IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOEL IRA,

Defendant-Appellant,

No. S-1-SC-35657

v.

JAMES JANECKA, Warden,
Lea County Correctional Facility,
Hobbs, New Mexico,

Plaintiff-Appellee.

SUPREME COURT OF NEW MEXICO
FILED
DEC 28 2016

BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

On Writ of Certiorari to the Twelfth Judicial District Court
for the State of New Mexico from the denial of Habeas Corpus
The Honorable Jerry H. Ritter, Jr.,
Twelfth Judicial District Judge, Presiding
No. JR-1995-00142

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

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.

SUMMARY OF PROCEEDINGS

Amicus adopt the Summary of Proceedings as laid out in the brief of the Defendant-Appellant.

SUMMARY OF ARGUMENT

In 2010, the U.S. Supreme Court held in *Graham v. Florida*, 560 U.S. 48 (2010) that life without parole sentences for juvenile offenders committing

[1] Pursuant to Rule 12-215(B) NMRA, counsel of record received timely notice of the intent to file this brief. Pursuant to Rule 12-215(F) NMRA, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amicus,* their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

nonhomicide offenses violate the Eighth Amendment's ban on cruel and unusual punishments. The Court explained: "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." *Id*. at 79. *See also Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 720 (2016). A sentence that provides no "meaningful opportunity to obtain release" is unconstitutional. *Graham*, 560 U.S. at 76.

Defendant-Appellant, Mr. Joel Ira, was convicted of criminal sexual penetration in the first degree for offenses that took place when he was between the ages of 14 and 15. He was sentenced to 91.5 years in prison, and must serve at least 45 years before becoming eligible for parole. As Mr. Ira was convicted of a non-homicide crime and sentenced to the functional equivalent of life without parole, he has been deprived of a "meaningful opportunity to obtain release" and his sentence is unconstitutional, despite being labeled as a term-of-years sentence. This Court should follow *Graham*'s mandate and hold that Mr. Ira's sentence is unconstitutional and remand for a new sentencing hearing.

ARGUMENT

I. CHILDREN ARE CATEGORICALLY LESS DESERVING OF THE HARSHEST FORMS OF PUNISHMENT

The Supreme Court has consistently recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). *See also Montgomery v. Alabama*, 136 S. Ct. 718 (2016).

In *Graham*, the Court found that juveniles could not be sentenced to mandatory life sentences without the possibility of parole for nonhomicide offenses. 560 U.S. at 81 (citing *Roper v. Simmons*, 543 U.S. at 572). The Court expanded on this in *Miller v. Alabama*, 132 S. Ct. 2455, banning mandatory life without parole sentences for juvenile *homicide* offenders. *Miller* found that, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*." 132 S. Ct. at 2469 (emphasis added).

A. Research In Adolescent Development And Neuroscience Confirms That Children Must Not Be Sentenced To Life Without Parole

Relying on *Roper*, the Supreme Court in *Graham* cited three essential characteristics that distinguish youth from adults for culpability purposes: "[a]s

compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *See also Miller*, 132 S. Ct. at 2464; *Montgomery*, 136 S. Ct. at 733.

In reaching these conclusions about a juvenile's reduced culpability, the Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. *Graham*, 560 U.S. at 68. The Supreme Court confirmed in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* For example,

> the ability to resist impulses and control emotions, the ability to gauge risks and benefits as an adult would, and the ability to envision the future consequences of one's actions—even in the face of environmental or peer pressures—are critical components of social and emotional maturity, necessary in order to make mature, fully considered decisions.

Brief for the American Psychological Ass'n & American Psychiatric Ass'n, et al. as Amici Curiae Supporting Petitioner at 12, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter APA Amicus]. Studies have shown that "adolescents, including 17-year-olds, scored significantly lower than adults on measures of 'temperance,' which included 'impulse control' and 'suppression of aggression,'" and that impulsivity declined from ages 10 to 30, with "'gains in

impulse control occur[ring] throughout adolescence' and into young adulthood." APA Amicus, *supra* at 9. Adolescents also have a different risk-reward analysis than adults because they cannot maturely evaluate the costs and benefits of their actions. APA Amicus, *supra* at 9-10. This may make them more likely to engage in criminal activity. APA Amicus, *supra* at 11.

