COLORADO SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203 Certiorari to the Colorado Court of Appeals Case No. 13CA2046 District Court, Jefferson County, 97CR1195 THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. Frank Vigil, Jr., RESPONDENT.	DATE FILED: March 3, 2015 6:28 AM FILING ID: 4F64911A1C773 CASE NUMBER: 2014SC495
Kimberly E. Dvorchak, Esq. #26795 Colorado Juvenile Defender Center 670 Santa Fe Drive Denver, Colorado 80204 Telephone: (303) 825-0193 Facsimile: (303) 825-0182 kim@cjdc.org *Attorney for Amicus Curiae*	Supreme Court Case Number: **2014SC495**

BRIEF OF THE COLORADO JUVENILE DEFENDER CENTER AS *AMICUS CURIAE* ON BEHALF OF RESPONDENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It does not exceed 30 pages and contains 4,728 words.

/s/Kim Dvorchak
Kimberly E Dvorchak, Esq. #26795
Colorado Juvenile Defender Center

Attorney for Amicus Curiae

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INTEREST AND IDENTITY OF AMICI

The **Colorado Juvenile Defender Center** (CJDC), formerly known as the Colorado Juvenile Defender Coalition, is a nonprofit organization dedicated to excellence in juvenile defense and advocacy, and justice for all children and youth in Colorado. CJDC trains juvenile defense attorneys and conducts nonpartisan research and policy analysis to ensure youth receive developmentally appropriate treatment, and has particular expertise in the defense of youth prosecuted and sentenced as adults. CJDC published *Re-Directing Justice: The Consequences of Prosecuting Youth as Adults and the Need for Judicial Oversight* and was instrumental in the reform of Colorado's direct file laws from 2009 to 2012. CJDC has participated as *amicus curiae* in juvenile appellate cases in Colorado and across the country, including in *Miller v. Alabama*.

ISSUE PRESENTED

This brief addresses the second issue before the Court: whether after *Miller v. Alabama,* 132 S. Ct. 2455 (2012) invalidated mandatory life without parole for juveniles the trial Court properly ordered a new sentencing hearing.

This court is also addressing the issue of whether *Miller v. Alabama,* 132 S. Ct. 2455 (2012) is to be applied retroactively to cases on collateral review. *Amici* previously filed, on December 11, 2014, with the Juvenile Law Center and other organizations, an amicus brief in this case on the retroactivity question. *Amici* maintains that *Miller*, 132 S.Ct. 2455, must be applied retroactively and relies on the arguments previously filed in the Brief of Amici Curiae Juvenile Law Center on Behalf of Respondent in regards to the retroactivity of *Miller*.

SUMMARY OF ARGUMENT

The United States Supreme Court decisions of *Miller v. Alabama*, *Graham v. Florida,* and *Roper v. Simmons* establish that children are constitutionally different from adults for purposes of sentencing. In each case the Court struck disproportionate sentencing practices that denied considerations of youthfulness and individual circumstances. Under the rules announced by the Court in *Miller*, *Graham*, and *Roper*, constitutional juvenile sentencing requires: (1) consideration of the mitigating attributes of adolescence that apply to all juveniles as a class; (2) consideration of each juvenile's individual history and unique personal and offense

characteristics; and (3) a meaningful opportunity for release based upon a young person's demonstrated maturity and rehabilitation.

Colorado's mandatory adult sentencing scheme that required Frank Vigil, Jr. and forty-seven other juveniles be sentenced to life in prison without the possibility of parole violates the Eighth Amendment to the U.S. Constitution and *Miller*. The correct remedy to this constitutional violation is to remand Frank Vigil, Jr.'s case to the trial court for an individualized sentencing hearing with judicial discretion to impose an appropriate constitutionally proportional sentence. Because *Miller* and *Graham* require individualized sentencing that considers each juvenile's individual history and unique personal and offense characteristics, in addition to a meaningful opportunity for release, the trial Court properly ordered a new sentencing hearing with judicial discretion for Frank Vigil Jr.

ARGUMENT

I. In *Miller v. Alabama,* the United States Supreme Court ruled that individualized sentencing is required for juvenile defendants in homicide cases, to consider both the mitigating features of youthfulness generally and the unique circumstances of the individual youth and his or her criminal participation, in order to impose a constitutional sentence.

A. Individualized Sentencing is required for Severe Adult Sentences.

In *Miller v. Alabama*, 132 S. Ct. 2455 (2011), the United States Supreme Court held that mandatory sentencing of juveniles to life imprisonment without the possibility of parole violates the Eighth Amendment's prohibition against cruel and

unusual punishment. In reaching this conclusion, the Court relied upon two lines of precedent concerning proportionate sentencing: cases involving categorical bans on sentencing practices where there was a mismatch between the offender's culpability and the severity of the punishment, such as in *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for juveniles) and *Graham v. Florida*, 130 S. Ct. 2011 (2010) (abolishing life imprisonment without the possibility of parole for juveniles in nonhomicide cases); and cases requiring courts to consider individual characteristics of the defendant and the details of his offense before imposing a death sentence. *Miller*, 132 S. Ct. at 2463-64 (internal citations omitted). The *Miller* Court explained how its decision differed from *Graham*: "*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses." *Miller*, 132 S. Ct. 2455, 2466, n.6. The Supreme Court has repeatedly concluded that, as a class, juveniles have diminished culpability and greater prospects for reform than adults; and that among juvenile defendants there are individualized personal and offense characteristics a court must consider in sentencing.

1. Children are constitutionally different from adults for purposes of sentencing because science demonstrates that youth are generally immature, vulnerable, and more capable of change than adults.

