held that, as the youthful offender statutes and the New Mexico penal code had afforded him a wide latitude of sentencing options, the Supreme Court authority did not control. **[11/20/2015 CD 4:08:30]** From this denial, Petitioner sought a Writ of Certiorari.

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10 Dr. Roll was very clear, though, that he had not performed a second evaluation. He said he had based his remarks solely on Respondent's testimony; he was not offering an official opinion as to whether Respondent had developed a conscience in prison. **[11/20/2015 CD 3:13:45]**
11 Dr. Roll said that there are a few private long term facilities, but none of them take patients through criminal cases.

ARGUMENT

I. GENERAL STATE OF THE CURRENT LAW

Petitioner correctly states that the Supreme Court has issued several important decisions in the last twelve years: *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). **[BIC 1]** These cases share a common recognition of the complexities of adolescence, "a time of immaturity, irresponsibility, [impetuosity] and recklessness" *Miller* at 2467; and all three decisions extrapolate from this fact to the conclusion that "youth matters" in the determination of an appropriate sentence for juvenile crimes. *Miller*, 132 U.S. at 2466.

The State concedes all the points made by the cases and by Petitioner about the general differences between juveniles and adults. To do otherwise runs counter to the tide of common sense notions held, hopefully, by the general public. But the State parts company with the Petitioner when he conflates the concepts of *Roper*, *Miller*, and *Graham*, referring to them collectively and interchangeably, as if each one applies with equal force to all situations.

Roper involves the death penalty, no longer an issue in New Mexico. *Miller* relates only to homicide cases; *Graham*, only to non-homicide cases.

In fact the opinions, other than the idea upon which they all build—that juvenile offenders are generally less culpable and more capable of change than adult ones—share very little common ground. Except for these general precepts, *Roper* and *Miller* have no bearing here.

Which brings this analysis to *Graham*, the only case cited by Petitioner that involves a non-homicide fact pattern. That opinion involved a 16-year-old sentenced adult lifetime incarceration for a home invasion.[12] The Florida Supreme Court decided *Graham* shortly after that state had dismantled its parole system so executive clemency remained his only hope for release. In *Graham* the Supreme Court held that because youthful offenders are less culpable and more capable of change than adult offenders, a life sentence without parole for a non-homicide offense constituted cruel and unusual punishment prohibited by the Eighth Amendment.

Petitioner argues that his sentence is the same as a life sentence without parole for a non-homicide offense, banned by *Graham*; that the Eighth Amendment requires that he receive a meaningful opportunity for parole; and that his opportunity for parole at the age of 63 does not qualify

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12 Graham already was on probation for an unrelated attempted robbery, when he committed the home invasion. The judge revoked his probation on that charge and sentenced the juvenile to 15 years in prison, concurrent with his life sentence.

as meaningful. However, Petitioner's case only fits under *Graham* if that decision applies retroactively, and if it prohibits not only a single sentence of life without parole, but also an aggregated one comprised of multiple "term of years" sentences which do provide for parole, albeit late in life ("an aggregated sentence"). Petitioner treats the answers to these two questions as if they are foregone conclusions **[BIC 21]**; however, the Supreme Court has not addressed either issue, and neither has New Mexico. These two questions remain issues of first impression in this State.

II. RETROACTIVITY

Several federal and state authorities have addressed this issue, holding that *Graham* does apply retroactively.[13] Also, the Supreme Court has determined that *Miller* applies retroactively. *Montgomery v. Louisiana*, --- U.S. ---, 136 S.Ct. 718, 736 (2016). In deciding the issue, the opinion distinguishes between new procedural rules which do not operate retroactively and new substantive rules which ordinarily do. Categorizing

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[13] 13 *People v. Rainer*, ---- P.3d ----, 2013 WL 1490107 (Colo.App. 2013); *In re: Sparks*, 657 F.3d 258, 261 (5th Cir. 2011); *Moore v. Biter*, 725 F.3d 1184, 1190–91 (9th Cir. 2013); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013); *Bonilla v. State*, 791 N.W.2d 697, 700–01 (Iowa 2010); *Beach v. State*, 348 P.3d 629, 642 (Mont. 2015); *State v. Moore*, 2016 WL 7448751, ---N.E.3d --- (Ohio 2016); *State v. Boston*, 363 P.3d 453, 454 (Nev. 2015); *State v. Zuber*, 152 A.3d 197, 212 (2015); *Kleppinger v. State*, 81 So.3d 547, 550 (Fla.App. 2012); and *St. Val v. State*, 107 So.3d 553, 554 (Fla.App. 2013).

Miller's ruling as a substantive one, the *Montgomery* decision reiterates that "[p]rotection against disproportionate punishments is the central substantive guarantee of the Eighth Amendment." *Montgomery, 136* S.Ct. at 732. The same reasons that undergird *Montgomery* pertain equally to *Graham*. For all these reasons, New Mexico should apply *Graham* retroactively.

