UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Kempis Songster, Appellee v. Jeffrey A. Beard, Secretary of the Pennsylvania Department of Corrections, *et al*., Appellants	Case No. 12-3941

On Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania in Kempis P. Songster v. Jeffrey A. Beard, *et al*., No. 04-5916, on September 6, 2012, granting in part Appellee's Third Amended Petition for Writ of *Habeas Corpus*

Brief of *Amici Curiae* Juvenile Law Center, Federal Public and Community Defender Organizations of the Pennsylvania Western, Middle, and Eastern Districts, and the Defender Association of Philadelphia Supporting Appellee Songster

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I. INTEREST AND IDENTITY OF *AMICI* AND CONSENT OF THE PARTIES

Juvenile Law Center, founded in 1975, 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 has worked extensively on the issue of juvenile life without parole, filing *amicus* briefs in the U.S. Supreme Court in both *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

The **Defender Association of Philadelphia** is an independent, non-profit corporation created in 1934 by a group of Philadelphia lawyers dedicated to the ideal of high quality legal services for indigent criminal defendants. Today approximately two hundred and fifteen full time assistant defenders represent clients in adult and juvenile, state and federal, trial and appellate courts, and at civil and criminal mental health hearings as well as at state and county violation of

probation/parole hearings. Association attorneys also serve as the Child Advocate in neglect and dependency court. More particularly, Association attorneys represent juveniles charged with homicide and facing life imprisonment without the possibility of parole. The Defender Association attorneys have had numerous juveniles given sentences of life imprisonment without parole. The constitutionality of such sentences has been challenged at the trial level and at the appellate level by Defender Association lawyers.

The **Federal Public and Community Defender** organizations in Pennsylvania represent indigent defendants and habeas corpus petitioners in federal court in each organization's respective district, and in the U.S. Court of Appeals for the Third Circuit, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. [1] As institutional defenders, these organizations have a unique interest and expertise in all areas of federal criminal and habeas corpus law, and a systemic perspective to offer the Court on issues pertaining to the retroactive application of new rules of constitutional law. *Amici* Defender organizations are intimately familiar with the issues before the Court in this case, and currently represent over

[1] The Federal Defender organizations for the other judicial districts in the Third Circuit have not joined this brief because Delaware has enacted legislation making the *Miller* rule retroactive; no individuals in New Jersey are serving mandatory life sentences that were imposed for crimes committed as juveniles; and *amici* have been unable to determine whether any individuals in the U.S. Virgin Islands are serving mandatory juvenile life sentences.

100 individuals sentenced as juveniles to a mandatory life sentence without the possibility of parole in Pennsylvania.

Amici file this brief pursuant to Fed. R. App. P. 29(a). Both parties consent to the filing of this *amicus* brief.

II. STATEMENT REQUIRED BY FED. R. APP. P. 29(c)(5)

No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the *amici curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

III. SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 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 Appellee Songster was sentenced for crimes he committed as a juvenile, state law mandated a life without parole sentence for his homicide offense. As applied to juvenile offenders, this mandatory scheme is unconstitutional pursuant to *Miller*.

Miller applies retroactively to Appellee. As argued in Appellee's brief at 16-30, *Miller* announced a substantive rule, which pursuant to U.S. Supreme Court precedent applies retroactively. Further, even assuming the rule is procedural, *Miller* is a watershed rule of criminal procedure that applies retroactively. Moreover, *Miller* must be applied retroactively because, once the Court determines that a punishment is cruel and unusual when imposed on a child, any continuing imposition of that sentence is itself a violation of the Eighth Amendment; the date upon which a mandatory life without parole sentence is imposed cannot convert it into a constitutional sentence.

IV. ARGUMENT

A. *Miller* Reaffirms The U.S. Supreme Court's Recognition That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishment.[2]

Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes:

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

560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Graham* found that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet

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

transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (quoting *Roper*, 543 U.S. at 569, 573). The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Graham*, 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for release was developmentally inappropriate and constitutionally disproportionate. The Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *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.*

Graham, 560 U.S. at 68. 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.

In reaching these conclusions about a juvenile's reduced culpability, the U.S.

Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological and neurological attributes of youth. The Court clarified in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offender" is central to the question of whether a punishment is constitutional. *Id*. at 68-69.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life without parole sentences for children convicted of homicide offenses. Reiterating that children are fundamentally different from adults, the Court held that, prior to imposing such a sentence on a juvenile offender, the sentencer must take into account the juvenile's reduced blameworthiness. *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*, 560 U.S. at 68, 74). 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*, 560 U.S. at 68-69; *Roper*, 543 U.S. at 570).

