THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2013-0566

State of New Hampshire v. Michael Soto
Hillsborough Superior Court - Northern District
No. 08-CR-1235;

Robert Tulloch v. Richard Gerry, Warden
Merrimack Superior Court
No. 12-CV-849;

Robert Dingman v. Richard Gerry, Warden
Merrimack Superior Court
No. 13-CV-050;

Eduardo Lopez, Jr. v. Richard Gerry, Warden
Merrimack Superior Court
No. 13-CV-085.

BRIEF OF *AMICUS CURIAE* JUVENILE LAW CENTER IN SUPPORT OF RESPONDENTS MICHAEL SOTO, ROBERT TULLOCH, ROBERT DINGMAN AND EDUARDO LOPEZ, JR.

Marsha L. Levick, Esq.
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19103
(215) 625-0551 (phone)
(215) 625-2808 (fax)
mlevick@jlc.org

Counsel for Amicus Curiae

Andrew S. Winters, Esq.
Cohen & Winters, PLLC
101 North State Street, Suite 1
Concord, NH 03301
(603) 224-6999 (phone)
(888) 926-5151 (fax)
andrew@cohenwinters.com

Local Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTEREST AND IDENTITY OF *AMICUS CURIAE* 1

II. CONSENT OF THE PARTIES 3

III. STATEMENT OF THE CASE AND THE FACTS 4

IV. SUMMARY OF ARGUMENT 5

V. ARGUMENT 6

- A. The U.S. Supreme Court Has Repeatedly Held That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishment 6
- B. *Miller v. Alabama* Applies Retroactively Pursuant To U.S. Supreme Court Precedent 8
  - 1. *Miller* Is Retroactive Because Kuntrell Jackson Received The Same Relief On Collateral Review 9
  - 2. *Miller* Applies Retroactively Pursuant To *Teague v. Lane* 10
    - a. Miller Is Retroactive Because It Announced A Substantive Rule That Categorically Prohibits The Imposition Of Mandatory Life Without Parole On All Juvenile Offenders 10
    - b. Miller Is Retroactive Because It Involves A Substantive Interpretation Of The Eighth Amendment Based Upon The Supreme Court's Evolving Understanding Of Child And Adolescent Development.... 14
    - c. Miller Is A "Watershed Rule" Under Teague 17
  - 3. Having Declared Mandatory Life without Parole Sentences Cruel And Unusual When Imposed On Juvenile Homicide Offenders, Allowing Juvenile Offenders To Continue To Suffer That Sentence Violates The Eighth Amendment 19

VI. CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Buss,
558 F.3d 657 (7th Cir. 2009) 11

Alleyne v. United States,
133 S. Ct. 2151 (2013)...13

Atkins v. Virginia,
536 U.S. 304 (2002)...11

Black v. Bell,
664 F.3d 81 (6th Cir. 2011) 11

Bonilla v. State,
791 N.W.2d 697 (Iowa 2010) 11

In re Corey Grant,
No. 13-1455 (3d. Cir. June 17, 2013) 11

Davis v. Norris,
423 F.3d 868 (8th Cir. 2005) 11

Eddings v. Oklahoma,
455 U.S. 104 (1982)...16, 17

In re Evans,
449 Fed. App'x 284 (4th Cir. 2011) 11

Furman v. Georgia,
408 U.S. 238 (1972)...19, 21, 22

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

Harvard v. State,
486 So.2d 537 (Fla. 1986)...17

Hill v. Snyder,
No. 10-14568, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013) 22

