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Colorado Supreme Court
STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Certiorari to the Court of Appeals, 2013CA2046
District Court, Jefferson County, 1997CR1195

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

Frank Vigil, Jr.,

Respondent.

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Supreme Court
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Brief of *Amici Curiae* Juvenile Law Center on Behalf of Respondent

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I. STATEMENTS OF INTEREST AND IDENTITY

The organizations submitting this brief work on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. *Amici* are advocates and researchers who have a wealth of experience and expertise in providing for the care, treatment, and rehabilitation of youth in the child welfare and justice systems. *Amici* know that youth who enter these systems need extra protection and special care. *Amici* understand from their collective experience that adolescent immaturity manifests itself in ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. *Amici* also know that a core characteristic of adolescence is the capacity to change and mature. For these reasons, *Amici* believe that youth status separates juvenile and adult offenders in categorical and distinct ways that warrant distinct treatment under the Eighth Amendment. *See* Appendix for a list and brief description of all *Amici*.

II. SUMMARY OF ARGUMENT

In *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the United States Supreme Court held that the mandatory imposition of sentences of life without the possibility of parole on juvenile offenders convicted of murder is unconstitutional. At the time the Respondent, Frank Vigil, Jr., was sentenced for a crime he committed at age 16, state law mandated that he be sentenced to life without parole. As applied to juvenile offenders, this mandatory scheme is unconstitutional pursuant to *Miller*.

Miller applies retroactively to the Respondent. *Miller* announced a substantive rule, which pursuant to U.S. Supreme Court precedent applies retroactively. Further, even assuming the rule is procedural, *Miller* is a watershed rule of criminal procedure that applies retroactively. Moreover, *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; the date upon which a mandatory life without parole sentence is imposed cannot convert it into a constitutional sentence.

III. ARGUMENT

A. *Miller* Reaffirms The U.S. Supreme Court's Recognition 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 forms of punishments.[1] Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes:

> [a]s compared to adults, juveniles have a "lack of maturity and an 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

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[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.

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)).

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 a sentencing scheme that mandates life without parole for juvenile offenders violates the Eighth Amendment and that the sentencer must take into account the juvenile's reduced blameworthiness and individual characteristics before imposing this harshest available sentence. *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, in *Miller*, the Court found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." 132 S. Ct. at 2465. The Court instead emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* As a result, it held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life

in prison without possibility of parole for juvenile offenders," *id.* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467.

B. *Miller v. Alabama* Applies Retroactively

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* 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 Substantive Pursuant To *Teague* Because It Alters The Range Of Available Sentencing Options

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." *Summerlin*, 542 U.S. at 353. Moreover, a 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)). *Miller* applies retroactively because it prohibits a "category of punishment" (mandatory life without parole) for a "class of defendants" (juveniles). *See id.*

Mandatory life without parole sentences are substantively distinct and obviously much harsher than alternative sentencing schemes in which life without parole is, at most, a discretionary alternative. The U.S. Supreme Court has stated

that "[m]andatory minimum sentences increase the penalty for a crime," and has found it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2160 (2013). The Court has explained that "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id.* at 2161. Accordingly, a mandatory life without parole sentence for a juvenile is substantively different from a discretionary life without parole sentence; it is substantively harsher, more aggravated, and imposes a more heightened loss of liberty.

Miller therefore *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. Unlike procedural rules, which "regulate only the *manner of determining* the defendant's culpability", *Summerlin*, 542 U.S. at 353, *Miller* imposes a fundamental, substantive change in sentencing for juveniles.

b. *Miller* Is Retroactive Pursuant To *Teague* Because It Establishes A Substantive Right To Individualized Sentencing For Juveniles Facing Life Without Parole Sentences

In *Miller*, the U.S. Supreme Court established a new rule requiring individualized sentencing for juvenile homicide offenders facing life without parole. *See Miller*, 132 S. Ct. at 2466 n.6 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses."). This new right to individualized sentencing is a new substantive right that must be applied retroactively.

