IN THE THIRD CIRCUIT COURT OF APPEALS
No. 12-cv-3996

FRANKLIN X. BAINES,
Petitioner
v.
COMMONWEALTH,
Defendant

BRIEF OF JUVENILE LAW CENTER, *et al.*

AS *AMICI CURIAE*

ON BEHALF OF PETITIONER

In support of Petitioner's Motion to File a Second or Successive Petition Pursuant to 28 U.S.C. § 2244(b)

MARSHA LEVICK
Attorney I.D. 22535
Deputy Director and Chief Counsel
EMILY KELLER
Attorney I.D. 22535
LAUREN FINE
Attorney I.D. 311636
JUVENILE LAW CENTER
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551

Amici Curiae for Petitioner

BRADLEY S. BRIDGE
Attorney I.D. 39678
Assistant Defender
ELLEN T. GREENLEE
Defender
DEFENDER ASSOCIATION OF PHILADELPHIA
1441 SANSOM STREET
PHILADELPHIA, PA 19102
(215) 568-3190

MARC BOOKMAN
Attorney I.D. 37320
Director
ATLANTIC CENTER FOR CAPITAL REPRESENTATION
1315 Walnut Street, Suite 1331
Philadelphia, PA 19107
215-732-ACCR (2227)

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I. INTEREST OF *AMICI*

Founded in 1975, Juvenile Law Center is the oldest multi-issue 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 the Court to hold that *Miller v. Alabama* provides Petitioner relief and to find that Petitioner thus may file a second or successive petition pursuant to 28 U.S.C. § 2244(b).

The Defender Association of Philadelphia is a private, non-profit corporation that represents a substantial percentage of the criminal defendants in Philadelphia County at trial and on appeal. The Association attempts to ensure a high standard of representation and to prevent abridgment of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania. Juvenile Law Center and the Defender Association of Philadelphia have previously participated

as *amicus curiae* in numerous cases before this Court, as well as before other courts.

The Atlantic Center for Capital Representation (ACCR) was founded in 2010. While its focus is on death penalty issues, the Atlantic Center believes that all Eighth Amendment cases impact capital punishment jurisprudence; thus ACCR joins with other *amici* in urging the Court to find that *Miller v. Alabama* applies retroactively to Petitioner.

II. SUMMARY OF ARGUMENT

In *Miller v. Alabama,* 567 U.S. _____, 132 S. Ct. 2455 (2012), the United States Supreme Court held that the mandatory imposition of sentences of life without the possibility of parole on juvenile offenders convicted of murder is unconstitutional. At the time Petitioner was sentenced, and at the time that he filed his first 28 U.S.C. § 2244(b) petition, Pennsylvania law mandated that any juvenile convicted of first or second degree murder received a sentence of life without parole. This mandatory statutory scheme is now unconstitutional pursuant to *Miller*.[1]

The holding in *Miller* applies retroactively to inmates, such as Petitioner, serving mandatory life without parole sentences for crimes committed as juveniles who have exhausted both direct and collateral appeal rights and seek to file a

[1] In recognition of this fact, the Pennsylvania legislature has enacted new legislation altering the sentencing options for juveniles convicted of these crimes, which applies to convictions occurring on or after June 25, 2012.

second or successive petition pursuant to 28 U.S.C. § 2244(b). The Court unambiguously resolved this question when it granted relief to Kuntrell Jackson, petitioner in *Jackson v. Hobbs*, the companion case to *Miller* which was a collateral review case like the case *sub judice*. Additionally, the *Miller* Court relied on a line of case law involving similar sentencing challenges, which have all been applied retroactively. *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and its progeny dictate that *Miller* applies retroactively to cases such as Petitioner's.

Moreover, because the *Miller* Court found a violation of the Eighth Amendment, the rule announced necessarily must provide retroactive relief. If the Court determines that a punishment is cruel and unusual, it inescapably deems the same punishment, albeit imposed before the decision, similarly cruel and unusual; nothing about the nature of the punishment or its disproportionality is lessened by the date upon which it was imposed. Categorically, any Eighth Amendment decision barring a particular sentence must be retroactive, including *Miller*.

III. ARGUMENT

A. *Miller* Applies Retroactively To Petitioners Who Have Exhausted Direct Appeal Rights And Are Proceeding Under 28 U.S.C. § 2244(b).