In re Holladay,
331 F.3d 1169 (11th Cir. 2003) 11

Horn v. Banks,
536 U.S. 266 (2002)..11

Horn v. Quarterman,
508 F.3d 306 (5th Cir. 2007) 11

Jackson v. Hobbs,
132 S. Ct. 548 (2011)...9, 24

Jackson v. State,
194 S.W.3d 757 (Ark. 2004)...9

Johnson v. Texas,
509 U.S. 350 (1993)..16

Johnson v. United States,
720 F.3d 720 (8th Cir. 2013) 11

LeCroy v. Sec'y, Florida Dept. of Corr.,
421 F.3d 1237 (11th Cir. 2005) 11

Lee v. Smeal,
447 F. App'x 357 (3d Cir. 2011) 11

Lockett v. Ohio,
438 U.S. 586 (1978)...16, 17

Loggins v. Thomas,
654 F.3d 1204 (11th Cir. 2011) 11

Mackey v. United States,
401 U.S. 667 (1971)...9, 20

May v. Anderson,
345 U.S. 528 (1953)..22

Miller v. Alabama,
132 S. Ct. 2455 (2012).. *passim*

Morris v. Dretke,
413 F.3d 484 (5th Cir. 2005) 11

People v. Williams,
982 N.E.2d 181 (Ill. App. Ct. 2012) 19, 22

Ring v. Arizona,
536 U.S. 584 (2002)....12

Roberts v. Louisiana,
428 U.S. 325 (1976)....16

Rogers v. State,
267 P.3d 802 (Nev. 2011)....11

J.D.B. v. North Carolina,
131 S. Ct. 2394 (2011)....14, 24

Roper v. Simmons,
543 U.S. 551 (2005).... *passim*

Saffle v. Parks,
494 U.S. 484 (1990)....10

Schriro v. Summerlin,
542 U.S. 348 (2004)....10, 11, 12, 13

Shuman v. Wolff,
571 F. Supp. 213 (D. Nev. 1983)....17

Songer v. Wainwright,
769 F.2d 1488 (11th Cir. 1985)....17

In re Sparks,
657 F.3d 258 (5th Cir. 2011)....11

State v. Dyer,
77 So. 3d 928 (La. 2011)....11

State v. Mantich,
--- N.W.2d ---, 287 Neb. 320 (2014)....17

Stone v. United States,
No. 13-1486 (2d Cir. May 30, 2013)....11

Sumner v. Shuman,
483 U.S. 66 (1987)....16

Teague v. Lane,
489 U.S. 288 (1989).... *passim*

Trop v. Dulles,
356 U.S. 86 (1958)....19, 22

Tyler v. Cain,
533 U.S. 656 (2001)..9

Wang v. United States,
No. 13-2426 (2d Cir.)..11

Whorton v. Bockting,
549 U.S. 406 (2007)..18

Williams v. United States,
No. 13-1731 (8th Cir. May 9, 2013) 11

Witherspoon v. Illinois,
391 U.S. 510 (1968)..18

Woodson v. North Carolina,
428 U.S. 280 (1976)...15, 16

Other Authorities

S. David Mitchell, *Blanket Retroactive Amelioration: a Remedy for Disproportionate Punishments*, 40 Fordham Urb.L.J. City Square 14 (2013), *available at* urbanlawjournal.com/?p=1224 21

I. INTEREST AND IDENTITY OF *AMICUS CURIAE*

Founded in 1975, Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

Juvenile Law Center has worked extensively on the issue of juvenile life without parole, filing *amicus* briefs in the U.S. Supreme Court in both *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Since the U.S. Supreme Court issued its decision in *Miller*, Juvenile Law Center has filed briefs in state and federal courts throughout the country addressing the impact and scope of the *Miller* decision, including briefs in the U.S. Supreme Court (*Pennsylvania v. Cunningham*, No. 13-1038); U.S. Court of Appeals for the Second Circuit (*Wang v. U.S.*, Case No. 13-2426); the U.S. Court of Appeals for the Third Circuit (*Baines v. Commonwealth*, Case No. 12-cv-3996); the U.S. Court of Appeals for the Eighth Circuit (*Martin v. Symmes*, Case No. 13-3676); the U.S. Court of Appeals for the Ninth Circuit (*DeMola v. Cavazo*s, No. CV 10-00014-JLS-SS); the Arkansas Supreme Court (*Hobbs v. Gordon*, No. CV-13-942); the California Supreme Court (*State v. Gutierrez*, Case No. S206365; *State v. Moffett*, Case No. S206771); the Colorado Supreme Court (*Banks v. State*, Case No. 12SC1022); the Florida Supreme Court (*Falcon v. State*, Case No. SC 13-865); the Massachusetts Supreme Court (*Commonwealth v. Brown*, Case No. SJC-11454); the

Nebraska Supreme Court (*State v. Castaneda*, Case No. S-11-0023); the Ohio Supreme Court (*State v. Long*, Case No. 2012-1410); the Pennsylvania Supreme Court (*Commonwealth v. Batts*, 79 MAP 2009; *Commonwealth v. Cunningham*, 38 EAP 2012); and the Wyoming Supreme Court (*State v. Mares*, No. S-13-0223).