In the landmark decisions of *Roper v. Simmons, Graham v. Florida,* and *Miller v. Alabama,* the Court has proclaimed: children are constitutionally different

from adults for purposes of sentencing. The three significant differences between children and adults relied upon by the Court in its assessment of constitutional juvenile sentencing are: (1) children lack maturity and have an underdeveloped sense of responsibility that leads to recklessness, impulsivity, and risk-taking; (2) children are more vulnerable to negative influences and outside pressures, including peer pressure, and have limited control over their environment; and (3) 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 irretrievable depravity. *Miller,* 132 S. Ct. at 2464; *Roper*, 543 U.S. at 569-70; *Graham,* 130 S. Ct. at 2026.

The Court arrived at these key differences in *Roper, Graham,* and *Miller* based upon adolescent brain science and social science research, and in particular the adolescent development research of Laurence Steinberg, Ph.D. Dr. Steinberg was the lead scientist in the drafting of amicus briefs filed by the American Psychological Association in all three cases. In *Roper,* the Court decided juveniles were less blameworthy than adults in part based upon studies that show only a relatively small proportion of adolescents who engage in illegal behavior develop "entrenched patterns of problem behavior." 543 U.S. at 569 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am Psychologist 1009, 1014) (also cited in *Miller*, 132 S. Ct. at 2464).

In *Graham,* the Court found "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" –for example, in "parts of the brain involved in behavior control." 130 S. Ct. at 2026, quoting Brief for American Psychological Association et al. as *Amici Curiae* 22-27 (also cited and quoted in *Miller,* 132 S. Ct. at 2464). Making matters worse, as the Court observed, children have limited control over their environment, and "lack the freedom that adults have to extricate themselves from a criminogenic setting." *Roper,* 543 U.S. at 569 (quoting Steinberg & Scott 1014). Then in 2012 the Court found "the science and social science supporting *Roper's* and *Graham's* conclusions have become even stronger." *Miller,* 132 S. Ct. at 2465, citing and quoting Brief for American Psychological Association et al. as *Amici Curiae,* p.3-4 (citations omitted). This research is now well integrated into constitutional law.[1]

The attributes of adolescent development are fundamental and universal; they are not dependent on or affected by the legal context of the case. Just as *Roper* was not limited to the death penalty, *Graham* was not limited to nonhomicide cases. In fact, "none of what *Graham* said about children is crime-specific." 132 S. Ct. at 2465. These features of adolescence are evident "in the

[1] *See, Brief of the Colorado Juvenile Defender Coalition, et al.as amicus curiae on behalf of Defendant-Respondent Michael Tate, 2012SC932,* Exhibit A, Report by Laurence Steinberg, attached herein as Exhibit A for the Court's convenience.

same way, and to the same degree" when a robbery turns into a killing. *Id.* "*Roper* and *Graham* 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." *Miller*, 132 S. Ct. at 2465.

Because age is relevant to the Eighth Amendment, "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Miller*, 132 S. Ct. at 2466. Harsh, mandatory adult sentencing schemes remove youth from the balance and prevent a sentencing court from considering whether the term of imprisonment proportionately punishes a juvenile. *Id.* "This contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* Life and long term sentences are particularly harsh for juveniles because a youth will "almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." *Miller*, 132 S. Ct. at 2466; *Graham*, 130 S. Ct. at 2028. Thus, offense-based mandatory sentencing schemes designed for adults are mismatched with the reduced culpability and greater rehabilitative potential of children.

2. <u>In addition to considering the mitigating features of youthfulness generally, a sentencing court must consider the individual characteristics of the child and the circumstances of the offense.</u>

Just as the Supreme Court recognized that juveniles, as a class, are different

than adults, the Court also recognized there are differences among individual juveniles and their circumstances. "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." Mandatory adult sentencing denies consideration of youthfulness and:

> It prevents taking into account the family and home environment that surrounds him –and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects 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…

Miller, 132 S. Ct. at 2468. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. *Id.*

The *Miller* Court discussed specific circumstances in the cases before it to highlight factors relevant to individualized sentencing. For instance, in the companion case of *Jackson v. Hobbs,* the Court observed Kuntrell Jackson's lower level of criminal participation in the homicide in that he was not the shooter and that dissenting state justices had found "any evidence of intent to kill was severely lacking." *Miller,* 132 S. Ct. at 2468, 2461-62. Justice Breyer, with whom Justice Sotomayor joined in a concurring opinion in *Miller*, added that there will have to be a determination whether Jackson "killed or intended to kill the robbery victim" upon resentencing because without such a finding, a life without parole sentence is

prohibited by *Graham. Miller*, 132 S. Ct. at 2475 (citing *Graham,* 130 S. Ct. at 2027). In Evan Miller's case, the Court discussed Evan's life history, that Evan had been physically abused by his father, was in and out of foster care due to a drug- addicted mother who neglected him, and had attempted suicide four times, the first when he was six years old and "should have been in kindergarten." *Id.* at 2462, 2469. Just like youthfulness, individual characteristics and offense participation are constitutionally relevant in the sentencing of juveniles.

Yet, in neither Jackson's nor Miller's case "did the sentencing authority have discretion to impose a different punishment." *Miller,* 132 S. Ct. at 2460. While the consideration of *Miller* factors is the first aspect of individualized sentencing, the actual authority to impose an appropriate sentence must follow. A one-size-fits-all mandatory scheme ignores the central principles of the Court. *See State v. Ragland,* 836 N.W.2d 107, 121 (Iowa 2013) (recognizing the absurdity of a rule that demands individualized sentencing as to youths facing a sentence of life without parole, but not as to youths facing a sentence of life with no parole for sixty years); *Parker v. State,* 119 So.3d 987, 995 (Miss. 2013) (*Miller* requires determination by the sentencing authority based upon age and other characteristics). A judge or jury must have the ability to consider whether youthfulness and the nature of the crime make a lesser sentence more appropriate. *Miller, Id.* at 2460. Judicial discretion without actual authority to impose a lesser sentence of

constitutional proportionality renders individualized sentencing meaningless.