The United States Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), applies retroactively to cases on collateral review. *Miller*'s companion case, *Jackson v. Hobbs*, announced a new rule on collateral review; thus the new rule applies retroactively to all similarly situated cases, including Petitioner's. Moreover, cases from both lines of precedent relied upon by the Court in *Miller* have been uniformly applied retroactively. Given the Court's application of *Miller* retroactively to cases on collateral review, further analysis under *Tyler v. Cain*, 533 U.S. 656, 663 (2001), and *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) and its progeny is not necessary. However, even considering the other elements of *Teague's* retroactivity analysis, it remains clear that *Miller* applies retroactively to cases on collateral review.

1. *Miller* Applies Retroactively Because *Miller*'s Companion Case, *Jackson v. Hobbs*, Was Decided On Collateral Review.

The United States Supreme Court has already answered the question of retroactivity by applying *Miller* to cases on collateral review. In *Miller*, the Court addressed and vacated the sentences of both Evan Miller and Kuntrell Jackson. *Miller,* 132 S. Ct. at 2475 (announcing that the Court "accordingly reverse[d] the judgments of the Arkansas Supreme Court…and remand[ed Jackson's case] for

further proceedings not inconsistent with this opinion"). However, while Miller's challenge before the Supreme Court was on direct review, Jackson's conviction, like Baines's, became final long before the Court announced its new rule in *Miller*. *Id.* at 2461. In writing for the majority in *Tyler*, Justice Thomas explained that under § 2244(b), "[m]ultiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Tyler*, 533 U.S. at 666. The Court's application of its holding in *Miller* to Jackson's case "necessarily dictate[s] retroactivity of the new rule." *Id.* This is further evidenced by Justice O'Connor's concurrence in *Tyler*, in which she explained that the Court "may 'ma[k]e' a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." *Id.* at 668. She clarified that "the holdings must *dictate* the conclusion and not merely provide principles from which one *may* conclude that the rule applies retroactively" and that the Court "can be said to have 'made' a rule retroactive within the meaning of § 2244(b)(2)(A) only where the Court's holdings logically permit no other conclusion than that the rule is retroactive." *Id.* at 669. *Miller* represents such a clear prescription. There is no other logical interpretation of the Court's decision except that it applied the same reasoning, and holding, to Kuntrell Jackson's case, which was brought before the Court on collateral review.

Had *Miller* not applied retroactively to cases on collateral review, Jackson

would have been precluded from the relief he was granted.[2] "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, 489 U.S., at 300. Justice O'Connor explained this prong of *Teague's* retroactivity analysis:

> Were we to recognize the new rule urged by petitioner in this [collateral review] case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. . . . [T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment "hardly comports with the ideal of 'administration of justice with an even hand.'(citation omitted). *See also Fuller v. Alaska,* 393 U.S. 80, 82, 89 S. Ct. 61, 62, 21 L.Ed.2d 212 (1968) (Douglas, J., dissenting) (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated). Our refusal to allow such disparate treatment in the direct review context led us to adopt the first part of Justice Harlan's retroactivity approach in *Griffith.* "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." 479 U.S., at 327-328, 107 S. Ct., at 716.
>
> If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable

[2] Notably, *Jackson* and *Miller* were joined—the Court did not simply apply *Miller* to Jackson, or remand *Jackson* for reconsideration in light of *Miller*. Instead, the two received the same relief, in the same manner. This is clear from the Court's language announcing that both cases were remanded "for further proceedings not inconsistent with" its opinion. *Miller*, 132 S. Ct. at 2475. Moreover, the state of Arkansas is not contesting that Jackson is entitled to a resentencing. *See* Brief of Appellee on Remand from the United States Supreme Court at 10, *Jackson v. Hobbs*, No. 09-145 (West Jefferson County Jan. 7, 2013) (citing *Yates v. Aiken*, 484 U.S. 211, 218 (1988)).

> treatment described above is "an insignificant cost for adherence to sound principles of decision-making." (citation omitted). But there is a more principled way of dealing with the problem. *We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.* . . . We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. *We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated.*

Id. at 315-316 (emphasis added).