II. CONSENT OF THE PARTIES

Pursuant to Supreme Court Procedural Rule 30(1), all parties have provided written consent to the filing of this *amicus* brief. *See* Appendix for written consent provided.

III. STATEMENT OF THE CASE AND THE FACTS

Amicus Juvenile Law Center incorporates by reference the Statement of the Case and the Facts in the Respondents' answering brief.

IV. SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the United States Supreme Court held that the mandatory imposition of life without parole sentences on juvenile offenders is unconstitutional. Instead, *Miller* requires that a sentencer make an individualized determination of the juvenile's level of culpability, taking into account the unique characteristics associated with his young age. When Respondents were convicted of murder for offenses they committed as juveniles, they received mandatory life without parole sentences which, pursuant to *Miller*, are unconstitutional. *Miller* applies retroactively to these Respondents and to other cases that have become final after the expiration of the period for direct review, for four primary reasons. First, the United States Supreme Court has already applied *Miller* retroactively by affording relief in Kuntrell Jackson's case, which was before the Court on collateral review. Second, *Miller* announced a substantive rule, which pursuant to Supreme Court precedent applies retroactively. Third, *Miller* is a watershed rule of criminal procedure that applies retroactively. Finally, *Miller* must be applied retroactively because, once the Court determines that a punishment is cruel and unusual when imposed on a child, any continuing imposition of that sentence is itself a violation of the Eighth Amendment; an arbitrary date on the calendar cannot deem a sentence constitutional which the United States Supreme Court has now declared cruel and unusual punishment.

V. ARGUMENT

A. The U.S. Supreme Court Has Repeatedly Held That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest punishments.[1]

Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes:

> 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."

560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Graham* found that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (*quoting* Roper, 543 U.S. at 569, 573). The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Graham,* 560 U.S. at 68 (*quoting Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

[1] *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life without parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for release was developmentally inappropriate and constitutionally disproportionate. The Court further explained that:

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

Id. The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

In reaching these conclusions about a juvenile's reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological and neurological attributes of youth. The Court clarified in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offenders" is central to the question of whether a punishment is constitutional. *Id*. at 68-69.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life without parole sentences for children convicted of homicide offenses. Reiterating that children are fundamentally different from adults, the Court held that, prior to imposing such a sentence on a juvenile offender, the sentencer must take into account the

juvenile's reduced blameworthiness. *Miller*, 132 S. Ct. at 2460. Justice Kagan, writing for the majority in *Miller*, was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id.* (*quoting Graham*, 560 U.S. at 68, 74). The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id.* at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 2464-65 (*quoting Graham*, 560 U.S. at 68-69; *Roper*, 543 U.S. at 570).

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

B. *Miller v. Alabama* Applies Retroactively Pursuant to U.S. Supreme Court Precedent

United States Supreme Court precedent requires that *Miller* be applied retroactively. True

justice should not depend on a particular date on the calendar. Nowhere is this principle steelier than in the Eighth Amendment's ban on cruel and unusual punishments. As Justice Harlan wrote: "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States,* 401 U.S. 667, 693 (1971) (Harlan, J., concurring). The U.S. Supreme Court's decisions interpreting the Eighth Amendment mark our nation's progress as a civilized society; once the Court sets down a marker along the continuum of our evolving standards of decency, all affected must benefit. To deny retroactive substantive application of *Miller* would compromise our justice system's consistency and legitimacy.

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

The Supreme Court's decision in *Miller* involved two juveniles, Evan Miller, petitioner in *Miller*, and Kuntrell Jackson, the petitioner in Miller's companion case, *Jackson v. Hobbs*. Kuntrell Jackson was sentenced to life imprisonment without parole; the Arkansas Supreme Court affirmed his conviction in 2004. *Jackson v. State*, 194 S.W.3d 757 (Ark. 2004). Having been denied relief on collateral review as well, Jackson filed a petition for certiorari; the U.S. Supreme Court granted certiorari in both Miller's and Jackson's cases and ordered that they be argued together. *Jackson v. Hobbs*, 132 S. Ct. 548 (2011); *Miller v. Alabama*, 132 S. Ct. 548 (2011). In its consolidated decision in *Miller* and *Jackson*, the U.S. Supreme Court vacated the judgments of sentences in both cases and remanded each for further proceedings. *Miller,* 132 S. Ct. at 2475.