In death penalty cases, the U.S. Supreme Court has held that defendants have a substantive right to individualized sentencing. In *Woodson v. North Carolina*, an adult capital case, 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." 428 U.S. 280, 304 (1976) (plurality opinion) (internal citation omitted) (emphasis added). *See also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("we cannot avoid the conclusion that an individualized decision is *essential* in capital cases") (emphasis added). Significantly, *Lockett* differentiates between the substantive right to individualized sentencing that is required under

the Eighth Amendment and the specific procedures states adopt in implementing individualized sentencing schemes:

> *There is no perfect procedure* for deciding in which cases governmental authority should be used to impose death. *But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's* character and record and to circumstances of the offense . . . creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605 (emphasis added). The right to individualized sentencing is a prerequisite to the constitutional imposition of the death penalty, even though the procedures may vary from state-to-state.

Since *Miller* acknowledges that life without parole sentences for juveniles are "akin to the death penalty" for adults, 132 S. Ct. at 2466, *Miller*'s new requirement of individualized sentencing for youth facing life without parole is, as in the death penalty cases, "constitutionally indispensable" and "essential." *See Woodson*, 428 U.S. at 304; *Lockett*, 438 U.S. at 605. As with the death penalty, a mandatory juvenile life without parole sentencing scheme "creates the risk that [the sentence] will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. *See Summerlin*, 542 U.S. at 352 (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.") (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). Therefore, *Miller* establishes a new substantive right to individualized sentencing in juvenile life without parole cases that must be applied retroactively.

c. *Miller* Is Substantive Pursuant To *Teague* Because It Outlawed An Automatic Life Without Parole Penalty For Juvenile Offenders And Required Sentencers To Consider Factors Other Than The Crime Itself Before Sentencing Juveniles To Life Without Parole

In addition to creating a new substantive right to individualized sentencing, *Miller* holds that mandatory life without parole for juveniles violates the Eighth Amendment and that, prior to imposing a life without parole sentence, the sentencer must consider specific factors that relate to the youth's overall culpability. 132 S. Ct. at 2468-69. 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." *Id.*

The fact that *Miller* requires sentencers to consider these specific new factors before imposing juvenile life without parole and bans the automatic imposition of such 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 *Summerlin*, 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. 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 *Summerlin*, *Miller* is a substantive rule.[2]

d. Even Assuming *Miller* Is Not A Substantive Rule, *Miller* Is A "Watershed Rule" Under *Teague*

As discussed above, *Miller* must be applied retroactively pursuant to *Teague* because it is a substantive rule. Even assuming the rule is procedural, *Miller* must be applied retroactively pursuant to *Teague*'s second exception,

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[2] Notably, the United States Department of Justice has taken a uniform position that *Miller* is, indeed, retroactive. *See, e.g.*, Gov't's Resp. to Pet'r's App. for Authoriz. to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 18, *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744) (explaining that "*Miller* should be regarded as a substantive rule for *Teague* purposes under the analysis in Supreme Court cases."); Letter from the Gov't to the Clerk of Court, United States Court of Appeals for the Second Circuit, dated July 3, 2013 at 1, *Wang v. United States*, No. 13-2426 (2d Cir. 2014) (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 Resp. to Pet'r's Mot. for Recons. of Order Den. Mot. for Leave to File a Second Mot. Purs. to 28 U.S.C. § 2255 at 10-11, *Stone v. United States*, No. 13-1486 (2d Cir. 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 Resp. to Pet'r's App. for Authoriz. to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 13-14, *Williams v. United States*, No. 13-1731 (8th Cir. 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); Resp. of the United States to Pet'r's App. for Authoriz. to File a Second or Successive Mot. 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).

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 313. 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. *Miller* found that sentencing juveniles to "that harshest prison sentence" without guaranteeing

consideration of their "youth (and all that accompanies it) . . . poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. 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.

Second, 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.* at 2469 (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."). The *Miller* ruling has "effected a profound and sweeping change," *see Whorton*, 549 U.S. at 421 (internal quotation marks omitted), by simultaneously striking down sentencing schemes for children in twenty-nine jurisdictions. *See Miller*, 132 S. Ct. at 2471. In comparison, the quintessential "watershed" right to counsel announced in *Gideon* changed the law in only fifteen states. Brief for the State Government *Amici Curiae*, p. 2, *Gideon v. Cochran*, 372 U.S. 335 (1963).

