IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. S-1-SC-35657

JOEL IRA,

Defendant—Appellant,

vs.

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

Plaintiff—Appellee.

STATE OF NEW MEXICO'S ANSWER BRIEF TO AMICUS BRIEF IN CHIEF

On Writ of Certiorari to the Twelfth Judicial District Court
For the State of New Mexico from the Denial of habeas Corpus
The Honorable Jerry H. Ritter, Jr.,
Twelfth Judicial District Judge, Presiding

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STATEMENT OF COMPLIANCE

The body of this Answer Brief does not exceed the 35 page limit set forth in Rule 12-213(F)(2) NMRA. Further, the document is proportionally spaced using Georgia, a TrueType font, set at fourteen (14) points, and contains 5,400 words. The word count was determined using Microsoft Office 2013.

STATEMENT OF RECORD CITATIONS

Citations to the record proper were made in accordance with Rule 23-112 NMRA. Citations to the recorded transcripts also were made in accordance with Rules 23-112 NMRA and 12-213 NMRA.

INTRODUCTION

The State does not deny the Amicus Brief statement that, at least generally, "children are categorically less deserving of the harshest forms of punishment." **[BIC 3]** To do so would run counter to decades of Supreme Court authority and commonly held societal beliefs. Although both Briefs-in-Chief imply that this principle is somehow new, ushered in by *Roper v. Simmons*, 543 U.S. 551 (2005), *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010); in fact the Supreme Court has long recognized the relevance of age and background in sentencing matters.[1]

Rather than create any new standard, the more recent cases simply expanded on the older ones, re-defining the parameters for sentencing juvenile offenders as adults. *Roper* increased the threshold age for the imposition of the death penalty from 16 to 18 years for homicide, while

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[1]*Eddings v. Oklahoma*, 455 U.S. 104, 109 (1982) (death penalty for a juvenile who committed murder at age 16 violated the Eighth Amendment because trial judge refused to consider that defendant's "unhappy upbringing and emotional disturbance"); *Thompson v. Oklahoma*, 487 U.S. 815, 816 (1988) (Eighth Amendment required categorical bar against death penalty for persons who committed crimes younger than 16 years of age "since . . . teenager[s are] less able to evaluate the consequences of [their] conduct"); *Johnson v. Texas*, 509 U.S. 350, 351 (1993) (death penalty for a juvenile who committed murder at age 19 did not violate the Eighth Amendment because the Texas statutes and jury instructions instructed the jury to consider all the "defendant's mitigating evidence of his youth, family background, and positive character traits").

Kennedy v. Louisiana, 554 U.S. 407 (2008) abolished the death penalty altogether for non-homicide crimes.[2] *Miller* determined that, in a homicide case, an individualized sentencing hearing is required before the imposition of any life sentence without parole; and finally, *Graham* established a categorical ban against a life sentence without parole for a single, non-homicide offense.

All these opinions reflect a continuing judicial commitment, whenever possible, to the rehabilitative goal embedded in our juvenile system, but the cases require only the recognition that juveniles are *generally* less culpable than adults and more capable of change. The State, Petitioner and Amicus have spent a great deal of time analyzing what these cases held, but it bears discussing now what these cases did not hold.

Miller did not hold that a life sentence without parole for a homicide is unconstitutional. *Graham* did not hold that a non-homicide offender must be released within his lifetime. Mostly importantly, *Graham* did not prohibit the imposition of an aggregated sentence for multiple, non-homicide crimes. The *Miller* opinion did note that "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate

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[2] *Kennedy* applies to both adult and juvenile offenders.

occasions for sentencing juveniles to th[ese] harshest possible penalt[ies] will be uncommon." *Miller*, 132 S.Ct. at 2469. However, all of these decisions left open the possibility that some juvenile offenders, if incapable of change, should and might spend the greater part of their lives behind bars. Petitioner is such an offender.

Amicus, however, assumes that *Graham* applies to an aggregated punishment for multiple crimes and, inextricably intertwined with that proposition, argues that a lengthy aggregated sentence, although comprised of consecutively imposed legal sentences, nonetheless constitutes a de facto life sentence without parole. Then she argues that such a de facto sentence does not afford Petitioner a meaningful opportunity for parole and thus violates the Eighth Amendment proscription against cruel and unusual punishment.

