UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal Nos. 14-2737 & 14-2818
(Case No. 2:13-cv-00278-RTR & 2:12-cv-01051-RTR (E.D. Wis.))

EMMANUEL MARTINEZ AND
TIMOTHY VALLEJO,

Petitioners-Appellants,
v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the Final Judgment in the United States
District Court for the Eastern District of Wisconsin,
the Hon. Rudolph T. Randa, Presiding

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER AND CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH IN SUPPORT OF APPELLANTS

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

Amicus Curiae **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 **Campaign for the Fair Sentencing of Youth (CFSY)** is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth

with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi- pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators--on both state and national levels-to accomplish our goal.

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 THE 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. *Miller* applies retroactively to Appellants. *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 continuing imposition of mandatory life without parole sentences on Appellants 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. Concerns with finality should not deny Appellants an opportunity to be resentenced; their interest in receiving a constitutional sentence outweighs interests in finality.

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 punishments.[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

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[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 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.

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.*

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 even 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 rationale was clear: 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, 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).

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, *Miller* held "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

U.S. Supreme Court precedent requires that *Miller* be applied retroactively. Justice should not depend on a particular date on the calendar. Nowhere is this principle steelier than in the Eighth Amendment's ban on cruel and unusual punishments. As Justice Harlan wrote: "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to

repose." *Mackey v. United States,* 401 U.S. 667, 693 (1971) (Harlan, J., concurring). The U.S. Supreme Court's decisions interpreting the Eighth Amendment mark our nation's progress as a civilized society; once the Court sets down a marker along the continuum of our evolving standards of decency, all affected must benefit. To deny retroactive application of *Miller* would compromise our justice system's consistency and legitimacy.

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

In *Teague v. Lane*, the U.S. Supreme Court held that a new Supreme Court rule applies retroactively to cases on collateral review only if it is: (a) a substantive rule; or (b) 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." *Summerlin*, 542 U.S. at 351. A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id*. at 353. Moreover, a 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 (1989), *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 obviously much harsher than alternative sentencing schemes in which life without parole is, at most, a discretionary alternative. The 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 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. Unlike procedural rules, which "regulate only the *manner*

of determining the defendant's culpability", *Summerlin*, 542 U.S. at 353, *Miller* imposes a fundamental, substantive change in sentencing for juveniles.

b. ***Miller* Is Retroactive Pursuant To *Teague* Because It Establishes A Substantive Right To Individualized Sentencing For Juveniles Facing Life Without Parole**

Miller established a new rule requiring individualized sentencing for juvenile homicide offenders facing life without parole. *See Miller*, 132 S. Ct. at 2466 n.6 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses."). A juvenile offender's right to individualized sentencing is a substantive right that must be applied retroactively.

In death penalty cases, the U.S. Supreme Court has held that defendants have a substantive right to individualized sentencing. In *Woodson v. North Carolina*, the 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 *constitutionally indispensable* part of the process of inflicting the penalty of death." 428 U.S. 280, 304 (1976) (plurality opinion) (internal citation omitted) (emphasis added). *See also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("we cannot avoid the conclusion that an individualized decision is *essential* in capital cases") (emphasis added). Significantly, *Lockett* differentiates between the substantive

right to individualized sentencing that is required under the Eighth Amendment and the specific procedures states adopt in implementing individualized sentencing schemes:

> *There is no perfect procedure* for deciding in which cases governmental authority should be used to impose death. *But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's* character and record and to circumstances of the offense . . . creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605 (emphasis added). The right to individualized sentencing is thus a prerequisite to the constitutional imposition of the death penalty, even though the procedures may vary from state-to-state.

The reasoning of these capital cases applies to mandatory sentences of juveniles to 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. Moreover, since *Miller* holds that life without parole sentences for juveniles are "akin to the death penalty," 132 S. Ct. at 2466, *Miller*'s new requirement of individualized sentencing for youth facing life without parole is, as in the death penalty cases, "constitutionally indispensable" and "essential." *See Woodson*, 428 U.S. at 304; *Lockett*, 438 U.S. at 605.