III. APPLICABILITY TO AGGREGATE SENTENCES

Because the Supreme Court has never examined this question, individual jurisdictions have been left to inquire whether to extend the *Graham* categorical ban (against a life sentence without parole for a single non-homicide offense) to an aggregated sentence. Several federal jurisdictions have considered the matter, but split as to the answer: the Fifth[14] and Sixth[15] Circuits chose not to expand *Graham*; while the Ninth[16] made the opposite choice.

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14 *United States v. Walton,* 537 Fed.Appx. 430, 437 (5th Cir. 2013) (per curiam), *cert. denied in Walton v. United States,* 134 S.Ct. 712 (2013).
15 *Bunch v. Smith,* 685 F.3d 546, 551 (6th Cir. 2012) *cert. denied in Bunch v. Bobby,* 133 S. Ct. 1996 (2013)
16 *Moore v. Biter,* 725 F.3d 1184, 1190–91 (9th Cir. 2013) *no pet.*

State appellate courts also cannot agree. Dozens have grappled with the issue: some agreeing with the State;[17] some, with the Petitioner.[18] As for the States within the Tenth Circuit, neither Utah nor New Mexico has ruled on the issue; while Wyoming,[19] Colorado,[20] Kansas, and Oklahoma have. The first two states held that *Graham* applies to aggregate sentences while the second two held that it does not. While the Kansas[21] defendant did not appeal to that state's highest court, the Oklahoma one did. After the Oklahoma Court of Criminal Appeals (OCCA) rejected that defendant's arguments, he appealed to the Tenth Circuit, making it the fourth federal jurisdiction to examine the issue.

In *Budder v. Addison*, --- F.3d ---, 2017 WL 1056094 (10th Cir. 2017), a 16-year-old defendant stabbed and raped his victim multiple times, with all the offenses taking place in a single episode. He was sentenced by the

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17 *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) *no pet.*; *State v. Brown*, 118 So.3d 332, 332 (La. 2013) *no pet.*; *State v. Kasic*, 265 P.3d 410, 414-15 (Ariz.App. 2011).

18 *Zuber v. Comer*, 152 A.3d 197, 212 (N.J. 2017) *no pet.*; *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012); *Henry v. State*, 175 So.3d 675, 680 (Fla. 2015) *cert. denied in Florida v. Henry*, 136 S.Ct. 1455 (2016); *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014) *no pet.*; *State v. Null*, 836 N.W.2d 41, ¶ 74 (Iowa 2013) *no pet.*

19 *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014), *no pet.*

20 *People v. Rainer*, ---- P.3d ----, 2013 WL 1490107, *cert granted by People v. Ranier*, 2014 Colo. 81 (2014).

21 *State v. Redmon*, 380 P3d 718, at note 6 (Kan.App. 2009) (decision published in table without opinion).

Oklahoma trial court to three consecutive life sentences, two without the possibility of parole. Because the crimes were not homicides, the OCCA had held that the two sentences without parole were unconstitutional and converted them to life sentences with parole, but found that *Graham* did not apply to aggregated sentences and left the three life sentences running consecutively. The Oklahoma parole statutes required Budder to serve 131.75 years before reaching parole eligibility.

Budder then sought habeas relief in federal district court that his sentence did not afford him a meaningful opportunity for parole. The Tenth Circuit decision cut a wide swath. The opinion held that *Graham* "clearly established" (*Budder,* 2017 WL 1056094 n. 9) that the ban against life sentences without parole applies equally to aggregated, de facto, life sentences. The opinion continued, holding also that *Graham* "prohibits . . . all sentences that would deny [non-homicide] offenders a realistic opportunity to obtain release," (*Budder,* 2017 WL 1056094 n. 4) "*regardless of the number or severity of those offenses.*" (emphasis supplied) (*Budder,* 2017 WL 1056094 n. 6).

IV. New Mexico Should Not Apply *Graham v. Florida* to Any Sentence Other Than Life Without the Possibility of Parole for a Single Offense.

Quite simply, the facts in *Graham* do not match Petitioner's: that defendant received a single life sentence without parole for a single offense; while Petitioner received an aggregated one for multiple crimes. *Graham* does not even mention, much less prohibit, the latter type of punishment. The language of *Graham* supports this argument: "[t]he instant case concerns only those juvenile offenders sentenced to *life without parole* solely for a non-homicide offense." (emphasis added). *Graham*, 560 U.S. at 63. Additional language from Justice Alito's dissent is even more direct: "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Graham*, 560 U.S. at 124.