The majority of state appellate courts have found that *Miller* is retroactive as it creates a new substantive rule. *People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *Ex Parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014); *Nebraska v. Mantich*, 287 Neb. 320 (2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Diatchenco v. Suffolk Cnty. Dist. Atty.*, 466 Mass. 655 (2013); *Jones v. Missipssippi*, 122 So.3d 698 (Miss. 2013); *Petition of State of New Hampshire*, No. 2013-566, 2014 WL4253359 (N.H. Aug. 29, 2014); *Wyoming v. Mares*, 335 P.3d 487 (Wy. 2014); *Aiken v. Byars*, No. 2012-213286, 2014 WL 5836918 (S.C. Nov. 12, 2014). While these courts have not addressed whether Miller constitutes a watershed rule, at least one state appellate court has adopted the watershed 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") (internal citations and quotation marks omitted), *abrogated by People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (holding *Miller* to be "a new substantive rule").

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 sentence at issue in this appeal.

The *Teague* watershed framework was based on Justice Harlan's opinion in *Mackey*, where he argued that "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Mackey v. U.S.*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring). As Justice Harlan predicted, changes in the understanding of youth have led to a line of cases dramatically changing the "bedrock" of juvenile criminal process, including *Roper* and *Graham,* and culminating in *Miller*. This process of dramatic, "profound and sweeping" reshaping of the sentencing of juvenile offenders illustrates that *Miller*, in conjunction with its predecessors, constitutes a watershed rule.

2. *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 and 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. The Supreme Court held in *Teague* that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."489 U.S. at 300 (1989). *See also Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring) (explaining that Supreme Court need not expressly hold new rule to be retroactive, but retroactivity may be "logically dictate[d]" by the Court's holdings). Because the new rule announced in *Miller* was applied to Mr. Jackson on collateral review, the Respondent here should likewise benefit from the Supreme Court's ruling in *Miller*.

3. The Eighth Amendment Requires That *Miller* Apply Retroactively

Even outside the boundaries of *Teague*, U.S. Supreme Court precedent requires that the holding of *Miller* apply retroactively

a. *Miller* Is Retroactive Because It Involves A Substantive Interpretation Of The Eighth Amendment That Reflects 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) (citing *Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982). *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 Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992); Laurence Steinberg & Elizabeth 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.

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 the decision in *Miller* substantively altered sentencing assumptions for juveniles – moving from a pre-*Miller* tolerance for mandated juvenile life without parole sentences to a post-*Miller* scheme in which even discretionary juvenile life without parole sentences are constitutionally suspect.

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 on youth, the decision must be applied retroactively.

b. U.S. Supreme Court Death Penalty Jurisprudence Requires That *Miller* Apply Retroactively

Because the two lines of cases upon which *Miller* relies – new categorical rule and new individualized sentencing rules – have been applied retroactively, *Miller* must similarly apply retroactively. Like the categorical rules announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), *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). When the Court, as in *Miller*, holds that a penalty is unconstitutional based

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[3] *Atkins* barred the imposition of the death penalty on the intellectually disabled. 536 U.S. at 321. 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) (per curiam); *Rogers v. State*, 267 P.3d 802, 804 (Nev. 2011) (noting that district court properly applied *Graham* retroactively).

on the unique characteristics of a class of defendants, the ruling has been applied retroactively.[4]

The U.S. Supreme Court's jurisprudence requiring individualized sentencing in capital cases is also instructive to the *Miller* retroactivity analysis. For example, in *Woodson*, 428 U.S. 280 (1976) (plurality opinion), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion), and *Sumner v. Shuman,* 483 U.S. 66 (1987), 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