None of these assertions, however, is accurate. The State submits that *Graham* does not apply to aggregated sentences at all, such that nothing requires this Court to provide *any* opportunity for parole; although Petitioner does, in fact, have the ability to seek release after 45 years. Additionally, even if this Court chooses to apply *Graham* to aggregated sentences, the Supreme Court has never defined the phrase "meaningful opportunity" for parole. This Court remains free, should it wish, to affirm

Petitioner's sentence as constitutional, despite all the briefs' unsupported generalizations and the claim that new developments in science warrant reconsideration of Petitioner's sentences.

SUMMARY OF PROCEEDINGS

The State adopts and incorporates herein the Summary of Proceedings, Sec. I (Factual History) and Sec. II (Procedural Summary), contained in the State's Answer Brief to Petitioner's Brief-in-Chief, pp. 2-16.

ARGUMENT

I. NONE OF THE MOST RECENT SUPREME COURT AUTHORITY APPLIES UNDER OUR FACT PATTERN

This information is important because both Petitioner's and the Amicus briefs conflated the holdings of all these cases, referring to them interchangeably. Just because all these decisions discuss the differences between adults and juveniles does not necessarily mean that all the cases apply equally in every circumstance. In fact, none of the above authorities fits this fact pattern: *Roper* and *Miller* both involve homicides and punishments not at issue here (the death penalty and life without parole, respectively). Only *Graham* contains a non-homicide fact pattern; however, the Supreme Court has never held that the case's categorical ban against life without parole for a single offense applies to aggregated

sentences. *See* the State of New Mexico's Answer Brief to Petitioner's Brief-in-Chief, Argument, Sec. III at p. 20.

Both briefs also repeatedly generalized about the facts of this case, without a single reference to the specifics of Petitioner's crimes. For instance, Amicus repeatedly referred to Petitioner as a "child." Amicus stated that "as [he] was convicted of a non-homicide crime and sentenced to the functional equivalent of life without parole, he has been deprived of a 'meaningful opportunity to obtain release' and his sentence is unconstitutional, despite being labeled as a term-of-years sentence." **[BIC 2]** In fact, nothing of the sort happened.

Instead, Petitioner, although fitting the legal description of a "child," nonetheless was just a few days shy of his 16th birthday when he committed not just one, but six non-homicide crimes, for which he was eventually convicted. He was sentenced according to the New Mexico Penal Code; and the trial court chose to run those sentences concurrently, a decision fully within the bounds of federal and state law. *State v. Padilla*, 1973-NMSC-049, ¶ 15, 85 N.M. 140 ("imposition of multiple valid sentences to run consecutively does not, as such, constitute cruel and unusual punishment as contemplated by the Eighth Amendment to the Constitution of the United States or by Art. 22, §13 [of the] Constitution of New Mexico").

II. RESEARCH IN ADOLESCENT DEVELOPMENT AND IN NEUROSCIENCE ONLY CONFIRMS WHAT PSYCHOLOGISTS AND SOCIETY, IN GENERAL, HAVE KNOWN ALL ALONG

The most recent Supreme Court cases do refer to an ever growing body of scientific evidence that explains why juveniles are less mature and more impulsive than adults, which evidence the State does not dispute. The new studies about brain growth provide a biological basis for why juveniles behave as they do. Because development of the brain's frontal lobes, which regulate emotion and impulsivity, continues until the age of 25, during the age of minority juveniles necessarily will be less mature than adults and less able to regulate behavior.

But having only lately discerned the physiological reasons behind youthful impulsive behavior in no way suggests that courts traditionally have ignored the differences between juveniles and adults. *Eddings v. Oklahoma*, published in 1982, demonstrates quite the opposite. As a society, we have understood for 35 years that age and background matter in sentencing, even if we didn't have a scientific justification for such a belief. These circumstances explain why the trial court, even in 1997, struggled so against the notion of sentencing Petitioner to adult incarceration: the trial courts' remarks during sentencing, filed in the case, resonate with regret, due to Petitioner's age and home circumstances. **[1 RP 213]**

III. THE DEVELOPMENT OF NEUROSCIENCE DOES NOT JUSTIFY APPLYING *GRAHAM V. FLORIDA* TO AGGREGATED SENTENCES

Amicus begins her Brief by claiming that, because a juvenile's brain is not fully developed until the age of 25, a lengthy sentence is "developmentally inappropriate and constitutionally disproportionate when applied to juveniles who are amenable to change. **[BIC 5]** This extreme argument, however, should fail for several reasons: first, the statement discounts the fact that growth is an ongoing process. Just because the process might not be complete during the age of minority, does not necessarily translate into the conclusion that a life sentence is inappropriate for anyone under 18. Second, the Brief rests on the faulty foundation of assumptions which do not emanate from any actual Supreme Court authority. Finally, Amicus adopts the position that all juveniles are capable of change, which completely ignores the facts in this case.