Consistent with their inability to weigh risks, adolescents are not able to foresee the consequences of their actions. APA Amicus, *supra* at 9. Even older adolescents "who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity." APA Amicus, *supra* at 9. Although adolescents may have some reasoning skills that approximate that of adults, sound judgment requires both cognitive and social and emotional skills, and social and emotional skills develop later than cognitive skills. APA Amicus, *supra* at 14. Adolescents lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future. APA Amicus, *supra* at 14-15.

B. Life Without Parole Sentences Are Developmentally Inappropriate And Constitutionally Disproportionate When Applied To Juveniles Who Are Amenable To Change

The Supreme Court's holding in *Graham* rested largely on the incongruity of imposing a final and irrevocable penalty that afforded no opportunity for release on

an adolescent who had capacity to change and grow. *See Graham*, 560 U.S. at 75. The Supreme Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

Id. Graham acknowledged that the salient characteristics of youth—the lack of maturity, evolving character, vulnerability and susceptibility to negative influences and external pressure—would make it "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573). Accordingly, the Court recognized that "juvenile offenders cannot with reliability be classified among the worst offenders," and that although "[a] juvenile is not absolved of responsibility for his actions…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. 835 (1988) (plurality opinion)). Thus, the Supreme 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.

II. PETITIONER'S SENTENCE IS THE FUNCTIONAL EQUIVALENT OF A LIFE WITHOUT PAROLE SENTENCE AND THEREFORE IS UNCONSTITUTIONAL

A. A Sentence That Precludes A "Meaningful Opportunity To Obtain Release" Is Unconstitutional Regardless Of Whether It Is Labeled "Life Without Parole" Or Is Comprised Of Consecutive Terms

Mr. Ira's consecutive sentences total 91½ years, meaning that he must serve a minimum of 45 years and 9 months before he is even eligible to petition for parole. A majority of courts agree that when imposed on juveniles, such long term-of-years sentences constitute *de facto* life without parole, even if they are consecutive-run sentences for multiple offenses, and as such, that *Graham* and *Miller*'s analysis extend to those serving such sentences. For example, the Ohio Supreme Court recently struck down a young man's sentence of 112 years as a functional life without parole sentence:

> It is consistent with Graham to conclude that a term-of-years prison sentence extending beyond a juvenile defendant's life expectancy does not provide a realistic opportunity to obtain release before the end of the term. Graham decried the fact that the defendant in that case would have no opportunity to obtain release "even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." Id. at 79. Certainly, the court envisioned that any nonhomicide juvenile offender would gain an opportunity to obtain release sooner than after three quarters of a century in prison. Graham is less concerned about how many years an offender serves in the long term than it is about the offender having an opportunity to seek release while it is still meaningful.
>
> We determine that pursuant to Graham, a sentence that results in a juvenile defendant serving 77 years before a court could for the first

> time consider based on demonstrated maturity and rehabilitation whether that defendant could obtain release does not provide the defendant a meaningful opportunity to reenter society and is therefore unconstitutional under the Eighth Amendment.

State v. Moore, No. 2016-Ohio-8288, slip op. at 23 (Ohio 2016).

