IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
PLAINTIFF-APPELLEE,	:	
	:	CASE NO. 2015-1180
v.	:	ON APPEAL FROM THE HAMILTON COUNTY
	:	COURT OF APPEALS, FIRST APPELLATE
ERIC LONG, A MINOR CHILD	:	DISTRICT
	:	
DEFENDANT-APPELLANT.	:	C.A. CASE NO. C-1400398

BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER ON BEHALF OF APPELLANT ERIC LONG IN SUPPORT OF JURISDICTION

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STATEMENT OF INTEREST

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 accept jurisdiction to consider whether Appellant's life without parole sentence violates the U.S. Supreme Court's decisions in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Graham v. Florida*, 560 U.S. 48 (2010).

STATEMENT OF THE CASE AND FACTS

Amicus Curiae Juvenile Law Center incorporates the Statement of the Case and Facts set forth by Appellant Eric Long.

ARGUMENT

In 2010, the United States Supreme Court held that life without parole sentences for juveniles convicted of nonhomicide offenses are unconstitutional, finding that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment." *Graham v. Florida*, 560 U.S. 48, 69 (2010). Two years later, the Court held in *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), that mandatory life without parole sentences were unconstitutional for juvenile homicide offenders.

In 2009, Appellant Eric Long was convicted of two counts of aggravated murder for a crime that occurred when he was 17. *State v. Long*, 8 N.E.3d 890, 892 (Ohio 2014). He received two consecutive discretionary life without parole sentences. *Id.* After the U.S. Supreme Court ruled in *Miller*, this Court vacated Eric's sentence and held that "the trial court must consider Long's youth as mitigating before determining whether aggravating factors outweigh it." *Id.* at 899. This Court further noted that "because of the severity of [life without parole], and because youth and its attendant circumstances are strong mitigating factors, [life without parole] should rarely be imposed on juveniles." *Id.* At his resentencing hearing, however, the trial court resentenced Eric to life without parole.

This Court should take jurisdiction of Eric's appeal to consider important questions of constitutional law that are of public interest. Specifically, this Court should clarify that *Miller* establishes a presumption against imposing juvenile life without parole; this Court should establish clear guidelines to ensure juvenile life without parole is not imposed arbitrarily and capriciously; and this Court should hold that juvenile life without parole cannot be imposed when a juvenile is convicted based on a finding of "complicity."

FIRST PROPOSITION OF LAW: A trial court must give some weight to youth as a mitigating factor.

I. The U.S. Supreme Court Recognizes That Children Are Fundamentally Different From Adults And Categorically Less Deserving Of The Harshest Forms Of Punishments

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.[1] Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for the purpose of determining culpability: "[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 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) (plurality opinion)).

Graham 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 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

[1] *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 nonhomicide 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.

> possibility exists that a minor's character deficiencies will be reformed." *Id.*

Id. The Court's holding acknowledged the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

In reaching these conclusions, 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. Because juveniles are more likely to be reformed than adults, the "status of the offenders" 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 the central premise that children are fundamentally different from adults, *Miller* held that the sentencer must take into account the juvenile's reduced blameworthiness and individual characteristics before imposing this harshest available sentence. 132 S. Ct. at 2460. The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id.* at 2464, noting "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.

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*.

II. This Court Should Clarify That *Miller* Establishes A Presumption Against Imposing Life Without Parole Sentences On Juveniles

Miller establishes a presumption against imposing life without parole sentences on juveniles. The Court declared 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). *Miller* further noted that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68). This Court similarly found that, "because of the severity of [life without parole], and because youth and its attendant circumstances are strong mitigating factors, *that sentence should rarely be imposed on juveniles*." *Long*, 8 N.E.3d at 899 (emphasis added).

Though *Miller* allows for the imposition of discretionary juvenile life without parole sentences, *Miller* also condemns the sentence for juveniles except in the rarest circumstances. This mandate is consistent with the Court's prior rulings in *Graham* and *Roper*. As the Court found, "'[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." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573) (emphasis added). If expert psychologists cannot determine which juveniles may be "irreparably corrupt," how can sentencing judges and juries accurately make such assessments? *See also* Brief for American Psychological Association et al. as *Amici Curiae* Supporting Petitioners at 25, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), (Nos. 10-9646, 10-9647) ("[T]here

is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile – even one convicted of an extremely serious offense – should be sentenced to life in prison, without any opportunity to demonstrate change or reform."). Therefore, *Miller* establishes, at a minimum, a presumption against juvenile life without parole sentences.