Regarding the scientific argument, Dr. Sam Roll, an expert psychologist who specialized in developmental psychology,[3] testified in the 1997 original sentencing hearing and in the 2015 habeas evidentiary hearing. During this latter hearing, defense counsel asked the doctor whether impulse control and good judgment develops slowly until the 20s.

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3 Developmental psychology is the study of how the personality develops from birth through death.

Dr. Roll responded yes, but clarified that the brain "develops enough that, by the time that people who are 16 or 17 and 18, [they] have the sufficient control, for example, that people drive and do other sorts of things. We've learned recently that the complete development of the frontal lobes is probably complete around the age of 20 or 21." **[11/20/2015 CD 3:08:06]**

Dr. Roll further explained the process of growth to the trial court, describing the conscience as the "ability to distinguish good from evil, to commit [one]self to doing good and generally avoid evil . . . and the capacity to feel guilt. He stated that those "things develop way below 25" **[11/20/2015 CD 2:41:50]**, beginning in early childhood between three and six years of age. The witness elaborated that the conscience "gels in the early adolescent years, [around] 14, 15." **[11/20/2015 CD 2:39:22]** This testimony comported with Roll's earlier, 1997 statements that "by 16 or 17, there are no major changes in what people see as right or wrong or how concerned [they] are for the suffering of others. **[8/20/1997 6T 622]**

This testimony establishes that development—of the brain, of character, and of personality—is a fluid concept, developing over time and affected by many factors. The science simply confirms the common sense notion that younger juveniles are less culpable than older ones; that

juveniles from an impoverished or abusive background are less culpable than ones from better circumstances; and that juveniles convicted one crime, however heinous, are less culpable than those convicted of many. Again, these universally accepted beliefs comport with what the Supreme Court always has recognized: that circumstances, including age and background, matter.

Therein lies the downfall of Amicus's argument. Extending *Graham's* prohibition (against a life sentence without parole for one non-homicide crime to preclude a lengthy aggregated sentence for many crimes) must narrow a trial court's focus to a single question: whether the Petitioner has reached the age of majority. Such an approach discounts all the other factors which the *Miller*[4] opinion found so important: age, educational and socioeconomic background, developmental disabilities, as well as a host of other conditions. The expansion also prevents inquiry into other matters required, both in 1997 and now, by the Children's Code Youthful Offender statutes, including the number and severity of crimes, and most importantly, a *particular offender's* capacity for change. Confining *Graham* to its fact pattern, however, leaves room for a sentencing authority

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[4] Although *Miller* does not apply to this situation since Petitioner did not commit a homicide, the length of his sentence merits consideration of the *Miller* factors, in determining the propriety of the sentence.

to consider all the individualized facts and craft an appropriate sentence which very well might include an extremely lengthy prison sentence.

IV. THE SUPREME COURT HAS NEVER HELD THAT GRAHAM V. FLORIDA APPLIES TO AGGREGATED SENTENCES

The second reason the Amicus argument should fail is that it rests on faulty assumptions: that *Graham* should bar any lengthy sentence, even one comprised of multiple, consecutive sentences for multiple crimes; and that a life sentence without parole and a sentence allowing for parole later in life are one and the same. The Supreme Court, however, has never held as much; and insofar as lower federal and state courts have addressed the matter, they have split. Whether *Graham* applies across the board remains a question of first impression for this Court, and the State respectfully requests that this Court follow the decisions of the Fifth[5] and Sixth[6] Circuits, as well as *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016) in rejecting Amicus's arguments. For a complete discussion of this argument and the supporting authorities, please see the State of New Mexico's Answer Brief to Petitioner's Brief-in-Chief, Argument, Sec. III, p. 20.

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5 *United States v. Walton*, 537 Fed.Appx. 430, 437 (5th Cir. 2013) (per curiam), *cert. denied in Walton v. United States*, 134 S.Ct. 712 (2013).
6 *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) *cert. denied in Bunch v. Bobby*, 133 S. Ct. 1996 (2013).