Like a mandatory sentence of death, a mandatory juvenile life without parole sentencing scheme "creates the risk that [the sentence] will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. *See Summerlin*, 542 U.S. at 352 (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.") (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).[2]

c. *Miller* Is Substantive Pursuant To *Teague* Because It Requires Sentencers To Consider Specific Factors Before Sentencing Juveniles To Life Without Parole

To ensure that the sentencing of juveniles is constitutionally appropriate, *Miller* spelled out specific factors for the sentencer to consider. Prior to imposing a life without parole sentence on a juvenile offender, factors relevant to the youth's diminished culpability and heightened capacity for rehabilitation must be examined. 132 S. Ct. at 2468-69. These factors include: (1) the juvenile's

[2] Notably, federal and state courts have applied individualized sentencing capital cases retroactively. *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (applying *Lockett* retroactively); *Dutton v. Brown*, 812 F. 2d 593, 599 (10th Cir. 1987) (same); *Harvard v. State*, 486 So.2d 537, 539 (Fla. 1986), *cert. denied*, 479 U.S. 863 (1986) (same); *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (*Eddings* applied retroactively); *Thigpen v. Thigpen*, 926 F. 2d 1003, 1005 (11th Cir. 1991) (applying *Shuman* retroactively). Since *Miller* similarly establishes a new substantive rule under the Eighth Amendment requiring individualized sentencing in juvenile life without parole cases, *Miller*, too, must apply retroactively.

“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*. *Miller* therefore requires the sentencer to make a substantive, individualized assessment of the juvenile’s culpability prior to imposing life without parole. *Id*.

The Supreme Court’s requirement that sentencers consider specific factors before imposing juvenile life without parole establishes that *Miller* announced a substantive rule. The Supreme Court’s ruling in *Summerlin*, denying retroactive effect to *Ring v. Arizona*, 536 U.S. 584 (2002), illustrates this point. In *Ring,* the Supreme Court had held that the Sixth Amendment requires that a jury find the aggravating factors essential to imposition of the death penalty. *Summerlin* 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 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. Following *Summerlin*, *Miller* is a substantive rule.

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

Even assuming the rule announced in *Miller* is procedural, *Miller* must be applied retroactively pursuant to *Teague*'s second exception, including "watershed rules of criminal procedure" and "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. 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).

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.[3] *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

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[3] 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)).

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).

Justice Harlan noted in *Mackey* 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,* 401 U.S. at 693 (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. ***Miller*** **Is Retroactive Because Kuntrell Jackson Received The Same Relief On Collateral Review**

The Supreme Court's decision in *Miller* actually provided immediate relief to two juveniles, Evan Miller, petitioner in *Miller*, and Kuntrell Jackson, the petitioner in Miller's companion case, *Jackson v. Hobbs*. Kuntrell Jackson was sentenced to mandatory life imprisonment without parole and the Arkansas Supreme Court affirmed his conviction in 2004. *Jackson v. State*, 194 S.W.3d 757

(Ark. 2004). Having been denied relief on collateral review as well, Jackson filed a petition for *certiorari*; the U.S. Supreme Court granted *certiorari* in both Miller's and Jackson's cases and ordered that they be argued together. *Jackson v. Hobbs*, 132 S. Ct. 548 (2011); *Miller v. Alabama*, 132 S. Ct. 548 (2011). In its consolidated decision in *Miller* and *Jackson*, the U.S. Supreme Court vacated the judgments of sentences in both cases and remanded each for further proceedings. *Miller,* 132 S. Ct. at 2475.

The Court's grant of relief to Jackson on collateral review also supports a finding that *Miller* is retroactive. The Supreme Court held in *Teague* that "once 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."489 U.S. at 300 (1989). *See also Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring) (explaining that Supreme Court need not expressly hold new rule to be retroactive, but retroactivity may be "logically dictate[d]" by the Court's holdings). Because the new rule announced in *Miller* was applied to Mr. Jackson on collateral review, Appellants should likewise benefit from the Supreme Court's ruling in *Miller*.

3. The Eighth Amendment Requires That *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) (citing *Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982). *Roper*, *Graham*, and *Miller* have bolstered 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.").