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. *Miller v. Alabama* Applies Retroactively

United States Supreme Court precedent requires that *Miller* be applied retroactively for the reasons stated in Appellee's brief at 16-32 and the additional reasons discussed below.

1. *Miller* Applies Retroactively Pursuant To *Teague v. Lane*

In *Teague v. Lane*, the U.S. Supreme Court held a new Supreme Court rule applies retroactively to cases on collateral review only if: (a) it is a substantive rule or (b) if it is a watershed rule of criminal procedure. 489 U.S. 288, 307, 311 (1989). *See also Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Because *Miller* announced a new substantive rule or, in the alternative, a "watershed" procedural rule, *Miller* applies retroactively.

a. *Miller* Is Substantive Pursuant To *Teague* Because It Alters The Range Of Available Sentencing Options

The U.S. Supreme Court has held that "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. New substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." *Id.* at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). A new rule is substantive if it "'prohibit[s] a certain

category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 329, 330 (2002), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)). *Miller* applies retroactively because it prohibits a "category of punishment" (mandatory life without parole) for a "class of defendants" (juveniles). *See id*.

Mandatory life without parole sentences are substantively distinct and much harsher than alternative sentencing schemes in which life without parole is, at most, a discretionary alternative. *See* Brief of Appellee at 22-23. The U.S. Supreme Court has stated that "[m]andatory minimum sentences increase the penalty for a crime," and has found it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2160 (2013). The Court has explained that "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id*. at 2161. Accordingly, a mandatory life without parole sentence for a juvenile is substantively different from a discretionary life without parole sentence; it is substantively harsher, more aggravated, and imposes a more heightened loss of liberty.

Miller therefore *expanded* the range of sentencing options available to juveniles by prohibiting mandatory life without parole and requiring that

additional sentencing options be put in place. This is a fundamental change in sentencing for juveniles that goes well beyond a change in a procedural rule.

b. *Miller* Is Substantive Pursuant To *Teague* Because The Court Imposed New Factors That A Sentencer Must Consider Before Imposing Juvenile Life Without Parole Sentences

Miller holds that, prior to imposing a life without parole sentence on a juvenile, the sentencer must consider factors that relate to the youth's overall culpability. 132 S. Ct. at 2468-69. These factors include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id*.

The fact that *Miller* requires sentencers to consider these new factors before imposing juvenile life without parole sentences necessitates a finding that *Miller* announced a substantive rule. The Supreme Court's refusal to hold *Ring v. Arizona*, 536 U.S. 584 (2002), retroactive in *Schriro v. Summerlin*, 542 U.S. at 358, illustrates this point. In *Ring*, the U.S. Supreme Court had held that the Sixth

Amendment requires a jury, rather than a judge, to find the aggravating factors essential to imposition of the death penalty. In *Summerlin*, the Court distinguished between *procedural* rules in which the Supreme Court determines who must make certain findings before a particular sentence could be imposed with *substantive* rules in which the U.S. Supreme Court itself establishes that certain factors are required before a particular sentence could be imposed:

> [the U.S. Supreme] Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as [*the U.S. Supreme*] *Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

542 U.S. at 354. Because *Miller* requires 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, the U.S. Supreme Court has made consideration of certain factors "essential" to imposing life without parole on juveniles. As directed by *Summerlin*, *Miller* is a substantive rule.

c. Even Assuming *Miller* Is Not A Substantive Rule, *Miller* Is A "Watershed Rule" Under *Teague*

As discussed above and in Appellee's brief at 16-30, *Miller* must be applied retroactively pursuant to *Teague* because it is a substantive rule. Even assuming the rule is procedural, *Miller* must be applied retroactively pursuant to *Teague*'s

second exception, which 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 313. 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). 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, mandatory life without parole sentences cause an "impermissibly large risk" of *inaccurately* imposing the harshest sentence available for juveniles. *Whorton*, 549 U.S. at 418. *Miller* found that sentencing juveniles to "that harshest prison sentence" without guaranteeing consideration of their "youth (and all that accompanies it) . . . poses too great a

risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth – and of each individual youth – which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464.

Second, by requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding. *See id.* at 2469 (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."). The *Miller* ruling has "effected a profound and sweeping change," *see Whorton*, 549 U.S. at 421 (internal quotation marks omitted), by simultaneously striking down sentencing schemes for children in twenty-nine jurisdictions. *See Miller*, 132 S. Ct. at 2471. In comparison, the quintessential "watershed" right to counsel announced in *Gideon* changed the law in only fifteen states. Brief for the State Government *Amici Curiae*, p. 2, *Gideon v. Cochran*, 372 U.S. 335 (1963).