Additionally, the opinion takes great care to establish that a juvenile living out his life within the prison system does not violate the Constitution: "while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Graham*, 560 U.S. at 75. Although the Court was referring to the fact that a non-homicide juvenile given a chance for parole might never qualify for release, the sentiment that the Eighth Amendment does not per

se bar a lifetime sentence applies here. Nothing in *Graham* suggests that the Supreme Court intended to prohibit an aggregated sentence, even one lasting longer than life.

The State respectfully requests that New Mexico join those jurisdictions which have elected not to extend the ban and points this Court to *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016) because the opinion contains an excellent review of the issue on a fact pattern which mirrors the one here. The case involves a 16-year-old juvenile "found guilty of 18 separate crimes, including forcible vaginal and anal rape . . . forcible fellatio, [and] forcible sodomy," which resulted in an aggregated sentence of 283 years. When that juvenile appealed, he urged the Virginia Supreme Court to expand *Graham's* prohibition just as this Petitioner has.

That court declined, holding unanimously that "[t]hese [aggregate] cases are nothing like *Graham*, which involved a single crime resulting in a single life-without-parole sentence." *Vasquez*, 81 S.E.2d 920, 926. The decision went on to describe the practical difficulties in expanding the ban: "what if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?" *Vasquez* at 928. The decision concluded that

> "with nothing more to rely on than *Graham*, we believe that attempting to answer these questions (particularly with the level of specificity necessary for a principled application of Eighth Amendment law) would require a proactive exercise inconsistent with our commitment to traditional principles of judicial restraint . . . . *Graham* does not apply to aggregate term of years sentences involving multiple crimes, and we should not declare that it does." *Vasquez*, 81 S.E.2d 920, 928.

The Supreme Court denied certiorari in this case on December 5, 2016.[22] For these reasons and the ones following, *infra*, the State asks this Court to decide this question as did the Virginia Supreme Court.

V. A Life Sentence Without Parole for a Single Crime is Qualitatively Different from a Sentence Comprised of Multiple Term of Years Sentences.

Refusing to expand *Graham* to apply to aggregated sentences for multiple crimes comports with historical Eighth Amendment principles of proportionality. States then are free to punish juvenile defendants who commit vicious multiple crimes, committed over and over, accordingly. *Roper*, *Miller*, and *Graham* require only the recognition that juveniles are generally less culpable than adults. Nothing in those cases requires that this Court excuse juveniles from bearing the greater consequences that flow from a chosen course of action, comprised of many crimes. In contrast, holding that *Graham* applies to aggregate sentences means that such

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[22] *Vasquez v. Virginia*, 132 S.Ct. 568 (2016).

offenders deserve a punishment no more harsh than one imposed for a single offense.

Therein lies the real issue before the Court. *Miller* and *Graham* stand at opposite ends of the spectrum. At one end, *Miller* involves a homicide, and determines that crime to be heinous enough to justify a life spent in prison without parole. The opinion simply bans a mandatorily imposed sentence and requires, instead, an individualized sentencing hearing before imposition of such a sentence. At the other end of the spectrum, *Graham* determines that a single, non-homicide offense, no matter how violent, could never justify a life sentence without parole for a juvenile. "The Court has recognized that Petitioners who do not kill . . . are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U.S. at 68. To account for this difference between a homicide and a lesser crime, as well as for the idiosyncrasies of youth, that case requires a State to afford a juvenile Petitioner "some meaningful opportunity to obtain a release based on demonstrated maturity and rehabilitation."

Because the Supreme Court has continued to deny certiorari, each individual court must decide where on that spectrum does an aggregated sentence fall, and what constitutional protections are implicated by that

location. If an aggregated sentence lasting longer than life is more akin to a life sentence without parole, courts should follow the guidance of *Miller*, even in non-homicide cases, by providing a juvenile Petitioner with an individualized sentencing hearing. If, after such a hearing considering—among other things, a juvenile's age and background—a sentencing authority is convinced that the number and/or severity of crimes justifies a lengthy sentence, such a sentence will withstand Constitutional challenges.

If, on the other hand, an aggregated sentence for multiple crimes more closely resembles a single non-homicide crime, then courts should impose the *Graham* categorical ban against life sentences without parole and require that a state offer a juvenile Petitioner a meaningful opportunity for parole. Petitioner asks this Court to adopt the latter position, arguing for the extension of the wholesale ban against any kind of lengthy sentence, based solely on a Petitioner's not having reached the age of majority. Holding as Petitioner requests, however, is neither warranted by the case law nor desirable.

While both the *Graham* and *Miller* opinion recognized that age cannot be discounted when considering an appropriate sentence, nothing in any of the authorities cited by either side holds that age is the only determining factor. Extending *Graham* to apply to aggregated sentences

produces, for all practical purposes, exactly that: a sentencing scheme in which every juvenile would have to be afforded an early chance for parole, without thought for the number and severity of crimes. This holding would discount the differences between juveniles and stand the concept of proportionality on its head. No one would deny the common sense notions that younger juveniles are less culpable than older ones; that juveniles from impoverished, abusive backgrounds, are less culpable than ones from supportive families; and that juveniles convicted one crime, however heinous, are less culpable than those convicted of many. To extend *Graham* as Petitioner asks would disregard all these considerations.