Additionally, review of the text of *Graham* itself supports the State's position that the categorical ban of a life without parole sentence applies only when a juvenile has committed a single crime. In explaining the rationale behind adopting a wholesale ban (and the concomitant rejection of the traditional, case-by-case approach), the Supreme Court expresses concern that a sentencing authority might be overcome by the details of the crime and ignore the mitigating factors of youth and circumstances. The Supreme Court concludes that "an unacceptable likelihood exists that the brutality or cold blooded nature *of any particular crime* would overpower mitigating arguments," (emphasis supplied) (internal quotations and citations omitted) *Graham*, 560 U.S. at 78. Additionally, Justice Alito's dissent even more bluntly states that "nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Graham*, 560 U.S. at 124.

Had the Supreme Court wished to extend the categorical ban to all juveniles, regardless of the number of crimes, it would have been very easy to do so. That panel, however, certainly had no difficulty in explicitly rejecting that option in *Miller*, decided three years later. When the *Miller* juvenile defendant appealed his mandatorily imposed life without parole sentence for the homicide he had committed, he urged two grounds for

relief: first, that the Eighth Amendment precluded a mandatory sentence and required, at least, an individualized sentencing hearing; and second, that the Eighth Amendment requires a categorical ban of life without parole sentences for any juvenile. The opinion adopted the juvenile's first argument and stated that "[b]ecause that holding is sufficient to decide these cases, we do not consider [the] alternative argument." *Miller*, 132 S.Ct. at 2469. In the same manner, the *Graham* decision could have, but did not, specifically state that the categorical ban applies to all juveniles. This omission suggests that the Supreme Court never intended *Graham* to pertain to anything other than an actual life without parole sentence for a single non-homicide.

V. EXTENDING *GRAHAM V. FLORIDA* IGNORES THE PRACTICAL REALITY THAT SOME JUVENILES ARE NOT AMENABLE TO CHANGE

Lying at the heart of the *Graham* opinion is the unspoken truth that a criminal justice system designed to protect the rights of defendants would rather err on the side of caution to make sure that no juvenile charged with a single crime spends his or her life behind bars. "[T]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole." (internal citations and quotations omitted) *Graham*, 560 U.S. at

78. This rationale informs the Amicus argument that a juvenile sentenced to a very long prison term, regardless of the terminology used to describe that sentence, remains unconstitutional because juveniles are more capable of change than adults. However, the third reason that the Amicus argument should fail is that several differences between the *Graham* fact pattern and this one militate against extending the categorical ban to apply to aggregates sentences.

The *Graham* opinion noted that the penological goal of incapacitation, while important even in the juvenile context, was "inadequate to justify [life without parole] for juveniles . . . . To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham*, 560 U.S. at 72-73. The decision continued 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." Given these facts, the *Graham* Court held that no juvenile should be subject to life without parole for a single, non-homicide crime.

In this case, though, the experts had no trouble in agreeing unanimously as to Petitioner's diagnosis and as to the almost non-existent chance of change without extensive residential treatment. The witnesses also concurred that no facility anywhere in the country was equipped to address Petitioner's needs, either then or even now, twenty years later. **[11/20/2015 CD 2:47:00]** Unfortunately, prison, the only alternative, did not offer the mental health services needed either. Finally, the experts also agreed that, without treatment, the chance for recidivism upon release was high.

After the 1997 testimony, if any doubt exists as to this particular Petitioner's inability to change, this Court need only look to his testimony at the 2015 habeas hearing. After Defendant spoke that he felt he had been rehabilitated **[2015 State's Ex 5, p. 20, ls. 7-19]**, Dr. Roll testified and expressed great concern that even after twenty years in prison, Petitioner still failed to take any real responsibility for his crimes and still was unable to identify with his victims' pain and suffering. **[6/30/2015 CD 2:53:50]** The witness added that even in those diagnosed with conduct disorder, Petitioner's degree of total disregard of and disrespect for his victim was unusual. **[11/20/2015 CD 2:46:30]**