Indeed, some state appellate courts have adopted the watershed analysis. *See, e.g.*, *People v. Williams*, 982 N.E.2d 181, 196, 197 (Ill. App. Ct. 2012) (granting petitioner the right to file a successive post-conviction 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," and finding that "*Miller* not only changed procedures, but also made a substantial change in the law"), *abrogated by People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (holding *Miller* to be "a new substantive rule").

Moreover, *Miller*'s admonition – and expectation – that juvenile life without parole sentences will be "uncommon" upon consideration of youth and its "hallmark attributes" explicitly undermines the accuracy of life without parole sentences imposed pre-*Miller* – the very sentences at issue in this appeal.

The *Teague* watershed framework was based on Justice Harlan's opinion in *Mackey*, where he argued that "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Mackey v. U.S.*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring). As Justice Harlan predicted, changes in the understanding of youth have led to a line of cases dramatically changing the "bedrock" of juvenile criminal process, including *Roper* and *Graham,* and culminating in *Miller*. This process of dramatic, "profound and sweeping" reshaping of the sentencing of juvenile offenders illustrates that

Miller, in conjunction with its predecessors, constitutes a watershed rule.

2. The Eighth Amendment Requires That *Miller* Apply Retroactively

Even outside the boundaries of *Teague*, U.S. Supreme Court precedent requires that the holding of *Miller* apply retroactively.

a. *Miller* Is Retroactive Because It Involves A Substantive Interpretation Of The Eighth Amendment That Reflects The Supreme Court's Evolving Understanding Of Child And Adolescent Development

The Supreme Court consistently has recognized that a child's age is far "more than a chronological fact," and has recently acknowledged that it bears directly on children's constitutional rights and status in the justice system. *See, e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citations omitted). *Roper*, *Graham*, and *Miller* have enriched the Court's Eighth Amendment jurisprudence with scientific research confirming that youth merit distinctive treatment. *See Roper*, 543 U.S. at 569-70 (explaining that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders") (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014

(2003)); *Graham*, 560 U.S. at 68 (reiterating that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Miller*, 132 S. Ct. at 2464 n.5 ("[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

This understanding that juveniles, as a class, are less culpable than adult offenders is central to the Court's holding in *Miller*, 132 S. Ct. at 2469, and reflects a substantive change in children's rights under the Eighth Amendment. As previously described, to ensure that the sentencing of juveniles is constitutionally appropriate, *Miller* requires that, prior to imposing a life without parole sentence on a juvenile offender, the sentencer must consider the factors that relate to the youth's overall culpability and capacity for rehabilitation. 132 S. Ct. at 2468-69. *Miller* therefore requires a substantive, individualized assessment of the juvenile's culpability prior to imposing life without parole.

The language of *Miller* demonstrates that the rule announced was not considered a mere procedural checklist, but a substantive shift in juvenile sentencing. The Court found:

> But 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 will be uncommon*. . . . Although we do not foreclose a sentencer's ability to make that judgment

> in homicide cases, *we require it 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). The Court's finding that appropriate occasions for juvenile life without parole sentences will be "uncommon" and that the sentencer must consider how a child's status counsels against sentencing *any* child to life without parole underscores that the decision in *Miller* substantively altered sentencing assumptions for juveniles – moving from a pre-*Miller* constitutional tolerance for mandated juvenile life without parole sentences to a post-*Miller* scheme in which even discretionary juvenile life without parole sentences are constitutionally suspect.

Because *Miller* relies on a new, substantive interpretation of the Eighth Amendment that recognizes that children are categorically less culpable than adults, and because sentencers must consider how these differences mitigate against imposing life without parole on youth, the decision must be applied retroactively.

b. U.S. Supreme Court Death Penalty Jurisprudence Requires That *Miller* Apply Retroactively

Miller is retroactive, because Appellee is now serving a punishment – mandatory life without parole – that, pursuant to *Miller*, the law can no longer impose on him. *See Summerlin*, 542 U.S. at 352. As discussed in Section IV.B.1.a., and like the rules announced in *Atkins v. Virginia*, 536 U.S. 304 (2002),

Roper and *Graham*, which have all been applied retroactively,[3] *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 v. Banks*, 536 U.S. 266, 271 n.5 (2002). When the Court, as in *Miller*, holds that a penalty is unconstitutional based on the unique characteristics of a class of defendants, the ruling has been applied retroactively.

