IN THE
SUPREME COURT OF MISSOURI

No. SC94745

STATE OF MISSOURI,	)	
	)	Appeal from Greene County Circuit Court
Appellant,	)	Thirty-First Judicial Circuit
	)	The Honorable Calvin R. Holden, Judge
v.	)	
	)	Case No. 1331-CR04069-01
JERRI SMILEY,	)	
	)	
Respondent.	)	

Brief of Amici Curiae Juvenile Law Center, et al. Supporting Respondent Jerri Smiley

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **iii**

I. STATEMENT OF IDENTITY AND INTEREST **1**

II. JURISDICTIONAL STATEMENT **2**

III. STATEMENT OF FACTS **3**

IV. POINTS RELIED ON **4**

V. CONSENT OF THE PARTIES **5**

VI. SUMMARY OF ARGUMENT **6**

VII. ARGUMENT **8**

A. *Miller v. Alabama* Reaffirms The United States Supreme Court's Recognition That Children Are Categorically Less Culpable Than Adults **8**

B. The United States Supreme Court's Jurisprudence That Children Are Different Than Adults In Constitutionally Relevant Ways Is Not Limited To A Specific Crime or Sentence **11**

C. Because Of Adolescents' Reduced Culpability, Missouri's Armed Criminal Action Statute Cannot Be Mechanically Applied To Juvenile Offenders **14**

D. Incarcerating Juvenile Offenders In Adult Facilities Diminishes Public Safety And Places Youth At Risk Of Severe Harm **19**

VIII. CONCLUSION... 23

TABLE OF AUTHORITIE

Page(s)

Cases

Eddings v. Oklahoma,
455 U.S. 104 (1982) 12

Gallegos v. Colorado,
370 U.S. 49 (1962) 12

In re Gault,
387 U.S. 1 (1967) 12

Graham v. Florida,
560 U.S. 48 (2010) ..... *passim*

Haley v. Ohio,
332 U.S. 596 (1948) 12

Harmelin v. Michigan,
501 U.S. 957 (1991) 15

J.D.B. v. North Carolina,
131 S. Ct. 2394 (2011) 12, 13

May v. Anderson,

345 U.S. 528 (1953) 23

Miller v. Alabama,

132 S. Ct. 2455 (2012) ..... *passim*

Roper v. Simmons,

543 U.S. 551 (2005) ..... *passim*

Schall v. Martin,

467 U.S. 253 (1984) 12

State v. Lyle,

854 N.W.2d 378 (Iowa 2014) 17, 18

T.L.O. v New Jersey,

469 U.S. 325 (1985) 13

Thompson v. Oklahoma,

487 U.S. 815 (1988) 9

Vernonia School Dist. 47J v. Acton,

515 U.S. 646 (1995) 13

Statutes

Mo. Rev. Stat. § 571.015.1 (2014) 6, 8, 14

Other Authorities

Angela McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review*, 32 AM. J. PREVENTATIVE MED. S7 (2007) 20

Justice Statistics, *Mortality in Local Jails and State Prisons, 2000-2012 – Statistical Tables* (Oct. 2014) 21

Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457 (2012). 16, 19

National Prison Rape Elimination Commission, Report (June 2009) 21

Richard E. Redding, U.S. Justice Department, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention *Juvenile Transfer Laws: An Effective Deterrent to Delinquency* (2007) 20

Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* (2007) 21

I. STATEMENT OF IDENTITY AND INTEREST

The organizations and individuals submitting this brief, though representing diverse viewpoints and constituencies, share a common belief that children are fundamentally different than adults for the purposes of sentencing. Amici include juvenile and criminal justice advocacy groups, researchers and academics, and faith-based leaders. Amici understand that children who commit crimes – even the most serious and violent crimes – are less culpable than adults and more capable of rehabilitation and redemption. Amici therefore believe that all children facing adult sentences are entitled to individualized sentencings in which the sentencer must consider their reduced culpability. *See* Appendix for a list and brief description of all Amici.

II. JURISDICTIONAL STATEMENT

Amici incorporate by reference the jurisdictional statement in the Respondent's brief.

III. STATEMENT OF FACTS

Amici incorporate by reference the statement of facts in the Respondent's brief.

