UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH WANG, *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent*.	)	Case No. 13-2426

BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* ON BEHALF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

I. INTEREST OF *AMICUS*

Founded in 1975, Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. Juvenile Law Center urges the Court to hold that *Miller v. Alabama* provides Petitioner relief and to find that Petitioner thus may file a successive petition pursuant to 28 U.S.C. § 2244(b).

II. CONSENT OF THE PARTIES

Both parties have consented to this filing.

III. SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 567 U.S. _____, 132 S. Ct. 2455 (2012), the United States Supreme Court held that the mandatory imposition of sentences of life without the possibility of parole on juvenile offenders convicted of murder is unconstitutional. At the time Petitioner was sentenced for crimes he committed as a

juvenile, federal law mandated a life without parole sentence for his murder-based offenses. As applied to juvenile offenders, this mandatory scheme is unconstitutional pursuant to *Miller*.

First, the United States Supreme Court has already answered the question of retroactivity by applying *Miller* to Kuntrell Jackson's case, which was before the court on collateral review. Moreover, *Miller* announced a substantive rule, which is consistent with the Supreme Court's interpretation of the Eighth Amendment in light of its evolving understanding and appreciation of the significance of child and adolescent development. Further, because the *Miller* Court found a violation of the Eighth Amendment, the rule announced necessarily must provide retroactive relief. If the Court determines that a punishment is cruel and unusual, it inescapably deems the same punishment, albeit imposed before the decision, similarly cruel and unusual; nothing about the nature of the punishment or its disproportionality is lessened by the date upon which it was imposed. In other words, categorically, any Eighth Amendment decision barring a particular sentence must be retroactive, including *Miller*. Finally, even assuming the rule is procedural, *Miller* is a "watershed rule[] of criminal procedure" under *Teague v. Lane*, 489 U.S. 288, 300 (1989). For each of these reasons, and as this Court and others have already found, the holding in *Miller* applies retroactively to inmates, such as Petitioner, serving mandatory life without parole sentences for crimes committed as juveniles who

have exhausted both direct and collateral appeal rights and seek to file a successive petition pursuant to 28 U.S.C. § 2244(b).

IV. ARGUMENT

A. *Miller* Is Retroactive Because Jackson Received The Same Relief On Collateral Review

The United States Supreme Court has already answered the question of retroactivity by applying *Miller* on collateral review. Had *Miller* not applied retroactively to cases on collateral review, Kuntrell Jackson – whose case, *Jackson v. Hobbs*, was the companion case to *Miller* – would have been precluded from the relief he was granted.[1] Additionally, "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." *Teague v. Lane*, 489 U.S. 288, 300 (1989). Therefore, if a new rule is announced and applied to a defendant on collateral review, as occurred in *Miller*, that rule necessarily is retroactive. *See also Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court, or by the combined action of the Supreme

[1] Notably, *Jackson* and *Miller* were joined and both Miller and Jackson received the same relief, in the same manner. This is clear from the Court's assertion that both cases were remanded "for further proceedings not inconsistent with" its opinion. *Miller*, 132 S. Ct. at 2475. Accordingly, on April 25, 2013, the Arkansas Supreme Court recognized Kuntrell Jackson's right to be resentenced in light of the ruling in *Miller*. *Jackson v. Norris*, 2013 Ark. 175 (2013).

Court and the lower courts, but simply by the action of the Supreme Court.").[2] Given the Court's application of *Miller* retroactively to Jackson's case on collateral review, further analysis under *Teague* and its progeny is not necessary. However, even when *Teague's* retroactivity analysis is applied fully, *Miller* still satisfies *Teague's* retroactivity standard. Petitioner Wang addresses the retroactivity analysis under the first exception under *Teague*; *Amicus* focuses on the second *Teague* exception, as well as discussing the relationship between retroactivity and Supreme Court rulings interpreting and applying the Eighth Amendment.

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

1. *Miller's* Interpretation Of The Eighth Amendment Is A Substantive Rule Based Upon Scientific Research Demonstrating Key Differences Between Children And Adults

[2] In writing for the majority in *Tyler*, Justice Thomas explained that under § 2244(b), "[m]ultiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Tyler*, 533 U.S. at 666. The Court's application of its holding in *Miller* to Jackson's case "necessarily dictate[s] retroactivity of the new rule." *Id.* Justice O'Connor, concurring in *Tyler*, explained that the Court "may 'ma[k]e' a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." *Id.* at 668. She clarified that "the holdings must *dictate* the conclusion and not merely provide principles from which one *may* conclude that the rule applies retroactively" and that the Court "can be said to have 'made' a rule retroactive within the meaning of § 2244(b)(2)(A) only where the Court's holdings logically permit no other conclusion than that the rule is retroactive." *Id.* at 669.