Because the Court's ruling was sufficient to decide the cases before it, the Court did not reach an opinion as to whether the Eighth Amendment requires a categorical bar on life without parole for juveniles. *Miller, Id*. at 2469. Thus, the Court has yet to determine the full reach of the principles underlying *Roper, Graham,* and *Miller,* but the Court has applied these principles in contexts other than sentencing. *See J.D.B. v North Carolina*, 131 S. Ct. 2394 (2011*)*.[2] In *J.D.B.* the Court found that where a "reasonable person" standard applies, common law reflects the reality that children are not miniature adults, and age is relevant to the analysis of whether a child is in custody under *Miranda*. *Roper*, 131 S. Ct. at 2404. There is now a "settled understanding that the differentiating characteristics of youth are universal." *J.D.B.*, 131 S. Ct. at 2403-04. Above all, youth matters.

The Colorado Court of Appeals recently recognized that *Miller* requires an individualized sentencing hearing in *People v. Wilder, 2015 COA 14* (Feb 26, 2015). In *Wilder*, the People conceded that *Miller* applies retroactively. The *Wilder* Court noted that the United Supreme Court has determined that "children are constitutionally different than adults for purpose of [criminal] sentencing." *Id.* ¶13. The *Wilder* Court remanded the case to the trial court for an "individualized

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[2] *J.D.B.* 131 S. Ct. at 3403, citing *Roper*, 543 U.S. at 569, "age is far more than a chronological fact" and children "are more vulnerable or susceptible to outside pressures than adults" and citing *Graham*, 130 S. Ct. at 2026, "finding no reason to reconsider these observations about the common nature of juveniles."

sentencing determination based on the factors elucidated in *Miller*." *Id*. ¶ 40.

Contrary to the proposal of the Colorado Attorney General's Office, the *Wilder* Court declined to restrict the trial court's discretion to sentence the defendant to a life sentence with the possibility of parole after forty years. *Id*. ¶ 37. The Court stated "*Miller*, in particular, stressed the potential unfairness and inappropriateness of imposing identical mandatory penalties on juveniles possessing markedly different characteristics from one another and having participated in an offense to significantly different degrees." *Id*. ¶ 38.

B. Under evolving standards of decency, Colorado is consistently progressing toward individualized treatment of children facing adult prosecution and adult incarceration in criminal court.

Proportionality is viewed through the lens of "evolving standards of decency that mark the progress of a maturing society." *Miller*, 123 S. Ct. at 2463. In the last twenty years in Colorado, juvenile justice laws have progressed from a retributive adult-like process to a more developmentally responsive approach with increasing individualized considerations. One of the most punitive periods for youth was in the early 1990's when Colorado enacted life without the possibility of parole for all persons convicted of class 1 felonies (1991 Colo. Sess. Laws 1086, H.B. 91-1086), and also expanded prosecutor's discretion to charge juveniles as adults (1993 First Extraordinary Session, S.B. 93S-09).[3] While this harsh

[3] *See Re-Directing Justice: The Consequences of Prosecuting Youth as Adults and*

combination was not intentionally aimed at youth,[4] its effect led to the problem Colorado faces today with forty eight former juveniles mandatorily sentenced to life in prison with no opportunity for parole. *See Commonwealth v. Knox,* 50 A.3d 749, 768 (Pa. Super. Ct. 2012) (the interplay of three separate statutes results in juveniles convicted of murder to be sentenced to mandatory life without parole which is unconstitutional under *Miller*).

One year after *Roper* was decided, the Colorado legislature took a pre-*Miller* step toward redemption and reform for youth convicted as adults when it recognized that children should be treated differently than adults for sentencing purposes and changed the mandatory penalty for youths convicted of class 1 felonies to a 40- year life while maintaining a sentence of mandatory life without parole for adults. *See* §18-1.3-401(4)(b)(I), C.R.S. 2014. This bill marked the beginning of evolving standards concerning the prosecution and sentencing of youth in adult court, but was expressly limited to juveniles convicted of offenses committed after July 1, 2006.

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the Need to Restore Judicial Oversight, Colorado Juvenile Defender Coalition, p.20-24 (2012), available at http://cjdc.org/wp/juvenile-justice-policy/re-directing-justice/

[4]At no time during the enactment of House Bill 91-1086 was there any consideration of juveniles. H.B. 91-1086: House Judiciary Committee, Jan. 24, 1991, 1:38 p.m.-4:11 p.m.; House Second Reading Feb. 4, 1991 (no recording of third reading); Senate Judiciary Committee, February 20, 1991, 1:43 p.m.-4:05 p.m.; Senate Second Reading March 13, 1991 (no recording of third reading).

Standards continued to evolve as Colorado reformed the way that juveniles could be charged as adults and treated in adult facilities. When Frank Vigil, Jr. was charged, prosecutors had sole discretion to decide which juveniles would be prosecuted in adult criminal court. There was minimal criteria based upon age and offense, but there were no statutory factors for the prosecutor's consideration and there was no provision for judicial review or appeal of the prosecutor's decision. §19-2-517, C.R.S. 2006. Unilateral prosecutorial action also placed direct filed youth in adult jails pre-trial. §19-2-508(4), C.R.S. 2008. But the tide began to turn against these direct file procedures that were so harsh on youth. The General Assembly passed legislation that created statutory factors for consideration before placing direct filed youth in adult jails, H.B. 09-1321; required education for youth in adult jails, S.B. 10-54; and began reform of the direct file statute by limiting eligibility, creating factors for the prosecutor's consideration in filing, and allowing time for more involvement and input from defense counsel before the prosecutor's direct filing decision. H.B. 10-1413.

