IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANDREW LAWRENCE MOFFETT, Defendant and Appellant.	Case No. S206771 (Court of Appeal No. A133032) (Contra Costa County Superior Court No. 05051378-8)

On Appeal from a Judgment of
The Superior Court of the State of California
In and for the County of Contra Costa

The Honorable Laurel Brady
Judge Presiding

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* ON BEHALF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANDREW LAWRENCE MOFFETT, Defendant and Appellant.	Case No. S206771

MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*
ON BEHALF OF PETITIONER

Juvenile Law Center respectfully moves this court, pursuant to Cal. Rules of Court, rule 8.520(f), for leave to appear as *amici curiae* on behalf of Petitioner Andrew Lawrence Moffett. In support, Juvenile Law Center states as follows:

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. 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. Information about the center, including downloadable versions of publications and *amicus* briefs, is available at www.jlc.org.

Juvenile Law Center is particularly concerned with constitutional issues related to the juvenile and criminal justice systems and has participated as *amicus curiae* in a wide array of cases in state and federal courts on these issues. Juvenile Law Center attorneys have authored many *amicus* briefs to state and federal courts, including to the United States Supreme Court, such as *Miller v. Alabama*, 567 U.S. ____, 132 S. Ct. 2455 (2012) (regarding the constitutionality of mandatory life without parole sentences for juveniles), *J.D.B. v. North Carolina*, 564 U.S.___ , 131 S. Ct. 2394 (2011) (regarding protection of Miranda rights for youth), *Graham v. Florida*, 130 S. Ct. 357 (2009) and *Sullivan v. Florida*, 129 S. Ct. 2157 (2009) (regarding the constitutionality of sentencing juveniles to life without parole for non-homicide crimes), *Roper v. Simmons*, 543 U.S. 551 (2005) (regarding the constitutionality of the death penalty for minors aged sixteen and seventeen at the time of their crimes), *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (regarding whether a minor's age was properly considered when determining if the minor was in custody during a police interrogation), and *People of California v. Caballero*, 282 P.3d 291 (Cal. 2012) (in which The California Supreme Court reversed the Court of Appeal's opinion, ruling that a 110-year-to-life sentence imposed on a juvenile convicted

of nonhomicide offenses violates *Graham*'s mandate against cruel and unusual punishment under the Eighth Amendment).

Juvenile Law Center helps to facilitate a national dialogue on juvenile justice issues both by participating as *amici* in cases across the country and conducting trainings at national conferences hosted by organizations such as the American Bar Association, National Council of Juvenile and Family Court Judges, Office of Juvenile Justice and Delinquency Prevention, and the National Association of Council for Children.

Juvenile Law Center works to integrate juvenile justice practice and policy with knowledge of adolescent development. Juvenile Law Center attorneys have authored several publications on this topic, including *Kids are Different: How Knowledge of Adolescent Development Theory Can Aid Decision-Making in Court*, a module in *Understanding Adolescents: A Juvenile Court Training Curriculum* (ed. by Lourdes Rosado, American Bar Association Juvenile Justice Center, Juvenile Law Center, Youth Law Center 2000). Executive director, Robert G. Schwartz, co-edited *Youth on Trial: A Developmental Perspective on Juvenile Justice*, an examination of the impact of the legal system on adolescent development and psychology published in 2000 (ed. by Thomas Grisso and Robert G. Schwartz, University of Chicago Press).

The questions of law before this Court are closely tied to important and pressing public policy concerns related to the prosecution of youth. As an organization that works closely with policymakers, juvenile justice advocates, social scientists and medical and mental health professionals, Juvenile Law Center is positioned to offer unique insight to this Court regarding some of the issues that are implicated in this appeal.

Jessica Feierman, together with Marsha L. Levick, Emily C. Keller, and Lauren A. Fine authored this *amicus* brief.