Having granted relief to Jackson on collateral review, the Supreme Court's ruling should be deemed retroactive. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court noted that the fair administration of justice requires that similarly situated defendants be treated similarly. *Id.* at 315-16. *See also Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive,

not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court."). Respondents here should likewise benefit from the Supreme Court's ruling in *Miller*.

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

In *Teague v. Lane*, the U.S. Supreme Court held that a new Supreme Court rule applies retroactively to cases on collateral review only if it is: (a) a substantive rule; or (b) a "watershed" rule of criminal procedure. 489 U.S. at 307, 311. *See also Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Because *Miller* announced a new substantive rule or, in the alternative, a "watershed" procedural rule, *Miller* applies retroactively.

a. *Miller* Is Retroactive Because It Announced A Substantive Rule That Categorically Prohibits The Imposition Of Mandatory Life Without Parole On All Juvenile Offenders

The U.S. Supreme Court has held that "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id.*, at 353. New substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." *Id.,* at 352 (*quoting Bousley v. United States*, 523 U.S. 614, 620 (1998)). A new rule is substantive if it "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (*quoting Penry v. Lynaugh,* 492 U.S. 302, 329, 330 (2002), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)).

The new rule announced in *Miller* is substantive and therefore retroactive, because Respondents are now serving a punishment – mandatory life without parole – that, pursuant to

Miller, the law can no longer impose on them. *See Schriro*, 542 U.S. at 352. [2] Like the rules announced in *Atkins*, *Roper* and *Graham*, which have all been applied retroactively,[3] *Miller* "prohibit[s] a certain category of punishment" – mandatory life imprisonment without the possibility of parole – "for a class of defendants," – juvenile homicide offenders. *Horn v. Banks*, 536 U.S. 266, 271 n.5 (2002).

---

[2] Notably, the United States Department of Justice has taken a uniform position that *Miller* is, indeed, retroactive. *See, e.g.*, Gov't's Response to Petitioner's Application for Authorization to File a Second or Successive Motion Under 28 U.S.C. § 2255 at 18, *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (explaining that "*Miller* should be regarded as a substantive rule for *Teague* purposes under the analysis in Supreme Court cases."); Letter from the Government to the Clerk of the Court, United States Court of Appeals for the Second Circuit, dated July 3, 2013, *Wang v. United States*, No. 13-2426 (2d Cir.) (explaining that "at least for purposes of leave to file a successive petition, *Miller* applies retroactively . . . under the law of this Circuit."); Gov't's Response to Petitioner's Motion for Reconsideration of Order Denying Motion for Leave to File a Second Motion Pursuant to 28 U.S.C. § 2255 at 10-11, *Stone v. United States*, No. 13-1486 (2d Cir. May 30, 2013) (explaining that "*Miller's* holding that juvenile defendants cannot be subjected to a mandatory life-without-parole sentence is properly regarded as a substantive rule" because *Miller* "alters the range of sentencing options for a juvenile homicide defendant"); Gov't's Response to Petitioner's Application for Authorization to File a Second or Successive Motion Under 28 U.S.C. § 2255 at 13-14, *Williams v. United States*, No. 13-1731 (8th Cir. May 9, 2013) (explaining that rules that "categorically change the range of outcomes" for a defendant should be treated as substantive rules and, therefore, *Miller* announced a new substantive rule for retroactivity purposes); Response of the United States to Petitioner's Application for Authorization to File a Second or Successive Motion Under 28 U.S.C. § 2255 at 8-15, *In re Corey Grant*, No. 13-1455 (3d. Cir. June 17, 2013) (arguing that *Miller's* new rule is substantive).