In 2012 the General Assembly amended the direct file statute further in House Bill 12-1271. Today's law narrows the range of eligible direct file offenses, increases the minimum age for direct filing, expands juvenile sentencing options, and gives all juveniles the right to a reverse-transfer hearing before a district court judge to consider sending the case back to juvenile court. §19-2-517, C.R.S. 2014.

Statutory factors for the court in deciding whether an offender should be returned to juvenile court include the considerations deemed essential for sentencing purposes in *Miller*: the age of the juvenile and the maturity of the juvenile as determined by considerations of the juvenile's home environment, emotional attitude, and pattern of living; the current and past mental health status of the juvenile as evidenced by relevant mental health or psychological assessments of screenings; and the likelihood of the juvenile's rehabilitation by the use of sentencing options available in the juvenile courts and district court. §19-2-517(3)(b)(IV), (VI), (VII), C.R.S. 2014. No court ever considered any of these important factors in Frank Vigil Jr.'s case, or in the case of any of Colorado's forty-eight juvenile lifers, from the time of the prosecution's unilateral and unreviewable direct file decision, to the time of their mandatory adult sentencing.[5]

In all, three laws were reformed in 2012 to provide individualized treatment of youth and judicial decision making in serious juvenile cases. *See New Juvenile Justice Laws Increase Options for Youth*, The Colorado Lawyer, p.37-45 (April 2013). Youth charged as adults are no longer held in adult jails pre-trial and

[5] There were fifty juveniles sentenced to death in prison in Colorado. Today there are forty-eight. One, Gabriel Adams, committed suicide in a psychiatric prison, http://www.denverpost.com/news/ci_25426692/man-convicted-double-murder-at-18-commits-suicide; the second, Lorenzo Montoya, was released by plea agreement with the Denver District Attorney's Office, after a post-conviction motion alleged his wrongful conviction, http://denver.cbslocal.com/2014/06/16/co-defendant-in-14-year-old-murder-case-released-after-plea-deal/.

judges decide whether a child is removed from a juvenile detention facility. H.B. 12-1139; §19-2-508(c)(II), C.R.S. 2014. This determination involves an evidentiary hearing and individualized factors for the court to consider, such as "the juvenile's current emotional state, intelligence, and developmental maturity, including any emotional and psychological trauma, and the risk to the juvenile caused by his or her placement in an adult jail…" §19-2-508(3)(c)(III)(C).

Additionally, as an alternative to prosecuting a juvenile in adult court, the aggravated juvenile offender statute was amended for youth facing serious charges, such as first degree murder, in the juvenile court system. Juveniles may now face consecutive commitments to the Division of Youth Corrections. S.B. 12-28, §19-2-601(5)(a)(I)(D), C.R.S. 2014. Under today's aggravated juvenile offender statute, judges have discretion to decide the outcome for a youth who reaches the age of twenty and a half and is about to age-out of the juvenile system; and judges have a range of options to consider at an evidentiary hearing, from early release, to adult parole, to the Youthful Offender System, to the Department of Corrections. §19-2-601(8)(b) C.R.S. 2014. Here again, the court considers *Miller*-like factors in deciding the next phase of the youth's sentence, including: psychological evaluations, the nature of the crimes committed, the maturity of the offender, the offender's behavior in custody and progress in programming, the likelihood of rehabilitation, and the placement where the juvenile is most likely to succeed in

reintegrating into society. §19-2-601(8)(c), C.R.S. 2014. These provisions of the aggravated juvenile offender statute afford youth a meaningful opportunity for release based upon demonstrated maturity and growth in serious juvenile cases.

Evolving standards of decency in the prosecution of youth in Colorado have focused on decision making that is individualized, that is structured by factors that include the attributes of youthfulness and a child's individual history and characteristics, and that provide judicial discretion to make rulings tailored to each juvenile in each case. *Miller* requires no less for the fifty former juveniles prosecuted and sentenced under a legislative scheme of the past, which can no longer survive scrutiny under the statutory or constitutional standards of today.

II. A sentence of life imprisonment with the possibility of parole after 40 calendar years does not provide juveniles with a meaningful opportunity for release based upon demonstrated maturity and rehabilitation as required by *Miller* and *Graham*.

The *Miller* Court concluded: "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." 132 S. Ct. at 2469. In doing so the Court quoted its decision in *Graham*: "A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation." *Id.*, citing 130 S. Ct. at 2030. The *Graham* Court required that if a state sentences a juvenile to life "it must provide him or her with some *realistic opportunity* to obtain release before the end of that

term." 130 S. Ct. at 2034 (emphasis added). It is for the states to determine the means and mechanisms for compliance with the Court's opinions, *Graham*, 130 S. Ct. at 2030, consistent with the fundamental principles announced by the Court.

Just as the social science and neurobiological developmental differences between adolescents and adults diminish the culpability of juveniles for purposes of sentencing, the transient and temporary nature of these differences necessitate an opportunity for review and release from prison. The *Graham* Court found that sentencing a juvenile to life imprisonment without the possibility of parole "makes an irrevocable judgment about that person's value and place in society," which is not appropriate in light of a juvenile's limited culpability and capacity for change. 130 S. Ct. at 2030. The scientific evidence relied upon in *Roper*, *Graham*, and *Miller* must apply with equal force to any analysis of what constitutes a meaningful opportunity for release for children sentenced to life or severe prison terms.