Moreover, in requiring *individualized sentencing in adult capital cases*, the Supreme Court stated that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a

[3] *Atkins* barred the imposition of the death penalty on the intellectually disabled. 536 U.S. at 321. Courts across the country have applied *Atkins* retroactively. *See, e.g.*, *Morris v. Dretke*, 413 F.3d 484, 487 (5th Cir. 2005); *Black v. Bell*, 664 F.3d 81, 92 (6th Cir. 2011); *Allen v. Buss*, 558 F.3d 657, 661 (7th Cir. 2009); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). Similarly, *Roper* and *Graham*, two cases upon which *Miller* relies, have been applied retroactively. *See Loggins v. Thomas*, 654 F.3d 1204, 1206 (11th Cir. 2011) (noting *Roper* applied retroactively); *Lee v. Smeal*, 447 F. App'x 357, 359 n.2 (3d Cir. 2011) (unpublished) (same); *Horn v. Quarterman*, 508 F.3d 306, 308 (5th Cir. 2007) (same); *LeCroy v. Sec'y, Florida Dept. of Corr*., 421 F.3d 1237, 1239 (11th Cir. 2005) (same); *See also In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review); *Bonilla v. State*, 791 N.W.2d 697, 700-01 (Iowa 2010) (holding *Graham* applies retroactively); *In re Evans*, 449 Fed. App'x 284 (4th Cir. 2011) (per curiam) (unpublished) (noting Government "properly acknowledged" *Graham* applies retroactively on collateral review); *State v. Dyer*, 77 So. 3d 928, 929 (La. 2011) (per curiam); *Rogers v. State*, 267 P.3d 802, 804 (Nev. 2011) (noting that district court properly applied *Graham* retroactively).

constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (internal citation omitted) (emphasis added). Since *Miller* acknowledges that life without parole sentences for juveniles are "akin to the death penalty" for adults, 132 S. Ct. at 2466, *Miller*'s requirement of individualized consideration of a youth's lessened culpability and potential for rehabilitation is similarly "constitutionally indispensable" and reflects a new substantive requirement in juvenile sentencing.

Indeed, by directly comparing a juvenile sentence of life imprisonment without parole to a death sentence, the U.S. Supreme Court's death penalty jurisprudence is instructive to the *Miller* retroactivity analysis. For example, in *Woodson*, 428 U.S. 280 (1976) (plurality opinion), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion), and *Sumner v. Shuman*, 483 U.S. 66 (1987), the Supreme Court held that a mandatory death penalty was a violation of the Eighth Amendment because it did not permit the sentencer to weigh appropriate factors in determining the proper sentence. "The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of 'relevant facets of the character and record of the individual offender or the circumstances of the particular offense.'" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (quoting *Woodson*, 428 U.S. at 304). In *Lockett*, the Supreme Court held that "[t]o meet constitutional

requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id*. at 608. *See also Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (requiring state courts to consider all mitigating evidence before imposing the death penalty). *Woodson*, *Roberts*, *Lockett* and *Eddings* have been applied retroactively. *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (applying *Lockett* retroactively); *Harvard v. State*, 486 So.2d 537, 539 (Fla. 1986) (same); *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (*Eddings* applied retroactively).

The reasoning of these individual sentencing capital cases similarly applies to mandatory juvenile life without parole. *Miller* found that "[b]y removing youth from the balance – by subjecting a juvenile to the same life-without-parole sentence applicable to an adult – these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." 132 S. Ct. at 2466. *See also Johnson v. Texas*, 509 U.S. 350, 367 (1993) ("There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*."). *Miller* should therefore similarly be applied retroactively.

c. Having Declared Mandatory Life without Parole Sentences Cruel And Unusual When Imposed On Juvenile Homicide Offenders, Allowing Juvenile Offenders To Continue To Suffer That Sentence Violates The Eighth Amendment

The boundaries of the Eighth Amendment are dynamic and constantly evolving. "The [Supreme] Court recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). The Court has thus recognized that "a penalty that was permissible at one time in our Nation's history is not necessarily permissible today." *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring).