The Florida Supreme Court similarly found that a consecutive 90-year sentence imposed on a juvenile for eight separate felony offenses constituted a *de facto* life without parole sentence. *Henry v. State*, 175 So. 3d 675, 676 (Fla. 2015). *See also State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (fourteen parole-eligible life sentences and a consecutive 92 years in prison, creating a minimum of 100 years, unconstitutional under *Graham*); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (three attempted murder counts constituting a 110-years-to life sentence are *de facto* life without parole); *People v. Rainer*, No. 10CA2414, 2013 WL 1490107, at *1 (Colo. App. 2013) (aggregate 112-year sentence violated *Graham*'s prohibition of life sentences for nonhomicide offenses despite four counts), *cert. granted*, No. 13SC408, 2014 WL 7330977 (Colo. Dec. 22, 2014); *State v. Riley*, 110 A.3d 1205, 1213-14 (Conn. 2015) (aggregate 100-year sentence for a total of four offenses, including murder, was *de facto* life sentence); *People v. Nieto*, 52 N.E.3d 442, 447, 455 (Ill. App. Ct. 2016) (three consecutive sentences for multiple homicide and nonhomicide crimes created a *de facto* life sentence in violation of *Miller*).

The Supreme Court's Eighth Amendment jurisprudence has clarified that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. The Court took this commonsense and equitable approach in *Sumner v. Shuman*, 483 U.S. 66 (1987), noting that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." 483 U.S. at 83. *Graham* defines a life without parole sentence as one that does not give the offender "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" 560 U.S. at 75. While this Court has not squarely addressed whether such a high term-of-years should be considered a *de facto* life sentence for those convicted as juveniles, other jurisdictions have made such determinations with even lower minimum terms.

A federal district court in Pennsylvania vacated a sentence in which a 15-year-old offender would not be parole-eligible until age 83 noting that the

> Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years rather than a life sentence if that term-of-years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime. This Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label.

Thomas v. Pennsylvania, 2012 WL 6678686 at *2 (E.D. Pa. 2012)**.** The Iowa Supreme Court also held that a 52½ year sentence, although not labeled "life without parole," was the functional equivalent of life imprisonment, triggering the protections established by *Miller*. *State v. Null*, 836 N.W.2d 41, 71-74 (Iowa, 2013). The Iowa Supreme Court rejected the state's argument that a "juvenile's potential future release in his or her late sixties after a half century of incarceration" was not barred by *Miller*. *Id.* at 71. *See also Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014) (an aggregate sentence of 45 years was the *de facto* equivalent of a life sentence without parole).

Furthermore, the Connecticut Supreme Court found that one defendant's 50-year sentence without the possibility of parole was the functional equivalent of a life sentence and, thus, his sentencing must comport with *Miller*. *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1035 (Conn. 2015). The court evaluated the sentence by reviewing life expectancy data, which shows that such a lengthy sentence will result in the likelihood that the individual will die in prison.

> We begin by observing that recent government statistics indicate that the average life expectancy for a male in the United States is seventy-six years. United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Reports, Vol. 62, No. 7 (January 6, 2014), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr 62_07.pdf (last visited May 26, 2015). This means that an average male juvenile offender imprisoned between the ages of sixteen and eighteen who is sentenced to a fifty-year term of imprisonment would be released from prison between the ages of sixty-six and sixty-eight, leaving eight to ten years

> of life outside of prison. Notably, this general statistic does not account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison. *See, e.g.*, Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited May 26, 2015) (concluding that Michigan juveniles sentenced to natural life sentences have average life expectancy of 50.6 years); N. Straley, "*Miller*'s Promise: Re–Evaluating Extreme Criminal Sentences for Children," 89 Wn. L.Rev. 963, 986 n. 142 (2014) (data from New York suggests that "[a] person suffers a two-year decline in life expectancy for every year locked away in prison"); see also *United States v. Taveras*, 436 F.Supp.2d 493, 500 (E.D.N.Y.2006) (acknowledging that life expectancy within federal prison is "considerably shortened"), vacated in part on other grounds sub nom. *United States v. Pepin*, 514 F.3d 193 (2d Cir.2008); *State v. Null*, supra, 836 N.W.2d at 71 (acknowledging that "long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population"). Such evidence suggests that a juvenile offender sentenced to a fifty-year term of imprisonment may never experience freedom.

Id. at 1046.