IV. POINTS RELIED ON

Amici incorporate by reference the points relied on in the Respondent's brief.

V. CONSENT OF THE PARTIES

Counsel for Appellant State of Missouri and Respondent Smiley have consented to the filing of this brief.

VI. SUMMARY OF ARGUMENT

The United States Supreme Court held 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), that children are different from adults in constitutionally significant ways and are categorically less culpable than adults. In spite of these differences, Missouri's Armed Criminal Action statute mandates that any person committing a felony with the use or aid of a dangerous instrument or deadly weapon, including juveniles tried as adults, "shall be punished by imprisonment . . . for a term of not less than three years." Mo. Rev. Stat. § 571.015.1 (2014). This statute, adopted to sanction adult offenders, gives the sentencer no opportunity to determine whether three years in prison is proportionate for a juvenile offender, in light of their decreased culpability and increased potential for rehabilitation. Indeed, the sentencer is precluded from considering any factors related to the youth's age and related characteristics, including their immaturity and impulsivity, family and home environment, the circumstances of the offense (including their participation and the role of peer pressure), their incompetencies in dealing with the adult criminal justice system, and, importantly, their potential for rehabilitation. Because incarcerating juvenile offenders actually *increases* recidivism and elevates the risk of harm to the youth, a sentencer's inability to craft an appropriate, individualized and constitutionally proportionate sentence is particularly problematic.

Striking the mandatory incarceration provision of the Armed Criminal Action statute would not preclude a sentencer from imposing a three-year prison sentence on a

juvenile; it would merely require that the sentencer consider the youth's age and reduced culpability in determining a proportionate sentence.

VII. ARGUMENT

Respondent Jerri Smiley was charged with first-degree assault and armed criminal action for an offense that occurred when she was 16. The Armed Criminal Action statute, a statute designed for adult criminal offenders, mandates a punishment of imprisonment for not less than three years. Mo. Rev. Stat. § 571.015.1 (2014). Because the Armed Criminal Action statute provides no opportunity for the sentencer to consider a youth's reduced culpability and increased potential for rehabilitation, this Court should hold the statute's mandatory penalty provision unconstitutional as applied to minors.

A. *Miller v. Alabama* Reaffirms The United States Supreme Court's Recognition That Children Are Categorically Less Culpable Than Adults

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 United States Supreme Court recognized that children are fundamentally different from adults and categorically less culpable than adult offenders.[1] Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes: [a]s compared to adults, juveniles have a "lack of maturity and an

[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.

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)).

The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, a sentence that may be proportionate for an adult may be constitutionally disproportionate when imposed on a juvenile offender. 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 possibility exists that a minor's character deficiencies will be reformed." *Id.*

Id.

In reaching these conclusions about a juvenile's reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological and neurological attributes of youth. The Court clarified in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the 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 that children are fundamentally different from adults, the Court held that, prior to imposing such a sentence on a juvenile offender, the sentencer must take into account the juvenile's reduced blameworthiness. *Miller*, 132 S. Ct. at 2460. Justice Kagan, writing for the majority in *Miller*, was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id*. (quoting *Graham*, 560 U.S. at 68, 74). The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id.* at 2464, which demonstrate fundamental

differences between juveniles and adults. The Court noted "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 2464-65 (quoting *Graham*, 560 U.S. at 68-69).

Importantly, in *Miller*, the Court found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." 132 S. Ct. at 2465. The Court instead emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id*. As a result, it held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467.

B. The United States Supreme Court's Jurisprudence That Children Are Different Than Adults In Constitutionally Relevant Ways Is Not Limited To A Specific Crime or Sentence

While *Miller, Graham and Roper* involved the constitutionality of the death penalty and life-without-parole sentences, the U.S. Supreme Court has made clear that the distinction between adolescents and adults is constitutionally relevant in a variety of contexts. As the Court in *Miller* noted, "'[o]ur history is replete with laws and judicial recognition that

children cannot be viewed simply as miniature adults.' . . . Indeed, it is the odd legal rule that does *not* have some form of exception for children." 132 S. Ct. at 2470 (citing *J.D.B. v. North Carolina,* 131 S. Ct. 2394, 2404 (2011)).