Three state Supreme Courts have held that *Miller* dictates this presumption against juvenile life without parole.[2] The Connecticut Supreme Court found:

> [I]n *Miller*, the court expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant circumstances, 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' *This language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances.*

[2] Massachusetts has gone further, banning juvenile life without parole sentences altogether. Relying on U.S. Supreme Court precedent, the Massachusetts Supreme Court held that even the discretionary imposition of juvenile life without parole sentences violates the state constitution. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 466 Mass. 655, 671 (2013). The court held:

> Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an "irretrievably depraved character," *Roper*, 543 U.S. at 570, can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. *See Miller*, 132 S. Ct. at 2464. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. *See Graham*, 560 U.S. at 68. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.

Id. at 669-70 (footnote omitted).

State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015) (emphasis added), *appeal docketed*, *Connecticut v. Riley*, No. 14-1472 (U.S. June 17, 2015). Similarly, the Missouri Supreme Court held that the state bears the burden of demonstrating, beyond a reasonable doubt, that life without parole is an appropriate sentence. *See State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (en banc) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances."). The Iowa Supreme Court also found that *Miller* established a presumption against juvenile life without parole:

> [T]he court must start with the Supreme Court's pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon. Thus, *the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder* unless the other factors require a different sentence.

State v. Seats, No. 13-1960, 2015 WL 3930169, at *9 (Iowa June 26, 2015) (emphasis added) (internal citations omitted).

This Court should accept jurisdiction and clarify that *Miller* requires, at a minimum, a presumption against juvenile life without parole sentences. Because this presumption was not applied in Eric's case, Eric's life without parole sentence should be vacated.

III. This Court Should Clarify That *Miller* Establishes A Presumption Of Immaturity For All Juvenile Offenders

As discussed in detail in First Proposition of Law, Section I, *supra*, *Miller*, together with *Roper* and *Graham*, establish that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. *Miller* emphasized that "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Id*. (internal citation and quotation marks omitted). *Miller* noted that

these findings about children's distinct attributes are not crime-specific. *Id*. at 2465. "Those features are evident *in the same way, and to the same degree*," whether the crime is "a botched robbery" or "a killing." *Id*. (emphasis added).

Given the Supreme Court's jurisprudence establishing that juveniles are developmentally different and less mature than adults, a sentencer must presume that a juvenile homicide offender lacks the maturity, impulse-control and decision-making skills of an adult. Indeed, it would be the unusual juvenile whose participation in criminal conduct is not closely correlated with his immaturity, impulsiveness, and underdeveloped decision-making skills. Therefore, absent *expert* testimony establishing that a particular juvenile's maturity and sophistication were more advanced than a typically-developing juvenile, a sentencer must presume the juvenile offender lacks adult maturity, and treat this lack of maturity as a factor counseling against the imposition of a life without parole sentence.[3]

Eric did not benefit from a presumption of immaturity. The judge instead concluded "there is zero evidence before this Court . . . to show me that youth is a mitigating factor." Resentencing Tr. 23:13-18 May 29, 2014. Eric's sentence should therefore be vacated.

[3] The risk of inaccurately assessing maturity and culpability based on implicit biases confirms the importance of the presumption of immaturity for all juvenile defendants. A recent study found that "Black boys were more likely to be seen as older and more responsible for their actions relative to White boys." Phillip Goff, *et al.*, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 Journal of Personality and Social Psychology 526, 539 (2014). Specifically, "Black boys are seen as more culpable for their actions (i.e., less innocent) within a criminal justice context than are their peers of other races." *Id*. at 540. Therefore, the presumption of immaturity should only be rebutted by expert evidence, rather than the independent assessment of sentencers or lay witnesses who may hold these implicit biases.

IV. This Court Must Ensure That Juvenile Life Without Parole Sentences Are Not Arbitrarily And Capriciously Imposed

Because *Miller* and *Graham* explicitly view life without parole for juveniles "as akin to the death penalty," *Miller*, 132 S. Ct. at 2466, this Court must look to death penalty jurisprudence to determine the constitutional imposition of juvenile life without parole sentences. U.S. Supreme Court precedent establishes that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion).