Therefore, if a new rule is announced and applied to a defendant on collateral review, as the Court did in *Miller*, that rule is necessarily retroactive. *See also Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court, or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court."). Significantly, the retroactive effect of *Miller* was apparent even to the dissenting justices in the case. Justice Roberts, joined by Justices Scalia, Thomas and Alito, lamented that the decision would invalidate more than 2,000 sentences. *Miller*, 132 S. Ct. at 2481 (Justice Roberts wrote: "[i]ndeed, the Court's gratuitous prediction [that life without parole sentences will be 'uncommon'] appears to be nothing

more than an invitation to *overturn* life without parole sentences imposed by juries and trial judges.") (emphasis added).

2. Cases From Both Strands Of Precedent Relied Upon By The Court In *Miller* Have Been Applied Retroactively.

In concluding "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," 132 S. Ct. at 2469, the Court in *Miller* relied upon two strands of precedent regarding proportionate punishment. *Id.* at 2463. The first strand includes cases adopting "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* These cases include the Court's decisions banning the execution of mentally retarded individuals, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), banning the death penalty for juvenile offenders, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), and banning life imprisonment without the possibility of parole for juvenile non-homicide offenders, *Graham v. Florida*, 560 U.S. _, 130 S. Ct. 2011 (2010). *Roper v. Simmons* was retroactive when it was announced, as it was decided on collateral review. 543 U.S., at 559. Although *Atkins* was decided on direct appeal, because of the categorical nature of the rule announced, and the Supreme Court's prior jurisprudence regarding such categorical rules, *e.g. Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), courts have uniformly applied *Atkins* retroactively to cases on collateral review. *See, e.g., In re Holladay*, 331 F.3d

1169, 1172-73 (11th Cir. 2003); *see also, e.g. Ochoa v. Simmons*, 485 F.3d 538, 540 (10th Cir. 2007); *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003). Likewise, courts have applied retroactively *Graham's* categorical bar against life imprisonment without the possibility of parole for juvenile non-homicide offenders. *See, e.g.*, *In re Evans*, 449 F. App'x 284 (4th Cir. 2011); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) ("By the combined effect of the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*."); *Loggins v. Thomas*, 654 F.3d. 1204, 1221 (11th Cir. 2011) (finding *Graham* applies retroactively because it fit under the *Teague* exception for "new rules 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" (quoting *Penry*, 492 U.S. at 330); *In re Moss*, 2013 WL 28371 (11th Cir. Jan. 3, 2013) (allowing petitioner to file a second or successive habeas motion pursuant to *Graham*).

The second line of cases are those "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death," *Miller*, 132 S. Ct., at 2463-64, including *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Lockett v. Ohio*, 483 U.S. 586 (1978), *Sumner v. Shuman*, 483 U.S. 66 (1987), and *Eddings v. Oklahoma*, 436 U.S. 921 (1978). These cases likewise have uniformly received retroactive application

whenever courts have considered the issue. *Sumner* struck down a statute mandating the death penalty for an inmate convicted of murder while serving a life sentence without the possibility of parole; it was retroactive to cases on collateral review because it was decided on collateral review. *Sumner*, 483 U.S. at 68. *See also Thigpen v. Thigpen*, 541 So.2d 465, 466 (Ala. 1989) (applying *Sumner* retroactively to case on collateral review). Although *Lockett* and *Eddings* were decided on direct appeal, both cases have been applied retroactively to other inmates long after their cases became final. *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (applying *Lockett* retroactively); *Harvard v. State*, 486 So.2d 537, 539 (Fla. 1986) (same); *Shuman v.Wolff*, 571 F. Supp. 213, 216 (D.C.Nev. 1983) (*Eddings* applied retroactively). "[T]he confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Miller*, 132 S. Ct. at 2464. *Miller* articulates a new rule typical of the two lines of precedent it relies on and should receive the same retroactive application.

3. Under *Teague* And Its Progeny, *Miller* Should Be Applied Retroactively.

Under the retroactivity doctrine laid out in *Teague* and its progeny, a defendant whose conviction is final, like Petitioner Baines, may invoke a new rule in one of two situations. *Teague*, 489 U.S. 306-8, *Penry*, 492 U.S. at 330, *Commonwealth v. Blystone* 555 Pa. 565, 576 (1999) (citing *Teague*). First, the

defendant may raise a claim based on the new rule if the rule "places a class of private conduct beyond the power of the State to proscribe." *Horn v. Banks*, 536 U.S. 266, 272 n.5 (2002) (citing *Saffle v. Parks*, 494 U.S. 484, 494 (1990)). This exception includes "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330. Second, a new rule may be applied retroactively if the new rule qualifies as a watershed rule of criminal procedure and thus calls into question the "fundamental fairness and accuracy of the criminal proceeding." *Horn*, 536 U.S., at 272 n.5 (citing *Saffle v. Parks*, 494 U.S. at 495).