For decades, the U.S. Supreme Court has invoked the particular vulnerabilities and distinct characteristics of youth in its application of numerous constitutional provisions and protections to children. *See, e.g.*, *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding that admission of a 14-year-old's confession was unconstitutional where the juvenile was held for five days without access to parent, lawyer, or the court, noting that a child, "no matter how sophisticated," "cannot be compared with an adult" without a "callous disregard of [his] rights."); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (holding that the Due Process Clause barred the use of a juvenile's coerced confession, noting that "a mere child – an easy victim of the law . . . cannot be judged by the more exacting standards of maturity."); *In re Gault*, 387 U.S. 1, 52 (1967) (holding that juvenile offenders are constitutionally entitled to timely and adequate written notice, the privilege against self-incrimination, and the assistance of counsel in juvenile delinquency proceedings, noting that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (holding that the sentencer may not be prevented from considering mitigating evidence presented by the defendant as a basis for a sentence less than death, noting that "youth is more than a chronological fact. . . . [M]inors . . . are less mature and responsible than adults. . . . [T]he chronological age of a minor is itself a relevant mitigating factor of great weight."); *Schall v. Martin*, 467 U.S. 253, 255 (1984)

(upholding a state statute authorizing pretrial detention of an accused juvenile delinquent noting that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae."); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (holding that random urinalysis drug testing of student athletes is constitutionally permissible and noting that "unemancipated minors lack some of the most fundamental rights of self-determination"); *T.L.O. v New Jersey*, 469 U.S. 325, 340 (1985) (holding that vice principal's search of a high school student's purse did not violate the Fourth Amendment and noting "[i]t is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."); *J.D.B.*, 131 S. Ct. at 2403 (holding that courts must apply a "reasonable child" standard when determining whether a juvenile is in police custody for *Miranda* purposes and noting that "[t]he law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.").

The United States Supreme Court's most recent juvenile sentencing cases are thus consistent with the Court's long-held recognition that a youth's age "is far more than a chronological fact." *J.D.B.*, 131 S. Ct. at 2403 (citations and internal quotations omitted). "It is a fact that generates commonsense conclusions about behavior and perception" that are "self-evident to anyone who was a child once himself, including any police officer or judge" and are "what any parent knows – indeed, what any person knows – about children generally." *Id.* (citations and internal quotations omitted). The fact that Ms.

Smiley is facing neither a death nor life-without-parole sentence does not permit this Court to disregard U.S. Supreme Court precedent that children are different in constitutionally relevant ways.

C. Because Of Adolescents' Reduced Culpability, Missouri's Armed Criminal Action Statute Cannot Be Mechanically Applied To Juvenile Offenders

The U.S. Supreme Court's juvenile sentencing cases require individualized, non-mandatory sentencing schemes for juveniles that take into account the particular facts of the case and the juvenile's reduced culpability. Because Missouri's Armed Criminal Action statute, Mo. Rev. Stat. § 571.015.1 (2014), provides for a mandatory three-year minimum adult sentence of incarceration on juvenile offenders with no consideration of the youth's reduced culpability and individual characteristics, [2] that statute is constitutionally infirm as applied to juveniles. As Chief Justice Roberts remarked, concurring in *Graham*, "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them." 560 U.S. at 96 (Roberts, C.J., concurring).

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[2] Mo. Rev. Stat. § 571.015.1 (2014) provides that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, *shall be punished by imprisonment by the department of corrections and human resources for a term of not less than three years*." (emphasis added).

Because children are categorically less culpable than adults, imposing a mandatory adult sentence on a juvenile offender creates a substantial risk that the punishment will be disproportionate. *See, e.g., Miller*, 132 S. Ct. at 2469 ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.").[3] As Professor Martin Guggenheim has observed,

> [a] state sentencing statute that requires, regardless of the defendant's age, that a certain sentence be imposed based on the conviction violates a juvenile's substantive right to be sentenced based on the juvenile's culpability. When the only inquiry made by the sentencing court is to consult the legislature's mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate for

[3] Contrary to Appellant's assertion that this Court's proportionality analysis must be guided by *Harmelin v. Michigan*, 501 U.S. 957 (1991), *see* Appellant's Brief at 43-44, the U.S. Supreme Court has specifically found that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. . . . So if (as *Harmelin* recognized) 'death is different,' children are different too." *Miller*, 132 S. Ct. at 2470.