[3] Courts across the country have applied *Atkins* retroactively. *See, e.g.*, *Morris v. Dretke*, 413 F.3d 484, 487 (5th Cir. 2005); *Black v. Bell*, 664 F.3d 81, 92 (6th Cir. 2011); *Allen v. Buss*, 558 F.3d 657, 661 (7th Cir. 2009); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). Similarly, *Roper* and *Graham*, two cases upon which *Miller* relies, have been applied retroactively. *See Loggins v. Thomas*, 654 F.3d 1204, 1206 (11th Cir. 2011) (noting *Roper* applied retroactively); *Lee v. Smeal*, 447 F. App'x 357, 359 n.2 (3d Cir. 2011) (unpublished) (same); *Horn v. Quarterman*, 508 F.3d 306, 308 (5th Cir. 2007) (same); *LeCroy v. Sec'y, Florida Dept. of Corr.*, 421 F.3d 1237, 1239 (11th Cir. 2005) (same); *See also In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review); *Bonilla v. State*, 791 N.W.2d 697, 700-01 (Iowa 2010) (holding *Graham* applies retroactively); *In re Evans*, 449 Fed. App'x 284 (4th Cir. 2011) (per curiam) (unpublished) (noting Government "properly acknowledged" *Graham* applies retroactively on collateral review); *State v. Dyer*, 77 So. 3d 928, 929 (La. 2011) (same); *Rogers v. State*, 267 P.3d 802, 804 (Nev. 2011) (noting that district court properly applied *Graham* retroactively).

Miller holds that, prior to imposing a life without parole sentence on a juvenile, the sentencer must consider factors that relate to the youth's overall culpability. These factors include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." 132 S. Ct. at 2468-69.

The fact that *Miller* imposed new factors that a sentencer must consider before imposing juvenile life without parole sentences necessitates a finding that *Miller* announced a substantive rule. The Supreme Court's refusal to hold *Ring v. Arizona*, 536 U.S. 584 (2002), retroactive in *Schriro v. Summerlin*, 542 U.S. at 358, illustrates this point. In *Ring,* the U.S. Supreme Court had held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating factors essential to imposition of the death penalty. In *Schriro*, the Court distinguished between *procedural* rules in which the Supreme Court determines who must make certain findings before a particular sentence could be imposed with *substantive* rules in which the U.S. Supreme Court itself establishes that certain factors are required before a particular sentence could be imposed:

> [the U.S. Supreme] Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as [*the U.S. Supreme*] *Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

542 U.S. at 354 (emphasis in original). Because *Miller* requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably

sentencing them to a lifetime in prison," *Miller*, 132 S. Ct. at 2469, the U.S. Supreme Court has made consideration of certain factors "essential" to imposing life without parole on juveniles. As directed by *Schriro*, *Miller* is a substantive rule.

Additionally, mandatory life without parole sentences are substantively distinct and much harsher than alternative sentencing schemes in which life without parole is, at most, a discretionary alternative. Most recently, in *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013), the U.S. Supreme Court stated that "[m]andatory minimum sentences increase the penalty for a crime." The Court described a sentence with a mandatory minimum as "a new penalty," *id*. at 2160, finding it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id*. The Court explained that "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id*. at 2161.
Alleyne makes clear that a *mandatory* life without parole sentence is substantively different from a *discretionary* life without parole sentence; it is substantively harsher, more aggravated, and implicates a more heightened loss of liberty.

As clarified by *Alleyne* and *Schriro*, *Miller* did not simply require that certain factors uniquely relevant to youth be considered before a juvenile can receive life without parole—it in fact *expanded* the range of sentencing options available to juveniles by prohibiting mandatory life without parole and requiring that *additional* sentencing options be put in place. This is a fundamental change in sentencing for juveniles that goes well beyond a change in a procedural rule.

Because *Miller* relies on a new, substantive interpretation of the Eighth Amendment that recognizes that children are categorically less culpable than adults, and because sentencers must consider how these differences mitigate against imposing life without parole sentences, the

decision must be applied retroactively. The Respondents are entitled to be resentenced pursuant to a sentencing scheme that comports with *Miller*'s constitutional mandates – one that is proportionate and individualized.