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

The decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), which barred the execution of mentally retarded individuals, and *Roper v. Simmons*, 543 U.S. 551 (2005), which banned the death penalty for juveniles, have been applied retroactively because they "prohibit[] a certain category of punishment for a class of defendants because of their status or offense." *Horn v. Banks*, 536 U.S. 266, 272 (2002). Similarly, *Graham v. Florida*, 560 U.S. 48 (2010) "bar[red] the imposition of a sentence of life imprisonment without parole on a juvenile offender" – i.e. barred a category of punishment for a class of defendants. *In re Sparks*, 657 F.3d at 262.

The new rule announced in *Miller* is substantive, and therefore retroactive, because "it alters . . . the class of persons that the law punishes." *Schriro*, 542 U.S.

at 353. In this case, the Court's decision altered the class of persons eligible for mandatory life without parole sentences by excluding juvenile offenders from such statutes' reach.[3] Like the rules announced in *Atkins*, *Roper* and *Graham*, *Miller* "prohibit[s] a certain category of punishment" – mandatory life imprisonment without the possibility of parole – "for a class of defendants," – juvenile homicide offenders. *Horn*, 536 U.S. at 272.

Although the Supreme Court has occasionally denied retroactive application to cases dealing with what it termed "procedural" sentencing issues, these cases are distinguishable from the situation confronting Mr. Wang. *See, e.g., Beard v. Banks*, 542 U.S. 406, 411 (2004) (in which the Court considered the retroactivity of *Mills v. Maryland*, 486 U.S. 367 (1988), which invalidated capital sentencing schemes that require juries to disregard mitigating factors not found unanimously); *Lambrix v. Singletary*, 520 U.S. 518 (1997) (denying retroactive application of *Espinosa v. Florida*, 505 U.S. 1079 (1992), which held that weighing invalid aggravating circumstances in death penalty cases violates the Eighth Amendment); *Sawyer v.*

[3] Additionally, it is a fallacy to say that a mandatory aspect of a sentence is a procedure: the mandatory life without parole sentences invalidated by *Miller* both: 1) applied to a class of defendants (juveniles); and 2) served as an additional punishment by virtue of their mandatory imposition. Like *Graham*, which did not impose a categorical ban on life without parole sentences (but instead served as a categorical ban on the sentence for juveniles not convicted of homicide), *Miller* banned a particular punishment (mandatory life without parole) for a class of defendants (youth), because of those defendants' membership in that class.

Smith, 497 U.S. 227 (1990) (finding *Caldwell v. Mississippi*, 472 U.S. 320 (1985) did not fit within either *Teague* exception). In each instance, the defendant had the opportunity to receive a sentence other than death at the time of sentencing – albeit pursuant to procedures the Court later deemed unconstitutional. Here, in contrast, under the Federal Sentencing Guidelines in effect in this Circuit at the time, Petitioner Wang and those similarly situated had no opportunity to be considered for a sentence other than life without parole based on their youth as defined by the Supreme Court in *Miller* – which presents a very different scenario than the "procedural" cases cited above. *Miller* actually *expanded* the sentencing options available to juveniles by prohibiting mandatory life without parole and requiring that an *additional* sentencing option be put in place – a fundamental change in sentencing for juveniles that goes well beyond a change in process.

The United States may argue that the new rule in *Miller* is a procedural rather than substantive categorical guarantee, as *Miller* bars only the imposition of mandatory life without parole and still theoretically allows for the discretionary imposition of such a sentence. Indeed, *Miller* recognized, as previously held by *Harmelin v. Michigan*, 501 U.S. 957 (1991), that in the adult context, there is no substantive right against mandatory sentencing – "a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is mandatory." *Miller*, 132 S. Ct. at 2470. However, the Court rejected *Harmelin* in

the juvenile context, writing that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentence of juvenile offenders." *Id*. Instead, the Court likened its holding to *Roper* and *Graham*, decisions holding that "a sentencing rule permissible for adults may not be so for children." *Id*. By rejecting *Harmelin*, the Court implicitly held that mandatory life without parole is *categorically* cruel and unusual for juveniles – and thus "prohibit[ed] a certain category of punishment for a class of defendants because of their status or offense." *Penry, v. Lynaugh*, 492 U.S. 302, 330 (1989).

Additionally, in a series of decisions announced after Mr. Wang's case was decided, the Supreme Court consistently has recognized that a child's age is far "more than a chronological fact"; 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 Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992); Steinberg & 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 2026–2027 (reiterating that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds") ; *Miller*, 132 S. Ct. at 2465 ("[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 new interpretation of the Eighth Amendment qualifies as a substantive change under *Teague*.

The actual extent of an offender's culpability is a cornerstone of our criminal justice system and is central to ensuring the rationality of sentencing. *See Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). The Supreme Court has held that juveniles as a class have reduced culpability for their criminal conduct. Therefore, *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 including: (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." 132 S. Ct. at 2468. Prior to imposing a juvenile life without parole sentence, the sentencer must consider how these factors impact the juvenile's overall culpability. *Id.* at 2469. These factors involve a substantive assessment of the juvenile's culpability. Because *Miller* relies on this new, substantive interpretation of the Eighth Amendment, which accounts for a juvenile's reduced culpability, the decision must be applied retroactively.