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[4] Though some new rules in capital cases have not been applied retroactively, those rules have not been based on the unique characteristics of a class of defendants. *See, e.g., Sawyer v. Smith*, 497 U.S. 227, 233, 241 (1990) (new rule prohibiting "the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere" barred by *Teague*); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (holding that a rule requiring juries to give adequate effect to mitigating evidence would be a new rule that could not be applied retroactive under *Teague*); *Beard v. Banks*, 542 U.S. 406, 416 (2004) (refusing to apply retroactively a ban on jury instructions to disregard mitigating factors not found unanimously). In these cases, the Court held that the rules were not substantive rules that "prohibit a certain category of punishment for a class of defendants because of their status or offense." *See Penry v. Lynaugh*, 493 U.S. 302, 305 (1989). The new rule in *Miller*, however, falls directly within *Penry*'s substantive definition because a category of punishment – mandatory life without parole – is prohibited as to a class of defendants – juveniles – because of their status. *See* Section II.B.1.a., *supra*. In addition, *Miller* established a new substantive right to individualized sentencing and imposed new substantive factors which the sentencer must consider, as discussed in Sections II.B.1.b. & II.B.1.c.

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) (quoting *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. *See also Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (requiring state courts to consider all mitigating evidence before imposing the death penalty). *Woodson*, *Roberts, Lockett* and *Eddings* have been applied retroactively. *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (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 reasoning of these individual sentencing capital cases similarly applies to mandatory juvenile life without parole. *Miller* found that "[b]y 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." 132 S. Ct. at 2466. *See also Johnson v. Texas*, 509 U.S. 350, 367 (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*."). *Miller* should therefore similarly be applied retroactively.

c. 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. 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.").

This understanding of adolescent development was not fully incorporated into Eighth Amendment jurisprudence when the direct appeal rights of Frank Vigil, Jr. were exhausted. However, this does not change the fact that he is as categorically less culpable than adults convicted of homicide as every other juvenile whose cases are either on direct appeal or subject to sentencing going forward. Therefore, Vigil is serving a constitutionally disproportionate sentence. *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 of conviction or the finality of their cases 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 desserts" 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 punishment. *See Furman*, 408 U.S. at 256 (Douglas, J., concurring) ("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 non-arbitrary, 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:

> [i]n 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."). Simply put, the constitutionality of a child's sentence cannot be determined by the arbitrary date his sentence became final.

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 the Respondent – 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.

C. The Respondent's Interest In Receiving A Constitutional Sentence And Society's Interest In Safeguarding Its Citizens From Cruel And Unusual Punishment Are More Compelling Than The State of Colorado's Interest In Finality Of A Life Without Parole Sentence

Even without relying on *Teague,* this Court is free to evaluate whether concerns with finality outweigh the Respondent's interest in serving a constitutional sentence. *See Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) ("[F]inality of state convictions is a *state* interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners

held in state custody are seeking a remedy for a violation of federal rights by their lower courts."). This Court should hold that a defendant's interest in receiving a sentence that comports with the Eighth Amendment outweighs the State of Colorado's interest in finality.

The State's interest in finality is less compelling when a defendant challenges only his sentence, and not his underlying conviction. As one commenter has written,

> [C]ourts and scholars analyzing whether and how defendants should be able to attack final criminal judgments have too often failed to explore or even recognize that different conceptual, policy and practical considerations are implicated when a defendant seeks only review and reconsideration of his final sentence and does not challenge his underlying conviction.

Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 152 (2014).

As Professor Berman notes, "[c]riminal trials are inherently backward-looking, offense-oriented events" and "merely the passage of time . . . provides reason to fear that any new review or reconsideration of backward-looking factual determinations of guilt made during a trial will be costly and inefficient, will be less accurate, and will raise questions about the accuracy and efficacy of criminal

trials generally." *Id.* at 167, 170. Sentencings, conversely, are "forward-looking," and therefore

> the passage of time – when societal perspectives on just punishment necessarily evolve, when further evidence concerning an offender's character emerges, and when new governmental and victim interests may enter the picture – can provide reason to *expect* that review or reconsideration of an initial sentence may be an efficient way to save long-term punishment costs, may result in a more accurate assessment of a fair and effective punishment, and may foster respect for a criminal justice system willing to reconsider and recalibrate the punishment harms that it imposes upon its citizens.

Id. at 170. The State of Colorado therefore has a less compelling interest in finality when only the sentence, and not the conviction, is challenged.