More recently, the United States Supreme Court has used somewhat different language in discussing retroactivity, focusing on whether a new rule is "substantive" or "procedural" to determine its retroactivity. *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004). A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id.* Generally, new substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'' or faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).

The decisions in *Atkins v. Virginia*, which barred the execution of mentally

retarded individuals, and *Roper v. Simmons*, which prohibited the death penalty for juveniles, have been applied retroactively because they "prohibit[] a certain category of punishment for a class of defendants because of their status or offense." *Horn*, 536 U.S. at 272. Similarly, *Graham v. Florida* "bar[red] the imposition of a sentence of life imprisonment without parole on a juvenile offender" – i.e. barred a category of punishment for a class of defendants. *In re Sparks*, 657 F.3d at 262. Applying this prong of the *Teague* doctrine, it is evident that the Court's decision in *Miller* applies retroactively to cases on collateral review. Like the rules announced in *Atkins*, *Roper* and *Graham*, *Miller* "prohibit[s] a certain category of punishment" – mandatory life imprisonment without the possibility of parole – "for a class of defendants," – juvenile homicide offenders. *Horn*, 536 U.S. at 272.

In the alternative, *Miller* must be applied retroactively under the second *Teague* exception. The second exception applies to "watershed rules of criminal procedure" and to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311. This occurs when the rule "requires the observance of 'those procedures that…are 'implicit in the concept of ordered liberty.'" *Id.* at 307 (internal citations omitted). To be "watershed", a rule must first, "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding, and second, "alter our understanding

of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal citations omitted), *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1208 (11th Cir. 2012). The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials. *See, e.g.*, *Witherspoon v. Illinois*, 391 U.S. 510, 523 n. 22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it "necessarily undermined 'the very integrity of the…process' that decided the [defendant's] fate." (internal citation omitted)).

Miller satisfies both requirements. First, mandatorily imposing life without parole causes an "impermissibly large risk" of inaccurately imposing the harshest sentence available for juveniles. Such a sentence fails to consider the unique characteristics of youth, which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464, *Whorton*, 549 U.S. at 418. *See also Miller*, 132 S.Ct. at 2469 (explaining that imposing mandatory life without parole sentences "poses too great a risk of disproportionate punishment.") By requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* also alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding. *See id.* (requiring sentencing judges "to take into account how children are different, and how those differences counsel

against irrevocably sentencing them to a lifetime in prison.") Indeed, state appellate courts have adopted this analysis. *See, e.g.*, *People v. Williams*, -- N.E.2d ---, 2012 Il App (1st) 111145, 2012 WL 6206407, *14 (Nov. 27, 2012) (granting petitioner the right to file a second or successive habeas petition because *Miller* is a "watershed rule," and at his pre-*Miller* trial, petitioner had been "denied a 'basic 'precept of justice'' by not receiving any consideration of his age from the circuit court in sentencing." The court found that "*Miller* not only changed procedures, but also made a substantial change in the law." *Id.*).

Using the Court's updated terminology yields the same result. The new rule announced in *Miller* is substantive, and therefore retroactive, because "it alters... the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. In this case, the Court's decision altered the class of persons eligible for mandatory life without parole sentences by excluding juvenile offenders from such statutes' reach.[3]