In recent years, Eighth Amendment jurisprudence has evolved with extraordinary speed in the context of juvenile sentencing. Prior to the Court's 2005 decision in *Roper*, juvenile offenders could be executed. Less than a decade later, not only the death penalty, but life without parole sentences for children are constitutionally disfavored. *See Miller*, 132 S. Ct. at 2469 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon."). This evolution in Eighth Amendment jurisprudence has been informed by brain science and adolescent development research that explains why children who commit crimes are less culpable than adults, and how

youth have a distinctive capacity for rehabilitation. In light of this new knowledge, the Court has held in *Roper*, *Graham,* and *Miller* that sentences that may be permissible for adult offenders are unconstitutional for juvenile offenders. *See, e.g.*, *Miller,* 132 S. Ct. at 2465 ("In [*Graham*], juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime.").

While this understanding of adolescent development was not fully incorporated into Eighth Amendment jurisprudence when Appellee Songster's direct appeal rights were exhausted, this does not change the fact that Songster, as well as all other juveniles sentenced pre-*Miller*, are categorically less culpable than adults convicted of homicide and therefore are serving constitutionally disproportionate sentences. *See Miller*, 132 S. Ct. at 2475 (finding "the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"). Forcing individuals to serve constitutionally disproportionate sentences for crimes they committed as children based on nothing other than the serendipity of the date on which they committed their offenses and their convictions became final runs counter to the Eighth Amendment's reliance on the evolving standards of decency and serves no societal interest. *See Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring) ("[T]he writ [of habeas corpus] has historically been

available for attacking convictions on [substantive due process] grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."). It is both common sense and a fundamental tenet of our justice system that

> the individual who violates the law should be punished to the extent that others in society deem appropriate. If, however, society changes its mind, then what was once "just desserts" has now become unjust. And, it is contrary to a system of justice that a rigid adherence to the temporal order of when a statute was adopted and when someone was convicted should trump the application of a new lesser, punishment.

S. David Mitchell, *Blanket Retroactive Amelioration: a Remedy for Disproportionate Punishments*, 40 Fordham Urb.L.J. City Square 14 (2013), *available at* urbanlawjournal.com/?p=1224.

Additionally, depriving the majority of juveniles sentenced to life without parole the benefit of *Miller*'s holding because they have exhausted their direct appeals violates the Eighth Amendment's proscription against the arbitrary infliction of punishment. *See Furman*, 408 U.S. at 256 (Douglas, J., concurring) ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and non-arbitrary, and to require judges to see to it that

general laws are not applied sparsely, selectively, and spottily to unpopular groups."). In his concurring opinion in *Furman*, Justice Brennan found:

> [i]n determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause – that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments.

Id. at 274 (Brennan, J., concurring). Unless *Miller* is applied retroactively, children who lacked sufficient culpability to justify the life without parole sentences they received will remain condemned to die in prison simply because they exhausted their direct appeals. 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." *Williams*, 982 N.E.2d at 197. *See also Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. 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."). The constitutionality of a child's sentence cannot be determined by the

arbitrary date his sentence became final. Such a conclusion defies logic, and contravenes Eighth Amendment jurisprudence.

Finally, the U.S. Supreme Court has found that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). *See also Furman*, 408 U.S. at 270 (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."). The Eighth Amendment's emphasis on dignity and human worth has special resonance when the offenders being punished are children. 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." More recently, the Court has found that:

> [juveniles'] own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. . . . From 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.

Roper, 543 U.S. at 570.

In order to treat Songster – and any other children sentenced to mandatory life without parole sentences seeking collateral review – with the dignity that the

Eighth Amendment requires, *Miller* must apply retroactively. "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79.

V. CONCLUSION

The Supreme Court's decision in *Miller* applies retroactively to cases on collateral review like Appellee's. The Supreme Court's jurisprudence makes clear that no other reading of the *Miller* decision would be consistent with the spirit or meaning of the Eighth Amendment. Accordingly, this Court should vacate Appellee's sentence and remand the case for sentencing in accordance with *Miller*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29 and 32 of the Federal Rules of Appellate Procedure, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 5,639 words, according to the word processer used to prepare it.

s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: October 30, 2014

CERTIFICATE OF VIRUS SCAN

I, Marsha Levick, do hereby certify this 30th day of October, pursuant to Third Circuit Local Rule of Appellate Procedure 31.1(c), that this electronic Brief of Juvenile Law Center *et al*. as *Amici Curiae* on Behalf of Appellee Songster has been successfully scanned for viruses, using Symantec Endpoint Protection NIS-20.4.0.40.

s/ Marsha L. Levick
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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on October 30, 2014. Pursuant to L.A.R. 25.1, I also caused paper copies of this brief to be delivered to the Clerk via in person service on October 30, 2014.

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