The federal government has used life expectancy data in recognizing that a sentence of under 40 years is the functional equivalent of a life sentence. The United States Sentencing Commission defines a life sentence as 470 months (or just over 39 years), based on average life expectancy of those serving prison sentences. *See, e.g., United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007); U.S. Sentencing Commission Quarterly Data Report (Through June 30, 2016) at Figure E, n.1, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-

updates/USSC_Quarter_Report_3rd_16_Final.pdf.pdf (last accessed December 23, 2016). The average life expectancy for an adult serving a life sentence in Michigan, for example, is 58.1 years. Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancy Data for Youth Serving Natural Life* Sentences, (2012-2015) p. 2, http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited December 23, 2016). The life expectancy for juvenile lifers is even shorter, dropping almost a decade to 50.6 years. *Id.*

Mr. Ira will be incarcerated for at least 45 years before he is even eligible to be considered for parole. Labels and semantics cannot obscure the fact that such a sentence amounts to a *de facto* life without parole sentence. As the Iowa Supreme Court noted in vacating mandatory 60-year sentences for juvenile homicide offenders pursuant to *Miller* and *Graham*, "it is important that the spirit of the law not be lost in the application of the law." *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013). Courts cannot circumvent the categorical ban on mandatory life without parole for juveniles simply by choosing to impose consecutive term-of-years sentences—here 91½ years—instead of actual "life without parole." Looking at the Petitioner's sentences as separate terms and ignoring the fact that they run consecutively allows courts that aim to foreclose a youth's eventual release to frustrate *Graham*'s constitutional requirements. The intent of the sentencing judge

was to impose the equivalent of a life without parole sentence on Petitioner, as he noted during the original sentencing hearing:

> [t]o assure that result, (of protecting society from the Petitioner 'until such time as his physical ability to cause harm is less than the likelihood that he would attempt it') in consideration of the crowded conditions of our prisons and the ability of the Department of Corrections to grant credit of up to half of an adult sentence in order to relieve overcrowding, the Court must impose twice what it intends to be the effective term of termination.

Ex. C, Brief for the Petitioner at 220, State v. Joel Ira, 132 N.M. 8 (2002) (No. 21,375). This is the very circumvention of constitutional protections that must be prevented by treating functional life sentences as life without parole under *Miller*. Because Mr. Ira's sentence clearly does not provide him with a meaningful opportunity to re-enter society during his natural life, it is the equivalent of life without parole and thus unconstitutional.

B. Scientific Research On Recidivism Of Juvenile Offenders Supports Early And Regular Review Of Sentences

For an opportunity for release to be "meaningful" under *Graham*, review must begin long before a juvenile reaches old age. Providing an opportunity for release only after decades in prison denies these individuals "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. *See, e.g.*, *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (striking down a 35-year sentence that would render the juvenile eligible for parole at age 52 because it violated Miller by "effectively depriv[ing] [him] of any

chance of an earlier release and the possibility of leading a more normal adult life").

As noted *supra* § I.A, the Supreme Court has recognized that "[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). In a study of juvenile offenders, "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*. (2014) Chicago, IL: MacArthur Foundation, p. 3, *available at* http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf.

Most juvenile offenders would no longer be a public safety risk once they reached their mid-twenties, let alone their thirties, forties, fifties, or sixties. Because most juveniles are likely to outgrow their antisocial and criminal behavior as they mature into adults, review of the juvenile's maturation and rehabilitation

should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g., Research on Pathways to Desistance: December 2012 Update*, Models for Change, p. 4, *available at* http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts. The study also found that "it is hard to determine who will continue or escalate their antisocial acts and who will desist," as "the original offense . . . has little relation to the path the youth follows over the next seven years.").

Consistent with this research, the Florida Supreme Court recently noted that their jurisprudence made it

> clear that we intended for juvenile offenders, who are otherwise treated like adults for purposes of sentencing, to retain their status as juveniles in some sense. . . . In other words, we have determined . . . that juveniles who are serving lengthy sentences are entitled to periodic judicial review to determine whether they can demonstrate maturation and rehabilitation.