The Court's holding that juveniles, as a class, are less culpable than adult offenders, *Miller,* 132 S. Ct. at 2469, reflects a substantive change in children's rights under the Eighth Amendment. As previously discussed. *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* further demonstrates that the rule announced was not a mere procedural checklist, but a substantive shift in what constitutes permissible juvenile sentencing under the Constitution. The Court found:

> [G]iven 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," combined with its requirement that the sentencer consider the child's status and developmental attributes before imposing a sentence of life without parole, underscores the conclusion that *Miller* created a substantial rule. Prior to *Miller*, mandated juvenile life without parole sentences were legislatively prescribed in a majority of states. Post-*Miller*, not only are these statutes invalid, even discretionary juvenile life without parole sentences are constitutionally suspect if the sentencer failed to fully consider relevant aspects of the defendant's youth. Because *Miller* mandates a consideration of specific factors and expands the range of sentencing options for juveniles convicted of homicide, it must apply retroactively.

b. 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 with respect to 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 been struck, but life without parole sentences for children are constitutionally disfavored. *See Miller*, 132 S. Ct. at 2469. 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.").

This understanding of adolescent development was not fully incorporated into Eighth Amendment jurisprudence when the direct appeal rights of Appellants were exhausted. However, Appellants are not more culpable because their appeal rights have run. Appellants are serving constitutionally disproportionate sentences

that could not be imposed today. *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 simply on the date of conviction or the finality of their cases runs counter to the Eighth Amendment's reliance on the evolving standards of decency and serves no societal interest. 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 before *Miller*. As the Illinois Appellate Court concluded in the face of similar arguments, 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*, 982 N.E.2d 181, 197 (Ill. App. Ct. 2012), *abrogated on other grounds by People v. Davis*, 6 N.E. 3d 709 (Ill. 2014). *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."). Simply put, the date upon which a child's sentence became final cannot mute his Eighth Amendment challenge.

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 sixty 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 Appellants 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.

C. The Interest In Ensuring That The Life Without Parole Sentence Imposed On A Juvenile Is Constitutional Outweighs The Interest In Finality

Teague's limitations on the retroactive application of new constitutional rules reflect the importance of finality of court decisions. *Teague*, 489 U.S. at 309 (1989). However, the interest in finality is not always paramount. "The fact that life and liberty are at stake in criminal prosecutions" means that conventional notions of finality should receive less weight than in civil cases, *id.*, and the Supreme Court has noted that "the principles of finality and comity 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (Blackmun, J., concurring) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). Here, the unjust nature of an unconstitutionally imposed mandatory life without parole sentence must outweigh any interest in the finality of that sentence.

1. The Accuracy Concerns Underlying Finality Interests Are Diminished In The Context Of Sentencing

In *Mackey*, Justice Harlan argued that failure to sufficiently respect the finality of convictions would force courts to "relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed," resulting in subsequent verdicts no more accurate than the first. 401 U.S. at 691 (Harlan, J., concurring). Because "[c]riminal trials are inherently backward-looking, offense-oriented events, . . . merely the passage of time . . . provides reason to fear that any new review or reconsideration of backward-looking factual determinations of guilt made during a trial will be costly and inefficient, will be less accurate, and will raise questions about the accuracy and efficacy of criminal trials generally." Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 167, 170 (2014) [hereinafter Berman, *Finality*].

However, these concerns do not apply to sentencing because fundamentally "different conceptual, policy, and practical considerations are implicated when a defendant seeks only review and reconsideration of his final sentence and does not challenge his underlying conviction." *Id.* at 152. Sentencing hearings, for example, have different rules of procedure, evidence, and burdens of proof than trials. They also have different goals; while criminal trials "are designed and seek only to

determine the binary question of a defendant's legal guilt," sentencing hearings "are structured to assess and prescribe a convicted offender's future and fate." *Id.* at 167.

Sentencing has an essential "forward-looking" component, which includes consideration of the defendant's characteristics and the possibility of rehabilitation. The final decision is not a binary finding of guilt or innocence, but "what to do with the convicted criminal in light of his, the victims', and society's needs." *Id.* at 169. "Although resentencing may take place years after the original proceedings, the relaxed evidentiary rules at resentencing make the risk of inaccuracy from unavailable or spoiled evidence less acute than at retrial. Indeed, the passage of time may provide better information about the offender's dangerousness and rehabilitation, enhancing accuracy." Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 181 (2014) [hereinafter Scott, *Collateral Review*].