There is growing scientific consensus that in late adolescence –late teens and early twenties—there is considerable neuroplasticity in the brain, which provides opportunities for change. *Graham*, 130 S. Ct. at 2026 ("juveniles are more capable of change than are adults"). Because considerable psychological and neurobiological change takes place during late adolescence; it is impossible to predict whether a convicted juvenile will grow out of delinquency through normal maturation or become a persistent offender. *Roper*,

543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile whose crime reflects irreparable corruption.") (citing Steinberg & Scott 1014-1016); *accord, Graham,* 130 S. Ct. at 2026; *Miller,* 132 S. Ct. at 2464 (citing Steinberg & Scott 1014). Even where a juvenile may need to be separated from society due to an "escalating pattern of criminal conduct," the Supreme Court found "it does not follow that he would be a risk to society for the rest of his life." *Graham,* 130 S. Ct. at 2029. Because juveniles are capable of such dramatic changes in development and maturity, adult laws that mismatch this period of growth with the denial of a meaningful opportunity for release are constitutionally flawed.

The prospect of serving 40 calendar years in prison before an opportunity for release is only a theoretical possibility of release and denies the exercise of discretion from the sentencing authority. *See Parker v. State*, 119 So.3d 987, 997 (Miss. 2013) (conditional release from prison would not be determined by the sentencing authority based on age and other characteristics mandated by *Miller*); *See also People v. Fernandez,* 883 P.2d 491, 495 (Colo. App. 1994) (the difference between life without the possibility of parole for forty years and life without any possibility of parole is insufficient to render life without parole sentence disproportionate). As such, remand to the trial court to consider *Miller* factors is

appropriate where neither the appellate court nor the parole board has sentencing authority. *See Parker* 119 So.3d at 998.

In order for the constitutionally required "meaningful opportunity for release based upon demonstrated maturity and rehabilitation" to become a reality for youth sentenced to life or long prison terms, there must be periodic review of their development and conduct. This review can help determine whether the youth is likely to continue the offending behavior exhibited during adolescence. The state should also ensure services and programs for young people to help facilitate rehabilitation. A mandatory life sentence that does not begin to permit parole review for 40 full calendar years—until a teen-ager is well into his or her fifties—is a proposed sentencing scheme that fails to take youthfulness into account and is constitutionally flawed. *See Miller*, 132 S. Ct. at 2466; *Graham*, 130 S. Ct. at 2031. "The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible." *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013). *See also People v. Rainer*, --P.3d-- , 2013WL1490107, 15 (2013 COA 51) (remanding for new sentencing hearing consistent with "the principles" announced in both *Graham* and *Miller*).

Imposing a sentence without an individualized sentencing hearing before the trial court is in effect asking this court to provide for mass commutation of all

juveniles serving life without parole to identical sentences of life imprisonment with a theoretical possibility of parole after 40 calendar years. This approach is flawed because: (1) it does not cure or affect the mandatory nature of the sentences; (2) there is an absence of individualized sentencing for each juvenile; and (3) the proposed sentence lacks consideration of the *Miller* factors. *See Ragland,* 836 N.W.2d 107 (citing *Miller,* 132 S. Ct. at 2468); *See also Parker v. State,* 119 So.3d at 999 (rejecting state's suggested resolution because it lacked sentencing authority consideration and thus circumvents *Miller*).

The mandatory life without parole sentence imposed upon Frank Vigil, Jr. and the now forty-seven other juveniles is unconstitutional under *Miller*. The task before this Court is not to substitute one unconstitutional mandatory sentence for another. Evolving standards of decency in our system of justice must provide Frank Vigil, Jr. and all the juvenile lifers in Colorado with individualized sentencing hearings and a meaningful opportunity for release based upon demonstrated maturity and rehabilitation, which given the nature of adolescents may manifest long before forty years have passed.

CONCLUSION

For the reasons stated above and in the Brief previously filed by Amici with this Court, Frank Vigil Jr.'s sentence of life imprisonment without the opportunity for parole must be vacated the case must be remanded for an

individualized resentencing at the discretion of the trial court.

Respectfully submitted this 2nd day of March, 2015.

/s/Kim Dvorchak
Kimberly E. Dvorchak, Esq. #26795
Colorado Juvenile Defender Center
670 Santa Fe Drive
Denver, Colorado 80204
Telephone: (303) 825-0194

Attorney for Amicus Curiae, Colorado Juvenile Defender Center

Attachment

Exhibit A, Report by Laurence Steinberg, Ph.D, from *Brief of the Colorado Juvenile Defender Coalition, et al.as amicus curiae on behalf of Defendant-Respondent Michael Tate, 2012SC932*

CERTIFICATE OF SERVICE

I certify that on March 2nd 2015, I served the foregoing Brief via ICCES to:

Peter A. Weir
Donna Skinner Reed
400 Jefferson County Parkway
Golden, CO 80401-6002
303-271-6800
dreed@jeffco.us

Kathleen Lord, Counsel for Appellant-Respondent Lord Law Firm
1544 Race Street
Denver, CO 80206

/s/Kim Dvorchak
Kimberly E. Dvorchak, Esq. #26795
Colorado Juvenile Defender Center

REPORT PREPARED BY LAURENCE STEINBERG, PH.D.

re: People v. Michael Tate

PROFESSIONAL POSITION

1. My name is Laurence Steinberg. My address is 1924 Pine Street, Philadelphia, Pennsylvania, 19103, USA.

2. I hold the degrees of A.B. in Psychology from Vassar College (Poughkeepsie, New York) and Ph.D. in Human Development and Family Studies from Cornell University (Ithaca, New York).

3. I am a developmental psychologist specializing in adolescence, and I am on the faculty at Temple University, in Philadelphia, Pennsylvania, USA, where I am the Distinguished University Professor and Laura H. Carnell Professor of Psychology. I am a member and Fellow of the American Psychological Association and the Association for Psychological Science, a member of the Society for Research in Child Development, and a member of the Society for Research on Adolescence. I was a member of the National Academies' Board on Children, Youth, and Families and chaired the Academies' Committee on the Science of Adolescence. I was President of the Division of Developmental Psychology of the American Psychological Association and President of the Society for Research on Adolescence.