Kelsey v. State, No. SC15-2079, WL 7159099, at *4 (Fla. Dec. 8, 2016). The court discussed its earlier decision in *Henry v. State*, 175 So. 3d 675 (Fla. 2015), where it held that "*Graham* was not limited to certain sentences but rather was intended to insure that 'juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a meaningful opportunity for early release based on a demonstration of maturity and rehabilitation.'" *Kelsey* at *3.

Early and regular assessments of juveniles would enable the reviewers to evaluate any changes in the juvenile's maturation, progress, and performance, as well as provide an opportunity to confirm that the juvenile is receiving vocational training, programming, and treatment that foster rehabilitation. *See, e.g.*, *Graham*, 560 U.S. at 74 (noting the importance of "rehabilitative opportunities or treatment" to "juvenile offenders, who are most in need of and receptive to rehabilitation"). A meaningful opportunity for release must mean more than simply release to die outside the prison walls: it should provide opportunity to live a meaningful life in the community and meaningfully contribute to society.

C. Whether A Sentence Provides A Meaningful Opportunity For Release Is Not Contingent Solely On Whether The Sentence Exceeds A Juvenile's Life Expectancy

Mr. Ira was incarcerated at 16 years old and must serve at least 45.75 years before he becomes eligible for parole. Assuming *arguendo* that Mr. Ira would be granted parole on his first time in front of the board and be released on the day he became eligible, after having served 45 years and 9 months, he would be nearly 62 years old before attaining freedom. It is more likely, however, that Mr. Ira would serve 45 years and 9 months and then a parole hearing would be scheduled, delaying any possible release. The research demonstrating that the life expectancy of juvenile lifers is significantly lower than the average male in the United States at 50.6 years leads to the conclusion that Mr. Ira is quite likely guaranteed to die in

prison. Campaign for the Fair Sentencing of Youth, *supra*, at 2. At best, Mr. Ira will only live a decade or so outside of prison. Thus, while a sentence that exceeds a juvenile offender's life expectancy *clearly* fails to provide a meaningful opportunity for release, whether an opportunity for release is *meaningful* should not solely depend on anticipated dates of death.

In *State v. Null*, the Iowa Supreme Court was explicit that whether a sentence complied with *Graham* was not dependent on an analysis of life expectancy or actuarial tables. The court stated:

> [W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Null, 836 N.W.2d at 71-72 (quoting *Graham*, 560 U.S. at 75).

III. MR. IRA'S SENTENCER FAILED TO CONSIDER HIS AGE AND AGE-RELATED CHARACTERISTICS WHEN SENTENCING HIM TO LIFE WITHOUT PAROLE, IN VIOLATION OF THE PROCEDURAL PROTECTIONS REQUIRED BY SUPREME COURT JURISPRUDENCE

While the Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life, it does prohibit States from "making the judgment at the *outset* that

[juvenile nonhomicide] offenders never will be fit to reenter society." *Graham.* 560 U.S. at 75 (emphasis added). When the sentencing judge ordered that Mr. Ira serve 91½ years in prison without properly considering the mitigating factors of youth, he improperly allowed the penological goal of incapacitation to override all other considerations and foreclosed Mr. Ira's opportunity to demonstrate, through growth and maturity, that he was fit to rejoin society. *See id*. at 73 ("A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."). Though, like Graham, Mr. Ira may have required separation from society for some time to prevent what the trial court saw as an "escalating pattern of criminal conduct," there was no evidence presented to suggest that he would be a risk to society for the rest of his life. *See id*.

Miller held that prior to imposing a discretionary sentence of life without parole (or its functional equivalent) upon a juvenile, the court must "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. Reiterating that children are fundamentally different from adults, the Court held that a sentencing scheme that mandates life without parole for juvenile offenders violates the Eighth Amendment and that the sentencer must consider the juvenile's

"lessened culpability," "greater 'capacity for change,'" and individual characteristics before imposing this harshest available sentence. *Miller*, 132 S. Ct. at 2460 (quoting *Graham*, 560 U.S. at 68, 74).