To illustrate his point, the doctor cited a specific question and answer from Petitioner's direct testimony: defense counsel asked whether Petitioner had been sexually assaulted in prison, to which Petitioner replied "I fought a lot . . . . I couldn't be a victim. I wouldn't . . ." Then defense counsel asked if Petitioner had made any connections between his fears about victimization in prison and his victim's feelings. **[2015 State's Ex 5, p. 20, ls. 7-19]** Petitioner responded that he did not understand the question. **[2015 State's Ex 5, p. 21, l. 8]** Dr. Roll concluded that "[t]here's something about him that he has not yet understood about how he got to be in the position of doing what he did. Even after he's been in the penitentiary for 20 years, there's still no recognition." **[11/22/2015 CD 2:55:42]**

VI. THE SCIENTIFIC RESEARCH ON RECIDIVISM OF JUVENILE OFFENDERS DOES NOT APPLY TO PETITIONER

In another scientific argument, Amicus claims that recidivism statistics show most juvenile offenders outgrow their antisocial behaviors, arguing that *Graham* should apply to aggregated sentences and should require frequent review to examine a juvenile's rehabilitative progress or, in other words, an early opportunity for parole. **[BIC 14]** She also quotes *Roper v. Simmons* ("for most teens, [risky or antisocial] behaviors are

fleeting")[7] and identifies the source of that quote: an article upon which the *Roper* court relied, Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty, 58 *Am. Psychologist* 1009, 1014 (2003). Amicus does not, however, point this Court to the source of that article, another treatise by Terrie E. Moffit, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, *Psychological Review*, Vol. 100, No. 4, 674-701 (1993).

According to this second commentary, conduct disorder falls into two categories, early onset and adolescent onset. "Of those with early onset conduct disorder (before eight years of age) about half persist with serious problems into adulthood. Of those with adolescent onset, the great majority (over 85%) desist in their antisocial behavior by their early twenties," quoting Stephen Scott, Conduct disorders. In Rey JM (ed), *IACAPAP*[8] *e-Textbook of Child and Adolescent Mental Health* 2012. It was to this latter category, late-onset conduct disorder, that the *Roper* court and the *American Psychologist* referred. Additionally, Amicus's other article—Laurence Steinburg, Give Adolescents the Time and Skills to Mature, and

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[7] *Roper*, 543 U.S. at 570.
[8] International Association for Child and Adolescent Psychiatry and Allied Professions

Most Offenders Will Stop (2014), Chicago, IL: MacArther Foundation[9]—refers to the second category as well, specifically exempting the early onset classification ("a small percentage—less than 10%--do become . . . 'life-course persistent offenders'"). Steinburg at 2.

According to the facts elicited at the 1997 hearing, Petitioner falls into the early onset category, having begun to experience difficulties in grade school. **[7/10/1997 5T 276]** Because of this classification, he does not belong to the vast majority comprised of those who outgrow their disorders. Even more troubling, none of sources cited by Amicus's or the IACAPAP sources refer at all to those rare few juveniles with Petitioner's complicated diagnosis.

Dr. Roll, along with all the witnesses who testified in 1997 and 1999, diagnosed Petitioner as having "conduct disorder," meaning that he had "failed to incorporate two basic aspects of human development. . . the development of a conscience and . . . the absence of ability to feel empathy or compassion for others." Additionally, Dr. Roll characterized Petitioner's disorder as "severe" **[11/20/2015 CD 2:39:08]** and "intense." **[8/20/1997 6T 492]** Finally, Petitioner's case was further "complicated

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[9]http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf

because of the combination of sexual and aggressive impulsive impulses that had not been sufficiently separated." **[11/20/2015 CD 2:38:53]**

Because Petitioner's is classified as an early onset conduct disorder, and a severe one at that, none of the statistics in the Amicus Brief-in-Chief apply to Petitioner. The fact that other, less severely disturbed juveniles might outgrow their impulses does not justify the conclusion that Petitioner would have. Given Petitioner's testimony at the 2015 hearing, the evidence suggests that, in fact, he never will. Additionally, just because he has done relatively well in prison does not indicate that he is rehabilitated. According to Dr. Roll, prison is the 'perfect place" for someone without a conscience because the facility provides external controls to govern behavior which compensate for Petitioner's lack of internal controls. **[11/20/2015 CD 3:01:10]** Given all these factors, the recidivism statistics relied upon by Amicus should not apply here.