4. I received my Ph.D. in 1977 and have been continuously engaged in research on adolescent development since that time. Prior to my appointment at Temple University, where I have been since 1988, I was on the faculty at the University of Wisconsin—Madison (1983-1988) and the University of California, Irvine (1977-1983). From 1997-2007, I directed the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, a national multidisciplinary initiative on the implications of research on adolescent development for policy and practice concerning the treatment of juveniles in the legal system.

5. Although my work has focused broadly on adolescent psychological development, I have a special interest in adolescent judgment and decision-making, especially with regard to risky and criminal behavior. In my capacity as chair of the National Academies' Committee on the Science of Adolescence, I organized and oversaw several workshops on adolescent risk-taking and its consequences for health and well-being. The summary of these workshops, which was published in 2011, discusses findings from recent research on adolescent brain development and the implications of this work for understanding why adolescents often display poor judgment in a range of situations, including those involving criminal behavior.

6. Since 1997, I have been engaged in research on the implications of research on adolescent development for legal decisions about the behavior of young people. More specifically, my colleagues and I have been studying whether, to what extent, and in what respects adolescents and adults differ in ways that may inform decisions about criminal responsibility and about sentencing.

7. The work that my colleagues and I have conducted has had demonstrable impact on American jurisprudence. Most significantly, it was cited and quoted verbatim in the majority opinion of the United States Supreme Court in *Roper v. Simmons*, the 2005 case that abolished the juvenile death penalty, and more recently, in *Graham v. Florida* (2010), which banned the imposition of the sentence of life without parole for juveniles convicted of crimes other than homicide, and *Miller v. Alabama / Jackson v. Hobbs* (2012) (subsequently referred to in this report as "*Miller*"), which banned mandatory sentences of life without parole for juveniles, even those convicted of homicide. In these cases, I served as the lead scientist in the drafting of amicus briefs filed by the American Psychological Association, which argued that adolescents' neurobiological and behavioral immaturity warranted treating them differently than adults. In these opinions, the Court held, citing our work, that juveniles' diminished decision-making capacity, heightened susceptibility to peer influence, and unformed character mitigate their responsibility and, as such, moderate the degree to which juveniles should be punished relative to adults who have been convicted of identical offenses.

8. This report is prepared at the request of the Office of Alternate Defense Counsel (OADC). I have been asked to discuss what is known about psychological and neurobiological development of individuals during adolescence and young adulthood and to render an opinion as to what this research suggests regarding the definition of "meaningful opportunity for parole."

DOCUMENTS

9. I have read the revised opinion of Judge Webb in *People v. Tate* (Colorado Court of Appeals No. 07CA2467), dated September 13, 2012, the opinion of Judge Graham in *People v. Banks* (Colorado Court of Appeals No. 08CA0105), dated September 27, 2012. and a summary of the issues in the present Colorado Supreme Court case that is the subject of this report. All three documents were provided to me by the Office of Alternate Defense Counsel

RELEVANT U.S. SUPREME COURT OPINIONS

10. In its majority opinion in *Roper*, the U.S. Supreme Court noted that "As any parent knows, and as the scientific and sociological studies…tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. These qualities often result in impetuous and ill-considered actions and opinions.…The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."

11. In *Graham*, the Court reiterated the logic behind its ruling in *Roper* and noted that "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."

12. In *Miller*, the Court reiterated the logic behind its prior rulings, in *Roper* and *Graham*, and noted that "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." The Court further noted that "the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger," that "[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions," and that, "It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance." The Court, citing *Graham*, further noted that in cases in which a juvenile offender has been given a life sentence, the State is required to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

SCIENTIFIC KNOWLEDGE ABOUT PSYCHOLOGICAL AND NEUROBIOLOGICAL DEVELOPMENT IN ADOLESCENCE AND YOUNG ADULTHOOD

13. Several specific aspects of psychological development in adolescence are especially relevant to the present case (for a review, see Steinberg, L. (2007). Risk-taking in adolescence: New perspectives from brain and behavioral science. *Current Directions in Psychological Science*, *16*, 55-59).

14. First, adolescents are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation. In our work, when asked to make a decision about a course of action, compared to adults, adolescents had more difficulty identifying the possible costs and benefits of each alternative, underestimated the chances of various negative consequences occurring, and underestimated the degree to which they could be harmed if the negative consequences occurred (Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N., & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior*, *27*, 333-363).

15. Second, adolescents are more likely than adults to engage in what psychologists call "sensation-seeking," that is, the pursuit of arousing, rewarding, or novel experiences. As a consequence of this, adolescents are more apt to focus on the potential rewards of a given decision (e.g., the money obtained as a result of a robbery) than the potential costs (e.g., the harm that might occur during the course of the robbery) (Steinberg, L., Albert, D., Cauffman, E., Banich, M., Graham, S., & Woolard, J. (2008). Age differences in sensation seeking and impulsivity as indexed by behavior and self-report: Evidence for a dual systems model. *Developmental Psychology*, *44*, 1764-1778).

16. Third, adolescents are less able than adults to control their impulses and consider the future consequences of their actions. In general, adolescents are more short-sighted and less planful, and they have more difficulty than adults in foreseeing the possible outcomes of their actions and regulating their behavior accordingly. (Steinberg, L., Graham, S., O'Brien, L., Woolard, J., Cauffman, E., & Banich, M. (2009). Age differences in future orientation and delay discounting. *Child Development*, *80*, 28-44).