No other parties or counsel for other parties authored the proposed *amicus* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

Respectfully submitted,

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OTHER AUTHORITIES

American Bar Association Criminal Justice Section, The State of Criminal justice 2007-2008 (Victor Streib, ed. 2008) 23

Human Rights Watch, "When I Die, They'll Send Me Home": Youth Sentenced to Life Without Parole in California 22 (2008), available at http:// www.hrw.org/reports/ 2008/us0108/us0108web.pdf.. 10, 19

Lawrence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003) 21

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I. INTEREST OF *AMICUS CURIAE*

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. 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. Juvenile Law Center urges this Court to vacate Appellant's life without parole sentence and remand for a sentencing consistent with the U.S. Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

II. SUMMARY OF ARGUMENT

In *Miller v. Alabama,* 567 U.S.___, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), the United States Supreme Court held that the mandatory imposition of life without parole sentences on juvenile offenders is unconstitutional. Under current California law, the presumptive sentence for any juvenile age 16 or older convicted of first degree murder with special circumstances is life imprisonment without the possibility of parole. *See* Cal. Penal Code § 190.5(b). California's statute effectively imposes

life without parole on juveniles in a mandatory fashion, in violation of *Miller*, as life without parole is the mandatory penalty unless the judge finds justification to deviate from this presumptive penalty. California Penal Code § 190.5(b) therefore fails to impose an individualized sentence as required by *Miller*, and contradicts *Miller*'s requirement that juvenile life without parole sentences be uncommon. Further, any life without parole sentence for a juvenile convicted of felony murder is inconsistent with adolescent development and neuroscience research and is unconstitutional pursuant to *Miller* and *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that a life without parole sentence can never be imposed upon a juvenile when there is no finding that the juvenile either killed or intended to kill). Accordingly, Appellant Andrew Lawrence Moffett's sentence must be vacated and a new constitutional sentence imposed.

III. ARGUMENT

A. *Miller* Reaffirms The U.S. Supreme Court's Recognition That Children Are Fundamentally Different From Adults And Categorically Less Deserving Of The Harshest Forms Of Punishments

Miller held that, prior to imposing a life without parole sentence on a juvenile offender, the sentencer must take into account the juvenile's decreased culpability. *Miller*, 132 S. Ct. at 2460. Justice Kagan, writing for the majority in *Miller*, was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life

without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. *Id.* (quoting *Graham*, 130 S. Ct. at 2026-27, 2029-30). The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id*. at 2464, which demonstrate fundamental differences between juveniles and adults. 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*, 130 S. Ct., at 2027; *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

In *Graham,* which held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, the U.S. Supreme Court found that three essential characteristics distinguish youth from adults for culpability purposes:

> As 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." *Roper*, 543 U.S. at 569-70. These 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." *Id.* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

Id. at 2026. The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id*. (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (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 review was developmentally inappropriate and constitutionally disproportionate. The Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U. S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

Id. at 2026-27. The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

Both the *Miller* and the *Graham* Courts relied upon an emerging 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." *Id*. at 2026. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offender" is central to the question of whether a punishment is constitutional. *Id*. at 2027.

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*. As a result, it held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467.

B. California Penal Code § 190.5(b) Is Unconstitutional Because It Presumes That Life Without Parole Is An Appropriate Sentence For Juvenile Offenders

Moffett's life without parole sentence is unconstitutional because the statute under which it was imposed creates a presumption that life without parole is the appropriate sentence for juvenile offenders. This presumption is counter to *Miller*'s requirement of individualized sentencing. *See Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Moreover, the statute directly contravenes Miller's command that juvenile life without parole sentences be "uncommon." *Id*. at 2469.

1. California's Presumptive Juvenile Life Without Parole Statute Contravenes *Miller*'s Requirement Of Individualized Sentencing

Contrary to *Miller,* the California Penal Code *presumes* that life without parole is an appropriate sentence for certain juvenile offenders. California Penal Code Section 190.5 (b) dictates that

> The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, *shall* be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.