Concerns about the accuracy of the original sentence are inapt in the context of mandatory sentences like those at issue in *Miller*. Because it was mandatory, the judge never had an opportunity to impose a sentence based on the particular facts and circumstances of the case and the offender. The "accuracy" of the former unconstitutional sentence will hardly be *reduced* by applying *Miller* retroactively;

applying *Miller* retroactively and allowing individualized sentencing would *increase* accuracy.

2. The Resource Concerns Underlying Interests In Finality Are Diminished In The Context Of Sentencing

Another factor underlying the importance of finality is efficient use of judicial resources. *See Mackey*, 401 U.S. at 691 (noting concerns it would "seriously distort the very limited resources society has allocated to the criminal process . . . to expend[] substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final."). As several Circuit courts have recognized, resource concerns have less force when applied to sentencings rather than to trials:

> [T]he context of review of a sentencing error is fundamentally different [than the costs of a second trial]. From the standpoint of the parties, the error might have great significance . . . More importantly, the cost of correcting a sentencing error is far less than the cost of a retrial.

U.S. v. Williams, 399 F.3d 450, 456 (2d Cir. 2005). *See also United States v. Saro*, 24 F.3d 283, 287-88 (D.C. Cir. 1994) "[w]hen an error in sentencing is at issue . . . the problem of finality is lessened, for a resentencing is nowhere near as costly or as chancy an event as a trial."; *U.S. v. Serrano-Beauvaix*, 400 F.3d 50, 61 (1st Cir. 2005) (Lipez, J., concurring) ("resentencing does not pose the burden of a new

trial, with its considerable costs in time, money, and other resources."); *Carrington v. U.S.*, 503 F.3d 888, 901 (9th Cir. 2007) (Pregerson, J., concurring in part and dissenting in part) ("The interest in repose is lessened all the more because we deal not with finality of a *conviction,* but rather the finality of a *sentence*. There is no suggestion that [the defendants] be set free or that the government be forced to retry these cases. The district court asks only for an opportunity to re-sentence in accordance with the Constitution.").

In addition, resentencing juveniles serving mandatory life without parole will not duplicate previous costs or efforts. Because every defendant who would be affected by retroactive application of *Miller* received a mandatory sentence, a new sentencing hearing will be the first time the court considers the offender's mitigating characteristics.

3. Concerns About the Legitimacy of Criminal Judgments Are Diminished In The Context Of Sentencing

Finality is also an important interest because it maintains the legitimacy and reputation of the criminal justice system. As Justice Harlan noted: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey*, 401 U.S. at 691. However, Justice Harlan's

concerns rest on the finality of the conviction itself, not on the possibility of repeated resentencing or parole:

> 'Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error *but rather on whether the prisoner can be restored to a useful place in the community*.' *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

Mackey, 401 U.S. at 690 (Harlan, J., concurring) (emphasis added). Justice Harlan suggests that "continuing litigation over a sentence may not pose the same threat to the reputation of the criminal justice system as continuing litigation over guilt or innocence." Scott, *Collateral Review*, at 181. Because "[s]entences are already subject to modification and reduction through a host of procedures," *id.*, retroactive application of laws that alter the length of a sentence are less disruptive than laws that call into question whether a defendant was properly convicted. On the other hand, confidence in the justice system is undermined if the Supreme Court's recognition that children have been unconstitutionally sentenced to mandatory life without parole applies only prospectively, leaving hundreds of juveniles to die in prison.[4]

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[4] *Teague* was also concerned that applying new rules retroactively would greatly interfere with the "deterrent effect" of criminal law. 489 U.S. at 309. However, juveniles are generally "less susceptible to deterrence." *Roper*, 545 U.S. at 571. *See also Graham*, 560 U.S. at 72 (juveniles "are less likely to take a possible

V. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court hold that *Miller v. Alabama* must be applied retroactively.

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punishment into consideration when making decisions"). Moreover, all of the defendants who would directly benefit from applying *Miller* retroactively have served years, if not decades, in prison. Because applying *Miller* retroactively is not an evasion of punishment, it would not erode the deterrent effect of criminal law.

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 6, 937 words.

s/ Marsha L. Levick
MARSHA L. LEVICK

DATED: March 13, 2015

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 Seventh Circuit by using the appellate CM/ECF system on March 13, 2015.

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