Thus, *Miller* adopted a presumption against imposing life without parole sentences on juveniles. While the Supreme Court has left open the possibility that a trial court could impose a life without parole sentence on a child, the Court noted that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." *Miller*, 132 S. Ct. at 2469. To overcome the presumption, the trial court must make specific findings demonstrating why the life without parole sentence is appropriate. *Miller* set forth specific factors for the sentencer to examine before imposing a discretionary sentence of life without parole: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* 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.

A. Youth Must Be Considered As A Mitigating Factor In Sentencing

In its recent decision remanding several cases for resentencing consistent with *Montgomery*, the Supreme Court reiterated that merely considering a defendant's age and associate characteristics in a checklist fashion is not sufficient. *Tatum v. Arizona*, 137 S. Ct. 11 (2016).[2] "*Miller* 'announced a substantive rule of constitutional law' . . . [t]hat draws 'a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption' and allows for the possibility 'that life without parole could be a proportionate sentence [*only*] for the latter kind of juvenile offender.'" *Id.* at 12 (quoting *Montgomery*, 136 S. Ct. at 734) (emphasis added*).* As Justice Sotomayor noted in her concurrence, the cases addressed in *Tatum* required remand because "none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Id.* (Sotomayor, J., concurring) (citing *Montgomery*, 136 S. Ct. at 734).

In at least four states, decisions interpreting *Miller* have turned on whether the trial court considered youth as a mitigating factor. The Ohio Supreme Court held that a pre-*Miller* discretionary life without parole sentence imposed on a

[2] The Court noted that the *Tatum* "opinion also applies to No. 15–8842, *Purcell* v. *Arizona*; No. 15– 8878, *Najar* v. *Arizona*; No. 15–9044, *Arias* v. *Arizona*; and No. 15– 9057, *DeShaw* v. *Arizona*." *Tatum*, 137 S. Ct. at 11 n.1.

juvenile homicide offender violated *Miller* because there was no evidence that the trial court treated the defendant's youth as a mitigating factor. *State v. Long*, 8 N.E.3d 890, 898-99 (Ohio 2014).

> Because the trial court did not separately mention that [the defendant] was a juvenile when he committed the offense, we cannot be sure how the trial court applied [the] factor [of his youth]. Although *Miller* does not require that specific findings be made on the record, it does mandate that a trial court *consider as mitigating* the offender's youth and its attendant characteristics before imposing a sentence of life without parole. For juveniles, like [the defendant], a sentence of life without parole is the equivalent of a death penalty.

Id. (citing *Miller*, 132 S. Ct. at 2463). Similarly, the South Carolina Supreme Court found that

> *Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution. . . . *Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an *affirmative requirement that* ***courts*** fully explore the impact of the defendant's juvenility on the sentence rendered.

Aiken v. Byars, 765 S.E.2d 572, 576-77 (S.C. 2014) (emphasis added). The Court concluded that "*Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an *individualized hearing* where the mitigating hallmark features of youth are fully explored." *Id.* at 578 (emphasis added).

In *State v. Riley*, 110 A.3d 1205 (Conn. 2015), the Connecticut Supreme Court held that "the dictates set forth in *Miller* may be violated even when the

sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate." *Id.* at 1213. The court concluded that

> *Miller* does not stand solely for the proposition that the eighth amendment [sic] demands that the sentencer have discretion to impose a lesser punishment than life without parole on a juvenile homicide offender. Rather, *Miller* logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court *must* consider the offender's "chronological age and its hallmark features" as mitigating against such a severe sentence.

Id. at 1216 (quoting *Miller*, 132 S. Ct. at 2468).

Finally, the California Supreme Court vacated juvenile life without parole sentences under a discretionary sentencing scheme in which life without parole was the presumptive sentence. *People v. Gutierrez*, 324 P.3d 245, 270 (Cal. 2014). The court held that "the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller* and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.'" *Id.* at 269 (citing *Miller*, 132 S. Ct. at 2465).