(emphasis added). This statute does not allow for a careful balancing of individualized factors relating to the juvenile's culpability; instead, "the statute has been judicially construed to establish a presumption that [life

without parole] is the appropriate term for a 16- or 17-year-old defendant." *People v. Moffett*, 148 Cal. Rptr. 3d 47, 55 (Cal. Ct. App. 2012). *See also People v. Guinn*, 33 Cal. Rptr. 2d 791, 797 (Cal. Ct. App. 1994) ("We believe Penal Code section 190.5 means, contrary to the apparent presumption of defendant's argument, that 16- or 17-year-olds who commit special circumstances murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life") (emphasis in original); *People v. Murray*, 136 Cal. Rptr. 3d 820, 825 (Cal. Ct. App. 2012) ("Under [190.5(b)], the no-parole life sentence is the presumptive choice."); *People v. Ybarra*, 83 Cal. Rptr. 3d 340, 358 (Cal. Ct. App. 2008) (quoting *Guinn*, 33 Cal .Rptr. 2d at 799, in observing that "[t]he statute 'does not involve two equal penalty choices, neither of which is preferred. The enactment by the People evidences a preference for the LWOP penalty.'"). As the sentencing judge himself noted before imposing life without parole on Appellant, rather than analyze Moffett's individual characteristics and fashion a just sentence accordingly, he instead had to consider whether to "deviate from the *statutory requirement* of life without the possibility of parole." *Moffett*, 148 Cal. Rptr. 3d at 52 (emphasis added) (internal quotation omitted).

Sentencing schemes that, absent exceptional circumstances, require courts to impose life without parole contravene *Miller*'s requirement for individualized sentencing. Prior to imposing a life without parole sentence

on a juvenile offender, the U.S. Supreme Court "*require[s]* [the sentencer] to 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 (emphasis added). However, rather than requiring courts to consider how an adolescent's individual characteristics "counsel against irrevocably sentencing them to a lifetime in prison," California's sentencing statute presumes that life in prison without parole is the appropriate sentence for juvenile offenders and, therefore, directly conflicts with *Miller*.

According to *Miller*, the factors that a court must consider prior to imposing a life without parole sentence on a juvenile include the juvenile's age[1] and developmental attributes, including immaturity, impetuosity, and failure to appreciate risks and consequences; his family and home environment; the circumstances of the offense, including the extent of his participation; the impact of familial or peer pressure; his lack of sophistication with the criminal justice system; and his potential for rehabilitation. 132 S. Ct. at 2468. *See also Caballero*, 55 Cal.4th at 268 (explaining, in the context of non-homicide offenses, that "the sentencing court must consider all mitigating circumstances attendant in the juvenile's

[1] The current statute only takes age into account to the extent that it exempts juveniles from the death penalty. *See* Cal. Pen. Code § 190.5(a) ("the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime.").

crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development”). As discussed in Section 2, *infra*, unless each of these factors dictate a finding that the juvenile is among the rare young offenders for whom life without parole is appropriate, a life without parole sentence cannot constitutionally be imposed. Because §190.5 of the California Penal Code presumes that life without parole is appropriate, the statute is unconstitutional pursuant to *Miller*.

2. California’s Presumptive Juvenile Life Without Parole Statute Contravenes *Miller*’s Requirement That Juvenile Life Without Parole Sentences Be Uncommon

While the United States Supreme Court has left open the possibility that a trial court could impose a life without parole sentence on a juvenile, the Court found 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 notes that

the "juvenile offender whose crime reflects irreparable corruption" will be "rare." 132 S. Ct. at 2469.[2]

Contrary to *Miller*'s command that juvenile life without parole sentences be "uncommon," California Penal Code § 190.5(b) assumes the opposite. Instead of meting out life without parole sentences to the "rare" juvenile offender, it allows the trial court only in uncommon circumstances to deviate from the presumptive penalty of life without parole.[3] *See, e.g.*, *Guinn*, 33 Cal. Rptr. 2d 791, 797 (Cal. Ct. App. 1994) ("The fact that a court might grant leniency in some cases, in recognition that some youthful special-circumstance murderers might warrant more lenient treatment, does not detract from the generally mandatory imposition of [life without parole] as the punishment for a youthful special-circumstance murderer.").