VII. THE TRIAL COURT CONDUCTED THOROUGH HEARINGS IN 1997 AND 1999, APPROPRIATELY CONSIDERING ALL THE FACTORS REQUIRED BY *MILLER V. ALABAMA* AND THE CHILDREN'S CODE

Miller contains an excellent description of all the aspects which a trial court should consider when deciding the fate of a juvenile offender. Although only applicable in homicide cases, the opinion bears mentioning at this juncture because its list mirrors the factors identified in the

Children's Code version under which Petitioner was sentenced. Both the 2012 decision and NMSA 1978 §32A-2-20(C) (1993), 20 years ahead of its time, require a sentencing court to consider a host of influences, including the age and maturity level of the offender; his or her record and previous history; his or her family and home life; the number and severity of the offenses, and the likelihood of reasonable rehabilitation within the facilities available at the time.

Amicus argues that the trial court did not consider the *Miller* factors when sentencing Petitioner. She wrote that "according to five different witnesses, [Petitioner] suffered physical abuse at the hands of his stepfather. However, after listening to all the testimony, the only statement regarding [Petitioner's] family and home environment that the sentencing court made was 'certainly, [Petitioner's] lifestyle was not one to be envied, and it appears that he either lacked or ignored the kind of intensive guidance that every young person deserves.' The failure of the sentencing judge to conduct any meaningful analysis of the effects of [Petitioner's] home environment underscores how inadequately the sentencing judge considered the relevant factors." (internal citations omitted) **[BIC 26]**

However, review of the trial court's order from 1997 reveals that he did contemplate all the required issues, including Petitioner's age:

"[o]rdinarily, the young age of the [Petitioner] would tend to influence a judge toward leniency, based upon the inference that the crimes were motivated in part by youthful impulsiveness and immaturity. . . . That analysis does not apply here . . . because Joel Ira is not the typical young [Petitioner]." **[1 RP 213]** Given the care taken by the trial court in 1997 to find alternatives for Petitioner, other than prison, and the eventual realization that none existed, the State respectfully would submit that the trial court did consider Petitioner's age and his circumstances prior to ruling. The Court of Appeals decision in the second appeal confirms the State's conclusion. The opinion lauds the trial court's remarks, as a whole, as "thoughtful and detailed," because they "so clearly set forth the circumstances of this case *and the dilemma faced by the court*" (emphasis supplied). *State v. Ira*, 2002-NMCA-037, ¶ 11, 132 N.M. 8, *cert. denied by State v. Joel I.*, a Child, 132 N.M. 133 (2002).

Amicus's real complaint was that the trial court, when assigning weight to the factors considered, did not place the greatest weight on the age factor in Petitioner's favor. Proof of this conclusion comes from Amicus's erroneous claim that *Miller* established a presumption against

imposing life without parole sentences on juveniles.[10] **[BIC 19]** As for the case law, neither *Miller* nor *Graham*, however, established any such presumption. *Miller* abrogated mandatorily imposed life without parole sentences for homicides; *Graham* abrogated life sentences without parole for a single non-homicide crime. Neither case even mentioned the term "presumption" in conjunction with a juvenile's age; and neither case indicated the particular weight that a trial court should assign to that factor.

Although the Supreme Court case has not addressed this issue, New Mexico has. *In the Matter of Ernesto M., Jr.* 1996-NMCA-039, 121 N.M. 562 involved the same type of complaint as Amicus's. That youthful offender appealed his aggregated sentence, claiming the trial court improperly balanced the sentencing factors, assigning the most weight to the seriousness of the crimes. Noting that the trial court "concluded that almost all of the factors weighed against sentencing [the youthful offender] as a juvenile," the Court of Appeals held that "our review of the judge's findings as to each factor does not indicate that using a different method of considering the factors would have resulted in a different outcome." *Ernesto*, 1996-NMCA-039, ¶¶ 11-12.

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[10] Again, Amicus improperly equates a life sentence without parole to a lengthy aggregated sentence, when neither *Graham* nor any Supreme Court authority since has made any such holding.

The *Ira* decision notes that the trial court in this case made the same determination: the trial court "weigh[ed] against [Petitioner] virtually every statutory factor" listed in the Children's Code. *Ira*, 2002-NMCA-037, ¶ 11, 132 N.M. 8. Given that nothing about the Supreme Court's recent cases dictate how a trial court should weigh the factors, the State asks this Court to make the same determination as was made in *Ernesto*: that review of the trial court's findings and assigning a different weight to Petitioner's age would not have resulted in a different outcome.