The Respondent, whose current mandatory life without parole sentence could not be re-imposed on him or any other juvenile today, has a strong and compelling interest in receiving a constitutional sentence. Because the State's competing interest in finality is diminished when a defendant challenges only his sentence – and because the State's interest in accuracy would be enhanced by allowing resentencing – this Court should hold that the Respondent's is entitled to be resentenced in accordance with *Miller*.

III. CONCLUSION

The Supreme Court's decision in *Miller* applies retroactively to cases on collateral review like Respondent's. The Supreme Court's jurisprudence makes clear that no other reading of the *Miller* decision would be consistent with the spirit or meaning of the Eighth Amendment. Accordingly, this Court affirm the trial court's order that Mr. Vigil be afforded a new sentencing hearing.

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Dated: December 10, 2014

APPENDIX

ORGANIZATIONS

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. 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 (2012).

The **Colorado Juvenile Defender Coalition (CJDC)** is a non-profit organization dedicated to excellence in juvenile defense and advocacy, and justice for all children and youth in Colorado. A primary focus of CJDC is to reduce the prosecution of children in adult criminal court, remove children from adult jails, and reform harsh prison sentencing laws through litigation, legislative advocacy,

and community engagement. CJDC works to ensure all children accused of crimes receive effective assistance of counsel by providing legal trainings and resources to attorneys. CJDC also conducts nonpartisan research and educational policy campaigns to ensure children and youth are constitutionally protected and treated In developmentally appropriate procedures and settings. Our advocacy efforts include the voices of affected families and incarcerated children.

The **Campaign for the Fair Sentencing of Youth (CFSY)** is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi- pronged approach, which includes

coalition-building, public education, strategic advocacy and collaboration with impact litigators--on both state and national levels-to accomplish our goal.

The **Campaign for Youth Justice (CFYJ)** is a national organization created to provide a voice for youth prosecuted in the adult criminal justice system. The organization is dedicated to ending the practice of trying, sentencing, and incarcerating youthful offenders under the age of 18 in the adult criminal justice system; and is working to improve conditions within the juvenile justice system.

The **Center for Children's Law and Policy (CCLP)** is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with

jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Coalition for Juvenile Justice** (CJJ) is a non-profit, non-partisan, nationwide coalition of State Advisory Groups (SAGs), allied staff, individuals, and organizations. CJJ is funded by our member organizations and through grants secured from various agencies. CJJ envisions a nation where fewer children are at risk of delinquency; and if they are at risk or involved with the justice system, they and their families receive every possible opportunity to live safe, healthy, and fulfilling lives. CJJ serves and supports SAGs that are principally responsible for monitoring and supporting their state's progress in addressing the four core requirements of the Juvenile Justice and Delinquency Prevention Act (JJDPA) and administering federal juvenile justice grants in their states. CJJ is dedicated to preventing children and youth from becoming involved in the courts and upholding the highest standards of care when youth are charged with wrongdoing and enter the justice system.

The **Loyola Civitas ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its

Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental

The **National Center for Youth Law (NCYL)** is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance.

The **National Juvenile Justice Network (NJJN)** leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families

involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty-three members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner that holds them accountable in ways that give them the tools to make better choices in the future and become productive citizens. Youth should not be transferred into the adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and placed in adult prisons where they are exceptionally vulnerable to rape and sexual assault and have much higher rates of suicide. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are age-appropriate, rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center (CFJC)** was established in1992 at the Clinic as a legal service provider for children,

youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The Sentencing Project is a 25-year old national non-profit organization engaged in research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate these problems. The Sentencing Project has produced policy analyses that document the increasing use of sentences of life without parole for both juveniles and adults, and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences.

The **Southern Poverty Law Center (SPLC)** is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Among other things, SPLC staff work to break the cycle of juvenile incarceration by making juvenile justice and education systems more responsive to the needs of children, families and the communities in which they live. We seek reform through public education, community organizing, litigation, legislative advocacy, training and technical assistance. SPLC is based in Montgomery, Alabama, and has offices in Florida, Georgia, Louisiana and Mississippi.

The **Youth Law Center** is a San Francisco-based national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in

almost every State. The Center has long been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles as adults. Center attorneys were consultants in the John D. and Catherine T. MacArthur Foundation project on adolescent development, and have recently authored a law review article on juvenile competence to stand trial. The imposition of life without parole sentences upon fourteen year-olds is an issue that fits squarely within the Center's long-term interests.