[3] The Government may argue that the new rule in *Miller* is a procedural rather than substantive categorical guarantee, as *Miller* bars only the imposition of mandatory life without parole and still theoretically allows for the discretionary imposition of such a sentence. Indeed, *Miller* recognized, as previously held by *Harmelin v. Michigan*, 501 U.S. 957 (1991), that in the adult context, there is no substantive right against mandatory sentencing—"a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is mandatory." *Miller*, 132 S. Ct. at 2470. However, the Court rejected *Harmelin* in the juvenile context, writing that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentence of juvenile offenders." *Id.* Instead, the Court likened its holding to *Roper* and *Graham*, decisions holding that "a sentencing rule permissible for adults may not be so for children." *Id.* By rejecting *Harmelin,* the Court implicitly held that mandatory life without parole is *categorically* cruel and unusual for juveniles — and thus "prohibit[ed] a certain category of punishment for a class of defendants because of their status or offense" *Penry*, 492 U.S. at 330. Additionally, it is a fallacy to say that a mandatory aspect of a sentence is a procedure: the mandatory life without parole sentences invalidated by *Miller* both: 1) applied to a class of defendants (juveniles); and 2) served as an additional punishment by virtue of their mandatory imposition. Like *Graham*, which did not impose a categorical ban on life without parole sentences (but instead served as a categorical ban on the sentence for juveniles not convicted of homicide), *Miller* banned a particular punishment (mandatory life without parole) for a class of defendants (youth), because of those defendants' membership in that class.

Moreover, the conclusion that the rule in *Miller* is substantive is further supported by the retroactive application given to the Court's decision in *Sumner v. Shuman,* where the Court struck a mandatory death penalty scheme. 483 U.S. 66, 68 (1987). Although the Court's decision barred only the mandatory imposition of the death sentence and allowed for its imposition after consideration of mitigating factors by the sentencer, the rule has been applied retroactively to cases on collateral review. *Id.* at 68. *See also Thigpen v. Thigpen*, 541 So.2d 465, 466 (Ala. 1989). The Court's decision in *Miller* applies retroactively to cases on collateral review, like Petitioner Baines's. As detailed above, the Court rendered any contrary view on this matter baseless when it applied its decision in *Miller* to the companion case *Jackson v. Hobbs*. Moreover, *Teague* and its progeny dictate that *Miller* applies retroactively because it "prohibit[s] a certain category of punishment for a class of defendants because of their status." *Penry*, 492 U.S. at 330. As such, Petitioner is entitled to benefit from the new rule announced in *Miller*.

B. *Miller* Is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," Under 28 U.S.C. § 2244(b)(2)(A).

Tyler v. Cain explains that a Petitioner may file a second or successive habeas petition if the claim relies "'on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" 533 U.S. at 662 (quoting § 2244(b)(2)(A)). All three of the

"prerequisites to obtaining relief" are present in Baines's case. *Id.* First, it is undisputed that *Miller* establishes a "'new rule' of constitutional law." *Id.* As was the case with *Graham* and juvenile life without parole for non-homicide offenders, *Miller* "was the first recognition that the Eighth Amendment bars the [mandatory] imposition of life imprisonment without parole" on homicide offenders who were under age eighteen at the time of their offenses. *See In re Sparks*, 657 F.3d 25, 260 (5th Cir. 2011). *See also People v. Morfin*, 2012 WL 6028634, *11 (concluding "that, pursuant to *Teague*, *Miller v. Alabama* is applicable retroactively on collateral review" and explaining that "*Miller* creates a new rule of law that was not required by either the precedents on what penalties a minor constitutionally cannot receive (*Roper* and *Graham*) or by the cases cited in *Miller* requiring sentencing discretion for the death penalty."). Second, *Miller* was made retroactive by virtue of the Court's application of the remedy to Jackson, as has been discussed in great detail in the preceding discussion. Third and finally, the claim was "'previously unavailable.'" *See, e.g.*, *Lawson v. Pennsylvania*, 2010 WL 5300531 at *3, n. 8. (E.D. Pa. Dec. 21, 2010) (explaining that *Graham* did "not extend relief to someone convicted of a homicide offense"); *Silas v. Pennsylvania*, 2011 WL 4359973 at *2 (E.D. Pa. Sept. 19, 2011) (same).

1. Petitioner Is Entitled To The Same Relief Granted By The Fifth Circuit Court Of Appeals in *In re: Sparks* And By Other Courts Around The Country Which Have Found That *Miller* Is Retroactive.