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

The Supreme Court consistently has recognized that a child's age is far "more than a chronological fact," and has recently acknowledged that it bears directly on children's constitutional rights and status in the justice system. *See, e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citations omitted). *Roper*, *Graham*, and *Miller* have enriched the Court's Eighth Amendment jurisprudence with scientific research confirming that youth merit distinctive treatment. *See Roper*, 543 U.S. at 569-70 (explaining that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders") (*citing* Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992); Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)); *Graham*, 560 U.S. at 68 (reiterating that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Miller*, 132 S. Ct. at 2464 n.5 ("[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

This understanding that juveniles, as a class, are less culpable than adult offenders is central to the Court's holding in *Miller,* 132 S. Ct. at 2469, and reflects a substantive change in children's rights under the Eighth Amendment. As previously described, to ensure that the

sentencing of juveniles is constitutionally appropriate, *Miller* requires that, prior to imposing a life without parole sentence on a juvenile offender, the sentencer must consider the factors that relate to the youth's overall culpability and capacity for rehabilitation. 132 S. Ct. at 2468-69. *Miller* therefore requires a substantive, individualized assessment of the juvenile's culpability prior to imposing life without parole.

In requiring individualized sentencing in adult capital cases, the Supreme Court stated that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (internal citation omitted) (emphasis added). Since *Miller* acknowledges that life without parole sentences for juveniles are "akin to the death penalty" for adults, 132 S. Ct. at 2566, *Miller*'s requirement of individualized consideration of a youth's lessened culpability and potential for rehabilitation is similarly "constitutionally indispensable" and reflects a new substantive requirement in juvenile sentencing.

Indeed, by directly comparing a juvenile sentence of life imprisonment without parole to a death sentence, the U.S. Supreme Court's death penalty jurisprudence is instructive in answering the instant retroactivity question. Of particular relevance are the Supreme Court's decisions in *Woodson*, 428 U.S. 280 (1976) (plurality), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality) and *Sumner v. Shuman,* 483 U.S. 66 (1987). *Woodson*, in fact, was repeatedly relied upon by the *Miller* Court. *See Miller*, 132 S. Ct. at 2464, 2467, 2471.

In *Woodson, Roberts*, *and Shuman*, the Supreme Court held that a mandatory death penalty was a violation of the Eighth Amendment because it did not permit the sentencer to

weigh appropriate factors in determining the proper sentence. "The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of 'relevant facets of the character and record of the individual offender or the circumstances of the particular offense.'" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (citing *Woodson*, 428 U.S. at 304). In *Lockett*, the Supreme Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id*. at 608.

This reasoning is similarly apt to mandatory juvenile life without parole: "By removing youth from the balance – by subjecting a juvenile to the same life-without-parole sentence applicable to an adult – these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller*, 132 S. Ct. at 2466. As the Supreme Court held in *Johnson v. Texas*, 509 U.S. 350 (1993), "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*." *Id., at* 367.

Woodson, *Roberts, Lockett* and *Eddings* have been held retroactive (as should *Miller*) either as a "categorical ban on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty" or because the offending statute barred consideration of the relevant characteristics of the defendant and the offense. *Miller*, 132 S. Ct. at 2463-64. *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (applying *Lockett* retroactively); *Harvard v. State*, 486 So.2d 537, 539 (Fla. 1986) (same); *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (*Eddings* applied retroactively).

The language of *Miller* demonstrates that the rule announced was not considered a mere procedural checklist, but a substantive shift in juvenile sentencing. The Court found:

> But 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 will be uncommon*. . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, *we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison*.

Miller, 132 S. Ct. at 2469 (emphasis added). The Court's finding that appropriate occasions for juvenile life without parole sentences will be "uncommon" and that the sentencer must consider how a child's status counsels against sentencing *any* child to life without parole underscores that *Miller* substantively altered sentencing assumptions for juveniles – from a pre-*Miller* constitutional tolerance for mandated juvenile life without parole sentences to a post-*Miller* environment in which even discretionary juvenile life without parole sentences are constitutionally suspect. *See, e.g.*, *State v. Mantich*, --- N.W.2d ---, 287 Neb. 320, 340 (2014) (describing *Miller* as substantive "because it sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where that juvenile cannot be distinguished from an adult based on diminished capacity or culpability.").