Given the Supreme Court's jurisprudence establishing that juveniles are developmentally different and less mature than adults, a sentencer must presume that a juvenile homicide offender lacks the maturity, impulse-control, and decision-making skills of an adult. Indeed, it would be the unusual juvenile whose participation in criminal conduct is not closely correlated with his immaturity,

impulsiveness, and underdeveloped decision-making skills. Therefore, absent expert testimony establishing that a particular juvenile's maturity and sophistication were more advanced than a typically-developing juvenile, a sentencer must presume the juvenile offender lacks adult maturity, and treat this lack of maturity as a factor counseling against the imposition of a life without parole sentence.

B. Neither Youth, Nor Any Other Mitigating Factor, Was Considered In Mr. Ira's Sentencing

Mr. Ira's sentencing hearing was similar to the processes Justice Sotomayor admonished in *Tatum* and the corresponding cases. With regard to Mr. Ira's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" the sentencing judge barely noted Mr. Ira's age beyond mentioning his date of birth and that he was "a young man of average intellectual and average or greater physical development." Ex. C, Petition for Writ of Certiorari at 215, *Ira*, 132 N.M. 8 (No. 21,375). *See Tatum*, 137 S. Ct. at 12 ("[T]he sentencing judge identified as mitigating factors that the defendant was '16 years of age' and 'emotionally and physically immature.' He said no more on this front." (Sotomayor, J., concurring) (citations omitted)). The court used Mr. Ira's average development, coupled with the fact that he was neither developmentally nor mentally disabled, to determine that the factors weighed "in favor of requiring [Mr. Ira] to accept adult consequences for his conduct." Ex. C, Petition for Writ of

Certiorari at 215, *Ira*, 132 N.M. 8 (No. 21,375). Though the sentencing judge acknowledged that "[t]he court should consider the sophistication and maturity of the child as determined by consideration of the child's home, environmental situation, emotional attitude, and pattern of living," arguably the attendant immaturity of Mr. Ira's age and other aspects of his troubled home life were considered as aggravating factors. *Id.*, *see Tatum*, 137 S. Ct. at 12 ("[The sentencing judge] minimized the relevance of Purcell's troubled childhood, concluding that 'this case sums up the result of defendant's family environment: he became a double-murderer at age 16. Nothing more need be said.'").

Directly contradicting all the science that *Roper*, *Graham*, *Miller*, and *Montgomery* are based on, the court stated, "each human being must develop these tools at a young age, for personalities become fixed before the teenage years and it is very hard, if not impossible, to implant a conscience in a sixteen-year-old where none existed before." Ex. C, Petition for Writ of Certiorari at 216, *Ira*, 132 N.M. 8 (No. 21,375). *See also Roper*, 543 U.S. at 553 ("Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. Juveniles' susceptibility to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Their 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. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."); *Graham*, 560 U.S. at 68-69 ("As 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.'. . . No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. . . . 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. 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. 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.'"); *Miller*, 132 S. Ct. at 2458 ("And because a child's character is not as 'well formed' as an adult's, his traits are 'less fixed' and his actions are less likely to be 'evidence of irretrievabl[e] deprav[ity].'").

When considering Mr. Ira's "home and family life" the court seemingly ignored the mitigating factors raised through testimony of multiple witnesses. The court heard from ten witnesses during the sentencing hearing, including psychologists, probation officers, police officers, social workers, program administrators and parents. Petition for Writ of Habeas Corpus at 9-15, *Ira v. Janecka*, Cause No. JR-1995-00142 (Dist. Ct. of Otero Cnty. Aug. 4, 2014). According to five different witnesses, Mr. Ira suffered physical abuse at the hands of his stepfather. Petition for Writ of Habeas Corpus, *supra* at 9-15. However, after listening to all the testimony, the only statement regarding Mr. Ira's family and home environment that the sentencing court made was "[c]ertainly, Joel Ira's lifestyle was not one to be envied, and it appears that he either lacked or ignored the kind of intensive guidance that every young person deserves." Ex. C, Petition for Writ of Certiorari at 215, *Ira*, 132 N.M. 8 (No. 21,375). The failure of the sentencing judge to conduct any meaningful analysis of the effects of Mr. Ira's home environment underscores how inadequately the sentencing judge considered the relevant factors.