In re: Sparks and similar cases from various state and federal jurisdictions around the country demonstrate that Petitioner is entitled to file a second or successive habeas petition. In *Sparks*, the Fifth Circuit determined first that "*Graham* clearly states a new rule of constitutional law that was not previously available" and second, that "*Graham* has been 'made retroactive to cases on collateral review by the Supreme Court.'" 657 F.3d 258, 260 (5th Cir. 2011). In providing relief to the petitioner, it classified *Graham* as falling under "the first *Teague* exception." *Id.* at 261. *See also In re: Evans*, 449 Fed. Appx. 284 (4th Cir. 2011) (granting a prisoner's "motion for authorization to file a successive habeas application" because he had "made a 'prima facie showing' that his 'claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'"). Baines seeks relief based on the same principle and legal argument articulated in *Sparks*; *Miller* announced a rule that built on the logic, rationale and legal basis underpinning *Graham*. *See also* Order of Judge Timothy J. Savage, *Songster v. Beard*, No. 04-5916 (Sept. 6, 2012) (granting prisoner's third amended petition for a writ of habeas corpus, "to the extent that it challenges the petitioner's mandatory sentence of life without parole in light of *Miller v. Alabama,*" and vacating for resentencing). Additionally, while not on federal habeas review, several other state

courts have ruled that *Miller* must apply retroactively.[4]

2. All Cases Finding a Violation Of The Eighth Amendment Must, By Definition, Apply Retroactively To Petitioners Who Have Exhausted Direct Appeal.

Miller's holding that mandatory life without parole sentences violate the Eighth Amendment must be applied retroactively. The Court repeatedly has recognized that the Amendment's ban on cruel and unusual punishment "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)

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[4] *People v. Williams*, 2012 Il App (1st) 111145, 2012 WL 6206407, *14 (Nov. 27, 2012); *People v. Morfin*, 2012 Il App (1st) 103568, 2012 WL 6028634, *11 (Nov. 30, 2012); *State v. Williams, available at*: http://www.lasc.org/news_releases/2012/2012-077.asp (the Louisiana Supreme Court retroactively applies *Miller* to Shon Williams); *State v. Simmons*, 99 So.3d 28 (La., 2012) (remanding a case decided in 1995 for resentencing "in accord with the principles enunciated in *Miller*."); *State v. Williams*, 2013 WL 84902 at *1 (La. App. 4 Cir. 1/7/13) (applying *State v. Simmons* and holding that "*Miller* is retroactive to cases that were final in Louisiana at the time the decision in *Miller* was rendered"). A handful of courts have held otherwise; these cases are distinguishable on several grounds. *See, e.g., Lawson v. Pennsylvania*, 2010 WL 5300531 at *3, n. 8. (E.D. Pa. Dec. 21, 2010); *Silas v. Pennsylvania*, 2011 WL 4359973 at *2 (E.D. Pa. Sept. 19, 2011); *People v. Carp*, ---N.W.2d ----, 2012 WL 5846553 (Mich. App. Nov. 15, 2012), *Craig v. Cain*, 2013 WL 69128 (5th Cir. 2013), *Geter v. State*, ---So.3d ----, 2012 WL 4448860 (Fla. 3rd DCA, 2012). It should be noted that the Court's language in *Lawson* and *Silas* was dicta, and *Graham* applied to neither petitioner. Moreover, the petitioner in *Silas* had not raised or briefed the Court on the retroactivity of *Graham*; the Court raised the issue *sua sponte*. In Michigan, a number of lower courts have granted petitions for resentencings despite the *Carp* ruling, either by distinguishing or by simply stating that the decision was wrong and that it would be an injustice to follow the appellate court. Additionally, the Michigan Supreme Court has been denying motions for resentencing "without prejudice to any relief that the defendant may seek under *Miller v. Alabama*." *See, e.g., People v. Burns-Perry*, 823 N.W.2d 601 (Mich., 2012); *People v. Reed*, 821 N.W.2d 886 (Mich., 2012). The Fifth Circuit's January 4, 2013 order in *Craig* recently has been challenged in that the court took on the retroactivity of *Miller*, without either party having raised it, and without it being germane to the resolution of the habeas claims before it, which did not seek sentencing relief. *See* Dale Dwayne Craig's Opposition to the State's Motion to Publish and Motion to Withdraw January 4, 2013 Order at 1, *Craig v. Cain*, No. 12-30035 (5th Cir. Jan. 14, 2013) (describing that the petitioner raised only claims regarding the guilt phase of his trial). In fact, not only did the petitioner not present any claim or argument that raises or even implicates the retroactivity of *Miller*, but the petitioner also had not exhausted those claims in the state courts and thus they were not properly before the Fifth Circuit for review. *See id.* at 1-2. Finally, the Attorney General in Florida (who had already conceded retroactivity in other cases) did not respond to Mr. Geter's *pro se* motion.