In *Godfrey*, the state of Georgia permitted the imposition of the death penalty when there was a finding that the homicide was "outrageously or wantonly vile, horrible and inhuman." *Id*. at 428. The U.S. Supreme Court held that this finding was insufficient to warrant the death penalty because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrific and inhuman." *Id*. at 428-29. *See also Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988) (holding Oklahoma's aggravating factor that a murder is "especially heinous, atrocious, or cruel" to be overbroad because "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'"). Because every murder could be considered "outrageously or wantonly vile, horrific and inhuman," *see Godfrey*, 446 U.S. at 428-29, or "especially heinous, atrocious, or cruel," *see Cartwright*, 486 U.S. at 364, the Supreme Court requires more specific criteria in order to ensure that the harshest available sentence is only imposed in the most egregious and extreme cases. [4]

[4] Similarly, the sentencing court's finding that Eric's crime was "horrific," *see* Resentencing Tr. 18:23-19:9 May 29 2014, is not a sufficiently narrow criteria to allow the imposition of the harshest allowable sentence in his case since almost any homicide could be considered horrific.

The facts of *Godfrey* are significant. The defendant, Godfrey, had previously threatened his wife with a knife, after which his wife left the home and filed for divorce. *Godfrey*, 446 U.S. at 424. When his wife refused to reconcile, the defendant

> got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

Id. at 425. He later informed police that he had "been thinking about [the crime] for eight years" and that he would "do it again." *Id*. at 426.

Even under these facts, the Court held that Godfrey's "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any other person guilty of murder." *Id*. at 433. *See also Cartwright*, 486 U.S. at 363 (noting that *Godfrey* "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty").

The U.S. Supreme Court has found that "'[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" *Godfrey*, 446 U.S. at 433 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion)). This same standard must apply in juvenile life without parole cases. Because there were no objective criteria for demonstrating either Eric's irreparable corruption – particularly in light of *Miller*'s finding that the "juvenile offender whose crime reflects irreparable corruption" will be "rare," 132 S. Ct. at 2469 – or that his offense was

more severe or egregious than any other homicide offense, Eric and the community cannot be confident that the imposition of the harshest available penalty was based on "reason rather than caprice or emotion." *Godfrey*, 446 U.S. at 433 (quoting *Gardner*, 430 U.S. at 358).

The need for clear sentencing guidance is particularly acute in juvenile homicide cases in which there is a risk that the facts of a homicide offense may overpower evidence of mitigation based on youth. In the context of the juvenile death penalty, the U.S. Supreme Court cautioned that "[a]n 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." *Roper*, 543 U.S. at 573. This same "unacceptable likelihood" exists in juvenile life without parole cases; if the violent nature of the crime is permitted to overpower evidence of mitigation based on the juvenile's youth, juvenile life without parole will not be "uncommon," *see Miller*, 132 S. Ct. at 2469, since every homicide is, by definition, a violent offense. Even when the facts of a homicide are brutal, the sentencer must still look beyond the facts of the offense and consider how the youth's age and development *counsel against* a life without parole sentence. *See Miller*, 132 S. Ct. at 2469.

SECOND PROPOSITION OF LAW: A trial court may not impose a sentence of life without parole on a child unless the jury instructions permitted a conviction only if the child both killed and intended to kill

I. Intent To Kill Cannot Be Inferred When A Juvenile Is Convicted Based On A Complicity Instruction

The jury considering Eric's case was instructed that Eric could be convicted of any of the underlying criminal charges if he was complicit in the offense. The jury was instructed:

> Complicity in an offense means the conduct of one who knowingly aids and abets another for the purpose of committing such an act. If you find beyond a reasonable doubt . . . Eric Long *purposely aided*,

> *helped, assisted, encouraged, or directed himself with another in the commission of an offense, he is to be regarded as if he were the principal offender and is just as guilty as if he had personally performed every act constituting the offense*. When two or more persons have a common purpose to commit a crime and one does one part and a second performs another, those acting together are equally guilty of the crime.

Trial Tr. Vol. 15, 2651:19-52:12 Feb. 1, 2011 (emphasis added). Therefore, in convicting Eric of murder, the jury did not specifically find Eric killed or intended to kill, only that he purposely aided the commission of the offense.