In other words, rather than requiring trial courts to make findings justifying the uncommon and extraordinary sentence of juvenile life

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[2] The Supreme Court has repeatedly found 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." *See Roper*, 543 U.S. at 573; *see also Graham*, 130 S. Ct. at 2026; *Miller*, 132 S. Ct. at 2469.

[3] As discussed below, of the "special circumstances" that qualify a case for Penal Code §190.5(b), felony murder or being an accessory to a murder is the "most frequently imposed out of all the 22 special circumstances, with a significant number based on the felony of robbery." Human Rights Watch, "When I Die, They'll Send Me Home": Youth Sentenced to Life Without Parole in California 22 (2008), available at http:// www.hrw.org/reports/ 2008/us0108/us0108web.pdf.

without parole, the California Penal Code assumes that life without parole is the appropriate sentence absent a finding of some special circumstance that justifies a less severe sentence. This directly contravenes both the letter and the spirit of *Miller*, as well as the seminal cases upon which *Miller* relied. *See, e.g., Roper*, 543 U.S. at 573 ("An 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"). California Penal Code § 190.5 requires a trial court to disregard the social and developmental science that irreparably corrupt juveniles are rare and instead presume, without any justification or explanation, that children are beyond redemption. This presumptive penalty, by definition, cannot be "rare." *Miller*, 132 S. Ct. at 2469.

Instead of requiring trial courts to presumptively impose juvenile life without parole sentences, this Court should be explicit that life without parole is only appropriate for children convicted of homicide when, consistent with the factors outlined in *Miller*, the trial court concludes, on the record, that *none* of the *Miller* factors suggest that the child is less culpable than an adult offender. Reserving juvenile life without parole sentences for these rare instances is consistent with the Supreme Court's

finding in *Miller* that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id*. (quoting *Roper*, 543 U.S. at 573).

C. Any Life Without Parole Sentence For A Juvenile Who Did Not Kill or Intend To Kill Is Inconsistent With Adolescent Development And Neuroscience Research And Unconstitutional Pursuant To *Miller* And *Graham*

Pursuant to *Miller* and *Graham*, juveniles convicted of felony murder, such as Appellant Moffett, are constitutionally ineligible to receive life without parole sentences. California's felony murder statute requires no finding that the defendant actually killed or intended to kill; instead, it creates a legal fiction in which intent to kill is inferred from the intent to commit the underlying felony. Such intent cannot be inferred when the offender is a juvenile. Thus, pursuant to *Graham*, juveniles who neither kill nor intend to kill cannot be sentenced to life without parole, Moreover, pursuant to *Miller*, only the most serious juvenile offenders should receive life without parole.[4] Accordingly, juveniles convicted of felony murder can never receive this harshest possible sentence.

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[4] *Miller* noted that "*appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*," 132 S. Ct. at 2469 (emphasis added). Quoting *Roper* and *Graham*, *Miller* further notes that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." *Id*.

1. Intent To Kill Cannot Be Inferred When A Juvenile Is Convicted Of Felony Murder

A felony degree murder conviction requires simply that an offender participated in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the killing or intended that anyone would die. *See* Cal. Penal Code § 189.[5] Felony murder is justified by a "transferred intent" theory, where the intent to kill is inferred from an individual's intent to commit the underlying felony since a reasonable person would know that death is a possible result of felonious activities. *See, e.g., People v. Gutierrez*, 28 Cal. 4th 1083, 1140-41 (2002) ("The mental state required [for felony murder] is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed."). *See also People v. Moffett*, 148 Cal. Rptr. at 56-57 (acknowledging that "Appellant is correct that the evidence at trial was insufficient to establish that he intended to kill Officer Lasater" and explaining that "by finding the felony-murder special circumstances to

[5] California Penal Code § 189's definition of first degree murder includes "[a]ll murder . . . by any other kind of willful, deliberate, and premeditated killing, *or* which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289 . . ." (emphasis added). Therefore, a conviction of first degree murder based on the defendant's participation in a felony requires no finding that the killing was "willful, deliberate, and premeditated."

be true, the jury necessarily determined [only] that appellant was at least a major participant in the underlying robbery.”).