(finding the death penalty unconstitutional for child rapists)). In determining what constitutes a cruel and unusual punishment, the Court has considered the proportionality of the sentence imposed to the harm committed. The Court has emphasized the need for objective factors to determine the gravity of the offenses in comparison to the criminal sentences, in order to assess the constitutionality of those sentences based on "the evolving standards of decency that mark the progress of a maturing society." *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 959 (1991) (Kennedy, J., concurring) (citing *Rummel v. Estelle*, 445 U.S. 263, 274–75(1980)). *See also Trop v. Dulles*, 356 U.S. 86, 101 (1958). In *Miller*, the Court observed that:

> [b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

132 S. Ct. at 2475. Unless *Miller* is applied retroactively, children who lacked sufficient culpability to justify the mandatory sentences they received before the case was decided will remain condemned to die in prison. *See id.* at 2460 (invalidating the mandatory imposition of sentences of life without parole because it "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham* v. *Florida,* 130

S. Ct. 2011, 2026-27, 2029-30 (2010)"). Such a conclusion defies logic, and contravenes Eighth Amendment jurisprudence. *See, e.g.*, *Atkins*, 536 U.S. at 304 (banning the death penalty for "mentally retarded offenders" who the Court acknowledged were "categorically less culpable than the average criminal."); *In re Brown*, 457 F.3d 392, 396 (5th Cir. 2006 (holding that a successive petition that raised *Atkins* after the decision came down would be permitted in light of the Supreme Court's new rule).[5] As the Illinois Appellate Court concluded in finding *Miller* retroactive for cases on collateral review, in addition to mandatory life without parole sentences constituting "cruel and unusual punishment[,]" "[i]t would also be cruel and unusual to apply that principle only to new cases." *People v. Williams*, 2012 WL 6206407 at *14. *See also Hill v. Snyder*, 2013 WL 364198 at *2-*2 n.2 (E.D.MI, Jan. 30, 2013)(proclaiming that "if ever there was a legal rule that should – as a matter of law and morality – be given retroactive effect, it is the rule announced in Miller. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice" and further describing that the court

> would find Miller retroactive on collateral review, because it is a new substantive rule, which "generally apply retroactively." Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004). "A rule is substantive rather than

[5] Given the Court's language about culpability in *Atkins*, it would have been inconceivable for the Court to have sanctioned the further execution of mentally retarded individuals simply because they had exhausted their direct appeal rights. The same holds true for the pronouncements made in *Miller*.

> procedural if it alters the range of conduct or the class of persons that the law punishes." Id. at 353. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant . . . faces punishment that the law cannot impose upon him.'" Id. at 352. Miller alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole). Further, the Supreme Court applied Miller to the companion case before it – on collateral review – and vacated the sentence of Kuntrell Jackson. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Teague v. Lane, 489 U.S. 288, 300 (1989).)

Any other interpretation of *Miller* would be incorrect, and immoral.[6]

Justice Baer of the Pennsylvania Supreme Court asked the Commonwealth's representative this very question toward the end of oral argument in the case of *Commonwealth v. Cunningham*, which confronted the same question as does Baines, but in the context of a PCRA petition. The exchange went as follows:

> Justice Baer: This is an 8th Amendment case, and that seems to me to make a difference. *Atkins*, retroactive?

[6] Although the Supreme Court has occasionally denied retroactive application to cases dealing with what it termed "procedural" sentencing issues, these cases are distinguishable from the situation confronting Mr. Baines. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 411 (2004) (in which the court considered the retroactivity of *Mills v. Maryland*, which invalidated capital sentencing schemes that require juries to disregard mitigating factors not found unanimously), *Lambrix v. Singletary*, 520 U.S. 518 (1997) (denying retroactive application of *Espinosa v. Florida*, which held that weighing invalid aggravating circumstances in death penalty cases violates the Eighth Amendment) and *Sawyer v. Smith*, 497 U.S. 227 (1990) (finding *Caldwell v. Mississippi* did not fit within either *Teague* exception). In each instance, the defendant had the opportunity to receive a sentence other than death at the time of sentencing. The procedure was flawed, and the court fixed it prospectively – but the option for a sentence other than death was available at the time of the original sentencing – albeit pursuant to the flawed regime. Here, in contrast, Petitioner Baines and those similarly situated had no opportunity to be considered for a sentence other than life without parole – like death, the most severe sentence these juveniles could receive -- which presents a very different scenario than the 'procedural' cases cited above. *Miller* actually *expanded* the sentencing options available to juveniles by prohibiting mandatory life without parole and requiring that an *additional* sentencing option be put in place – a fundamental change in sentencing for juveniles that goes well beyond a change in process.