Presuming "intent to kill" from a juvenile's decision to aid in an offense is inconsistent with adolescent developmental and neurological research recognized by the U.S. Supreme Court in *Roper, Graham, Miller* and *J.D.B. v. North Carolina,* 131 S. Ct. 2394 (2011). When juveniles take part in crimes – even when they purposely aid or assist in the commission of certain crimes – they lack the same level of anticipation or foreseeability as the law ascribes to an adult.[5] As Justice Breyer explained in his concurring opinion in *Miller* in the context of felony murder:

> 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*.

[5] Specifically, the U.S. 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*, 560 U.S. at 72 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). In particular, the Supreme Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." *Graham*, 560 U.S. at 78. The Court also has recognized that juveniles are more vulnerable or susceptible to negative influences and outside pressures" than adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id*.

132 S. Ct. at 2476 (Breyer, J., concurring) (emphasis added) (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 aid in a crime would reasonably know or foresee that death may result from that crime, their risk-taking should not be equated with malicious intent, nor should their recklessness be equated with indifference to human life.

Accordingly, the jury did not specifically find that Eric killed or intended to kill, and intent to kill cannot be inferred from his participation or aiding in the commission of the offense.

II. Absent A Finding That A Juvenile Killed Or Intended To Kill, Any Life Without Parole Sentence Is Unconstitutional Pursuant To *Miller* And *Graham*

In *Graham*, the U.S. 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. 560 U.S. at 69. 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 there was no finding that Eric killed or intended to kill, his life without parole sentence violates *Graham*.

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 [*Miller*] 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 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.").

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 based on a complicity theory 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 2476-77 (Breyer, J., concurring). A sentencing court confronting a child found culpable under a complicity 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. *Graham*, 560 U.S. at 69. Where there is no finding that the juvenile killed or intended to kill, a juvenile offender like Eric cannot receive a sentence of life without the possibility of parole.

Notably, in the wake of *Miller*, at least two states amended their sentencing statutes to eliminate life without parole as sentencing option for juveniles convicted of felony murder. *See* N.C. Gen. Stat. §§ 15A-1340.19A, 15A-1340.19B; 18 Pa. Cons. Stat. §§ 1102.1, 2502(b).[6] Courts around the country are also considering issues surrounding the conviction and sentencing of juveniles charged with felony murder. *See, e.g.*, *Layman v. State*, 17 N.E.3d 957, 968 (Ind.

[6] Numerous additional states, post-*Miller*, eliminated juvenile life without a parole sentences entirely. *See, e.g.*, W. Va. Code §§ 62-3-15, 62-12-13b (2014); Wyo. Stat. Ann. §§ 6-2-101(b), 6-10-301(c) (2013); Tex. Gov't Code Ann. § 508.145 (2013), Tex. Penal Code Ann. § 12.31 (2013); Mass. Gen. Laws Ann. Ch. 265, § 2 (2014); Vt. Stat. Ann. tit. 13, § 7045 (2015); 2015 Nevada Laws Ch. 152 (A.B. 267). *See also* Del. Code. Ann. tit. 11, §§ 4209A (2013), 4217 (2010) (establishing judicial sentencing review); Cal. Pen. Code § 1170(d)(2) (2012) (establishing review in nearly all juvenile cases); Fla. Stat. §§ 775.081(1)(b); 921.1402 (2015) (same).

Ct. App. 2014) (May, J., concurring) ("Subjecting a juvenile who did not kill or intend to kill anyone to a murder prosecution in adult court based solely on the premise it was 'foreseeable' to the juvenile that someone might be killed is problematic because juveniles do not 'foresee' like adults do."); *State v. Mantich*, 842 N.W.2d 716, 731-32 (Neb. 2014) ("[The juvenile] invites us to extend [*Graham*'s] holding to a juvenile convicted of felony murder. Because we find [the juvenile] is entitled to be resentenced under the dictates of *Miller,* we do not reach this argument in this appeal. If [the juvenile] . . . is resentenced to life imprisonment with no minimum term which permits parole eligibility, he may raise the *Graham* argument in an appeal from that sentence."). This Court, too, should address this question and hold that, absent a finding that a juvenile killed or intended to kill, life without parole cannot be constitutionally imposed.

CONCLUSION

Juvenile Law Center respectfully requests that this Court accept jurisdiction and vacate Eric Long's life without parole sentence pursuant to *Miller v. Alabama* and *Graham v. Florida*.

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