17. Finally, these inclinations are exacerbated by the presence of peers. In several studies we have found that when they are with their friends, adolescents pay relatively more attention to the potential rewards of a risky decision than they do when they are alone, and that they are especially drawn to immediate rewards. Moreover, we have shown that the presence of peers activates the brain's "reward center" among adolescents, but has no such effect on adults (Chein, J., Albert, D., O'Brien, L., Uckert, K., & Steinberg, L. (2010). Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry. *Developmental Science*, *14*, F1-F10; Gardner, M., & Steinberg, L. (2005). Peer influence on risk-taking, risk preference, and risky decision-making in adolescence and adulthood: An experimental study. *Developmental Psychology*, *41*, 625-635; O'Brien, L., Albert, D., Chein, J., & Steinberg, L. (2011). Adolescents prefer more immediate rewards when in the presence of their peers. *Journal of Research on Adolescence*, *21*, 747-753; Smith, A., Chein, J., & Steinberg, L. (2014). Peers increase adolescent risk taking even when the probabilities of negative outcomes are known. *Developmental Psychology*. Advance online publication. doi: 10.1037/a0035696; Weigard, A., Chein, J., Albert, D., Smith, A., & Steinberg, L. (2014). Effects of anonymous peer observation on adolescents' preference for immediate rewards. *Developmental Science*, *17*, 71-78). In addition, studies also show that adolescents are more susceptible than adults to overt peer pressure (and boys are especially susceptible to pressure to engage in antisocial activity) (Steinberg, L., & Monahan, K. (2007). Age differences in resistance to peer influence. *Developmental Psychology*, *43*, 1531-1543).

18. Recent research on brain development sheds light on the biological underpinnings of age differences in judgment and decision-making and suggests that many of the differences between adolescents' and adults' behavior likely reflect the neurobiological immaturity of juveniles, relative to adults, and not simply age differences in preferences, attitudes, or values.

19. The upshot of this new brain research is that adolescents are *inherently* less able than adults to regulate their impulses, give proper consideration to the longer-term consequences of their decisions, and appropriately attend to the risks, as well as the rewards, of their options. There is broad consensus among scientists on these points.

20. Research on neurobiological development shows continued maturation into the early- or even mid-20s of brain regions and systems that govern various aspects of self-regulation and executive function. These developments involve structural (anatomical) and functional (activity) changes in the prefrontal and parietal cortices as well as improved structural and functional connectivity between cortical and subcortical regions (for recent reviews of changes in brain structure and function during adolescence and young adulthood, see Blakemore, S-J. (2012). Imaging brain development: The adolescent brain. *Neuroimage, 61*, 397-406; Engle, R. (2013). The teen brain. *Current Directions in Psychological Science*, *22 (2)* (whole issue); Luciana, M. (Ed.) (2010). Adolescent brain development: Current themes and future directions. *Brain and Cognition, 72* (2), whole issue; and Steinberg, L. (2014). *Age of Opportunity: Lessons From the New Science of Adolescence*. New York: Houghton Mifflin Harcourt).

21. Many scientists, including myself, believe that the underlying cause of immaturity in judgment during adolescence is the different timetables along which two important brain systems change during adolescence, sometimes referred to as a "maturational imbalance." The system that is

responsible for the increase in sensation-seeking and reward-seeking that takes place in adolescence undergoes dramatic changes very early in adolescence, around the time of puberty. But the system that is responsible for self-control, regulating impulses, thinking ahead, and evaluating the rewards and costs of a risky act is still undergoing significant maturation well into the decade of the 20s (Casey, B. J., et al. (2010). The storm and stress of adolescence: Insights from human imaging and mouse genetics. *Developmental Psychobiology*, *52*, 225-235; and Steinberg, L. (2008). A social neuroscience perspective on adolescent risk-taking. D*evelopmental Review*, *28*, 78-106). Thus, during middle adolescence (approximately 14-17 years) there is an imbalance between the reward system and the self-control system that inclines adolescents toward sensation-seeking and impulsivity. The hyperactivation of the brain's reward system that occurs in adolescents when their friends are present further exaggerates this imbalance.

22. As this "maturational imbalance" diminishes, there are improvements in such capacities as impulse control, resistance to peer pressure, planning, and thinking ahead (for reviews, see Albert, D., & Steinberg, L. (2011). Judgment and decision making in adolescence. *Journal of Research on Adolescence*, *21*, 211-224; Blakemore, S-J., & T. Robbins, T. (2012). Decision-making in the adolescent brain. *Nature Neuroscience*, *15*, 1184-1191; and Steinberg, L. (2009). Adolescent development and juvenile justice. *Annual Review of Clinical Psychology*, *5*, 47-73).

23. Neuroplasticity refers to the potential for the brain to be modified by experience; certain periods in development appear to be times of greater neuroplasticity than others. There is growing consensus that there is considerable neuroplasticity in late adolescence, which suggests that there are opportunities for individuals to change (for a discussion of adolescent neuroplasticity, see Kays, J., Hurley, R., Taber, K. (2012). The dynamic brain: Neuroplasticity and mental health. *Journal of Clinical Neuropsychiatry and Clinical Neuroscience*, *24*, 118-124; Steinberg, L. (2014). *Age of Opportunity: Lessons From the New Science of Adolescence*. New York: Houghton Mifflin Harcourt; and Thomas, M., & Johnson, M. (2008). New advances in understanding sensitive periods in brain development. *Current Directions in Psychological Science*, 17, 1-5). In *Graham*, the U.S. Supreme Court, relying in part on amicus briefs submitted by the American Psychological Association and other scientific organizations, recognized that youth under the age of 18 were not fully developed, and that it was this lack of maturity and capacity for growth that led to the requirement that youth who commit serious crimes are to have an opportunity for release based on demonstrated maturity and rehabilitation.