> a juvenile, for no other reason than it is appropriate for an adult, the Constitution requires more.

Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 490-91 (2012) (citing *Graham*, 560 U.S. at 88 (Roberts, C.J., concurring) ("[J]uvenile offenders are *generally* – though not necessarily in every case – less morally culpable than adults who commit the same crimes."). *See also Miller*, 132 S. Ct. at 2468 ("*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."). When sentencing a child, a sentencer must take into account the child's "diminished culpability and greater prospects for reform." *Id*. at 2464.

As compared with an adult offender, a juvenile offender's culpability is similarly diminished whether the youth is facing life without parole or a three-year period of mandatory incarceration. *See, e.g., Miller*, 132 S. Ct at 2465 ("[N]one of what [*Graham*] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific."). As the Iowa Supreme Court noted in striking down mandatory minimum sentences for juvenile offenders under their state Constitution:

> [I]f mandatory sentencing for the most serious crimes that impose the most serious punishment of life in prison without parole violates [the Iowa Constitution], so would mandatory sentences for less serious crimes imposing the less serious

> punishment of a minimum period of time in prison without parole. . . . The constitutional prohibition against cruel and unusual punishment does not protect all children if the constitutional infirmity identified in mandatory imprisonment for those juveniles who commit the most serious crimes is overlooked in mandatory imprisonment for those juveniles who commit less serious crimes. *Miller* is properly read to support a new sentencing framework that reconsiders mandatory sentencing for all children. Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults. This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes.

State v. Lyle, 854 N.W.2d 378, 401-02 (Iowa 2014), *reh'g denied* (Sept. 30, 2014), *as amended* (Sept. 30, 2014). The Iowa court further noted:

> [O]ur collective sense of humanity preserved in our constitutional prohibition against cruel and unusual punishment and stirred by what we all know about child development demands some assurance that imprisonment is actually appropriate and necessary. There is no other area of the law in which our laws write off children based only on a

> category of conduct without considering all background facts and circumstances.

Id. at 401.

A judge sentencing a juvenile therefore must have the opportunity to assess the juvenile's individual level of culpability, considering not only the juvenile's level of involvement in the crime, but also how the juvenile's age and development may have influenced his actions or involvement. The sentencer should consider, at a minimum, the factors the U.S. Supreme Court found relevant in *Miller*, including the juvenile's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences;" "the family and home environment that surrounds him;" "the circumstances of the [ ] offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" the "incompetencies associated with youth" in dealing with the adult criminal justice system; and "the possibility of rehabilitation [ ] when the circumstances most suggest it." 132 S. Ct. at 2468.

Accordingly, this Court should hold that the mandatory incarceration provision of Missouri's Armed Criminal Action statute is unconstitutional as applied to juveniles. As the Court in *Graham* noted, "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham*, 560 U.S. at 76.[4] A mandatory sentence that does not allow

[4] The U.S. Supreme Court's jurisprudence, of course, "does not rule out the possibility

the sentencer to account for the juvenile's individual level of culpability – including his actions, intent and expectations – is counter to the Court's reasoning in *Roper*, *Graham*, and *Miller*.

D. Incarcerating Juvenile Offenders In Adult Facilities Diminishes Public Safety And Places Youth At Risk Of Severe Harm

When determining an appropriate sentence for a youth tried and convicted in the adult system, a sentencer should have the opportunity to consider the offender's potential for rehabilitation. S*ee Miller*, 132 S. Ct. at 2468.[5] Unfortunately, incarcerating youth in

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that juveniles and adults may receive identical sentences but merely requires consideration of the differences between juveniles and adults prior to sentencing." Guggenheim, 47 HARV. C.R.-C.L. L. REV. at 499. "What is impermissible . . . however, is a legislature's choice to impose an automatic sentence on children that is the same sentence it imposes on adults for the same crime." *Id.* at 489.