As Petitioner has explained, at the time of Mr. Wang's sentencing, the district court judge was bound by the Sentencing Guidelines, and which did not permit consideration of the attributes of youth as articulated and now required under *Miller*. *SeeStinson v. United* States, 508 U.S. 36, 42 (1993); U.S. Sentencing Guidelines Manual §§ 5H1.1 (1991). Absent a specific finding that Mr. Wang is among the rare juveniles for whom life without parole is appropriate, the trial court must impose a sentence that provides him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S. Ct. at 2030. The Eighth Amendment "forbid[s] States from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Id*. at 2032.

Juveniles who receive non-life without parole sentences "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 2032. Mr. Wang therefore must have an opportunity to have his sentence reviewed in light of the new – substantive – developmental scheme.

2. A Violation Of The Eighth Amendment Must, By Definition, Apply Retroactively To Petitioners Who Have Exhausted Their Direct Appeals

Miller's holding that mandatory life without parole sentences violate the Eighth Amendment must be applied retroactively. The Supreme Court repeatedly has recognized that the Amendment's ban on cruel and unusual punishment "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). In determining what constitutes cruel and unusual punishment, the Court has considered the proportionality of the sentence imposed to the harm committed. The Court has emphasized the need for objective factors to determine the gravity of the offenses in comparison to the criminal sentences, in order to assess the constitutionality of those sentences based on "the evolving standards of decency that mark the progress of a maturing society." *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 959 (1991) (Kennedy, J., concurring) (citing *Rummel v. Estelle*, 445 U.S.

263, 274–75(1980)). *See also Trop v. Dulles*, 356 U.S. 86, 101 (1958). In *Miller*, the Court observed that:

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

132 S. Ct. at 2475. Unless *Miller* is applied retroactively, children who lacked sufficient culpability to justify the mandatory sentences they received before the case was decided will remain condemned to die in prison. *See id.* at 2460. Such a conclusion defies logic, and contravenes Eighth Amendment jurisprudence. *See, e.g.*, *Atkins*, 536 U.S. at 304 (banning the death penalty for "mentally retarded offenders" who the Court acknowledged were "categorically less culpable than the average criminal."); *In re Brown*, 457 F.3d 392, 396 (5th Cir. 2006) (holding that a successive petition that raised *Atkins* after the decision came down would be permitted in light of the Supreme Court's new rule).[4] 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

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

punishment[,]" "[i]t would also be cruel and unusual to apply that principle only to new cases." *People v. Williams*, 2012 WL 6206407 at *14. *See also Hill v. Snyder*, 2013 WL 364198 at *2 (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."). Any other interpretation of *Miller* would be incorrect, unjust, and immoral.

C. *Miller* Is A "Watershed Rule" Under *Teague*

As discussed above and by Petitioner Wang, *Miller* must be applied retroactively pursuant to the first *Teague* exception, as a substantive rule. Even assuming the rule is procedural, *Miller* must be applied retroactively pursuant to the 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 311. This occurs when the rule "requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.* at 307 (internal citations omitted). To be "watershed", a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding, and second, "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v.*

Bockting, 549 U.S. 406, 418 (2007) (internal citations omitted). The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials. *See*, *e.g.*, *Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it "necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] fate.") (internal citation omitted).

Miller satisfies both requirements. First, mandatorily imposing life without parole causes an "impermissibly large risk" of inaccurately imposing the harshest sentence available for juveniles. *Whorton*, 549 U.S. at 418. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth, which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464. *See also id.* at 2469 (explaining that imposing mandatory life without parole sentences "poses too great a risk of disproportionate punishment."). By requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding. *See id.* (requiring sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). Indeed, some state appellate

courts have adopted this analysis. *See, e.g., People v. Williams*, -- N.E.2d --, 2012 Il App (1st) 111145, 2012 WL 6206407, *14 (Nov. 27, 2012) (granting petitioner the right to file a 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.").

V. CONCLUSION

The Supreme Court's decision in *Miller* applies retroactively to cases on collateral review, like Petitioner Wang's. As detailed above, the Supreme Court rendered any contrary view on this matter baseless when it applied its decision in *Miller* to the companion case *Jackson v. Hobbs*. Further, 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 Honorable Court should hold that *Miller v. Alabama* provides Petitioner relief, based on Supreme Court jurisprudence and on the fact that it is a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" under 28 U.S.C. § 2244(b), and rule that Petitioner may file a successive federal habeas petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I, Marsha L. Levick, Esq., hereby certify under penalty of perjury that on June 27, 2013, I served a true and correct copy of Brief of Juvenile Law Center as Amicus Curiae On Behalf Of Petitioner by E-mail on the following parties:

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