Commonwealth: Yes.

Justice Baer: *Roper*, retroactive?

Commonwealth: Yes

Justice Baer: *Graham*? *Furman*?

Commonwealth: Right.

Justice Baer: All retroactive.... Isn't it all because the U.S. Supreme Court measures society's evolving standards of decency and in all of those cases said no, this is cruel and unusual in whatever year they decided it. So in this case, the US Supreme Court, following all of those cases, has said, life without the possibility of parole as a standardized sentence, violates the 8th Amendment. Why doesn't the relatively small class of whatever it is, 400 Pennsylvanians, get the benefit of our evolving societal decency?[7]

As Justice Baer posited, because the *Miller* Court found a violation of the Eighth Amendment, the rule announced necessarily must provide retroactive relief.

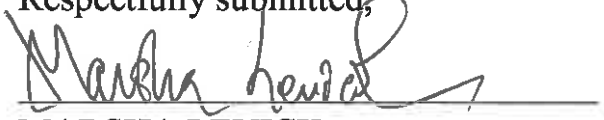
IV. CONCLUSION

This Honorable Court should hold that *Miller v. Alabama* provides Petitioner relief, based on *Tyler v. Cain* and on the fact that it is a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" under 28 U.S.C. § 2244(b)(2)(A), and rule

[7] *See* Oral Argument video, *Commonwealth v. Cunningham*, 51 A.3d 178 (Pa., 2012), *available at*: http://streaming.pcntv.com:554/SupremeCourt/091212SupremeCourtPt1.mov.

that Petitioner may file a second or successive federal habeas petition.

Respectfully submitted,



MARSHA LEVICK
Attorney I.D. 22535
Deputy Director and Chief Counsel
EMILY KELLER
Attorney I.D. 22535
LAUREN FINE
Attorney I.D. 311636
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107 (215) 625-0551

BRADLEY S. BRIDGE
Attorney I.D. 39678
Assistant Defender
ELLEN T. GREENLEE
Defender
DEFENDER ASSOCIATION OF
PHILADELPHIA
1441 SANSOM STREET
PHILADELPHIA, PA 19102
(215) 568-3190

MARC BOOKMAN
Attorney I.D. 37320
Director
ATLANTIC CENTER FOR CAPITAL
REPRESENTATION
1315 Walnut Street, Suite 1331
Philadelphia, PA 19107
215-732-ACCR (2227)

Amici Curiae for Petitioner

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Marsha Levick, Esq.

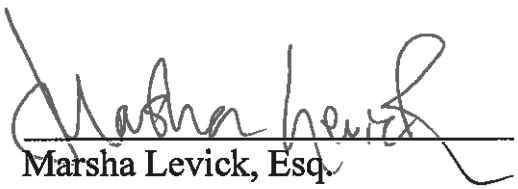
MARSHA Levick
(Printed name)
JUVENILE LAW CENTER
1315 Walnut Street
Suite 400
Philadelphia, PA 19107
215.625.2808
mlevick@jlc.org

CERTIFICATE OF SERVICE

I, Marsha Levick, hereby certify that, on February 13, 2013, I caused a true and correct copy of the foregoing brief to be served by U.S. first-class mail upon the following:

Thomas W. Dolgenos, Esq.
Office of the District Attorney
Three South Penn Square
Philadelphia, PA 19107
Phone: (215) 686-8000
Fax: (215) 563-0047

David R. Fine, Esq.
K&L Gates LLP
Market Square Plaza
17 North Second Street, 18th Floor
Harrisburg, PA 17101
Phone: (717) 231-5820
Fax: (717) 231-4501



Marsha Levick, Esq.
JUVENILE LAW CENTER
1315 Walnut Street
Suite 400
Philadelphia, PA 19107
215.625.2808
mlevick@jlc.org