The State thus asks this Court to refuse Petitioner's request to extend *Graham* for two critical reasons. First, taking this perspective recognizes that certain crimes, such as those involving the violent sexual abuse of children, while not homicides, have permanent, devastating consequences for the victims, hence Katherine Peterson's comment that the damage done to child victims is irreparable. **[8/20/1997 3T 366]** Second, such a decision would establish a workable middle ground between a homicide which might warrant life without parole (after a proper hearing) and a single non-homicide crime which never could. This middle ground allows sentencing authorities to prioritize age and all its attendant characteristics,

yet leaves room to punish truly deviant juvenile petitioners more harshly than one time offenders. Flexibility in this manner remains especially important in cases like Petitioner's.

Part of the Supreme Court's apprehension about imposing the harshest penalties lies in the understandable difficulty "even for expert psychologists [of] differentiat[ing] between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender who crime reflects irreparable corruption." *Graham*, 560 U.S. at 73. In this case, however, all the experts agree that Petitioner is incapable of change and beyond repair. The workable middle ground which the State seeks would not foreclose the possibility that Petitioner, as one of the rare few, should spend the better part of his life in jail.

VI. *BUDDER V. ADDISON* SHOULD NOT CONTROL THIS DECISION

As for *Budder*, this Court is free to disregard the Tenth Circuit Opinion. "Although a majority of the Supreme Court has never directly addressed the weight state courts should give lower federal court precedent, two Justices have stated in concurrences that state courts are not constitutionally obligated to follow inferior federal courts, and a recent majority opinion contains dicta suggesting that state courts are not bound

by the decisions of the lower federal courts." Frost, Amanda,[23] Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law. *Vanderbilt Law Review*, Vol. 68:1:53 (2015), referring, first, to *Steffel v. Thompson*, 415 U.S. 452, 482 at n. 3 (1974) (Rehnquist, J., concurring) ("a federal appellate decision would not be accorded the stare decisis effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction").

The second reference from the article is to *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring): "[t]he Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a lower federal court's interpretation." *Lockhart*, 506 U.S. at 376. Interestingly, "[n]o other Justice joined the concurrence. However, an oddly cryptic footnote in the Court's unanimous opinion in *Arizonans for Official English v. Arizona* stated that the Ninth Circuit's view that state courts within the Ninth Circuit must follow its precedent was 'remarkable," citing Justice Thomas's concurrence in *Lockhart*." (internal citations omitted) Inferiority Complex, p. 65 at n. 47.

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Given this fact, the State respectfully suggests that this Court should disregard the Tenth Circuit opinion for several practical reasons. First, the decision stepped way beyond the basic parameters of *Graham*, which the Supreme Court forbids. When the Ninth Circuit ruled in *Moore* in 2013, claiming that the application of *Graham* to aggregated sentences was "clearly established law," California sought a re-hearing *en banc*, which request was denied. Judge O'Scannlain dissented to that decision, with six others joining him. He wrote that "[o]ur Court defies [the] AEDPA[24] once again, this time by failing to distinguish one 'life without parole' sentence from multiple 'term-of-years' sentences. A panel of this Court holds that *Graham v. Florida*, 560 U.S. 48 (2010), invalidates the latter, ignoring the contrary holding of the Sixth Circuit, disregarding the views of state courts across the country, and flouting *Graham's* text and reasoning." *Moore v. Biter*, 742 F.3d 917, 919 (9th Cir. 2014).

More importantly, Judge O'Scannlain acknowledged that "[t]he [Supreme] Court has consistently warned lower courts, *and this court in particular*, to avoid defining [the phrase] "clearly established" law too broadly." (emphasis supplied) *Moore*, 742 at 919. The dissent focused on the split between jurisdictions as to the applicability of *Graham* to

24 The Antiterrorism and Effective Death Penalty Act, the federal vehicle for habeas relief from state court decisions.

aggregated sentences and noted that "[t]he existence of such a split is good evidence" that the majority ruling was incorrect. *Moore,* 742 at 921, citing *Evenstad v. Carlson,* 470 F.3d 777, 783 (8th Cir. 2006) ("[w]hen the federal circuits disagree as to a point of law, the law cannot be considered 'clearly established'"). Given that the Tenth Circuit also used expansive language that traveled far beyond the parameters of *Graham,* see Sec. III, *supra,* this Court is not bound to follow *Budder.*

Second, *Budder's* fact pattern does not align with the one in this case. Budder kidnapped his victim, a stranger, and raped and stabbed her repeatedly, however, all the crimes took place during a single episode. The Tenth Circuit focuses on this circumstance: when the state of Oklahoma tried to point out that Budder had committed at least three different types of offenses, the *Budder* opinion responds that "[states] may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham's* rule[s]." *Budder,* 2017 WL 1056094 n. at 8. The time frame in *Budder* is quite different than this one, in which the felonies occurred on different days.