VIII. SENTENCING IN NEW MEXICO IS REVIEWED UNDER AN ABUSE OF DISCRETION STANDARD.

When Amicus claims that the trial court failed to assign particular weight to Petitioner's age and home life, she makes this claim without considering an alternative possibility: that the trial court took great note of Petitioner's home life and counted it, not for, but against him. If such was the trial court's decision, Amicus cannot now petition this Court for review of that decision. A trial court's sentencing is reviewed for abuse of discretion." *State v.* Bonilla, 2000-NMSC-037, ¶ 6, 130 N.M. 1, 15 P.3d 491. Under that standard, error "occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize

it as clearly untenable or not justified by reason." *State v. Apodaca*, 1994-NMSC-121, ¶ 23, 118 N.M. 762.

Petitioner was a mere days shy of his 16th birthday when he committed the crimes for which he was convicted. The testimony illustrated that Thomas Ira and his wife, at best neglectful, had left Petitioner to care for the younger children in the house. **[11/20/2013 CD 3:04:20]** He shoplifted and scavenged for food, in order that the children could eat. **[11/20/2013 CD 3:04:38]** In short, he assumed a parental role. **[11/20/2013 CD 3:05:22]** As Dr. Roll put it: Petitioner had "way beyond what should be expected of a child that age the responsibility." **[11/20/2013 CD 3:05:33]** Of course, Petitioner should not have been put in that position; but nonetheless, he was the victim's provider.

Both Petitioner and Amicus refer to these factors as mitigating circumstances which should have warranted a shorter sentence. However, the State contends that it is equally reasonable to interpret these conditions in another light. The victim relied on Petitioner: for guidance, for food, for companionship. Rather than caring for the victim appropriately, Petitioner exercised his authority over her by exploiting her dependence uoon him. Those were the actions of the classic adult sexual predator. He not only raped and violated his main target, but he also used her to widen his circle

of victims and begin to groom her brother and her friends, as well. Viewed from this perspective, Petitioner's actions were monstrous, no matter his age; and his sentence was, and is, perfectly reasonable and more than justified by the facts. As the trial court did not abuse his discretion, the sentence should stand.

IX. THE SUPREME COURT HAS NEVER DETERMINED WHAT CONSTITUTES A MEANINGFUL OPPORTUNITY FOR PAROLE

Finally, even if this Court chooses to apply *Graham* to aggregated sentences, the Supreme Court has never defined exactly when in life a juvenile must be eligible for parole in order for that opportunity to be meaningful. In fact, the *Graham* decision specifically held that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." *Graham*, 560 U.S. 74. In so doing, various jurisdictions have reached a wide variety of conclusions.

The vast majority of those cases cited by Amicus invalidated sentences much longer than Petitioner's. The main decision she quoted at length, *State v. Moore*, --- N.E.3d ----, 2016 WL 7448751 (Ohio 2016) at ¶ 30, struck down that juvenile's sentence because he would not have qualified for parole until the age of 90. In *Henry v. State*, 175 So.3d 675, 680 (Fla. 2015), that juvenile would not have reached parole eligibility until 95. *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) invalidated a sentence

requiring the juvenile to serve 100 years before any opportunity for release, as did *People v. Caballero*, 282 P.2d 291, 295 (Cal. 2012). These juveniles all would have been required to serve decades longer than Petitioner before qualifying for parole. In contrast, Petitioner will reach parole eligibility at age 62; and nothing in these authorities requires this Court to determine that Petitioner's opportunity for parole is not meaningful.

To be sure, some jurisdictions have held much shorter sentences unconstitutional; however, the salient point here is that none of these authorities controls this Court. When considering Petitioner's sentence, the State respectfully requests that this Court disregard the decisions of other jurisdictions and look toward Justice Alito's dissent in *Graham*: he noted that the juvenile had "conceded at oral argument that a sentence of as much as 40 years without the possibility of parole probably would be constitutional" under a traditional proportionality analysis. (internal quotations omitted) *Graham*, 560 U.S. 124. As New Mexico provides Petitioner with the possibility of reducing his sentence by half, Petitioner could, just as contemplated by the *Graham* dissent, demonstrate maturity and rehabilitation and obtain his freedom in 45 years. Such a sentence comports with the principles of proportionality and violates neither the Federal nor the New Mexico constitutions.

CONCLUSION

The State asks this Court to decline to apply *Graham v. Florida* to aggregated sentences. Should this Court rule otherwise, the State asks that Petitioner's sentence be found to afford a constitutional opportunity for parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by mail, on this 3rd day of April, 2017, addressed to:

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