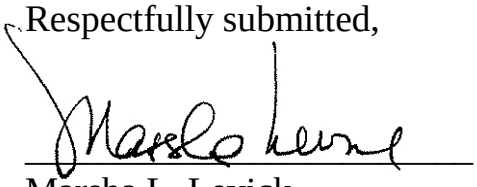
After a "day of extraordinary testimony by some of the most experienced and qualified experts in the field of the juvenile corrections and psychotherapy," Ex. C, Petition for Writ of Certiorari at 218, *Ira*, 132 N.M. 8 (No. 21,375).4, the sentencing judge seemingly weighed the testimony of only one doctor heavily,

finding that a juvenile sentence was inappropriate, as "there is not the slightest credible evidence that Joel Ira will be less of a threat to his former victims or society at large after five years in CYFD custody." Ex. C, Petition for Writ of Certiorari at 218, *Ira*, 132 N.M. 8 (No. 21,375). When the trial court originally determined that Mr. Ira would serve consecutive terms totaling to 108 years, the mitigating factors required by *Miller*, including evidence of familial instability and physical abuse experienced by the Petitioner, were not properly considered. Ex. C, Petition for Writ of Certiorari at 215, *Ira*, 132 N.M. 8 (No. 21,375). When the Court of Appeals reversed the decision of the trial court and remanded the case for a new sentencing, the court again failed to provide the individualized and youth-focused sentencing hearing required by *Miller* and resentenced the petitioner to consecutive terms totaling 91½ years. Petition for Writ of Habeas Corpus, *supra* at 29-33. Because the trial court did not consider the differences between juveniles and adults, including "lessened culpability" and "greater 'capacity for change,'" *Miller*, 132 S. Ct. at 2460, before sentencing him to functional life without parole, Mr. Ira's sentence is unconstitutional and should be vacated.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court grant the petition for *writ of certiorari*.

Respectfully submitted,



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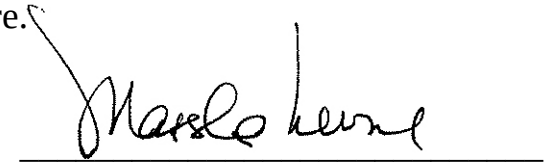
Dated: December 27, 2016

CERTIFICATE OF COMPLIANCE

I, Marsha L. Levick, do hereby certify this 27th day of December 2016, that the attached Brief of *Amicus Curiae* Juvenile Law Center complies with New Mexico Rule of Appellate Procedure 12-213(F) because it is written in fourteen-point Times New Roman font and contains 6,615 words in the body of the brief, as calculated by Microsoft Word 2016 software.



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CERTIFICATE OF SERVICE

I, Marsha L. Levick, do hereby certify, this 27th day of December 2016, pursuant to New Mexico Rule of Appellate Procedure 12-307, that the original and six (6) true and correct copies of this Brief of *Amicus Curiae* Juvenile Law Center and the original of the attached Motion for Leave to File an *Amicus Curiae* brief in support of Defendant-Appellant have been served, via UPS Next Day mail, to:

New Mexico Supreme Court
Clerk's Office
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Santa Fe, New Mexico 87504

Additionally, I hereby certify that one (1) copy of this Brief and attached Motion have been served, via first class mail, postage prepaid, to all counsel of record as follows:

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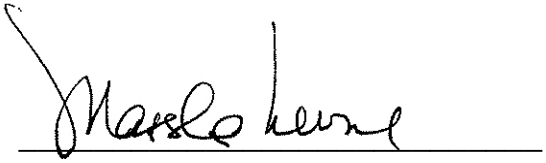

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