[5] To the extent that mandatory incarceration provisions are justified based on a deterrence, rather than rehabilitative, theory, this justification is also suspect as applied to juvenile offenders. In *Roper*, the Court found that "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." 543 U.S. at 571. *See also Graham*, 560 U.S at 72 (finding that "juveniles . . . are less likely to take a possible punishment into consideration when making decisions.").

adult facilities often diminishes, rather than enhances, the prospects for rehabilitation, and therefore decreases public safely. For example, one study found that, juveniles transferred to the adult system:

> were 39% more likely than [juveniles who remained in the juvenile justice system] to be re-arrested on a violent offense. *This effect (greater violent recidivism among transferred juveniles) was magnified for sentences that included incarceration*. For example, *among transferred juveniles receiving prison sentences of a year, there was a 100% greater rate of violent recidivism, compared with those retained* [in the juvenile system]."

Angela McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System*: *A Systematic Review*, 32 AM. J. PREVENTATIVE MED. S7, S13 (2007) (emphasis added), *available at* http://www.thecommunityguide.org/violence/mcgowanarticle4.pdf. Accordingly, mandating the incarceration of juvenile offenders convicted of certain offenses may diminish both rehabilitative and public safety goals.

Incarcerating juvenile offenders in adult facilities also imposes significant harms on children. Juvenile offenders in adult facilities are at high risk for being targets of physical and sexual violence. *See* Richard E. Redding, U.S. Justice Department, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention *Juvenile Transfer Laws: An Effective Deterrent to Delinquency*, at 7 (2007), *available at*

https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf. Youth in adult facilities are five times more likely to be sexually assaulted while incarcerated and almost two times more likely to be assaulted with a weapon by inmates or beaten by staff than youth in the juvenile justice system. *Id*. The National Prison Rape Elimination Commission found that "[m]ore than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse." National Prison Rape Elimination Commission, Report, at 18 (June 2009), *available at* http://www.ncjrs.gov/pdffiles1/226680.pdf. Children incarcerated in adult facilities also experience a higher risk of suicide; research estimates that children incarcerated in adult facilities are up to thirty-six times more likely to commit suicide than children in juvenile facilities. Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, at 4 (2007). Notably, "[f]rom 2001 to 2012, the suicide rate for prisoners age 17 or younger was nearly two times higher than for older inmates." Margaret E. Noonan & Scott Ginder, U.S. Department of Justice, Bureau of Justice Statistics, *Mortality in Local Jails and State Prisons, 2000-2012 – Statistical Tables*, at 3 (Oct. 2014), *available at* http://www.bjs.gov/content/pub/pdf/mljsp0012st.pdf.

The mandatory incarceration provision of Missouri's Armed Criminal Action statute, however, prevents a sentencer from considering this data and the particular characteristics of a juvenile offender in determining whether rehabilitation, public safety, and the safety of the youth is better promoted through incarceration or through community-based interventions. Therefore, applying mandatory incarceration provisions to juvenile offenders not only disregards established U.S. Supreme Court jurisprudence

and adolescent development research, but also makes little policy sense.

VIII. CONCLUSION

As Justice Frankfurter wrote in *May v. Anderson*, "[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." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). When trying and sentencing children in the adult criminal justice system, courts must take account of the unique developmental characteristics of adolescents and their lesser culpability.

The "common sense" fact that juveniles are less culpable than adults, see *Miller*, 132 S. Ct. at 2464, is at odds with Missouri's Armed Criminal Action statute's mandatory incarceration provision. Requiring a juvenile, no matter the facts of the offense or her individual culpability, to serve the same mandatory minimum three-year incarceration term as an adult convicted of the same offense contravenes current law and research. Amici urge the Court to give judges the discretion to consider a child's youth in determining the child's criminal responsibility and culpability. For the foregoing reasons, Amici respectfully request that this Court uphold the circuit court's determination that the penalty provision of that statute is unconstitutional as applied to juvenile offenders.

Respectfully,

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Dated: August 24,2015

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), includes the information required by Rule 55.03 and that the brief contains 4,132 words (according to the word processing software used to prepare it).

/s/ Marsha L. Levick
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DATED: August 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Supreme Court of Missouri through the Court's electronic filing system. I further certify that the following have also been served through the Court's electronic filing system:

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