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

As discussed above, *Miller* must be applied retroactively pursuant to *Teague* because it is a substantive rule. *Miller* must also be applied retroactively pursuant to *Teague*'s second exception, which applies to "watershed rules of criminal procedure" and to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311. This occurs when the rule "requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.''" *Id.* at 307 (internal citations omitted). To be "watershed[,]" a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding and, second, "alter our understanding of the bedrock

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

Miller satisfies both requirements. First, mandatory life without parole sentences cause an "impermissibly large risk" of *inaccurately* imposing the harshest sentence available for juveniles. *Whorton*, 549 U.S. at 418. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth – and of each individual youth – which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464. *See also id.* at 2469 (explaining that imposing mandatory life without parole sentences "poses too great a risk of disproportionate punishment."). By requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding. *See id.* (requiring sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). Indeed, some state appellate courts have adopted this analysis. *See, e.g.*, *People v. Williams*, 982 N.E.2d 181, 196, 197 (Ill. App. Ct. 2012) (granting petitioner the right to file a successive post-conviction petition because *Miller* is a "watershed rule," and at his pre-*Miller* trial, petitioner had been "denied a 'basic 'precept of justice'' by not receiving any consideration of his age from the circuit court in sentencing," and finding that "*Miller* not only changed

procedures, but also made a substantial change in the law."). Moreover, *Miller's* admonition – and expectation – that juvenile life without parole sentences will be "uncommon" upon consideration of youth and its "hallmark attributes" explicitly undermines the accuracy of life without parole sentences imposed pre- *Miller* – the very sentences at issue in this appeal.

3. Having Declared Mandatory Life without Parole Sentences Cruel And Unusual When Imposed On Juvenile Homicide Offenders, Allowing Juvenile Offenders To Continue To Suffer That Sentence Violates The Eighth Amendment

The boundaries of the Eighth Amendment are dynamic and constantly evolving. "The [Supreme] Court recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). The Court has thus recognized that "a penalty that was permissible at one time in our Nation's history is not necessarily permissible today." *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring).

In recent years, Eighth Amendment jurisprudence has evolved with extraordinary speed in the context of juvenile sentencing. Prior to the Court's 2005 decision in *Roper*, juvenile offenders could be executed. Less than a decade later, not only the death penalty, but life without parole sentences for children are constitutionally disfavored. *See Miller*, 132 S. Ct. at 2469 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon."). This evolution in Eighth Amendment jurisprudence has been informed by brain science and adolescent development research that explains why children who commit crimes are less culpable than adults, and how youth have a distinctive capacity for rehabilitation. *See* Section III. A., *supra*. In light of this new knowledge, the Court has held in *Roper*, *Graham*, and *Miller* that sentences that may be permissible for adult offenders are

unconstitutional for juvenile offenders. *See, e.g., Miller,* 132 S. Ct. at 2465 ("In [*Graham*], juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime.").

While this understanding of adolescent development was not fully incorporated into Eighth Amendment jurisprudence when Respondents' direct appeal rights were exhausted, this does not change the fact that Respondents, as well as all other juveniles sentenced pre-*Miller*, are categorically less culpable than adults convicted of homicide and therefore are serving constitutionally disproportionate sentences. *See Miller*, 132 S. Ct. at 2475 (finding "the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"). Forcing individuals to serve constitutionally disproportionate sentences for crimes they committed as children based on nothing other than the serendipity of the date on which they committed their offenses and their convictions became final runs counter to the Eighth Amendment's reliance on the evolving standards of decency and serves no societal interest. *See Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring) ("[T]he writ [of habeas corpus] has historically been available for attacking convictions on [substantive due process] grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."). It is both common sense and a fundamental tenet of our justice system that

> the individual who violates the law should be punished to the extent that others in society deem appropriate. If, however, society changes its mind, then what was once "just deserts" has now become unjust. And, it is contrary to a system of justice that a rigid adherence to the temporal order of when a statute was adopted and when someone was convicted should trump the application of a new lesser, punishment.

S. David Mitchell, *Blanket Retroactive Amelioration: a Remedy for Disproportionate Punishments*, 40 Fordham Urb.L.J. City Square 14 (2013), *available at* urbanlawjournal.com/?p=1224.