The felony murder doctrine’s theory of transferred intent is inconsistent with adolescent developmental and neurological research recognized by the United States Supreme Court in *Roper*, *Graham*, *J.D.B.*, and *Miller*. *See, e.g., J.D.B.*, 131 S. Ct. at 2404 (noting that the common law has long recognized that the “reasonable person” standard does not apply to children).[6] These cases preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony—even a dangerous felony—as the law ascribes to an adult.[7] As Justice Breyer explains in his concurring opinion in *Miller*:

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[6] Notably, even as applied to adults, the United States Supreme Court “has made clear that this artificially constructed kind of intent does not count as intent for the purposes of the Eighth Amendment.” *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring). *See also Enmund v. Florida*, 458 U.S. 782 (1982).

[7] Specifically, the United States Supreme Court has observed that adolescents “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *J.D.B.*, 131 S. Ct. at 2403 (internal quotation omitted). In the criminal sentencing context, the Court has recognized that adolescents’ “‘lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.’” *Graham*, 130 S. Ct. at 2028 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). In particular, this Court has noted that adolescents have “[d]ifficulty in weighing long-term consequences” and “a corresponding impulsiveness.” *Graham*, 130 S. Ct. at 2032. The Supreme Court has also recognized that juveniles are more vulnerable or susceptible to negative influences and outside pressures” than adults. *Roper*, 543 U.S. at 569. They “have

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack the capacity to do effectively.

132 S. Ct. at 2476 (Breyer, J., concurring) (internal citations omitted).

Because adolescents' risk assessment and decision-making capacities differ from those of adults in ways that make it unreasonable to infer that a juvenile who decides to participate in a felony would reasonably know or foresee that death may result from that felony, their risk-taking should not be equated with malicious intent, nor should their recklessness be equated with indifference to human life.[8] In particular, the Supreme Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." *Graham*, 130 S. Ct. at 2032. The Court also has recognized that juveniles are more vulnerable or susceptible to negative influences and outside pressures" than adults.

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less control, or less experience with control, over their own environment." *Id*.

[8] The U.S. Supreme Court has held that the death penalty can be imposed on an adult convicted of felony murder where the adult was a major participant in the crime and was recklessly indifferent to human life. *Tison v. Arizona*, 481 U.S. 137, 152 (1987). In *Roper* and *Graham*, however, the Court recognized that youth generally are more reckless than adults, which can result in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2028. An adolescent's recklessness is not a manifestation of his indifference to human life so much as a reflection of his immaturity and impulsiveness.

Roper, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id*.

2. Any Life Without Parole Sentence For A Juvenile Convicted Of Felony Murder Is Unconstitutional Pursuant To *Miller* And *Graham*

In *Graham*, the United States Supreme Court found that children "who did not kill or intend to kill" have a "twice diminished" moral culpability due to both their age and the nature of the crime. 130 S. Ct. at 2027. The Court further "recognized that defendants *who do not kill, intend to kill, or foresee that life will be taken a*re categorically less deserving of the most serious forms of punishment than are murderers." *Id*. (emphasis added). Because in California a conviction of felony murder includes no finding of fact that a defendant killed, intended to kill, or foresaw that a life would be taken, s*ee* Cal. Penal Code § 189,[9] sentencing a juvenile convicted of felony murder to life without parole is unconstitutional under *Graham*.[10]

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[9] As described in the preceding section, the theory of transferred intent cannot apply to a juvenile convicted of felony murder.

[10] In his concurrence in *Miller*, Justice Breyer explained:

> Given *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. Quite simply, if the juvenile either kills or

Miller, too, dictates that life without parole is an inappropriate sentence for Appellant. As the Court cautioned, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*," 132 S. Ct. at 2469 (emphasis added). Therefore, to the extent juvenile life without parole sentences are ever appropriate, *Miller* necessitates they be imposed only in the most extreme circumstances. Under *Miller*, a juvenile convicted of felony murder who did not kill or intend to kill cannot be categorized as one of the most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See id*. at 2476 (Breyer, J., concurring) ("The dissent itself here would permit life without parole for 'juveniles who commit the worst types of murder,' but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.").[11]

> intends to kills the victim, he lacks "twice diminished" responsibility. But where the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply. The dissent itself here would permit life without parole for "juveniles who commit the worst types of murder," but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.