Third, *Vasquez v. Virginia* addressed exactly the same arguments as have been made by Petitioner and Amicus. In that case one defendant argued that Virginia had the "prerogative to extend precedential holdings of

the United States Supreme Court, while another defendant in a companion case stated that the Court should give "precedential treatment to the reasoning in *Graham*, which generalized that children are simply less culpable than adults. The Virginia Supreme Court held, however, that

> "[n]either of these views persuades us. We are duty bound to enforce the Eighth Amendment consistent with the holdings of the highest court in the land. But the duty to following binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding. . . . Understandably so, for the very concept of binding precedent presupposes that courts are bound by holdings, not language. Such distinctions are important if we want to keep the scale of justice even and steady . . . ." (internal quotations and citations omitted) *Vasquez*, 81 S.E.2d 920, 926.

For all these reasons, the State requests that this Court disregard *Budder* and refuse to apply *Graham* to aggregate sentences.

VII. New Mexico Jurisprudence Already Supports This Type of Result

New Mexico case law already supports this request. At the time of Petitioner's sentencing, a first degree felony carried eighteen years incarceration which was determined to be proportional. *State v. Garcia*, 1983-NMCA-069, ¶ 32, 666 P.2d 1267 ("mandatory imposition of eighteen years upon conviction of a first degree felony does not constitute cruel and unusual punishment . . . . Considering the nature of the offense involved[,

criminal sexual penetration of a minor], the punishment will not as a matter of law be deemed disproportionate to the criminal statute violated").

New Mexico has held that such sentences are constitutional even when the sentences run consecutively. *State v. Padilla*, 1973-NMSC-049, ¶ 15, 85 N.M. 140 ("imposition of multiple valid sentences to run consecutively does not, as such, constitute cruel and unusual punishment as contemplated by the Eighth Amendment to the Constitution of the United States or by Art. 22, §13 [of the] Constitution of New Mexico." These standards apply equally to juveniles. *State v. Trujillo*, 2002-NMSC-005, ¶47, 131 N.M. 709 (upholding serious youthful offender's sentence because it conformed to the Children's Code which allowed imposition of the up to but not more than the punishment authorized for adults).

Pursuant to all these cases, the evidence here supports the imposition of consecutive, lawful sentences for each first degree conviction, even though the long aggregated sentence might outlive Petitioner. *State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006) contains the best expression of the State's position in this case: "[i]f the sentence for a single offense is not disproportionately long, it does not become so merely because it is

consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate."[25]

VIII. A JUVENILE PETITIONER STILL RETAINS EIGHTH AMENDMENT PROTECTION

This ruling would not leave a New Mexican juvenile Petitioner without constitutional protection. He still retains all the Eighth Amendment rights he possesses under a traditional proportionality analysis. *Weems v. United States,* 217 U.S. 349, 367 (1910) ("[e]mbodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense"]. New Mexico has been extending this sort of protection to defendants for years. *State v. Rueda,* 1999-NMCA-033, ¶ 12, 126 N.M. 738, *cert denied in State v. Rueda,* 127 N.M. 391 (1999) (recognizing that the Supreme Court had adopted a proportionality analysis to determine "whether the sentence imposed was so disproportionate as to violate the Eighth Amendment" and holding that a defendant may invoke a proportionality review under both the federal and the state constitution).

Additionally, the Children's Code itself already provides an extra layer of protection for juvenile defendants by requiring a trial court to consider

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[25] *Berger* was not a juvenile law case.

many factors prior to imposing an adult sentence. Both when Petitioner was sentenced and now, NMSA 1978 §32A-2-20(C) (1993) requires a trial court, before imposing an adult sentence, to consider the very same factors listed in the 2012 *Miller* decision, including any and all mitigating circumstances. Having already provided New Mexico youthful offenders with both traditional and Children's Code protections, this Court does not need to extend the *Graham* ban to aggregated sentences in order to accommodate the notion that certain juveniles, albeit not Petitioner, have a lesser degree of culpability than adults.

IX. THE TESTIMONY FROM THE 1997 AND 1999 HEARINGS SATISFIED ALL THE REQUIREMENTS OF BOTH THE 1993 CHILDREN'S CODE AND *MILLER*.