24. As a consequence of this heightened neuroplasticity, adolescents are also distinguished from adults by their relatively unformed character. Because considerable psychological and neurobiological development takes place during the late teens and early twenties, it is impossible to predict whether an adolescent who has committed an antisocial act will grow out of his delinquent behavior as a result of normal maturation (what psychologists refer to as "adolescence-limited offending") or whether his adolescent offending is indicative of a chronic criminal in the making (so called, "life-course persistent offending") (Moffitt, T. (2006). Life-course persistent versus adolescence-limited antisocial behavior. In D. Cicchetti & D. Cohen (Eds.), *Developmental psychopathology* (2nd ed., pp. 570-598). New York: Wiley).

25. Very few individuals who have committed crimes as juveniles continue offending beyond their mid-20s. My colleagues and I have found, as have other researchers, that approximately 90 percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood (Monahan, K., Steinberg, L., Cauffman, E., & Mulvey, E. (2013). Psychosocial (im)maturity from adolescence to early adulthood: Distinguishing between adolescence-limited and persistent antisocial behavior. *Development and Psychopathology*, 25, 1093–1105; and Mulvey, E., Steinberg, L., Piquero, A., Besana, M., Fagan, J., Schubert, C., & Cauffman, E. (2010). Trajectories of desistance and continuity in antisocial behavior following court adjudication among serious adolescent offenders. *Development and Psychopathology*, *22*, 453-475). Importantly, research indicates that one cannot predict, on the basis of information available during the teen years, whether an adolescent who has broken the law is likely to become a persistent offender on the basis of his adolescent offense alone, even if the offense is a serious one.

26. Longitudinal studies that document this pattern of desistance are consistent with epidemiological evidence on the relation between age and crime. In general, sociological studies demonstrate what scientists describe as an "age-crime curve," which shows that, in the aggregate, crime peaks in the late teen years, and declines during the early 20s (see Sweeten, G., Piquero, A., & Steinberg, L. (2013). Age and the explanation of crime, revisited. *Journal of Youth and Adolescence, 42,* 921-938). For example, according to the most recent available data from the U.S. Bureau of Justice Statistics (2013), on arrest rates as a function of age, arrests for property crime and for violent crime increase between 10 and 18 years, peak at 18, and decline thereafter, most dramatically after 25. This is a robust pattern observed not only in the United States, but across the industrialized world and over historical time (see Farrington, D. (1986). Age and crime. In M. Tonry & N. Morris (Eds.), *Crime and justice: An annual review of research, vol. 7* (pp. 189-250). Chicago: University of Chicago Press; Hirschi, T., & Gottfredson, M. (1983). Age and the explanation of crime. *American Journal of Sociology, 89*, 552-84; and Piquero, A., Farrington, D., & Blumstein, A. (2007). *Key issues in criminal careers research: New analysis from the Cambridge study in delinquent development*. Cambridge: Cambridge University Press).

27. Research in developmental psychology has produced a growing understanding of the ways in which normative psychological maturation contributes to desistance. My colleagues and I have shown that normal and expected improvements in self-control, resistance to peer pressure, and future orientation, which occur in most individuals even in the absence of intervention, are related to desistance from crime during the late adolescent and young adult years (Monahan, K., Steinberg, L., & Cauffman, E. (2009). Affiliation with antisocial peers, susceptibility to peer influence, and desistance from antisocial behavior during the transition to adulthood. *Developmental Psychology*, *45*, 1520-1530; Monahan, K., Steinberg, L., Cauffman, E., & Mulvey, E. (2009). Trajectories of antisocial behavior and psychosocial maturity from adolescence to young adulthood. *Developmental Psychology*, *45*, 1654-1668). This observation is consistent with findings from developmental neuroscience, noted earlier (for example, Liston, C., Watts, R., Tottenham, N., Davidson, M., Niogi, S., Ulug, A., & Casey, B.J. (2006). Frontostriatal microstructure predicts individual differences in cognitive control. *Cerebral Cortex, 16,* 553-560).

APPLICATION OF SCIENTIFIC FINDINGS TO COLORADO'S MANDATORY LIFE WITHOUT PAROLE SENTENCING FOR JUVENILES

28. In light of the fact that considerable psychological and neurobiological development continue into the mid-20s, I believe that it is improper to sentence juvenile offenders to long terms without periodically reviewing their development and conduct, especially during the early and mid-20s, in order to assess whether the offending they exhibited during adolescence is likely to continue over time. Such evaluations should be performed by individuals who have training in adolescent development and are able to assess psychological maturity as well as progress with regard to rehabilitation. In addition, it is important to provide services and programs during the period of incarceration that are likely to facilitate rehabilitation. In my view, such practices would be consistent with the Supreme Court's ruling in *Graham* that sentencing schemes for juveniles must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." A mandatory sentence of life that does not permit parole consideration until 40 years have been served does not provide a juvenile, who is still maturing into his mid-20s, with this opportunity.

STATEMENT OF TRUTH

29. Throughout my report I have attempted to be accurate and complete and to discuss all matters that I regard as being relevant to the opinions expressed within my report.

30. I have indicated the source of any factual information upon which I have based an opinion on facts.

31. I have not included anything in my report that has been suggested to me by anyone without forming my own view on the matter.

32. I have received payment for my consultation with counsel and for the preparation of this report.

33. Where a range of reasonable opinion is present, I have indicated the extent of that range in my report.

34. If I believe that my existing report requires any correction or qualification, I will notify my instructing attorneys immediately in writing. If the correction or qualification is significant, I will prepare a supplementary report as soon as possible.

35. I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct.

Laurence Steinberg, Ph.D.
Philadelphia, March 28, 2014