Miller, 132 S.Ct. at 2466-67 (internal citations omitted).

[11] Although acknowledging that the Constitution sometimes allows the imposition of the harshest available sentence (for adults, the death penalty) when adult felony murder defendants are "actively involved" in the crime

Since, specifically, an accomplice is less culpable than a shooter, and, more generally, a person who did not kill or intend to kill is less culpable than an intentional killer, the Court's reasoning implies that a juvenile convicted of felony murder would never be categorized as one of the "uncommon" most serious, most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See Miller*, 132 S.Ct. at 2466-67 (Breyer, J., concurring). Accordingly, and as the appellate court expressed in remanding Moffett's case, a sentencing court confronting a child found culpable under a felony murder theory of liability should consider the "'twice diminished moral culpability'" of a "juvenile defendant who was not the actual killer and did not intend to kill." *Moffett*, 148 Cal. Rptr. at 56 (quoting *Miller*, 132 S.Ct. at 2475-77 (quoting *Graham*, 130 S.C.t at 2017)).[12] Since California Penal Code §

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and display "a reckless disregard for human life," Justice Breyer draws a different line for juveniles. Justice Breyer urges, that "even juveniles who meet the *Tison* standard of 'reckless disregard' may not be eligible for life without parole." *Miller*, 132 S.Ct. at 2476 (Breyer, J., concurring). To face a life without parole sentence, a juvenile must have either killed or intended to kill; recklessness is not sufficient. Appellant did not kill nor did he show an intent to kill.

[12] In *Miller*'s companion case, *Jackson v. Hobbs*, the Court was confronted with Jackson's argument that the Eighth Amendment requires a categorical ban on life without parole for juveniles convicted of felony murder. Because a ban on mandatory life without parole was "sufficient to decide these cases," the Court did not consider Jackson's and Miller's alternative arguments, including Jackson's argument on felony murder. *Miller*, 132 S.Ct. at 2468. As we discuss above, although not reaching the issue, the reasoning underpinning the Court's opinion *Miller*, together with Justice Breyer's concurrence, establish that life without parole sentence for a

190.5 does not allow for this type of consideration, the statute is unconstitutional.

Further, the rate at which life without parole is imposed pursuant to Penal Code §190.5(b) renders it unconstitutional. Rather than only in the most "uncommon" or "rare" circumstances, the special circumstance cited "most frequently" of all of the special circumstances that can give rise to juvenile life without parole sentences is felony murder, "with a significant number based on the felony of robbery." Human Rights Watch, "When I Die, They'll Send Me Home": Youth Sentenced to Life Without Parole in California 22 (2008), available at www.hrw.org/reports/2008/us0108/ us0108web.pdf. As of 2010, "forty-five percent of those who responded to Human Rights Watch's survey [of individuals serving life without parole sentences for offenses they committed as juveniles] said they were not convicted of physically committing the murder for which they are serving life without parole." *Id. at 21*. Because juvenile life without parole should be uncommon and is unconstitutional for juveniles who do not kill or intend to kill, juveniles convicted of felony murder where there is no finding that the juvenile killed or intended to kill cannot receive a sentence of life without the possibility of parole.

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juvenile convicted of felony murder is *always* unconstitutional. A juvenile who did not kill or intend to kill by definition cannot be one of the most culpable juvenile offenders, which under *Miller*, are the only offenders who may be deserving of this most severe penalty.

D. Absent A Determination That Appellant Is Among The "Uncommon" Juveniles For Whom A Life Without Parole Sentence As Justified, His Sentence Must Provide A Meaningful Opportunity For Release

Absent a finding that Appellant is among the rare juveniles for whom life without parole is appropriate, the trial court must impose a sentence that provides Appellant a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,*130 S. Ct. at 2030. As *Graham* makes clear, the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Id*. at 2032. Juveniles who receive non-life without parole sentences "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 2032. Therefore, absent a finding that the juvenile is among the most culpable juvenile offenders, a sentencer cannot replace a "life without parole" sentence with a sentence that is the functional equivalent of life without parole and where the opportunity for release within the juvenile's lifetime is not "meaningful."