Additionally, depriving the majority of juveniles sentenced to life without parole the benefit of *Miller*'s holding because they have exhausted their direct appeals violates the Eighth Amendment's proscription against the arbitrary infliction of punishments. *See Furman*, 408 U.S. at 256 ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."). In his concurring opinion in *Furman*, Justice Brennan found:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause – that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments.

Id. at 274 (Brennan, J., concurring). Unless *Miller* is applied retroactively, children who lacked sufficient culpability to justify the life without parole sentences they received will remain condemned to die in prison simply because they exhausted their direct appeals. As the Illinois Appellate Court concluded in finding *Miller* retroactive for cases on collateral review, in addition to mandatory life without parole sentences constituting "cruel and unusual punishment[,]" "[i]t would also be cruel and unusual to apply that principle only to new cases." *Williams*, 982 N.E.2d at 197. *See also Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Jan. 30, 2013) (proclaiming that "if ever there was a legal rule that should – as a matter of law and

morality – be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice."). The constitutionality of a child's sentence cannot be determined by the arbitrary date his sentence became final. Such a conclusion defies logic, and contravenes Eighth Amendment jurisprudence.

Finally, the U.S. Supreme Court has found that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). *See also Furman*, 408 U.S. at 270 (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."). The Eighth Amendment's emphasis on dignity and human worth has special resonance when the offenders being punished are children. As Justice Frankfurter wrote over fifty years ago in *May v. Anderson,* 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." More recently, the Court has found that:

> [juveniles'] own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. . . . From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Roper, 543 U.S. at 570.

In order to treat Respondents – and any other children sentenced to mandatory life without parole sentences seeking collateral review – with the dignity that the Eighth Amendment requires, *Miller* must apply retroactively. "The juvenile should not be deprived of the

opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79.

VI. CONCLUSION

Sentencing practices that preclude consideration of the distinctive characteristics of individual juvenile defendants are unconstitutionally disproportionate punishments. Requiring individualized determinations in these cases does not require excusing juvenile offending. Juveniles who commit serious offenses should not escape punishment. But the U.S. Supreme Court's recent Eighth Amendment jurisprudence striking particular sentences for juveniles does require that additional considerations and precautions be taken to ensure that the sentence reflects the unique developmental characteristics of adolescents. As the Supreme Court has acknowledged, a child's age is far "'more than a chronological fact.'" *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). New Hampshire must comply with *Miller* and provide individualized sentencing to all individuals serving mandatory juvenile life without parole sentences.

The Supreme Court's decision in *Miller* applies retroactively to cases on collateral review. While this conclusion seems obvious from the Supreme Court's application of *Miller* to Kuntrell Jackson, Petitioner in its companion case, *Jackson v. Hobbs,* this ruling is likewise dictated by the Court's retroactivity analysis in *Teague v. Lane*. Accordingly, this Court should vacate the Respondents' sentences and remand their cases for re-sentencing in accordance with *Miller*.

Respectfully submitted,

____

Marsha L. Levick, Esq.
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19103
P: 215-625-0551
F: 215-625-2808
mlevick@jlc.org

Counsel for Amicus Curiae

____

Andrew S. Winters, Esq.
Cohen & Winters, PLLC
101 North State Street, Suite 1
Concord, NH 03301
(603) 224-6999 (phone)
(888) 926-5151 (fax)
andrew@cohenwinters.com

Local Counsel for Amicus Curiae

Dated: May 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 9, 2014, I caused two copies of the foregoing Brief of *Amicus Curiae* Juvenile Law Center to be sent, via first class mail to:

Joseph A Foster, Attorney General
Elizabeth C. Woodcock, Assistant Attorney General
Office of the Attorney General
The State of New Hampshire
Criminal Justice Bureau
33 Capitol Street
Concord, NH 03301-6397

Richard Guerriero, Esq.
Lothstein Guerriero, PLLC
7 Main Street, Suite 5
Keene, NH 03431

Christopher Johnson
Appellate Defender Program
New Hampshire Public Defender
10 Ferry Street, Suite 202
Concord, NH 03301

Andrew R. Schulman, Esq.
Getman, Schulthess & Steere, P.A.
1838 Elm Street
Manchester, NH 03014

____

Marsha L. Levick, Esq.
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19103
P: 215-625-0551
F: 215-625-2808
mlevick@jlc.org