Despite Petitioner's claim that he never received an individualized sentencing factors hearing, he actually had three: in 1997, 1999, and 2015. During the 1997 hearing, the trial court heard extensive testimony from several experts that met the requirements of NMSA §32-2-20(C)(1-7) (1993). A juvenile probation officer described Petitioner's juvenile history and home life; the victim detailed the violent and sexual assaults perpetrated by Petitioner; and several experts testified as to Petitioner's diagnosis and his lack of amenability to treatment.

David Miller, the director of psychological services at the New Mexico Boys School ("Springer") testified that Petitioner was unsuitable, either for Springer or for most other programs in existence at the time, which only treated much younger juveniles who were not violent. **[8/20/1997 8T 32, 36]** Thomas Salb, a psychotherapist with four years of experience in assessment testing and forensic evaluation, also differentiated between the types of transgressions addressed by the available juvenile programs and Petitioner's offenses, which suggested a far more disturbed individual than most and one pervasively resistant to treatment. **[8/20/1997 3T 443]**

Salb noted the hallmark of Petitioner's crimes: an ever growing need for increasing levels of adrenal stimulation, which resulted in his escalating destructive behavior. Petitioner went from misdemeanor batteries to shoplifting to substance abuse to setting fires to physical abuse to sexual cruelty to children. **[8/20/1997 4T 572]** Dr. Roll built upon that testimony, by diagnosing Petitioner with a "severe conduct disorder" **[8/20/1997 6T 450]**, in that he had failed to develop a superego or conscience. **[8/20/1997 6T 450]** Dr. Roll also concurred with Salb that Petitioner's affliction was "the most intense kind of conduct disorder," since he engaged in "a trio of forced sex, physical cruelty and behavior which humiliates and degrades others." **[8/20/1997 6T 461]**

When these factors are present, Dr. Roll explained, no one changes without very intensive treatment. **[T6 8/20/1997 713]** Petitioner required, for even a modest chance of rehabilitation, intensive residential treatment for five to six years **[8/20/1997 6T 517]**, during which he would participate in almost daily therapy with just one counselor, in order for Petitioner to develop feelings for another human being. **[8/20/1997 6T 118]** Intensive group therapy also was required to inculcate in Petitioner a sense of accountability for his actions, a crucial step in the formation of a conscience. **[8/20/1997 6T 517]** The doctor informed the trial court that the needed regimen was no longer available anywhere in the country. **[8/20/1997 5T 517, 719]**, a fact reiterated by all the 1997 experts. **[8/20/1997 3T 208; 8/20/1997 8T 176]**

During the 1999 hearing, Dr. Matthews testified that he had performed another evaluation of Petitioner in September, 1999, in which he repeated some of the 1995 tests and added some new instruments to inquire specifically about sexual issues and attitudes. According to Dr. Matthews, Petitioner's 1999 tests showed the same traits present in his 1995 tests: antisocial qualities, aggressiveness, and self-indulgence. Dr. Matthews also spoke of some new facts the judge had not heard in 1995. Petitioner had never presented himself to Dr. Matthews as the victim of

childhood sexual abuse. **[12/3/1999 1T 481]** To the psychologist, this fact rendered Petitioner even more culpable for the sexual crimes that he had committed against the victim. **[12/3/1999 1T 481]**

Although Dr. Matthews cited a better chance for reasonably successful rehabilitation, he nonetheless agreed that any hope of success would come only from five or six years of residential treatment. **[12/3/1999 1T 500]** And the witness's less than reassuring comments that treatment *might be successful* were made even more troubling when the witness admitted that when he had formed his opinions, he did not have all the needed information about Petitioner's transgressions. For instance, Dr. Matthews had no idea that Petitioner had choked the victim **[2 RP 361]** nor did Dr. Matthews know Petitioner had tried to force M.L. to have anal sex with the victim. **[12/3/1999 1T 377]**

Looming over both hearings was the ominous reality that, because no treatment existed anywhere in the country that could offer Petitioner a reasonable chance for rehabilitation in the time left before he reached the age of mandatory discharge, prison was the only alternative. According to the trial court, there was simply no way to sentence Petitioner as a juvenile and still provide for the safety of the public upon his discharge. **[1 RP 220]** In recognition of all these facts, at the end of the 1999 hearing, the

trial court sentenced Petitioner to the 91½ year sentence he now appeals. Both of those hearings introduced ample testimony not only of Petitioner's difficult start in life, but also the result of that start: an almost non-existent chance for even modest success without years of intensive treatment that might or might not be successful for someone whom the psychologists generally acknowledged was probably incapable of change.