INDIVIDUALS

Tamar Birckhead is an assistant professor of law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is president of the board for the North Carolina Center on Actual Innocence and has been appointed to the executive council of the Juvenile Justice and Children's Rights Section of the North Carolina Bar Association. Professor Birckhead received her B.A. degree in English literature with honors from Yale University and her J.D. with honors from Harvard Law School, where she served as Recent Developments Editor of the Harvard Women's Law Journal. She regularly consults on matters within the scope of her scholarly expertise, including issues related to juvenile justice policy and reform, criminal law and procedure, indigent criminal defense, and clinical legal education. She is frequently asked to assist litigants, advocates, and scholars

with amicus briefs, policy papers, and expert testimony, as well as specific questions relating to juvenile court and delinquency.

Randy Hertz is the Vice Dean of N.Y.U. School of Law and the director of the law school's clinical program. He has been at the law school since 1985, and regularly teaches the Juvenile Defender Clinic and a simulation course entitled Criminal Litigation. Before joining the N.Y.U. faculty, he worked at the Public Defender Service for the District of Columbia, in the juvenile, criminal, appellate and special litigation divisions. He writes in the areas of criminal and juvenile justice and is the co-author, with Professor James Liebman of Columbia Law School, of a two-volume treatise entitled —Federal Habeas Corpus Law and Practice,‖ and also the co-author, with Professors Anthony G. Amsterdam and Martin Guggenheim of N.Y.U. Law School, of a manual entitled —Trial Manual for Defense Attorneys in Juvenile Delinquency Cases.‖ He is an editor-in-chief of the Clinical Law Review. In the past, he has served as the Chair of the Council of the ABA's Section of Legal Education and Admissions to the Bar; a consultant to the MacCrate Task Force on Law Schools and the Profession: Narrowing the Gap; a reporter for the Wahl Commission on ABA Accreditation of Law Schools; a reporter for the New York Professional Education Project; and the chair of the AALS Standing Committee on Clinical Legal Education. He received NYU Law

School's Podell Distinguished Teaching Award in 2010; the Equal Justice Initiative's Award for Advocacy for Equal Justice in 2009; the Association of American Law Schools' William Pincus Award for Outstanding Contributions to Clinical Legal Education in 2004; the NYU Award for Distinguished Teaching by a University Professor in 2003; and the American Bar Association's LivingstonHall award for advocacy in the juvenile justice field in 2000.

Professor **Jane M. Spinak** is the Edward Ross Aranow Clinical Professor of Law. A member of the Columbia faculty since 1982, she co-founded the Child Advocacy Clinic, which currently represents adolescents aging out of foster care. During the mid-1990s, Professor Spinak served as attorney-in-charge of the Juvenile Rights Division of The Legal Aid Society of New York City. From 2001 to 2006, she was the director of clinical education at the law school. In 2002, she became the founding chair of the board of the Center for Family Representation, an advocacy and policy organization dedicated to ensuring the procedural and substantive rights of parents in child-welfare proceedings. Professor Spinak is a member of the New York State Permanent Judicial Commission on Justice for Children. She has served on numerous tasks forces and committees addressing the needs and rights of children and families and has trained and lectured widely on those issues to lawyers, social workers and other mental health professionals. She

has authored books and articles for child advocates and judges on child welfare and Family Court matters including a Permanency Planning Judicial Benchbook. Her current research focuses on Family Court reform as discussed in Adding Value to Families: The Potential of Model Family Courts (2002 Wisconsin Law Review 332) and Romancing the Court (Family Court Review, April 2008). In 2005, Professor Spinak was named a Human Rights Hero for her work on behalf of children by the ABA's Human Rights Magazine. In 2008 she was awarded the Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare by the New York State Bar Association. Professor Spinak is currently co-chairing the Task Force on Family Court in New York City recently established.

Colorado Supreme Court STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Certiorari to the Court of Appeals, 2013CA2046 District Court, Jefferson County, 1997CR1195 THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. Frank Vigil, Jr., Respondent.	
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