For an opportunity for release to be "meaningful" under *Graham*, review must begin long before a juvenile reaches old age. The Supreme Court has noted that"'[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as 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: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). 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, *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."). Early and regular assessments enable the reviewers to evaluate any changes in the juvenile's maturation, progress and performance. Regular review also provides an opportunity to confirm that the juvenile is receiving vocational training, programming and treatment that foster rehabilitation. *See, e.g., Graham*, 130 S. Ct. at 2030 (noting the importance of

"rehabilitative opportunities or treatment" to "juvenile offenders, who are most in need of and receptive to rehabilitation").

A "meaningful opportunity for release" also requires that the parole board focus on the characteristics of the youth, including his or her lack of maturity at the time of the offense, and not merely the circumstances of the offense. *Roper* cautioned against the "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." 543 U.S. at 573. *See also Graham*, 130 S. Ct. at 2032. Similarly, in parole review, the parole board must not allow the underlying facts of the crime to overshadow the juvenile's immaturity at the time of the offense and progress and growth achieved while incarcerated.[13] For the opportunity for

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[13] *Miller,* like *Roper* and *Graham,* recognized "the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller,* 567 U.S. at 2026 (internal citations omitted). Rehabilitative programming and meaningful opportunities for parole are the vehicles by which society can distinguish the former from the latter. The American Bar Association (ABA) provides a model: in 2008, the ABA adopted a policy that built upon *Roper* and anticipated *Miller* by calling for different sentencing and parole policies for offenders who were under 18 at the time of their crimes. With respect to parole, the ABA declared that:

> Youthful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.

release to be meaningful, the juvenile's young age at the time of the offense and incarceration cannot be a factor that makes release *less* likely. *Cf. Roper*, 543 U.S. at 573 (noting that "[i]n some cases a defendant's youth may even be counted against him"); Ga. Comp. R. & Regs. r. 475-3-.05(8)(e) (automatically assigning a higher risk score to inmates admitted to prison at age 20 or younger for the purposes of assessing parole eligibility in Georgia).[14]

IV. CONCLUSION

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson* 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Even today, adult sentencing practices that preclude taking into account the characteristics of individual juvenile defendants are unconstitutionally disproportionate

See ABA Criminal Justice Section, The State of Criminal justice 2007-2008, at 317 (Victor Streib, ed. 2008). California should adopt a similar scheme.

[14] Additionally, parole boards should be mindful that any risk assessment tools that favorably assess inmates with a stable employment histories or stable marriages may not be applicable to inmates who were incarcerated as children and therefore had little or no opportunity to establish an employment history or stable marital relationships prior to their incarceration. *See, e.g.,* Ga. Comp. R. & Regs. r. 475-3-.05(8)(g) (Georgia regulations giving lower risk scores to inmates who were employed at the time of their arrest); Mich. Comp. Laws Ann. § 791.235 (3)(a) (noting that the parole board in Michigan can consider an inmate's marital history).

punishments. Requiring individualized determinations does not suggest that children who commit serious offenses should escape punishment. It merely requires that additional considerations and precautions must be taken to ensure that the sentence accounts for the unique developmental characteristics of adolescents, as the Supreme Court has acknowledged that a child's age is far "more than a chronological fact." *See J.D.B. v. North Carolina* 564 U.S. 1, 8 (2011). This approach builds upon other recent Supreme Court jurisprudence that recognizes that juveniles who commit crimes—even serious or violent crimes—can outgrow this behavior and become responsible adults.

For the foregoing reasons, *Amicus Curiae* Juvenile Law Center respectfully requests that this Court vacate Appellant Moffett's sentence and remand the case for sentencing in accordance with *Miller* and *Graham*.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief conforms to Rules 8.200 and 8.204, and that it contains 5,884 words in 13-point Times New Roman font, as calculated by Microsoft Word 2010.

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