X. THE ORIGINAL PLEA AND SENTENCING WAS FREE FROM PROCEDURAL ERRORS

Amenability Hearing

Petitioner complained of several technical matters, including the lack of the amenability hearing required under the Children's Code, NMSA 1978 §32A-2-17(A)(3) (1993). Petitioner actually did receive two separate hearings: in the original proceeding, the trial court heard all the testimony regarding non-amenability on August 20, 1997; but the actual sentencing hearing didn't take place until September 8, 1997. **[1 RP 213]**

Required Reports

Petitioner claimed that he did not receive the benefit of the reports required by NMSA 1978 §32A-2-17(A)(3) (1993), which directs a trial court to obtain written documentation from the Children, Youth, and Families Department (CYFD), and in the case of a non-amenability finding, from the

Department of Corrections (Corrections). **[BIC 31]** In his cited authority, *In re Jose S.*, 2007-NMCA-146, 142 N.M. 829, the Court of Appeals reversed an amenability finding and the adult sentence because of this lack of information.

Jose S. does not control this issue, however, because the problem in that case was not just the lack of written documentation, but also the lack of any information, written or otherwise: two psychologists testified, but no one from either CYFD or Corrections. After *Jose S.* reached the conclusion that the trial judge had proceeded improperly without sufficient information, the opinion considered "whether the trial court's failure . . . is inconsistent with substantial justice. In the absence of prejudice, there is no reversible error." (internal quotations and citations omitted). *Jose S.*, 2007-NMCA-146, ¶ 20.

Unlike that Petitioner, this one cannot show the prejudice required for reversal. First, the State disputes that the trial court did not have a CYFD report on amenability: the Children's Court Attorney who brought the 1997 case testified in 2015, that a report had been done although she didn't know whether that report had been introduced as an exhibit at the 1997 hearings. **[11/20/2015 CD 2:04:45]**

Second, the trial court did get ample information from a CYFD juvenile probation officer prior to making the decision on amenability, although not in the form of a written report. The officer testified at the hearing, instead, and spoke about Petitioner's lacking home life and extensive juvenile background. Given these factors, the witness did not think Petitioner amenable to treatment in the juvenile system, especially given that he was being sentenced so late in his teens. For the first time in four years of processing "150-200 kids" **[T2 8/20/1997 697]**, he "strongly urged" the imposition of adult sanctions.

Third, the *Jose S.* Court of Appeals ruled as it did because of the necessity for information from Corrections as to appropriate length of sentence and the treatment options available in the prison system for any given juvenile. Here, although the trial judge had neither reports nor testimony from Corrections, he had more than enough information to determine that prison had no treatment for persons with severe conduct disorder, especially when that entailed the integration of sex and violence. **[8/20/1997 6T 573]** The trial court heard from Peterson, who stated that "history shows that if you put a sex offender in prison for a relatively short period, when they are released they have the same problems and will molest again." Dr. Roll also testified, but was much more blunt: when

asked about the suitability of imposing an 18 year sentence on each of the felonies, but running them concurrently, the witness stated flatly that it would not have been safe to "turn [Petitioner] loose after 9 years" in the penitentiary. **[8/20/1997 6T 694]** All the experts concluded that no way existed to safeguard the public from Petitioner, other than an extremely long prison sentence.

It is doubtful, given the dire nature of the 1997 testimony as to non-amenability; the non-existence of treatment, either in prison or out; and the necessity of a long sentence, that the trial court would have ruled any differently than he did, even had he possessed written documentation. Because of that fact, Petitioner is unable to demonstrate the prejudice required by *Jose S.* Other case law has engaged in a similar analysis. *See e.g., In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562 ("concluding that the child failed to show how the trial's determination that the child was not amenable to treatment would have been different had trial court weighed the statutory facts in a different order").

Plea Agreement and Ineffective Assistance of Trial Counsel

Petitioner complained that the trial judge abused his discretion in refusing to allow Petitioner to withdraw his plea due to the ineffective assistance of his counsel in not knowing the changes in the youthful

offender statute. Petitioner made this claim at every level of these proceedings, beginning with his filing a Motion to Invalidate the Proceedings immediately after the trial court signed the Judgment. **[1 RP 234]** The Court denied the motion, which was made a part of Petitioner's first appeal.

On October 1, 1998, the Court of Appeals issued its Memorandum Opinion that the trial court had erred in sentencing Petitioner as an adult for crimes he committed at 14. Because of that holding, the Court of Appeals did not remand the matter on ineffective assistance grounds. On December 3, 1999, the trial court re-sentenced Petitioner, imposing a juvenile sentence for those crimes committed when Petitioner was 14 and consecutive adult sentences for those committed when he was 15.

Afterwards, Mr. Mitchell filed a Motion to Set Aside the Plea Agreement **[RP2 382]**, and the trial court allowed Petitioner extra time to file the second appeal **[RP2 387]**, presumably to make the denial of Petitioner's Motion to Withdraw the Plea part of the proceedings. On March 30, 2000, the Court held a hearing on the Motion, allowing Petitioner to develop a record regarding his claim of ineffective assistance of counsel. The trial judge denied the Motion, then Petitioner filed his second appeal.

In his second appeal, "Petitioner [did] not argue that the district court abused its discretion, or lacked substantial evidence to impose adult sanctions against him as a youthful offender," *State v. Ira*, 2002-NMCA-037, ¶ 16. Instead, he claimed that the trial court abused its discretion in denying his motion to withdraw his plea, given that that he had received ineffective assistance of counsel. The opinion supported Petitioner in that it held "we have little trouble rejecting the notion that the performance of Petitioner's trial attorney was objectively unreasonable" given that he did not know Petitioner couldn't be sentenced as an adult for crimes committed at 14. After recognizing that fact, however, the decision continued that, despite counsel's unreasonable performance, "Petitioner must still demonstrate a reasonable probability that he would have gone to trial instead of pleading guilty had his attorney not acted unreasonably." *Ira*, 2002-NMCA-037, ¶ 39.

The Court of Appeals focused on the fact that original trial counsel had testified at the motion to set aside the plea that he had counseled Petitioner to plead guilty because the attorney had thought Petitioner might receive a juvenile disposition. The opinion noted that trial counsel, even had he known about the Youthful Offender statute changes, nonetheless still might have counseled Petitioner to accept a plea. Ultimately, the

decision held that "we do not believe the district court abused its discretion" in refusing to set aside the plea. *Ira*, 2002-NMCA-037, ¶ 40, establishing that Petitioner was unable to show the required prejudice.

Given that the Court of Appeals has ruled on this issue based on a developed record of facts, res judicata now bars re-litigation of this issue in the habeas petition. This Court has determined that "new Mexico post-conviction procedures are not a substitute for direct appeal and that our statues do not require collateral review of issues." Although exceptions exist, such as when fundamental error has occurred or "when an adequate record to address the claim properly was not available on direct appeal," *Duncan v. Kirby*, 1993-NMSC-011, ¶ 3, 115 N.M. 344; neither of those exceptions apply here.

Even if this Court chooses to entertain Petitioner's argument, he still cannot prevail. *State v. Paradez*, 2004-NMSC-036, ¶ 13, 136 N.M. 533 holds that "[a] motion to withdraw a guilty plea is addressed to the sound discretion of the trial court, and we review the trial court's denial of such a motion only for abuse of discretion. The district court abuses its discretion in denying a motion to withdraw a guilty plea when the undisputed facts establish that the plea was not knowingly and voluntarily given."

Although Petitioner implied that the plea was neither knowing nor voluntary **[BIC 32]**, review of the transcript demonstrates that Petitioner understood his plea did not include any agreement as to punishment. The trial court advised Petitioner that he could receive either a juvenile **[6/20/1997 1T 440]** or an adult disposition **[6/20/1997 1T 337]** of up to 185 years' incarceration. That the judge and the attorneys were mistaken about the number of charges which could carry an adult sentence does not invalidate the plea as either illegal or unknowing: "we do not believe the district court abused its discretion in rejecting trial counsel's testimony given that the plea itself did not agree to an illegal sentence." *Ira*, 2002-NMCA-037, ¶ 39.

<u>Preliminary Hearing</u>

Finally, Petitioner complained about the lack of any preliminary hearing. Petitioner, however, voluntarily waived his probable cause proceeding **[1 RP 91]**, allowable under NMRA Rule 10-213(B)(1), first enacted on July 1, 1995, and effective for the date of Petitioner's waiver on March 11, 1997. Despite Petitioner's implication to the contrary **[BIC 31]**, the current version of NMRA 10-213 has continued to provide for a juvenile's right to waive, and no case has abrogated that right.

CONCLUSION

The State asks that this Court refuse to extend the *Graham* ban to preclude an aggregated sentence such as Petitioner's. With such a ruling, no need exists to consider whether Petitioner's sentence violates the Constitution because the Court of Appeals already addressed that issue in 2002: the sentence was affirmed using a traditional proportionality analysis: after "view[ing] the facts in the light most favorable to the district court's decision and defer[ring] to the district court on evidentiary matters of weight and credibility" (*Ira*, 2002-NMCA-037, ¶ 17), the Court of Appeals held that "when compar[ed to] the gravity of the offenses committed by Petitioner . . . we cannot say that Petitioner's punishment is so grossly disproportionate as to shock the general conscience or violate principles of fundamental fairness." *Ira*, 2002-NMCA-037, ¶ 19.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by mail, on this 3rd day of April, 2017, addressed to:

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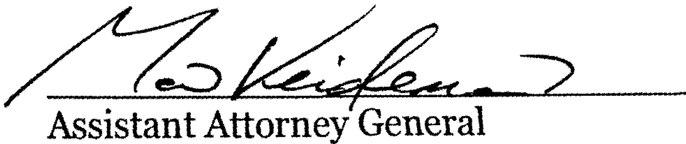

Assistant Attorney General